No. 25-

IN THE

Supreme Court of the United States

JOSHUA ERIC HAWK CLARK,

Petitioner,

v.

BURL CAIN, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DAN W. WEBB
WEBB SANDERS & WILLIAMS, PLLC
P.O. Box 496
Tupelo, MS 38802

JIM WAIDE
Counsel of Record
WAIDE & ASSOCIATES, P.A.
332 North Spring Street
Tupelo, MS 38804
(662) 842-7324
waide@waidelaw.com

November 6, 2025

Counsel for Petitioner

120749

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Under the law of Mississippi, in all civil cases, a judge performs the gatekeeping function of determining the reliability of scientific evidence before that evidence can be presented to a jury. In this criminal case, however, the Mississippi Supreme Court upheld Petitioner Joshua Clark's conviction for murder and forty (40) year mandatory sentence, even though the trial judge had expressly declined to perform this gatekeeping function and had ruled that the issue of reliability of scientific evidence was a question for the jury.

The Mississippi Supreme Court refused to hear Petitioner's Fourteenth Amendment challenge to this discrimination. The United States District Court for the Northern District of Mississippi held habeas corpus relief is not available for such a claim. A single judge on the Fifth Circuit Court of Appeals denied a Certificate of Appealability without giving a reason.

The Question Presented is as follows:

Did the Court of Appeals erroneously deny Petitioner Joshua Clark a Certificate of Appealability on his Fourteenth Amendment claims even though Petitioner established that: (a) in all civil cases, a trial judge is required to act as a gatekeeper to determine the reliability of scientific evidence before that evidence can be received; (b) in Joshua Clark's criminal case, the trial judge refused to determine reliability of scientific evidence; and (c) the evidence in Joshua Clark's criminal case was uncontradicted that Shaken Baby Syndrome is not a scientifically reliable diagnosis?

PARTIES TO THE PROCEEDING BELOW

Joshua Eric Hawk Clark, the defendant in this criminal case, is the petitioner.

The State of Mississippi, which brought this criminal case, is the respondent.

There are no other parties to these proceedings.

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

Table of Appendices

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Page

Page

Page

CONSTITUTIONAL PROVISIONS

STATUTES, RULES AND REGULATIONS

Page

OTHER AUTHORITIES

OPINIONS BELOW

The published opinion of the Mississippi Court of Appeals reversing Petitioner Joshua Clark's conviction for murder is found at 363 So.3d 880 (Miss. App. 2019) and is attached as Appendix F. The published opinion of the Mississippi Supreme Court, reinstating Petitioner's conviction, is found at 315 So.3d 987 (Miss. 2021), cert denied 142 S.Ct. 466 (Mem.)(2021), and attached as Appendix E. The unpublished opinion of the District Court for the Northern District of Mississippi denying habeas corpus relief is attached as Appendix C. The unpublished opinion of that court denying a Certificate of Appealability is attached as Appendix B. The unpublished order of a judge of the Fifth Circuit Court of Appeals also denying a Certificate of Appealability is attached as Appendix A.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254 to review the decision of the United States Court of Appeals for the Fifth Circuit rejecting Petitioner's request for a Certificate of Appealability dated August 8, 2025. *Buck v. Davis*, 580 U.S. 100 (2017). The District Court had jurisdiction over this habeas corpus proceeding under 28 U.S.C. § 2254.

RELEVANT CONSTITUTIONAL PROVISION

The Fourteenth Amendment provides:

> 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.

RELEVANT STATUTORY PROVISIONS

28 U.S.C. § 2254 provides:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or law or treaties of the United States.

28 U.S.C. § 2253 provides:

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—– (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issue by a State court; . . . (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

INTRODUCTION

"Every year in this country, hundreds of people are convicted of having shaken a baby, most often to death. In a prosecution paradigm without precedent, expert medical testimony is used to establish that a crime occurred, that the defendant caused the infant's death by shaking, and that the shaking was sufficiently forceful to constitute depraved indifference to human life." Deborah Tuerkheimer, *The Next Innocence Project: Shaken Baby Syndrome and the Criminal Courts*, 87 Wash. U. L. Rev. 1 (2009).

In many of these cases, those convicted are later proven to be innocent. Justice Sotomayor, respecting the denial of certiorari in *McCrory v. Alabama*, 144 S.Ct. 2483, 2484 n.2 (2024), wrote:

> The scientific community's reevaluation of expert evidence is not limited to these types of forensic analysis. For example, there is now significant doubt in the medical community over the validity of "Shaken Baby Syndrome," or SBS, an expert diagnosis that formed the basis for convicting caregivers of murder when babies died suddenly under their care. See, e.g., *Cavazos v. Smith*, 565 U.S. 1, 13, 132 S.Ct. 2, 181 L.Ed. 2d 311 (2011) (Ginsburg, J., dissenting) (collecting studies questioning the validity of SBS in one such case). The National Registry of Exonerations included over 30 cases where people convicted of murder, manslaughter, or child abuse based partially on evidence of SBS were later exonerated. *See* https://www.law.

umich.edu/special/exoneration/Pages/detaillist.aspx.

In this case, there was no evidence that Joshua Clark, who had no prior criminal record, had ever engaged in any acts of violence against his four-month-old daughter Kyllie or anyone else. Nonetheless, the State obtained a conviction for second degree murder for which a Shaken Baby Syndrome ("SBS") hypothesis given by Dr. Karen Lakin, a pediatrician, provided the only significant evidence.

There are serious questions as to whether SBS is a reliable diagnosis. *See Jones v. State*, 2021 WL 346552 (Md. Ct. Spec. App. Feb. 2, 2021) (extensively reviewing the recent scientific evidence). There are similar doubts about whether shaking an infant could have caused the injuries at issue here and whether the assumed shaking can be traced to the two- and one-half hour time period when Joshua Clark had exclusive custody of his child.

In this case, the prosecution and its expert witness introduced no scientific literature indicating that the SBS hypothesis is scientifically reliable, but Joshua Clark presented a mountain of scientific evidence that the hypothesis is unreliable.

Under Mississippi law in civil cases, the trial judge must first specifically find that an expert's testimony is reliable and that his or her testimony can be applied to the facts of the case before the jury is permitted to hear that testimony. However, in this criminal case, the Mississippi Supreme Court allowed the jury alone to perform that gatekeeping function of deciding whether

SBS is a reliable diagnosis and whether the assumed shaking can be traced to the time when Joshua Clark had exclusive custody of his infant child. The Mississippi Supreme Court declined to scrutinize the trial judge's decision to allow the jury alone to determine reliability by claiming a lack of scientific expertise to do so, stating that Mississippi Supreme Court justices are jurists, not scientists. Petitioner asks this Court to grant review and to overturn the decision of the Fifth Circuit Court of Appeals that Petitioner's Fourteenth Amendment claims did not warrant a Certificate of Appealability.

STATEMENT OF THE CASE

Joshua Clark's conviction rests squarely upon the testimony of Dr. Karen Lakin, a Memphis, Tennessee pediatrician, who claimed that Joshua Clark must have been responsible for the death of Kyllie Clark. Lakin's claims were contradicted by scientific articles and publications with which she was confronted at trial and were without any support in any scientific literature offered by the State. Lakin made the claim that Josuha Clark was responsible for the child's death because Joshua Clark was the last person caring for Kyllie at the time Kyllie's symptoms manifested and because, in Lakin's scientifically unsupported opinion, the onset of symptoms would have been immediate.

Joshua Clark's indictment alleged that Joshua Clark did "kill and murder Kyllie Clark" by violently shaking the child, causing rib fractures and other internal injuries. . . . Based upon Lakin's testimony, a jury found Joshua Clark not guilty of capital murder, but guilty of second-degree murder, a conviction for which the trial

court judge sentenced Joshua Clark to forty (40) years in prison, without the possibility of parole or any other form of early release. Joshua Clark was convicted of the second-degree murder of his daughter Kyllie with no evidence that he had ever been violent toward her, either immediately before her death or at any other time in her short life. There was also no evidence that Joshua Clark was anything other than a loving and caring parent toward Kyllie and her siblings or even any evidence that he ever expressed anger or frustration with her. But for the expert testimony of Dr. Karen Lakin, Joshua Clark could not have been convicted.

Joshua Clark was a construction worker whose job took him out of town from Monday mornings until Friday evenings. On a Saturday morning in January 2008, as was Joshua Clark's custom, he woke up and took care of infant Kyllie, her twin brother, her two-year old sister, and her five-year old stepsister, while her mother, Bethany Clark, slept in. That afternoon Bethany Clark left the children with Joshua Clark around 3:00 p.m. and returned around 5:30 p.m. At that time, Kyllie had difficulty breathing, and both parents took Kyllie to the local hospital. Both Joshua Clark and Bethany Clark also attempted to resuscitate Kyllie through cardiopulmonary resuscitation ("CPR"), as did medical personnel at the hospital.

Later that day, Kyllie was transferred to Le Bonheur Children's Hospital in Memphis, Tennessee. The following day Kyllie was pronounced dead. The only physician assigned to Kyllie at Le Bonheur was Dr. Karen Lakin, a pediatrician who had never treated Kyllie previously. Lakin had testified for the prosecution in numerous cases that the death or injury of an infant was due to SBS. Lakin

claimed that Kyllie had died from SBS, simply because there was no evidence of external trauma, and because Lakin believed (mistakenly) that Kyllie had no history of any prior injury. Contrary to Lakin's belief, Kyllie had been both stepped on and dropped within several weeks before her death, while in the exclusive custody of babysitters chosen by Bethany Clark and while Joshua Clark was away at work.

Except for the scientifically empty opinion of Lakin, there was no witness who said that Joshua Clark shook or otherwise physically abused Kyllie. There was no evidence of any motive or reason why Joshua Clark, a loving father, would have harmed his daughter. To the contrary, multiple witnesses testified about Joshua Clark's being the primary caregiver for all of his children and described his non-violent character and intense love for his children. Joshua Clark was the only adult in his home for the crucial two and a half hours, but the other children never suggested that Joshua Clark had harmed Kyllie in any way during that period. As the Mississippi Court of Appeals recognized, but for the expert testimony of Lakin, the State would have had no case. Therefore, it was essential that Lakin be found qualified to offer a reliable expert opinion that Joshua Clark had caused Kyllie's death.

Lakin testified that she disagreed with scientific literature which demonstrates that there can be lucid intervals between the time brain bleeding begins and the time when the child becomes symptomatic. Lakin admitted that she had conducted no independent research about SBS, had not published any peer reviewed papers on the subject, and that it is impossible to determine whether there is an "error rate" in making a diagnosis of

SBS. When Lakin was asked the basis of her opinion, she cited to the alleged position of the American Academy of Pediatrics. Lakin, however, never produced any document evidencing the Academy's alleged position. As reported in *Commonwealth v. Millien*, 50 N.E. 3d 808, 826 (Mass. 2016), the Academy's 2009 policy statement included the following: "Few pediatric diagnoses engender as much debate as [abusive head trauma] . . . Controversy is fueled because the mechanisms and resultant injuries of accidental and abusive head injury overlap, the abuse is rarely witnessed, an accurate history of trauma is rarely offered by the perpetrator, there is no single or simple test to determine the accuracy of the diagnosis, and the legal consequences of the diagnosis can be so significant." (alteration in court opinion).

Contrary to the universally applied rule in civil cases, the trial judge refused to make any finding as to whether Lakin's testimony was reliable or could be reliably applied to the facts of this case. Instead, contrary to what Mississippi law plainly requires in civil cases, the trial judge ruled:

> The Court is of the opinion that the question concerning whether or not there is a valid theory or hypothesis upon which the defendant might be found guilty is for the jury to decide, not for the Court.

During Lakin's cross-examination, she acknowledged that the job of determining cause of death was normally that of a pathologist, not a pediatrician like herself.

In response, Joshua Clark offered the testimony of Dr. Mark Shuman, a forensic pathologist, who produced

many published articles that supported his position that SBS is not a currently reliable hypothesis, and that many other non-criminal events may produce the same symptoms (bleeding around the brain and eye areas and brain swelling).

Additionally, Dr. Shuman produced numerous scientific studies finding that there can be "lucid intervals" between the time an injury is inflicted and the time when the injury manifests itself. According to Dr. Shuman's undisputed testimony, the autopsy photographs show blood adhering to the dura. In Dr. Shuman's opinion, that condition existed for some period of time before Joshua Clark came home and had custody of Kyllie.

Joshua Clark produced these scientific articles at a *Daubert* hearing, at the motion for a directed verdict stage, at the close of the evidence at trial, and again on the motion for new trial. The trial judge allowed the numerous articles to be marked for identification but not admitted into evidence.

Lakin's theory, which amounted to no more than a lay opinion, was that Kyllie Clark must have been shaken during the time when Joshua Clark had custody of her because the injury was so serious that it would have manifested itself immediately. Shortly before Lakin's testimony was completed, however, the State finally turned over a report of the State Medical Examiner, which Joshua Clark's defense counsel had repeatedly requested for many months. That report stated that the time the injury to Kyllie was inflicted could not be determined. Nevertheless, the jury returned a verdict of not guilty of capital murder, but guilty of second-degree murder. Appendix H.

After the jury returned its verdict, Joshua Clark moved for a new trial, offering further scientific evidence that undermined the testimony of Lakin, including a new meta-study, published after the trial and done under the auspices of the government of Sweden, that concluded that brain swelling and bleeding around the brain and bleeding around the eye, do not, as Lakin claimed, reliably indicate that a child has been shaken. That study was reviewed by Keith A. Findley et al., in *Feigned Consensus: Usurping the Law in Shaken Baby Syndrome/Abusive Head Trauma Prosecutions*, 2019 Wis. L. Rev. 1211 (2019). Those authors agreed with the study, which reviewed more than 1000 papers, and its conclusion that the papers supporting SBS were of "very low quality." *Id.* at 1222. Despite this exhaustive new study and the lack of any evidence introduced to contradict it, the trial judge summarily denied the motion for a new trial. The trial judge did comment, however, that he was "not insensitive to the fact that there may be some difficulty or some difference of opinion about that which is called shaken baby syndrome."

Joshua Clark appealed to the Mississippi Court of Appeals, which reversed 7-3 on the grounds that the trial judge had failed to perform the required gatekeeping function of determining whether the evidence was reliable and could be reliably applied to the facts of the case. The Mississippi Court of Appeals emphasized that, although reliability must be determined by the trial judge, the judge here had "left the determination of reliability to the jury and the cross-examination skills of [petitioner's] trial attorney." Appendix F ¶ 44

In directing a new trial, the Mississippi Court of Appeals noted that the error in admitting Lakin's opinion

was "magnified since Dr. Lakin's testimony as to those issues was the only evidence to support the State's theory of the case," other than the evidence that Joshua Clark was with Kyllie during the period immediately before she first developed any symptoms. Appendix F ¶47. Moreover, the Mississippi Court of Appeals continued, the defense offered "numerous cites to studies and peer-reviewed articles, that reflected the scientific community may no longer wholly accept SBS" and "at the very least, the State should have provided either a minimal defense of articles or other expert testimony to support the reliability of the opinion." Appendix F ¶47; *See also* ¶48 (discussing the many other ways in which Lakin's testimony was unreliable and failed to provide the jury with a basis to support a finding of guilt by SBS).

By a vote of 5-4, the Mississippi Supreme Court reversed the Court of Appeals and reinstated Joshua Clark's conviction, with Chief Justice Michael Randolph's concurring in only the result. The Mississippi Supreme Court found the trial judge had fulfilled his function by finding that the testimony was admissible. The Mississippi Supreme Court held that no "magic words," such as a specific finding that Lakin's testimony was reliable or that the brain bleed could reliably be traced to the time when Joshua Clark had exclusive custody of the child, were required. The Mississippi Supreme Court reasoned that it could not review the correctness of the trial court's decision because, as the high court held, "we are jurists, not scientists." Appendix E ¶ 24.

A four Justice dissent agreed with the Mississippi Court of Appeals majority that the "State failed to establish that its expert was anything more than a qualified pediatrician." Appendix E ¶ 85. That dissent

relied upon that fact that the trial judge had made no finding of scientific reliability of Lakin's testimony. Appendix E ¶ 96.

Joshua Clark then filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Mississippi. The District Court ruled Joshua Clark had not met his exhaustion requirements with respect to the Fourteenth Amendment claims and directed him to the state courts. The Mississippi Supreme Court then ruled that it could not review the Equal Protection and Due Process claims because Mississippi Code Annotated § 99-39-21(1)&(3) required these claims to be raised on the direct appeal. Appendix D. After the habeas petition returned to the District Court, the District Court entered its memorandum opinion which correctly found that Joshua Clark could not have raised these claims on direct appeal. Appendix C. This ruling was correct since in their arguments to the Mississippi Supreme Court and the Mississippi Court of Appeals, both parties assumed, incorrectly, that Mississippi courts would apply the same *Daubert/McLemore* reliability standards as those courts apply in civil cases.

Although finding in favor of Joshua Clark on the exhaustion issue, the District Court dismissed the habeas corpus petition through a memorandum opinion. Appendix C.

Joshua Clark moved the District Court for a Certificate of Appealability, which the District Court denied, based upon its memorandum opinion finding against Joshua Clark on the merits. Appendix B.

Joshua Clark then sought a Certificate of Appealability from the Fifth Circuit. In a two-paragraph order, a single

Fifth Circuit judge recited the claims Joshua Clark made, set forth the requirements for the Certificate, and then stated, with no further explanation, that "[b]ecause Clark has not met these standards, his request for a COA is DENIED." Appendix A.

REASONS FOR GRANTING THE WRIT

1. REASONABLE JURISTS COULD DIFFER AS TO WHETHER THE STATE VIOLATED JOSHUA CLARK'S EQUAL PROTECTION RIGHTS BY FAILING TO GIVE CLARK, A CRIMINAL DEFENDANT, THE BENEFIT OF A TRIAL JUDGE'S ACTING AS A GATEKEEPER TO DETERMINE THE RELIABILITY OF SCIENTIFIC EVIDENCE, WHILE AFFORDING THIS IMPORTANT PROTECTION TO THE PARTIES IN ALL CIVIL CASES.

Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993), abolished the standard for admissibility of expert evidence, established in *Frye v. U.S.*, 293 F.3d 1013 (1993). *Daubert* held that the *Frye* requirement that expert testimony not be admitted unless it is generally accepted in the scientific community would no longer apply in federal court. Instead, *Daubert* interpreted the Federal Rules of Evidence to permit the admission of scientific evidence, if the trial judge finds that the expert's reason or methodology is scientifically reliable and can be reliably applied to the facts of the particular case at issue.

Daubert became controlling in Mississippi civil cases when the Mississippi Supreme Court decided *Mississippi Transp. Comm'n v. McLemore*, 863 So.2d 31 (Miss.

2003). *McLemore* adopted the same gatekeeping function required in federal court, stating, in part, "The trial court is vested with 'gatekeeping responsibility.'" The trial court must make a 'preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning and methodology properly can be applied to the facts in issue.'" *McLemore*, 863 So.2d at 36.

McLemore also expressly adopted the *Daubert* non-exclusive factors for a trial judge to utilize in determining whether expert testimony is sufficiently reliable to be admitted. *McLemore* held: "These factors include whether the theory or technique can be and has been tested; whether it has been subjected to peer review and publication; whether, in respect to a particular technique, there is a high known or potential rate of error; whether there are standards controlling the technique's operation; and whether the theory or technique enjoys general acceptance within a relevant scientific community." *McLemore*, 863 So.2d at 37.

Neither at the pretrial hearing nor at the trial did Lakin ever discuss any of these factors, except that Lakin agreed that there could be no determination of an error rate in the Shaken Baby Syndrome diagnosis, since finding such error rate would require shaking a baby.

The Mississippi Supreme Court reversed the Mississippi Court of Appeals and upheld the decision of the trial court to admit Lakin's testimony. That Court expressly declined to review whether the evidence was reliable, however. Appendix E.

In upholding the trial court's admission of Lakin's testimony, despite the failure even to mention the words "reliability," "*Daubert*," or "*McLemore*," the Mississippi Supreme Court departed from its precedents in civil cases which have uniformly reversed trial courts if those courts did not expressly conduct a review of scientific evidence to determine whether that evidence is reliable and can be reliably applied to the facts of a particular case.

Chief Justice Michael K. Randolph concurred in only the result in this criminal case, but in civil cases, he has routinely required trial courts to act as gatekeepers and expressly determine reliability. Chief Justice Randolph wrote in *Gulf S. Pipeline Co., LP v. Pitre*, 35 So.3d 494, 498 (Miss. 2010), "[T]rial courts are charged with being gatekeepers in evaluating the admissibility of expert testimony . . . " In that same opinion, Chief Justice Randolph went on to say that trial courts must determine whether the proffered testimony is reliable. *Gulf S. Pipeline*, 35 So.3d at 498. Chief Justice Randolph's concurrence in *City of Jackson v. Johnson*, 343 So.3d 356 (Miss. 2022), cited, with approval, *Watts v. Radiator Specialty Co.*, 990 So.2d 143, 146-47 (Miss. 2008), which held that it is "necessary" for the trial judge to find expert testimony is "relevant and reliable."

Hill v. Mills, 26 So.3d 322, 331 (Miss. 2010), reversed a plaintiff's verdict in a civil case, stating: "Were we automatically to allow introduction of expert opinions which are based upon nothing more than personal experience in cases where those opinions are contradicted in the scientific literature, we would effectively render Rule 702 and *Daubert* a nullity." *Hill*, 26 So.3d at 333.

Hyundai Motor Am. v. Hutton, 328 So.3d 592 (Miss. 2021), *cert. denied*, 142 S.Ct. 1447 (Mem) (2022), prohibited a plaintiff's expert auto mechanic from testifying in a civil case that there was a defective design since the mechanic's opinion was "was not supported by any treatise, peer-reviewed publication, or any other scientific article," and the opinion, therefore, "lacked reliability when examined through the lens of Rule 702, [and] should have been excluded." *Hyundai Motor Am.*, 328 So.3d at 607.

All of these Mississippi cases are a result of the Mississippi Supreme Court's adoption of *Daubert* reliability standards in *McLemore*. *Daubert* itself is clear in rendering this evidence inadmissible under its standards. *Daubert* held that "the Rules of Evidence—especially Rule 702—do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Daubert*, 509 U.S. at 597. Federal Rule of Evidence 702 is identical to Mississippi Rule of Evidence 702.

Had the *Daubert*/*McLemore* civil case requirement been applied in this criminal case, there would have been no basis for upholding the conviction because the trial judge made no reliability analysis, and no scientific literature was produced to support Lakin's opinions.

The irrational phenomena of strict adherence to *Daubert* reliability in civil cases, and nonadherence as to criminal defendants, is not limited to Mississippi. "Several studies of the impact of *Daubert* have concluded that it has had a significant impact on limiting flawed expert testimony in civil cases but almost no impact in criminal cases, at least with regard to evidence proffered by the

prosecution." Keith A. Findley, *Judicial Gatekeeping of Suspect Evidence: Due Process and Evidentiary Rules in the Age of Innocence*, 47 Ga. L. Rev. 723, 755 (2013).

Had the trial court applied the *Daubert/McLemore* reliability procedures in this case, the trial judge would have found that the SBS theory, even if it is valid, does not fit the facts of this case. Lakin's testimony was that the injury must have occurred while Joshua Clark had custody of the child because the serious nature of the injury meant that it would have manifested immediately. This testimony was contradicted not only by the scientific evidence produced by Joshua Clark at trial but also by the opinion of the State Medical Examiner, whose report Joshua Clark's attorneys received at trial, during Lakin's testimony, after having spent months requesting that the State produce that report.

When the State finally gave defense counsel the report of the State Medical Examiner, defense counsel requested that Lakin's testimony be reopened so that Lakin might be asked about the report. The trial judge permitted additional cross examination. After having testified on direct examination that the brain bleeding and the breathing difficulties began at the same time as the injury, Lakin then suddenly changed her mind and agreed with the State Medical Examiner that the time of the injuries could not be determined.

If the time the brain bleeding began cannot be determined, then it cannot be determined that this precipitating event occurred during the time when Joshua Clark had exclusive custody of Kyllie. If SBS is a reliable scientific theory, the trial judge should nevertheless have found it cannot be reliably applied to the facts of this case.

Because Joshua Clark was denied the crucial right to have the trial judge determine reliability and to determine whether the alleged scientific theory could be applied to the facts of this case, Joshua Clark was denied equal protection of the law.

"The purpose of the equal protection clause . . . is to secure every person . . . against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

This equal protection case is particularly egregious because it affects a fundamental interest, Joshua Clark's liberty, for forty (40) years. "When a fundamental right is at stake, the Government can act only by narrowly tailored means that serve a compelling state interest." *Department of State v. Munoz*, 602 U.S. 899, 910 (2024).

Notwithstanding the fact that the State had no interest, let alone a compelling interest, in denying Joshua Clark a trial court's determination that evidence is reliable before it can be admitted, the District Court nevertheless denied relief. Appendix C. The District Court did so based on cases which have no application. The District Court relied upon *Erie v. Tompkins*, 304 U.S. 64 (1938), which held only that state law, not federal law, must be applied in diversity cases.

The District Court also relied upon *Beck v. Washington*, 369 U.S. 541, 554-55 (1962), which held only that utilizing different grand jury procedures for some criminal defendants, as opposed to other criminal defendants,

was not "an invidious discrimination" outlawed by the Fourteenth Amendment. *Beck* says nothing about whether a state may not grant protections to assure reliability for criminal defendants whose liberty is at stake when it gives such protections to civil defendants whose liberty is not at stake.

The District Court ignored the highly relevant case, *Chambers v. Mississippi*, 410 U.S. 284 (1973), which held that the Fourteenth Amendment does not permit the State of Mississippi to apply its rules of evidence excluding hearsay when the effect is to bar testimony that a different person had confessed to the crime for which the defendant was being tried. *Chambers* refutes the District Judge's opinion that the United States Constitution cannot be applied to question state rulings on the admissibility of evidence.

The issue directly presented here is not whether the Equal Protection Clause prevents the State from imposing different standards for the admissibility of expert opinion on criminal defendants than those applied in civil cases. Rather, the issue presented here is whether a petition alleging such an Equal Protection violation is one which the criminal defendant can appeal to a federal Court of Appeals. The applicable statute, 28 U.S.C. § 2253(c)(2), says an appeal is available only if a petitioner has made a substantial showing of the denial of a constitutional right. This means that a judge of the Court of Appeals should grant a petition if the petition presents an issue that is debatable by "reasonable jurists." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

The fact that reasonable jurists could differ is demonstrated by the writings of the Mississippi appellate courts on the issue of reliability of evidence, which is a central issue in this case.

An 11-5 majority of all appellate judges (the seven (7) judge majority of the Court of Appeals and the four (4) justice dissent of the Mississippi Supreme Court) all agreed that the conviction should be reversed because there was no finding by the trial court of either reliability or that the diagnosis of Shaken Baby Syndrome could be reliably applied to the facts of this case. *See* Appendix E and Appendix F.

Moreover, the four-justice plurality upholding Joshua Clark's conviction refused to make any decision on whether the evidence was reliable. Thus, not a single justice of the Mississippi Supreme Court has ever found that SBS is a scientifically valid theory or that such a theory could be reliably applied to the facts of this case.

This Court should direct the Court of Appeals to grant a Certificate of Appealability. Such a direction will give the Court of Appeals much-needed guidance on when such a certificate should be granted. Keith Trahan, in *A Shortcut to Death: An Analysis of the Fifth Circuit's Refusal to Adopt the Supreme Court's Certificate of Appealability Standard in Capital Cases*, 48 Am. J. Crim. L. 1 (2020), describes three (3) cases in which this Court has accepted *certiorari* to correct the Fifth Circuit's failing to apply the correct standard in deciding whether a Certificate of Appealability should issue. That same article amasses statistics indicating the Fifth Circuit, in capital cases, refuses to issue Certificates of Appealability at rates

overwhelmingly higher than those of other Circuits. Cases like this one, where a judge of the Court of Appeals simply denies a Certificate of Appealability with no explanation, leave the lower courts with no standards as to exactly when a Certificate of Appealability should be permitted.

The Court of Appeals should be instructed that it should grant Certificates of Appealability at least in those cases involving a federal question and in which the state courts have strongly disagreed as to whether the criminal conviction is valid. Most assuredly, a Certificate of Appealability should issue when the question presented goes to the heart of whether the criminal defendant is actually innocent of the crime with which he is charged. *See McQuiggin v. Perkins*, 569 U.S. 383 (2013) (holding that there may be equitable exceptions to strict federal habeas rules when there is a bona fide claim of actual innocence).

2. REASONABLE JURISTS COULD DIFFER AS TO WHETHER THE STATE VIOLATED JOSHUA CLARK'S DUE PROCESS RIGHTS BY FAILING TO REQUIRE THE TRIAL JUDGE TO ACT AS GATEKEEPER TO DETERMINE THE RELIABILITY OF PROFERRED SCIENTIFIC EVIDENCE.

In determining what due process requires in a procedural context like this, *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), enunciated the applicable test as follows:

> [T]he specific dictates of due process generally requires consideration of three distinct factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Based on the *Mathews*' test, this Court should require a Certificate of Appealability so that the Court of Appeals may determine whether due process requires that the State produce evidence of the reliability of an expert opinion and that the trial judge make an on-the-record finding that the opinion is reliable and can be reliably applied to the facts of a case. Each of the three *Mathews*' factors points decidedly in that direction.

First, Joshua Clark's liberty interest in avoiding a wrongful conviction and decades in prison is, as this Court stated in *In re Winship*, 397 U.S. 358, 363 (1970), "of immense importance." Second, the risk of an erroneous result because the jury heard testimony from an expert without evidence of reliability and without a trial judge's finding that the expert opinion is reliable, is precisely the risk that Daubert was designed to avoid. Third, there will be no additional burdens imposed on the State, simply by requiring that the State provide evidence that its experts are using a scientifically reliable method and that the trial judge so find. Indeed, as the Court of Appeals in this case ruled, a trial judge is required to perform that task under Mississippi law, as are federal judges under *Daubert* and Fed. R. Evid. 702(c) and (d).

In some criminal cases, this Court has declined to apply *Mathews.* For example, in *Medina v. California*, 505 U.S. 437 (1992), the issue was whether the State could properly assign the burden of proof to the defendant in a criminal case to establish his incompetence to stand trial. Although procedural in one sense, the California rule represented a substantive judgment by the State on which party is best able to shoulder the evidentiary burden on the issue of competence to stand trial. Here, the party who is better able to assess the reliability of scientific evidence is the trial judge, not a jury of lay persons who are not even allowed to see the scientific literature. Thus, even under the *Medina* standard, reasonable jurists could find a violation of due process.

Reasonable jurists could determine that due process requires the trial judge to explain why he permitted Lakin to offer her opinion that SBS is a reliable diagnosis and that shaking caused Kyllie's death.

Yet in circumstances eerily similar to this case—a wrongful death of an unborn child case—the Mississippi courts refused to admit the testimony of an obstetrician-gynecologist as to the cause of death of an unborn child because it would be "outside *his discipline* or the *particular topic* in which he possessed scientific, technical, or specialized knowledge" which is that of pathologist. *Worthy v. McNair*, 37 So.3d 609, 616 (Miss. 2010) (emphasis in original).

The Mississippi Supreme Court may be correct in its statement that "we are jurists, not scientists," Appendix E ¶ 24, but jurors are not scientists either. That court stated

in the next sentence: "Judges are increasingly asked to make scientific determinations based on contradictory science despite not being qualified to do so." Appendix E ¶ 24. However, that is what Mississippi Rule of Evidence 702 and *Daubert* already require. Because that is the law, the Due Process Clause is a proper means to assure that judges follow the law in the least intrusive way possible: here, by requiring the State to produce scientific evidence of reliability and by requiring trial judges to explain their reasoning when admitting expert testimony.

Other states strongly dispute the Mississippi Supreme Court's holding with respect to the core issue of the procedures required to be used in determining whether SBS evidence is sufficiently reliable to be admitted in criminal cases. See *State v. Nieves*, 302 A.3d 595 (N.J. App. 2023) (holding that SBS lacks acceptance in the field of biomechanical engineering to allow the diagnosis to be introduced as evidence in a criminal trial); *In re D.S., L.J., and K.J.*, 2024 WL 5103663 (W.Va. Dec. 13, 2024) (holding that conviction must be reversed where trial court failed to enter detailed findings demonstrating the SBS theory is reliable); *People v. Bailey*, 999 N.Y.S.2d 713 (N.Y. Cty. Ct. 2014) (holding that recent scientific studies cast serious doubts on the SBS theory); *People v. Miller*, 2021 WL 1326733 (Mich. Ct. App. Apr. 8, 2021) (sustaining post-conviction challenge because there is "significant doubt" about the reliability of SBS as a medical diagnosis); *Del Prete v. Thompson*, 10 F. Supp. 3d 907 (N.D. Ill. 2014) (holding, after extensive review of scientific literature, that an SBS diagnosis is "more an article of faith than a proposition of science"); *Hanson v. Baker*, 766 Fed. Appx. 501 (9th Cir. 2019) (granting habeas corpus relief

because the scientific reliability of the State's SBS expert witness had been undermined); *Jones v. State*, 2021 WL 346552 (Md. Ct. Spec. App. Feb. 2, 2021) (granting petition for a writ of innocence and analyzing scientific studies demonstrating flaws in the diagnosis).

In fact, there are so many cases addressing whether or not an SBS diagnosis can support a criminal conviction that there exists a one hundred fifty-seven (157) page ALR report discussing the conflicting cases. *See Admissibility, Sufficiency, and Other Issues Concerning Expert Evidence to Prove or Disprove Shaken Baby Syndrome*, 16 A.L.R. 7th Art. 5 (2016). The disagreement among the state courts about the core issue of whether SBS is a reliable theory so as to form the basis for multiple criminal convictions is an important one, warranting review.

CONCLUSION

This Court should grant the writ so as to set out for the lower courts standards under which a Certificate of Appealability may properly be denied. Alternatively, this Court should grant the petition and direct the Fifth Court of Appeals to issue a Certificate of Appealability.

Respectfully submitted,

DAN W. WEBB
WEBB SANDERS & WILLIAMS, PLLC
P.O. Box 496
Tupelo, MS 38802

JIM WAIDE
Counsel of Record
WAIDE & ASSOCIATES, P.A.
332 North Spring Street
Tupelo, MS 38804
(662) 842-7324
waide@waidelaw.com

November 6, 2025

Counsel for Petitioner

APPENDIX

TABLE OF APPENDICES

TABLE OF APPENDICES

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED AUGUST 8, 2025

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25-60126

JOSHUA ERIC HAWK CLARK,

Petitioner-Appellant,

versus

BURL CAIN, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

Filed August 8, 2025

Application for Certificate of Appealability
the United States District Court
for the Northern District of Mississippi
USDC No. 3:22-CV-76

ORDER

Joshua Eric Hawk Clark, Mississippi prisoner# 155269, was convicted of depraved heart murder and sentenced to serve 40 years in prison. Now, following the denial of his 28 U.S.C. § 2254 habeas corpus petition, he moves this court for a certificate of appealability (COA) on claims

concerning Equal Protection, Due Process, evidentiary sufficiency, and the application of 28 U.S.C. § 2254(d). Because the last claim is raised for the first time in his pleadings with this court, it will not be considered. *See Black v. Davis,* 902 F.3d 541, 545 (5th Cir. 2018).

A COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, the applicant must demonstrate "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell,* 537 U.S. 322, 327 (2003). Because Clark has not met these standards, his request for a COA is DENIED.

/s/
KURT D. ENGELHARDT
United States Circuit Judge

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI, OXFORD DIVISION, FILED APRIL 29, 2025

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI, OXFORD DIVISION

NO. 3:22-CV-00076-MPM-RP

JOSHUA ERIC HAWK CLARK,

PETITIONER,

V.

COMMISSIONER OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS and ATTORNEY GENERAL OF THE STATE OF MISSISSISSIPPI,

RESPONDENTS.

Filed April 29, 2025

ORDER DENYING CERTIFICATE OF APPEALABILITY

Before the Court is the petitioner's motion [44] for a certificate of appealability ("COA") from the denial of his federal habeas petition. Doc. # 44. Pursuant to Rule 11(a) of the Rules Governing § 2254 Proceedings for the United States District Courts, this Court must issue

or deny a certificate of appealability ("COA") upon the entry of a final order adverse to the petitioner, and Clark must obtain a COA before appealing this Court's decision denying federal habeas relief. *See* 28 U.S.C. § 2253(c)(l). This Court may only grant a COA if the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To obtain a COA for claims rejected on their merits, a petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel,* 529 U.S. 473, 484 (2000). For claims rejected on procedural grounds, a petitioner must demonstrate "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling" in order for a COA to issue. *Id.* Applying this standard, and for the reasons stated in the Court's memorandum opinion, *see* Doc.# 42, the Court concludes that Petitioner's motion [44] for a COA should be **DENIED.**

SO ORDERED, this the 29th day of April, 2025.

/s/Michael P. Mills
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF MISSISSIPPI

APPENDIX C — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI, OXFORD DIVISION, FILED FEBRUARY 27, 2025

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI, OXFORD DIVISION

No. 3:22-cv-076-MPM-RP

JOSHUA ERIC HAWK CLARK,

PLAINTIFF

v.

COMMISSIONER OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS and ATTORNEY GERNERAL OF THE STATE OF MISSISSIPPI,

DEFENDANTS

Decided February 27, 2025, Filed February 27, 2025

MEMORANDUM OPINION

This matter comes before the Court on Plaintiff Joshua Clark's Petition for Writ of Habeas Corpus. [1]. The Court, having reviewed the record and having carefully considered the applicable law, is now prepared to rule.

Appendix C

FACTS

This case centers around the admission of expert testimony regarding head trauma in a child murder case. On January 5, 2008, Mr. Clark was at his home with his wife, friends, and children in Itawamba County. Around 3:00 p.m., his wife and friends drove into town, leaving Mr. Clark in charge of four children—his four-month-old daughter (Kyllie), Kyllie's twin brother (Quinton), and two older siblings. When his wife and friends returned at around 5:30 p.m., they found Kyllie glassy-eyed and gasping for breath in the same room as an unconcerned Mr. Clark. His wife and friends immediately recognized Kyllie was seriously injured and called 911 before attempting CPR. Kyllie was taken to a local hospital and then transferred to Le Bonheur Children's Hospital in Memphis where shortly she died.

The hospital diagnosed Kyllie with rib fractures, retinal and subdural hemorrhages, and brain swelling. Dr. Lakin, who would later serve as the State's primary expert witness, concluded that Kyllie's death had been caused by Abusive Head Trauma ("AHT").[1]

Mr. Clark was charged with capital murder. After initially pleading guilty and being sentenced to life in prison, Mr. Clark successfully moved to have his guilty plea rescinded and received a second chance at trial.

---

1. Abusive head trauma ("AHT") and Shaken Baby Syndrome ("SBS") have been used interchangeably throughout these proceedings to mean "trauma inflicted on the head of a child." This Court will use "AHT" to refer to this trauma.

Appendix C

A strong source of pretrial contention was the admissibility of Dr. Lakin's expert testimony regarding the timing of the alleged injury and the validity of an AHT diagnosis. The trial judge held an extensive *Daubert* hearing dealing with these issues and ultimately allowed Dr. Lakin's testimony.

At trial, Mr. Clark took the stand. His version of events did not align with the version proffered by his wife and friends. While he maintained that he did not cause Kyllie's injuries, he had no explanation for his failure to call emergency services or seek medical care for his daughter. At the conclusion of trial, Mr. Clark was found guilty of second-degree murder and sentenced to forty years in prison.[2], [3]

Mr. Clark appealed his conviction on six claims of error. At the first stage of appeal, the Mississippi Court of Appeals reversed his conviction holding that "the [trial] court abused its discretion by admitting into evidence Dr. Lakin's expert testimony" and found Dr. Lakin's testimony "fell well short of *Daubert's* expectations" for reliability. *Clark v. State*, 363 So.3d 880, 894 (Miss. Ct. App. 2019) (citing *Daubert v. Merrell Dow Pharms., Inc.*,

2. Mr. Clark was also charged with abuse of Kyllie's twin, Quinton, who Dr. Lakin determined had also suffered broken ribs and abusive head trauma. That case was severed.

3. Mr. Clark was previously under suspicion for abusing the nine-month-old child of his former girlfriend. That child, after being left alone with Mr. Clark, was found to have two broken arms and a broken leg. The trial court allowed this evidence, though it was ultimately not presented at trial.

509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)). The Mississippi Supreme Court then reversed the Court of Appeals and reinstated Mr. Clark's conviction holding that Dr. Lakin's expert testimony satisfied *Daubert's* reliability requirement. *Clark v. State*, 315 So. 3d 987 (Miss. 2021). Finally, after exhausting all other postconviction remedies, Mr. Clark filed a Petition for Writ of Habeas Corpus with this Court.

ANALYSIS

The Writ of Habeas Corpus, found in the Suspension Clause of the U.S. Constitution, is a postconviction procedure which enables prisoners to challenge the legality of their confinement. *Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 116, 140 S. Ct. 1959, 207 L. Ed. 2d 427 (2020) (citing U.S. Const., Art. I, § 9, cl. 2.). The remedy "is an extraordinary one." *Goto v. Lane*, 265 U.S. 393, 401, 44 S. Ct. 525, 68 L. Ed. 1070 (1924). "The statutory authority of federal courts to issue habeas corpus relief for persons in state custody is provided by 28 U.S.C. § 2254." *Harrington v. Richter*, 562 U.S. 86, 97, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). For claims adjudicated on the merits in state court, § 2254(d) prohibits federal habeas relief unless the state court's ruling:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)-(2); *Id.* at 98. Thus, strict limits exist on the permissible scope of habeas review.

In Mr. Clark's habeas petition, he raises three arguments: (1) The Mississippi Supreme Court violated the Equal Protection Clause by misapplying Mississippi Rule of Evidence 702; (2) failing to require the trial court to conduct a reliability analysis before admitting expert testimony violated the Due Process Clause; and (3) the evidence was insufficient to establish guilt beyond a reasonable doubt.

I. Equal Protection

Mr. Clark first argues that the Mississippi Supreme Court's "refusal to apply the standards of Miss. R. Evid. 702 in this criminal case, when these standards are applied in civil cases, violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution." This argument—while creative—is constructed upon two unfounded presumptions: (1) that the trial court misapplied Mississippi Rule of Evidence 702 and (2) that the Mississippi Supreme Court erred in affirming the trial court. Assuming these to be true (for now), Mr. Clark's argument is still a bit unclear. It deploys three separate equal protection theories interchangeably. At some points, Mr. Clark argues that treating criminal

defendants differently than civil defendants is an equal protection violation. At other points, Mr. Clark uses a class-of-one equal protection theory to argue that he was intentionally treated differently than every other similarly situated person. And yet at other points, Mr. Clark argues that because his liberty interest is a fundamental right that was unjustly taken from him, this Court must analyze the Mississippi Supreme Court's decision under strict scrutiny.

In response, the State argues that Mr. Clark's equal protection argument is waived under Miss. Code Ann. § 99-39-21 since he failed to raise it at trial or on appeal. Mr. Clark retorts that it was impossible for him to raise his equal protection argument at trial or on appeal since the conduct he takes issue with—the Mississippi Supreme Court's decision—did not exist at those times. This Court agrees that Mr. Clark's equal protection argument is not waived since it was not capable of being raised previously. *See* Miss. Code Ann. § 99-39-21(1) (requiring claims to be "capable of determination at trial and/or on direct appeal" for waiver to apply).

What is more concerning lies at the heart of Mr. Clark's claim. Mr. Clark is essentially asking this Court to reverse a state court's determination of state evidence law. Doing so, however, would eviscerate the bedrock principles of federalism, state sovereignty, and common law that our country's judicial system is founded upon. In the landmark case *Erie R. Co. v. Tompkins*, the Supreme Court stated:

Appendix C

> [T]he constitution of the United States [] recognizes and preserves the autonomy and independence of the states,—independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the state, and, to that extent, a denial of its independence.

Erie R. Co. v. Tompkins, 304 U.S. 64, 78-79, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) (quoting *Baltimore & O.R. Co. v. Baugh*, 149 U.S. 368, 401, 13 S. Ct. 914, 37 L. Ed. 772 (1893)). Thus, this Court is hesitant to even consider the equal protection argument since to do so would first require finding erroneous the State of Mississippi's determination of Mississippi law, thereby impinging on its sovereignty.

The Supreme Court analyzed a similar situation in *Beck v. Washington*, 369 U.S. 541, 82 S. Ct. 955, 8 L. Ed. 2d 98 (1962). In *Beck*, a man argued that his state court conviction violated his due process and equal protection rights. *Id.* at 542. The Supreme Court, in upholding the man's conviction, stated:

> The final argument under the Equal Protection Clause is that Washington has singled out

> petitioner for special treatment by denying him the procedural safeguards the law affords others... But this reasoning proceeds on the wholly unsupported assumption that such procedures have been required in Washington in all other cases. Moreover, it is contrary to the underlying finding of the Superior Court... And even if we were to assume that Washington law requires such procedural safeguards, the petitioner's argument here comes down to a contention that Washington law was misapplied. Such misapplication cannot be shown to be an invidious discrimination. **We have said time and again that the Fourteenth Amendment does not 'assure uniformity of judicial decisions * * * (or) immunity from judicial error * * *.'** *Milwaukee Electric Ry. & Light Co. v. Wisconsin ex rel. Milwaukee*, 252 U.S. 100, 106, 40 S.Ct. 306, 309, 64 L.Ed. 476 (1920). Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question.

Id. at 554-55 (emphasis added); *and see Little v. Crawford*, 449 F.3d 1075, 1082 (9th Cir. 2006) ("[This] claim...amounts to an allegation that...Nevada law was misapplied or that the Nevada Supreme Court departed from its earlier decisions. Under clearly established Supreme Court law, such contention neither gives rise to an equal protection claim, nor provides a basis for habeas relief." (citing *Beck v. Washington*, 369 U.S. 541, 554-55, 82 S. Ct. 955, 8 L. Ed. 2d 98 (1962) and *Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991))).

Appendix C

Another controlling Supreme Court case is *Estelle v. McGuire*, 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). In *Estelle*, a man convicted of killing his six-month-old daughter filed a habeas petition arguing that a state court's admission of expert testimony regarding battered child syndrome was a violation of his due process rights. *Id.* at 64. Although the Ninth Circuit agreed with him, the Supreme Court reversed, holding that the Ninth Circuit "exceeded the limited scope of federal habeas review of state convictions." *Id.* The Supreme Court continued:

> "We have stated many times that 'federal habeas corpus relief does not lie for errors of state law.' Today, we reemphasize that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."

Id. at 67 (citations omitted) (quoting *Lewis v. Jeffers*, 497 U.S. 764, 780, 110 S. Ct. 3092, 111 L. Ed. 2d 606 (1990) and citing *Pulley v. Harris*, 465 U.S. 37, 41, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984)); *and see Jones v. Hendrix*, 599 U.S. 465, 490, 143 S. Ct. 1857, 216 L. Ed. 2d 471 (2023) ("a state prisoner could never bring a pure statutory-error claim in federal habeas, because 'federal habeas corpus relief does not lie for errors of state law.'" (quoting *Estelle*, 502 U.S. at 67.)); *see also Cummings v. Sirmons*, 506 F.3d 1211, 1237 (10th Cir. 2007) ("[The defendant] has cited to no [] Supreme Court decisions, and our own independent research has failed to produce any holding that a state court's erroneous application of state criminal law can result in a violation of a criminal defendant's equal protection rights.").

A state-court determination of state law is exactly what is at issue here. Although framed as a constitutional question, Mr. Clark's equal protection claim is primarily a contention that the Mississippi Supreme Court erred when ruling on Mr. Clark's case—the constitutional element is just window dressing. It is hard to imagine a workable judicial system where each time a state supreme court issues a decision, the losing party has a viable equal protection claim. For the common law system to function, courts must have breathing room to create and modify precedent. Case law develops slowly, organically over time as high courts render decisions to fit the legal and factual issues presented. This is not a case where the Mississippi Supreme Court refused to apply the rules of evidence to Mr. Clark because it did not like him or his race or his religion. It is a case where the court reviewed the record, reviewed the law, and reached what it felt was the proper decision—a decision that was certainly correct. For these reasons, Mr. Clark's equal protection claim fails.

II. Due Process

Mr. Clark next argues that his due process rights were violated. He contends "failing to require the trial court to conduct a reliability analysis before admitting expert opinion against a criminal defendant violates *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)." This argument is similar in form to his last one in that it erroneously presupposes a failure by the trial court. The record does not support Mr. Clark's contention that the trial court failed to conduct a reliability analysis. It instead shows that the trial court held an extensive

Daubert hearing during which defense counsel engaged in a prolonged presentation of their concerns about the reliability of Dr. Lakin's testimony. Indeed, when addressing this same issue, the Mississippi Supreme Court stated:

> [M]agic words are not required under the *Daubert* standard or elsewhere... The fact that the judge lumped the *Daubert* finding under the phrase "qualified to testify" is of no importance here because it is clear that the judge considered not only Dr. Lakin's qualifications but also the relevance and reliability of her expert testimony concerning SBS/AHT. The record clearly shows that the trial judge had the issues regarding the actual SBS/AHT testimony squarely before it when it determined Dr. Lakin to be "qualified to testify."

Clark v. State, 315 So. 3d 987, 996-97 (Miss. 2021). Thus, Mr. Clark's entire due process argument rails against something that never occurred.

Ignoring this fatal flaw, Mr. Clark's due process argument is still unclear. The language "failing to require the trial court," suggests that Mr. Clark is arguing—much like in his last argument—that the Mississippi Supreme Court was the entity which violated his due process rights. The body of the argument, however, contends that it was the trial court which violated his due process rights.

Regardless of whose conduct Mr. Clark argues as violative, the procedural due process requirements of *Mathews v. Eldridge* were satisfied. 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). In *Mathews*, the Supreme Court stated that "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' *Id.* at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965)). Here, even if the trial judge had not made a reliability determination, it is undisputed that Mr. Clark received a meaningful opportunity to be heard at every stage of trial and appeal. During these chances to be heard, Mr. Clark raised his concerns about the reliability of Dr. Lakin's testimony. Mr. Clark received more than the minimum required procedural safeguards, and his due process claim therefore fails.

III. Sufficiency of Evidence

Finally, Mr. Clark argues "[Dr.] Lakin's testimony was insufficient to establish guilt beyond a reasonable doubt as required by the Due Process Clause of the Fourteenth Amendment." This argument fails because, even if true, it overlooks that there were other sources of evidence beyond Dr. Lakin's testimony which were independently sufficient to establish guilt beyond a reasonable doubt. In *Jackson v. Virginia*, the Supreme Court held that "in a challenge to a state criminal conviction...the applicant is entitled to habeas corpus relief if it is found that... no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 324, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). A rational trier of fact could have found proof beyond a reasonable doubt here.

Dr. Lakin's testimony, when viewed in conjunction with the testimony of the other witnesses, was sufficient to prove Mr. Clark guilty. Dr. Lakin stated that Mr. Clark told her that Kyllie ate around 5:00 p.m. She testified that Kyllie's injuries were so severe that the child would have lost consciousness very quickly and would have been unable to eat or cry. According to Dr. Lakin, the injuries to Kyllie's head were too severe to be the result of simple drop or fall or trivial household trauma; they required much greater force. She also ruled out the possibility of hypoxia, CPR, birth complications, or sudden infant death syndrome as possible causes of death.

Mr. Clark makes much ado about Dr. Lakin's "admi[ssion] that she could not determine the time of the alleged injury." Mr. Clark argues that because Dr. Lakin could not determine when the injury occurred, "there remains a lack of proof beyond a reasonable doubt that the alleged injury occurred [when] Clark had exclusive custody." This argument is flawed. It erroneously conflates Dr. Lakin's concession that she could not pinpoint the *exact* time of the injury with the conclusion that Dr. Lakin could not reliably determine that the injury occurred while the infant was in Mr. Clark's exclusive care. Dr. Lakin consistently testified that the severity of Kyllie's head trauma would cause the immediate onset of significant symptoms. These significant symptoms were not present when Mr. Clark's wife and friends left. These symptoms were immediately recognized as present when they returned three hours later. A rational trier of fact could have concluded that Kyllie's injuries occurred between these two periods of time when she was in Mr. Clark's exclusive custody.

But even without Dr. Lakin's testimony, a rational trier of fact could have found Mr. Clark guilty beyond a reasonable doubt. All witnesses—Mr. Clark, his wife, both friends—agreed that Kyllie was fine when the wife and friends left the house. Mr. Clark had sole control of Kyllie, a four-month-old who was just beginning to support her own head, until they returned. The wife and friends all stated that, upon their return, they immediately recognized Kyllie was seriously injured.

According to the wife: the first friend who went through the door was so taken aback by Kyllie's condition that she dropped the bags she was carrying and asked what had happened; Mr. Clark, who was playing video games, appeared unconcerned; the wife and Mr. Clark then argued about whether to take Kyllie to the hospital, Mr. Clark insisting that Kyllie was fine; the wife had to push Mr. Clark off so she could perform CPR. Both friends told a similar story: all of them were shocked as they walked through the door, and one of the friends called 911 while the wife performed CPR.

When Mr. Clark took the stand, his story did not match the testimony of the others. Mr. Clark claimed, contrary to the testimony of his wife and friends, that he was not playing video games when they returned. He also denied that his wife ever attempted CPR or that, as one of the friends testified, he said his daughter "cried like a f-ing titty baby" when asked about his daughter's behavior that day. Although he maintained that he did not hurt Kyllie and claimed that Kyllie began making gasping sounds only five to ten minutes before his wife and friends returned,

he had no explanation for why he did not call emergency services or take Kyllie to the hospital. He also failed to explain how his wife and friends could look at Kyllie and immediately recognize an injury severe enough to result in imminent death, while Mr. Clark could look at Kyllie at the same time and argue that she was fine.

Even the defense expert conceded that Kyllie's death was caused by blunt force trauma to her head.

The jury saw firsthand the testimony and body language of the witnesses. The jury saw firsthand the demeanor of Mr. Clark as he testified. The jury then decided unanimously to find Mr. Clark guilty beyond a reasonable doubt. It is "the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial." *Parker v. Matthews*, 567 U.S. 37, 43, 132 S. Ct. 2148, 183 L. Ed. 2d 32 (2012) (quoting *Cavazos v. Smith*, 565 U.S. 1, 2, 132 S. Ct. 2, 181 L. Ed. 2d 311 (2011)). On appeal, the Mississippi Supreme Court addressed Mr. Clark's sufficiency-of-the-evidence argument and found that "a rational trier of fact could have found the essential elements of depraved-heart murder beyond a reasonable doubt." *Clark v. State*, 315 So.3d 987, 1001 (Miss. 2021). "Where a state appellate court has conducted a thorough review of the evidence ... its determination is entitled to great deference." *Callins v. Collins*, 998 F.2d 269, 276 (5th Cir. 1993). This Court agrees that the evidence was sufficient for a rational trier of fact to find Mr. Clark guilty beyond a reasonable doubt. Therefore, this claim fails.

Appendix C

CONCLUSION

ACCORDINGLY, Plaintiff Joshua Clark's Petition for Writ of Habeas Corpus [1] is **DENIED**. The State's Motion to Strike [40] is **DISMISSED** as moot. This case is **CLOSED**.

SO ORDERED this the 27th day of February, 2025.

/s/ Michael P. Mills
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF MISSISSIPPI

APPENDIX D — ORDER OF THE SUPREME COURT OF MISSISSIPPI, FILED JUNE 23, 2023

IN THE SUPREME COURT OF MISSISSIPPI

No. 2022-M-00442

JOSHUA ERIC CLARK

Petitioner

v.

STATE OF MISSISSIPPI

Respondent

Filed June 23, 2023

ORDER

Now before the panel of King, P.J., Coleman and Ishee, JJ., is Joshua Eric Clark's Motion for Post-Conviction Relief. In 2019, Clark was found guilty of second-degree murder. He appealed, and the Court of Appeals reversed and remanded Clark's conviction on the basis that the testimony of the State's expert witness was unreliable and inadmissible. *Clark v. State,* 2019 WL 5566234 (Miss. Ct. App. 2019). This Court granted certiorari review, reversed the Court of Appeals' decision, and reinstated Clark's conviction and sentence. *Clark v. State,* 315 So. 3d 987 (Miss. 2021).

Clark filed the instant motion, and on October 14, 2022, this Court ordered the State of Mississippi to file a response to Clark's motion, which it did on December 9, 2022. *See* Order, *Clark v. State,* 2022-M-00442 (Miss. Oct. 14, 2022). Then, on February 8, 2023, Clark filed a reply to the State's response. The issues raised by Clark are whether the application of Mississippi Rule of Evidence 702 violates the Equal Protection Clause; whether the trial court is required to perform an on-the-record reliability analysis pursuant to *Mathews v.Eldridge,* 424 U.S. 319 (1976); and whether there was sufficient evidence to sustain Clark's conviction.

After due consideration, the panel finds that Clark's issues are barred by Mississippi Code Sections 99-39-21(1)-(3) (Rev. 2020).

IT IS THEREFORE ORDERED that Joshua Eric Clark's Motion for Post-Conviction Relief is hereby denied.

SO ORDERED.

/s/ Leslie D. King
Leslie D. King,
Presiding Justice

APPENDIX E — ON WRIT OF CERTIORARI TO THE MISSISSIPPI SUPREME COURT, FILED FEBRUARY 4, 2021

315 So.3d 987
SUPREME COURT OF MISSISSIPPI

NO. 2017-CT-00411-SCT

JOSHUA ERIC HAWK CLARK a/k/a
JOSHUA CLARK

v.

STATE OF MISSISSIPPI

02/04/2021

ON WRIT OF CERTIORARI

CHAMBERLIN, JUSTICE, FOR THE COURT:

¶1. Following the death of his four-month-old daughter, Kyllie Clark, and his subsequent indictment for murder under Mississippi Code Section 97-3-19(2)(f) (Rev. 2014), Joshua Clark was convicted of depraved-heart murder under Mississippi Code Section 97-3-19(1)(b). The prosecution relied heavily on the testimony of Dr. Karen Lakin, a pediatrician who opined that Kyllie's death resulted from Shaken Baby Syndrome (SBS), now referred to as Abusive Head Trauma (AHT). The Court of Appeals reversed and remanded Clark's conviction after finding that crucial parts of Dr. Lakin's testimony were

unreliable and therefore inadmissible. *Clark v. State,* No. 2017-KA-00411-COA, 2019 WL 5566234 (Miss. Ct. App. Oct. 29, 2019). This Court granted certiorari on issues raised both by Clark and by the State.

¶2. We disagree with the conclusion of the Court of Appeals that Dr. Lakin's opinion testimony was inadequately supported to meet the reliability prong of the *Daubert* standard and was thus improperly admitted. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L.Ed. 2d 469 (1993). We hold instead that the circuit court did not err by admitting Dr. Lakin's testimony. Therefore, the judgment of the Court of Appeals is reversed, and the judgment of the Itawamba County Circuit Court is reinstated and affirmed.

¶3. Further, we find that Clark's six additional assignments of error not previously addressed by the Court of Appeals are without merit. First, we hold that sufficient evidence existed to establish Clark's guilt beyond a reasonable doubt. Second, we hold that Mississippi Code Sections 97-3-19(2)(f) and 97-5-39(2)(c)(iii) (Rev. 2014) are not unconstitutionally vague. Third, we find that the circuit court did not abuse its discretion by instructing the jury on depraved-heart murder. Fourth, we find that the circuit court did not violate Clark's Sixth and Fourteenth Amendment rights to a fair cross-section of the community by refusing to separate the trials into a guilt phase and a penalty phase so that jurors opposed to the death penalty could sit at the guilt phase. Fifth, we find that the trial court did not err by (a) permitting the introduction of evidence regarding the compensation of Clark's expert, Dr.

Shuman; (b) disallowing impeachment evidence regarding Dr. Lakin's divorce and child; or (c) disallowing testimony of Bethany Clark's drug conviction. Sixth, and finally, we find that the circuit court did not abuse its discretion when it admitted, through Dr. Lakin's testimony, the medical report dictated by nurse practitioner Ashley Weiderhold that was later reviewed and signed by Dr. Lakin.

FACTS

¶4. On January 5, 2008, Kyllie Clark was left in Clark's sole care at around 3 p.m. when his wife, Bethany, and two teenagers staying with the Clarks left their home. *Clark*, 2019 WL 5566234, at *2. From approximately 3 p.m. to 5:30 p.m., no one besides Clark witnessed what occurred in the Clark household. *Id.* When Bethany and the teenagers returned, Kyllie's condition prompted alarm. *Id.* at *2. Clark said that approximately five or ten minutes before Bethany and the teenagers returned, Kyllie had made a gasping sound. *Id.* After one of the teenagers called 911, Clark brought Kyllie into the bedroom where she went limp. *Id.* Bethany brought Kyllie back to the living room and attempted CPR. *Id.*

¶5. Kyllie was taken to a local hospital and later transferred to Le Bonheur Children's Hospital in Memphis, Tennessee, for specialized care. *Id.* at *2. Kyllie was diagnosed with rib fractures, retinal and subdural hemorrhages and brain swelling. *Id.* The hospital staff ultimately declared Kyllie brain dead and terminated life support. *Id.* at *2. Dr. Lakin, who would later serve as the State's primary witness, examined Kyllie at Le Bonheur and concluded

that her death had been caused by SBS/AHT. *Id.* at *2. Dr. Lakin's conclusion was memorialized in a report dictated by Ashley Weiderhold, a nurse practitioner. Dr. Lakin reviewed and signed the same report.[1]

STANDARD OF REVIEW

¶6. "When reviewing a trial court's decision to allow or disallow evidence, including expert testimony, we apply an abuse of discretion standard." *Watts v. Radiator Specialty Co.*, 990 So. 2d 143, 145-46 (Miss. 2008) (internal quotation marks omitted) (quoting *Canadian Nat'l/Ill. Cent. R.R. v. Hall*, 953 So. 2d 1084, 1094 (Miss. 2007)). "Therefore, the decision of a trial court will stand 'unless we conclude that the discretion was arbitrary and clearly erroneous, amounting to an abuse of discretion.'" *Miss. Transp. Comm'n v. McLemore*, 863 So. 2d 31, 34 (Miss. 2003) (quoting *Puckett v. State*, 737 So. 2d 322, 342 (Miss. 1999)).

¶7. Moreover, "[w]hen testing the sufficiency of the evidence, this Court uses a *de novo* standard of review." *Sanford v. State*, 247 So. 3d 1242, 1244 (Miss. 2018) (citing *Brooks v. State*, 203 So. 3d 1134, 1137 (Miss. 2016)). Thus, "'[t]he relevant question is whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."'" *Id.* (quoting *Hearn v. State*, 3 So. 3d 722, 740 (Miss. 2008)). And "[t]he evidence is viewed in the light most favorable to the State." *Id.* (quoting *Henley v. State*, 136 So. 3d 413, 415 (Miss. 2014)).

1. Additional relevant facts and procedural history concerning the additional six issues raised by Clark on appeal are provided in the discussion of each issue below.

¶8. Additionally, "[j]ury instructions are generally within the discretion of the trial court and the settled standard of review is abuse of discretion." *Bailey v. State*, 78 So. 3d 308, 315 (Miss. 2012) (citing *Newell v. State*, 49 So. 3d 66, 73 (Miss. 2010)). We "review[] jury instructions as a whole[,]" and "[w]hen those instructions, 'taken as a whole fairly—although not perfectly—announce the applicable primary rules of law . . . no reversible error will be found.'" *Moody v. State*, 202 So. 3d 1235, 1237 (Miss. 2016) (quoting *Boyd v. State*, 47 So. 3d 121, 123-24 (Miss. 2010). And "constitutional questions are reviewed de novo." *Armstead v. State*, 196 So. 3d 913, 916 (Miss. 2016) (citing *Smith v. State*, 25 So. 3d 264, 267 (Miss. 2009)).

DISCUSSION

¶9. The State and Clark filed petitions for certiorari raising the following three issues: first, whether the Court of Appeals applied an incorrect *Daubert* standard in analyzing the trial court's admission of portions of Dr. Lakin's expert testimony; second, whether, when the Court of Appeals reverses and orders a new trial because the State's expert does not meet Mississippi Rule of Civil Procedure 702 reliability standards, the Court of Appeals must also address the defendant's other assignments of error; and third, whether the Double Jeopardy Clauses of the United States and Mississippi Constitutions forbid retrial in a circumstantial evidence case in which the State does not introduce evidence negating non-criminal, medical causes of the condition causing the injury. Because we reverse the Court of Appeals based on our analysis of the first issue on certiorari, we do not address the

remaining two issues raised on certiorari. Further, since we are reversing the Court of Appeals and reinstating the judgment of the circuit court, we also must address the remaining six assignments of error raised on appeal.

I. Dr. Lakin's Testimony

¶10. Dr. Lakin, who examined Kyllie at Le Bonheur hospital, became the State's expert witness and testified about SBS/AHT. At trial, Dr. Lakin testified that she has "lectured extensively in abusive head trauma." She then went on to explain SBS/AHT to the trial court and to the jury. She described how around the "late [1960s] or early [1970s]" medical findings showed "injured children" with "intracranial hemorrhages" that resulted from "what we call whiplash injuries." She continued explaining that these "injuries involve particularly intracranial hemorrhages called subdural hemorrhages, which is a bleeding that occurs in the dura layer of the brain." She testified that the term used to describe what caused these injuries was "beginning to be used as shaken baby syndrome." She explained that ultimately, SBS has been reduced to a "component" of the larger diagnosis, AHT.

¶11. In her testimony, Dr. Lakin importantly distinguished between the possession of a prior "history" and a "lack of significant history." She testified that in a case in which she knows of a prior history, like a car accident, she would not "report that to Child Protective Services because [she] know[s] that they have been in a car accident and they have sustained those life-threatening or fatal injuries." She continued to explain that in a case that lacks

a prior history in which the child's injuries are consistent with a prior history, like the car accident case, then "in [her] opinion, that combination of findings with a lack of significant history would, in [her] opinion, be consistent with abusive head trauma or nonaccidental trauma."

¶12. Dr. Lakin concluded that the injuries Kyllie suffered were the result of AHT. The Court of Appeals, however, found that the circuit court erred by admitting Dr. Lakin's trial testimony. We disagree. The circuit court did not err by admitting Dr. Lakin's testimony.

¶13. We must not allow ourselves to become the gatekeeper. As we have stated in *McLemore*: "We are confident that our learned trial judges can and will properly assume the role as gatekeeper on questions of admissibility of expert testimony. . . . The trial court can identify the specific indicia of reliability of evidence in a particular technical or scientific field." *McLemore*, 863 So. 2d at 40.

¶14. Rather than becoming the gatekeeper, our function is to determine whether the actual gatekeeper, the trial judge, has abused his discretion in performing that role in a particular case. *Inv'r Res. Servs., Inc. v. Cato*, 15 So. 3d 412, 416 (Miss. 2009). In this case, we conclude that the trial judge properly performed his role as gatekeeper by admitting Dr. Lakin's testimony. The fact that separate members of this Court might come to a different conclusion than the trial judge is of no matter under the applicable standard of review.

¶15. Mississippi Rule of Evidence 702 sets forth the analysis for admitting expert testimony. The rule states:

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

MRE 702.[2]

¶16. "Under Mississippi Rule of Evidence 702, expert testimony should be admitted only when the trial court can affirmatively answer a two-fold inquiry." *Kan. City S. Ry. v. Johnson*, 798 So. 2d 374, 382 (Miss. 2001), *superseded by rule as stated in McLemore*, 863 So. 2d 31. The first prong mandates that a witness must be qualified by virtue of his or her knowledge, skill, experience, or education.

---

2. Mississippi Rule of Evidence 702 is identical to Rule 702 of the Federal Rules of Evidence.

Id. (citing MRE 702). Second, "the witness's scientific, technical, or other specialized knowledge must assist the trier of fact to understand or decide a fact in issue." *Id.* (citing MRE 702). Put simply, the expert's proposed testimony must be both relevant to the case at hand and based on reliable methodology. This standard is generally known as the *Daubert* standard. *See McLemore*, 863 So. 2d at 35 (adopting the federal standard for admissibility of expert witness testimony articulated in *Daubert*, 509 U.S. at 592-594, 113 S.Ct. 2786, for Mississippi courts).

¶17. In amending Rule 702 in 2003, this Court recognized that trial courts are vested with a gatekeeping responsibility to determine whether the expert testimony presented is both relevant and reliable. MRE 702 advisory committee note. It is the task of the trial court to make a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether the reasoning or methodology properly can be applied to the facts in issue." *Daubert*, 509 U.S. at 592-93, 113 S.Ct. 2786.

¶18. In applying the *Daubert* standard, we must first determine whether Dr. Lakin's expert testimony was relevant to the case at hand. The Mississippi Rules of Evidence define evidence as relevant if "**(a)** it has any tendency to make a fact more or less probable than it would be without the evidence; and **(b)** the fact is of consequence in determining the case." MRE 401. "[T]he threshold for admissibility of relevant evidence is not great. Evidence is relevant if it has any tendency to prove a consequential fact." *McLemore*, 863 So. 2d at 40 (internal quotation

marks omitted) (quoting *Whitten v. Cox*, 799 So. 2d 1, 15 (Miss. 2000)).

¶19. We find that Dr. Lakin's opinion as to the cause of Kyllie's death was relevant and satisfies the first prong of the *Daubert* standard. It was the second prong of the *Daubert* standard that concerned the Court of Appeals. After careful review, however, this Court concludes that this prong, too, was satisfied.

¶20. First, the Court of Appeals found fault with the specific wording used by the trial judge to show that Dr. Lakin's testimony was reliable. *Clark*, 2019 WL 5566234, at *9-10. The trial judge found, in part, that "she is qualified to testify." This statement was construed by the Court of Appeals to mean that no consideration was given to relevance or reliability. *See id.* But magic words are not required under the *Daubert* standard or elsewhere. *Jones v. State*, 920 So. 2d 465, 476 (Miss. 2006) ("magic words" not necessary in the context of Rule 403). The trial judge clearly found the testimony admissible both by acknowledging the availability to the defense of cross-examination and by, of course, allowing the testimony in the trial. The judge's duty is to perform the gatekeeper function and to leave for us a record sufficient to allow us to determine that the function was performed and supported by the record submitted. We have before us the record, and it is sufficient for us to determine whether the trial judge abused his discretion. The fact that the judge lumped the *Daubert* finding under the phrase "qualified to testify" is of no importance here because it is clear that the judge considered not only Dr. Lakin's qualifications but

also the relevance and reliability of her expert testimony concerning SBS/AHT. The record clearly shows that the trial judge had the issues regarding the actual SBS/AHT testimony squarely before it when it determined Dr. Lakin to be "qualified to testify."

¶21. Second, the Court of Appeals relied on the fact that Dr. Lakin lacked recall of certain literature supporting her theories and conceded articles in opposition to her testimony. *Clark*, 2019 WL 5566234, at *8-9. Of course, failing to recall certain articles in a scientific field cannot be uncommon and opposition articles in a contentious field are to be expected. This is what cross-examination of an expert witness is all about. An appellate court that deems concessions on cross-examination to be disqualifying not only thrusts that court squarely into the role of gatekeeper, but it also threatens to establish an expert-witness threshold so high that it borders on perfection.

¶22. Dr. Lakin was required to provide evidence of support and acceptance in the scientific community. *Patterson v. Tibbs*, 60 So. 3d 742, 751 (Miss. 2011). She did so by citing the American Academy of Pediatrics (AAP) as well as its Canadian counterpart and supporting evidence from the Centers for Disease Control. Specifically, Dr. Lakin testified that she was member of the AAP. Further, when asked if the AAP recognizes and accepts SBS/AHT, not only did Dr. Lakin respond affirmatively, but she went on to testify that SBS/AHT is accepted "by a number of other medical governing organizations" including the Centers for Disease Control which, according to Dr. Lakin, "funds research in abusive head trauma." She further testified

that numerous peer-reviewed articles across different disciplines supported SBS/AHT.

¶23. The Court of Appeals also compared testimony of the expert witness for the defense to that of Dr. Lakin. *Clark*, 2019 WL 5566234, at *5. While this Court might consider opposing testimonies in an evaluation of the weight or sufficiency of the evidence, we have no place comparing the two in determining the admissibility of one of their opinions. That one party's expert witness contradicts the testimony of the other party's expert witness should come as no surprise. We even have a name for it. We call it a "battle of the experts." *Hill v. Mills*, 26 So. 3d 322, 330 (Miss. 2010). The fact the Court of Appeals may itself deem the expert testimony from the defense as better than that of Dr. Lakin's testimony is irrelevant to the admissibility of Dr. Lakin's testimony. *See Gen. Motors Corp. v. Pegues*, 738 So. 2d 746, 753 (Miss. Ct. App. 1998) ("When the evidence is conflicting, we defer to the jury's determination of the credibility of witnesses and the weight of their testimony." (internal quotation marks omitted) (quoting *Ducker v. Moore*, 680 So. 2d 808, 811 (Miss. 1996))). This Court has held that the winner in a battle of experts is to decided by a jury. *Hill*, 26 So. 3d at 322; *see*, *e.g*, *Bickham v. Grant*, 861 So. 2d 299, 307 (Miss. 2003).

¶24. This brings us to the real problem in this case: it is not so much the testimony of Dr. Lakin as it is the fact that the SBS/AHT diagnosis has been increasingly questioned in recent years. The Court of Appeals recognized this difficulty in its decision as did the trial judge, who stated

that he was not "insensitive to the fact that there may be difficulty or some difference of opinion about that which is called SBS." If we wish to take it upon ourselves to determine that some theory has been debunked, that is certainly within our power if appropriately supported by the science. But we must continue to remember that we are jurists, not scientists. Judges are increasingly asked to make scientific determinations based on contradictory science despite not being qualified to do so. Science by nature is seldom certain, and thus the validation of a proposed submission need not be universally accepted. *Daubert*, 509 U.S. at 590, 113 S.Ct. 2786. The fact that experts hold opposite views does not make the testimony inadmissible.[3]

---

3. We acknowledge the academic debates surrounding SBS/AHT. *See* AK Choudhary et al., *Consensus Statement on Abusive Head Trauma in Infants and Young Children*, 48 Pediatric Radiology 1048 (2018); Joëlle A. Moreno & Brian Holmgren, *Dissent Into Confusion: The Supreme Court, Denialism, and the False "Scientific" Controversy Over Shaken Baby Syndrome*, 2013 Utah L. Rev. 153; *but see* Randy Papetti et al., *Outside the Echo Chamber: A Response to the "Consensus Statement on Abusive Head Trauma in Infants and Young Children"*, 59 Santa Clara L. Rev. 299 (2019). As we make this acknowledgment, however, we recognize that the centerpiece of this case is *expert witness testimony*, and it is ultimately the "responsibility of the jury and not the appellate court to draw conclusions based on the evidence presented at trial. A reviewing court 'may set aside the jury's verdict on the ground of insufficient evidence *only if* no rational trier of fact could have agreed with the jury.'" Moreno & Holmgren, at 209 (emphasis added) (quoting *Cavazos v. Smith*, 565 U.S. 1, 2, 132 S. Ct. 2, 181 L.Ed. 2d 311 (2011)).

II. Remaining Issues on Appeal

¶25. Clark raises six additional arguments not addressed by the Court of Appeals.[4] Since we are reinstating the trial court's judgment and affirming Clark's conviction, we address each remaining issue in turn below.

A. Whether the evidence at trial was insufficient to establish guilt beyond a reasonable doubt and to the exclusion of every reasonable hypothesis of innocence.

¶26. In his first remaining argument on appeal, Clark argues that the evidence presented at trial was insufficient to establish guilt beyond a reasonable doubt and to the exclusion of every reasonable hypothesis of innocence. Clark points to *Weathersby v. State*, 165 Miss. 207, 147 So. 481, 482 (1933), arguing that since no substantial evidence to contradict Clark's version of events was presented at trial, the trial court was required to enter a directed verdict. Clark qualifies his argument that the evidence presented in this case requires a review of *Weathersby*: "[a]bsent the opinion testimony of the expert witness, the conviction must be evaluated in light of the *Weathersby* rule. . . ."

¶27. A review of the record and Clark's motions for directed verdict reveals that while Clark made a similar

4. The issues provided in subheadings A through F are slightly modified for clarity from Clark's "Corrected Brief of Appellant."

argument before the trial court, he failed to specifically raise an argument regarding *Weathersby*. Since Clark failed to raise the *Weathersby* rule as a defense before the circuit court, the issue is procedurally barred on appeal. *Jones v. State*, 154 So. 3d 872, 877 (Miss. 2014) (citing *Page v. State*, 64 So. 3d 482, 489 (Miss. 2011)). Procedural bar notwithstanding, we find Clark's *Weathersby* argument to be without merit.

¶28. In *Weathersby*, we recognized a rule

> in this state that where the defendant or the defendant's witnesses are the only eyewitnesses to the homicide, their version, if reasonable, must be accepted as true, unless substantially contradicted in material particulars by a credible witness or witnesses for the state, or by the physical facts or by the facts of common knowledge.

Weathersby, 147 So. at 482 (citing *Houston v. State*, 117 Miss. 311, 78 So. 182 (1918)). Indeed, "[w]here the *Weathersby* rule applies and the defendant's version affords an absolute legal defense, the defendant is entitled to a directed verdict of acquittal." *Green v. State*, 631 So. 2d 167, 174 (citing *Blanks v. State*, 547 So. 2d 29, 33 (Miss. 1989)). Additionally, "*Weathersby* does not require the State to offer evidence excluding the defendant's theory from the realm of possibility; rather, the State must offer evidence that substantially contradicts the material particulars of the defendant's version of the incident." *Booker v. State*, 64 So. 3d 965, 974 (Miss. 2011) (citing *Weathersby*, 147 So. at 482).

¶29. In *Booker*, we looked to expert witness testimony to determine whether a defendant's version of events were unlikely. *Id.* at 975. In that case, a pathologist expert witness testified that while the defendant's version of events were possible, the same version of events were "very unlikely" based on the expert's assessment of statistical probabilities associated with the expert's observations. *Id.* We opined, "this expert testimony, admissible under our rules of evidence, substantially contradicted Booker's version of the incident and created a question for the jury to resolve." *Id.* at 975-76 (footnote omitted).

¶30. Here, as in *Booker*, Clark's alternative causes for Kyllie's death were substantially contradicted by the expert witness testimony of Dr. Lakin. As discussed above, Dr. Lakin testified that "in [her] opinion, that combination of findings with a lack of significant history would, in [her] opinion, be consistent with abusive head trauma or nonaccidental trauma." We have already upheld the circuit court's determination under *Daubert* that Dr. Lakin's testimony was admissible. Her testimony contradicts Clark's alternative theories of Kyllie's injuries such that a question was created for the jury to resolve. *See Booker*, 64 So. 3d at 975-76. Indeed, Clark's own *Weathersby* argument is qualified by the condition that Dr. Lakin's testimony was admitted erroneously—an argument that we have already rejected. Therefore, Clark's *Weathersby* argument is without merit.

¶31. In furtherance of his broader argument, Clark points to testimony which, in his opinion, shows that insufficient evidence was presented to support the jury's guilty

verdict. Clark points to conflicting evidence presented to the jury that indicated, among other things, that Kyllie was dropped on two occasions prior to the time Clark was alleged to have committed the crime. He additionally discusses dueling expert witness testimony from Dr. Shuman and Dr. Lakin regarding potential and probable causes of Kyllie Clark's injuries and subsequent death, including testimony calling into question the State's timeline of events. Further, Clark argues that testimony presented fails to negate other reasonable hypotheses as to the cause of Kyllie's death: that Kyllie was either injured at birth, through a fall, by being dropped days before Clark had exclusive custody of Kyllie or that Sudden Infant Death Syndrome (SIDS) occurred.[5]

---

5. On January 26, 2021, we received Clark's letter pursuant to Mississippi Rule of Appellate Procedure 28(k). M.R.A.P. 28(k). In the letter, in addition to highlighting recent literature regarding AHT, Clark argues that our recent decision in *Hampton v. State*, No. 2019-KA-01304-SCT, 309 So. 3d 1055, 1057–58 (Miss. Jan. 21, 2021), supports his argument that the State failed to prove that Clark was guilty beyond a reasonable doubt and to the exclusion of every reasonable hypothesis consistent with innocence. *See*, *e.g.*, *Steele v. State*, 544 So. 2d 802, 808 (Miss. 1989) (citing *Leflore v. State*, 535 So. 2d 68, 70 (Miss. 1988)). We disagree. In *Hampton*, we reversed Hampton's conviction for felony child abuse where "Dr. Lakin testified only to the severity of the burns and that the burns appeared to be more than a few days old." *Hampton*, 309 So. 3d at 1067. Additionally, Dr. Lakin "only went so far as to state that in her professional opinion, a caregiver aware of such burns would seek medical care for the burns." *Id.* These statements constituted Dr. Lakin's sole testimony regarding the victim's burn injury. *Id.* Therefore, we held that "[e]ven though one could reasonably conclude from the evidence presented that Hampton knew about LRJ's injury and failed to seek necessary medical care for it, one

cannot infer from this same evidence that because Hampton did not seek medical care for LRJ she must have knowingly or recklessly caused the injury." *Id.* at 1067 (footnote omitted). Since the State failed to prove Hampton's guilt beyond a reasonable doubt to the exclusion of every reasonable hypothesis consistent with innocence, the State's burden was not met. *See id.* In contrast, we affirmed Hampton's conviction for felonious starvation under the same standard where "Dr. Lakin provided evidence that excluded the possibility that LRJ's malnourished state was the result of some sort of medical condition . . . [a]nd she and other witnesses provided evidence that his malnourishment continued while in Hampton's care." *Id.* at 1067.

Dr. Lakin's testimony in Clark's case is more similar to that provided in *Hampton* for the felonious starvation charge. For example, Clark asserts that the State failed to exclude the reasonable, non-criminal hypotheses advanced by Clark for Kyllie's death including SIDS, an accidental dropping, that Kyllie was stepped on and CPR performed on Kyllie. In support, Clark points to various portions of testimony regarding both the occurrence of potential non-criminal, accidental causes of Kyllie's injuries and testimony from Dr. Lakin admitting either that the same causes were either possible or could not be ruled out. In isolation, Clark's argument about *Hampton* could work. Clark, however, ignores Dr. Lakin's testimony that does exclude these alternative theories.

Specifically, after the State asked Dr. Lakin for an approximation of the time Kyllie sustained her injuries to a medical certainty, Dr. Lakin responded, "[b]ased on the history that was given to me, it would have to be sometime between her most recent normal activity, it would be sometime after her most recent normal activity to the time when she was found unconscious. And so in my experience, the symptoms are immediate." The State then asked, "[a]nd the last time of normal activity, as given to you in the history, was?" Dr. Lakin responded, "5:00 when she ate." Therefore, contrary to Clark's argument, the State did prove Clark's guilt beyond a reasonable doubt to the exclusion of hypotheses consistent with innocence that rely on the fact that Kyllie's injuries

¶32. When the evidence is viewed in the light most favorable to the State, it is clear that a rational trier of fact could have found the essential elements of depraved-heart murder beyond a reasonable doubt. *See Sanford*, 247 So. 3d at 1244. The elements of depraved-heart murder are as follows: "[t]he killing of a human being without the authority of law by any means or in any manner . . . [w]hen done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without any premeditated design to effect

---

occurred prior to the period where Clark had sole custody of Kyllie. When questioned about the elimination of SIDS as a cause of Kyllie's death on cross-examination, Dr. Lakin provided that "[t]his child had multiple abnormal physical findings—the subdural hemorrhage, the rib fractures, the retinal—multilayer retinal hemorrhages. You can't even entertain the possibility of sudden infant death syndrome because there are so many abnormalities." Thus, the State did prove Clark's guilt to the exclusion of SIDS as a possibility for Kyllie's death.

Further, Dr. Lakin testified as her conclusion as to Kyllie's death: "[w]ell, the injuries that the patient did sustain were consistent with abusive head trauma, so it's a nonaccidental mechanism which involves some type of very severe acceleration and deceleration which very much could have been a shaking—a severe shaking episode." Finally, Dr. Lakin testified that "[i]n my opinion, the injuries that killed Kyllie was [sic] a severe acceleration/deceleration injury, which is consistent with shaking, and it is consistent with abusive head trauma. And that is my opinion." Given Dr. Lakin's extensive testimony regarding the cause of Kyllie's injuries and death and her insistence that, based on her medical opinion, Kyllie's injuries and death were the result of a nonaccidental event consistent with AHT, the State was able to exclude Clark's alternative theories consistent with innocence and, therefore, Clark's reliance on *Hampton* is misplaced.

the death of any particular individual[.]" *Montgomery v. State*, 253 So. 3d 305, 316 (Miss. 2018) (alterations in original) (internal quotation marks omitted) (quoting Miss. Code Ann. § 97-3-19(1)(b) (Rev. 2014)).

¶33. First, there was evidence that Kyllie Clark was killed. Second, the cause of Kyllie's injuries and resulting death, in Dr. Lakin's opinion, supported a finding that her cause of death was the result of acts imminently dangerous and evincing a depraved heart. *See id.* To that end, Dr. Lakin testified extensively that Kyllie's condition was consistent, in her opinion, with AHT or nonaccidental trauma. Moreover, Dr. Lakin testified that injuries consistent with those sustained by Kyllie are possibly caused by the mechanism of "very rapid acceleration and deceleration, which include shaking as a possible mechanism." Therefore, despite conflicting testimony elicited at trial, when viewed in the light most favorable to the State, we find that a rational trier of fact could have found the essential elements of depraved-heart murder beyond a reasonable doubt. Thus, Clark's argument that insufficient evidence was presented to support the jury's finding that he was guilty beyond is without merit.

B. Whether, under *Johnson v. United States*, 576 U.S. 591, 135 S. Ct. 2551, 192 L.Ed.2d 569 (2015), both Mississippi Code Sections 97-3-19(2)(f) and 97-5-39(2)(c) are unconstitutionally vague.

¶34. Clark argues that sections 97-3-19(2)(f) and 97-5-39(2)(c) of the Mississippi Code are unconstitutionally vague. Section 97-3-19(2)(f) provides that

> (2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases:
>
> . . . .
>
> (f) When done with or without any design to effect death, by any person engaged in the commission of the crime of felonious abuse and/or battery of a child in violation of subsection (2) of Section 97-5-39, or in any attempt to a commit such felony[.]

Miss. Code Ann. § 97-3-19(2)(f) (Rev. 2014). Section 97-5-39(2)(c) provides the following:

> (2) Any person shall be guilty of felonious child abuse in the following circumstances:
>
> . . . .
>
> (c) If serious bodily harm to any child actually occurs, and if the person shall intentionally, knowingly, or recklessly:
>
> (i) Strike any child on the face or head;
>
> (ii) Disfigure or scar any child;
>
> (iii) Whip, strike, or otherwise abuse any child[.]

Miss. Code Ann. § 97-5-39(2)(c) (Rev. 2014).

¶35. Clark specifically takes issue with section 97-5-39(2)(c)(iii) and its so-called "catch-all" language, "otherwise abuse any child." Clark contends that the United States Supreme Court, in *Johnson v. United States*, 576 U.S. 591, 135 S. Ct. 2551, 192 L.Ed.2d 569, L.Ed. 2d 569 (2015), held a provision similar to Section 97-5-39(2)(c)(iii) unconstitutionally vague. In *Johnson*, the Court examined 18 U.S.C. § 924(e)(2)(B), the statute defining a "violent felony" under the Armed Career Criminal Act of 1984 as, among other things, "any felony that 'involves conduct that presents a serious potential risk of physical injury to another.'" *See id.* at 593, 135 S. Ct. 2551 (internal quotation marks omitted) (quoting 18 U.S.C. § 924(e)(2)(B)). This "residual clause" was applied to a Minnesota offense of "unlawful possession of a short-barreled shotgun." *Id.* at 594, 135 S. Ct. 2551.

¶36. The *Johnson* Court noted two features that left the residual clause at issue unconstitutionally vague: (1) the clause "leaves grave uncertainty about how to estimate the risk posed by a crime" and "ties the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements" and (2) the "clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Id.* at 597-98, 135 S. Ct. 2551. In "combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony," the Court held that "the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id.* at 598, 135 S. Ct. 2551.

¶37. *Johnson* is distinguishable here. We have recognized that "[a] criminal statute must provide a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited." *Faraga v. State*, 514 So. 2d 295, 303 (Miss. 1987) (citing *Cumbest v. State*, 456 So. 2d 209 (Miss. 1984)). In *Rubenstein v. State*, 941 So. 2d 735, 772 (Miss. 2006) (quoting *Faraga*, 514 So. 2d at 303), we held that Mississippi Code Section 97-5-39(2)(a) was not unconstitutionally vague, reasoning that Section 97-5-39(a) afforded "'a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited.'" The subsection at issue in *Rubenstein* read as follows:

> Any person who shall intentionally (I) burn any child, (ii) torture any child or, (iii) except in self-defense or in order to prevent bodily harm to a third party, whip, strike or otherwise abuse or mutilate any child in such a manner as to cause serious bodily harm, shall be guilty of felonious abuse of a child. . . .

Id. (alteration in original) (quoting Miss. Code Ann. § 97-5-39(2)(a)). While the *Rubenstein* Court was only concerned with Section 97-5-39(2)(a) and did not analyze section 97-5-39(2)(c)(iii), we now hold that Section 97-5-39(2)(c)(iii), which contains the same "otherwise abuse" language as Section 97-5-39(2)(a), is also not unconstitutionally vague. The language in Section 97-5-39(2)(a) connects both the action "otherwise abuse" with "in such a manner as to cause serious bodily harm. . . ." *Id.* Likewise, the language in Section 97-5-39(2)(c)(iii) requires "serious bodily harm to any child" to occur and that the defendant "intentionally, knowingly or recklessly . . . otherwise abuse any child[.]"

¶38. Section 97-5-39(f) defines "serious bodily harm" for the purposes of section 97-5-39(2) as

> any serious bodily injury to a child and includes, but is not limited to, the fracture of a bone, permanent disfigurement, permanent scarring, or any internal bleeding or internal trauma to any organ, any brain damage, any injury to the eye or ear of a child or other vital organ, and impairment of any bodily function.

Miss. Code Ann. § 97-5-39(f) (Rev. 2014) (internal quotation marks omitted). Paragraph (g) further clarifies that nothing in paragraph (c) "shall preclude a parent or guardian from disciplining a child of that parent or guardian, or shall preclude a person in loco parentis to a child form disciplining that child. . . ." Miss. Code Ann. § 97-5-39(2)(g) (Rev. 2014).

¶39. Pointing to examples such as spanking, Clark asserts that ordinary people will differ on what actions constitute abuse of a child. We disagree. When viewed together, the element of serious bodily harm in Section 97-5-39(2)(c)(iii), along with the clarification in Section 97-5-39(2)(g) that discipline of a child is not precluded under paragraph (c), negates any concern that ordinary people would differ with regard to what actions constitute abuse of a child. In other words, we are unpersuaded that "a person of ordinary intelligence" would lack "a reasonable opportunity to know what conduct is prohibited" when section 97-5-39(2)(c)(iii) requires serious bodily harm and section 97-5-39(2)(g) carves out acts of discipline from the

same offense. *Faraga*, 514 So. 2d at 303 (citing *Cumbest*, 456 So. 2d 209); *c.f. Wolfe v. State*, 743 So. 2d 380, 385 (Miss. 1999) ("As long as the discipline is moderate and reasonable in light of the age and condition of the child, and other surrounding circumstances, the parent or custodian will not incur criminal liability [for felony child abuse]."). Thus, we find Clark's second additional assignment of error without merit.

C. Whether the circuit court erroneously instructed the jury on the lesser nonincluded offense of depraved-heart murder when Clark did not request such an instruction and whether, as a result, the circuit court violated Clark's rights per the Sixth and Fourteenth Amendment and Mississippi Constitution article 3, section 26.

¶40. Again, Clark was convicted of depraved-heart murder under Mississippi Code Section 97-3-19(1)(b). Count I of Clark's indictment reads, in pertinent part:

> That [Joshua Eric Hawk Clark] . . . in said County and State between the 25th day of October, A.D., 2007 and the 6th day of January, 2008, did wilfully, unlawfully and feloniously with or without malice aforethought or deliberate design kill and murder Kiley Clark, a human being, having a date of birth of September 15, 2007, by violently shaking the child, causing rib fractures and other internal injuries resulting in the death of Kiley [sic] Clark, while he the

> said [Joshua Eric Hawk Clark] was engaged in the crime of Felony Child Abuse, all in violation of Mississippi Code, Annotated, Sections 97-3-19(2)(f) and 97-5-39(2)(a)[.]

¶41. Section 97-3-19(2) is Mississippi's capital murder statute. *See* Miss. Code Ann. § 97-3-19(2) (Rev. 2014). Clark argues that Count I failed to allege that Clark acted with a depraved heart and that the indictment instead implies that whether Clark acted with a depraved heart is irrelevant. Section 97-3-19(1)(b) provides that

> (1) The killing of a human being without the authority of law by any means or in any manner shall be murder in the following cases:
>
> . . . .
>
> (b) When done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual, shall be second-degree murder[.]

Miss. Code Ann. § 97-3-19(1)(b) (Rev. 2014).

¶42. According to Clark, his rights under the Sixth and Fourteenth Amendments, as well as article 3, section 26, of the Mississippi Constitution, were violated since the jury was allowed to convict him via a depraved-heart-murder theory when he was not afforded notice of the nature and

cause of the State's accusation. Further, citing *Gause v. State*, 65 So. 3d 295, 300 (Miss. 2011), *abrogated on other grounds by Hall v. State*, 127 So. 3d 202, 207 (Miss. 2013), Clark argues that a lesser, non included offense may not be given as an instruction absent a request for the same from the defendant. Finally, pointing to *Johnson v. State*, 52 So. 3d 384, 397 (Miss. Ct. App. 2009), Clark argues that no evidence of malice, wanton recklessness or depraved heart was presented. In response, citing *Wheeler v. State*, 536 So. 2d 1341, 1344 (Miss. 1988), the State argues that Section 97-3-19 "implicitly recognizes the established doctrine that simple murder is a lesser included offense of capital murder."

¶43. Clark's reliance on *Gause* and *Johnson* is misplaced. In *Gause*, we held that "burglary is not a lesser-included offense of capital murder, and because the State was not entitled to a lesser-offense instruction[,]" the "trial court clearly erred by granting the State's request for an instruction on burglary[.]" *Gause*, 65 So. 3d at 302. In *Johnson*, the Court of Appeals, recognizing that "manslaughter is a lesser offense of murder[,]" determined that there was insufficient evidence to support Johnson's conviction for depraved-heart murder. *Gause*, 65 So. 3d at 397 (citing *McCune v. State*, 989 So. 2d 310, 316 n.13 (Miss. 2008)).

¶44. We have held that "[a]s a matter of common sense, every murder done with deliberate design to effect the death of another human being is by definition done in the commission of an act imminently dangerous to others and evincing a depraved heart, regardless of human

life." *Schuck v. State*, 865 So. 2d 1111, 1119 (Miss. 2003), *disagreed with by Dilworth v. State*, 909 So. 2d 731, 735 n.4 (Miss. 2005)[6]; *see Mallett v. State*, 606 So. 2d 1092, 1095 (Miss. 1992) ("[E]very murder done with deliberate design to effect the death of another human being is by definition done in the commission of an act imminently dangerous to others and evincing a depraved heart, regardless of human life."); *see also White v. State*, 964 So. 2d 1181, 1187 (Miss. Ct. App. 2007) ("Although the statutory language defining depraved heart murder does not clearly state the requirement for deliberate design or malice aforethought, depraved heart murder involves an act so reckless that malice or deliberate design is implied." (internal quotation marks omitted) (quoting *Chatman v. State*, 952 So. 2d 945, 948 (Miss. Ct. App. 2006))). Therefore, we find Clark's argument—that depraved-heart murder is a lesser, rather than a lesser-included, offense of capital murder—is without merit and that the circuit court did not err by providing a depraved-heart-murder instruction.

¶45. As to Clark's argument that he did not receive notice of a criminal charge for depraved-heart murder, Mississippi Code Section 97-3-19(3) provides that "[a]n indictment for murder or capital murder shall serve as notice to the defendant that the indictment may include any and all lesser included offenses thereof, including, but

---

6. In *Dilworth*, we disagreed with *Schuck* and other precedent regarding "standard of review for sufficiency and weight of the evidence"—positions that "we retreated from" in *Bush v. State*, 895 So. 2d 836, 844 n.3 (Miss. 2005), *abrogated on other grounds by Little v. State*, 233 So. 3d 288, 292 (Miss. 2017). *Dilworth*, 909 So. 2d at 735 n.4.

not limited to, manslaughter." Miss. Code Ann. § 97-3-19(3) (Rev. 2014). Count I of Clark's indictment alleging that he "did wilfully, unlawfully and feloniously with or without malice aforethought or deliberate design kill and murder Kiley [sic] Clark"[7] while engaged in the crime of felony child abuse clearly served as notice under Mississippi Code Section 97-3-19(3) that his indictment would include any and all lesser-included offenses, including depraved-heart murder. Therefore, we find Clark's third additional assignment of error without merit.

D. Whether, by refusing to separate the trial into a guilt phase and a penalty phase so that jurors opposed to the death penalty could sit at the guilt phase, the circuit court violated Clark's Sixth and Fourteenth Amendment rights to a fair cross section of the community on the jury.

¶46. Clark further asserts that his Sixth and Fourteenth Amendment rights were violated when eight jurors that expressed opposition to the death penalty were struck from the jury. Additionally, Clark argues that by excluding otherwise qualified jurors that were opposed to the death penalty, the State denied Clark a fair and impartial jury and effectively benefitted from extra peremptory challenges. Citing Mississippi Code Section 99-19-101(3), Clark argues that killing through child abuse cannot be considered an aggravating factor since all persons

7. *See Hawkins v. State*, 101 So. 3d 638, 642 (Miss. 2012), (general discussion about how "depraved heart murder 'subsumes' deliberate design murder. . . ." (quoting *Ruttley v. State*, 746 So. 2d 872, 879 (Miss. Ct. App. 1998))).

convicted of capital murder through child abuse are guilty of capital murder. *See* Miss. Code Ann. § 99-19-101(3) (Rev. 2015) ("For the jury to impose a sentence of death, it must unanimously find in writing the following: . . . (b) That sufficient aggravating circumstances exist as enumerated in subsection (5) of this section; and (c) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.").

¶47. Specifically, Clark asserts that there were abundant mitigating factors and only one aggravating circumstance—that Kyllie was killed during the course of child abuse. And according to Clark, the fact that death occurred through child abuse does not narrow the class of eligible persons for the death penalty. Thus, Clark contends there was no need for a second jury since no aggravating factors existed and the mitigating factors were overwhelming. Clark cites two United States Supreme Court cases for the proposition that, notwithstanding the language of Mississippi Code Sections 99-19-101(3) and 99-19-101(5)(d), the fact that a killing occurred during the commission of felonious child abuse may not be constitutionally considered since such a fact does not "narrow the class" of persons eligible for the death penalty.

¶48. First, Clark points to *McCleskey v. Kemp*, 481 U.S. 279, 303-04, 107 S. Ct. 1756, 95 L.Ed. 2d 262 (1987) (footnote omitted) (citations omitted), in which the Court held that "a State must 'narrow the class of murderers subject to capital punishment,' . . . by providing 'specific and detailed guidance' to the sentencer.'" Second, and in

further support of his argument that felonious child abuse may not constitutionally be used as an aggravating factor, Clark cites *Arave v. Creech*, 507 U.S. 463, 474, 113 S. Ct. 1534, 1542, 123 L.Ed. 2d 188 (1993). There, the Court held that "a State's capital sentencing scheme . . . must 'genuinely narrow the class of persons eligible for the death penalty.'" *Id.* (quoting *Zant v. Stephens*, 462 U.S. 862, 877, 103 S. Ct. 2733, 2742, 77 L.Ed. 2d 235 (1983)). Further, the Court recognized that "[w]hen the purpose of statutory aggravating circumstance is to enable the sentencer to distinguish those who deserve capital punishment from those who do not, the circumstance must provide a principled basis for doing so." *Id.* (citing *Lewis v. Jeffers*, 497 U.S. 764, 776, 110 S. Ct. 3092, 111 L.Ed. 2d 606 (1990)).

¶49. We have resolved this issue. In *Galloway v. State*, 122 So. 3d 614, 680 (Miss. 2013) (citing *Thorson v. State*, 895 So. 2d 85, 105 (Miss. 2004)), we recognized that "the felony-murder aggravator genuinely narrows the class of defendants eligible for the death penalty." In doing so, we reasoned that "[n]ot every defendant eligible for the death penalty will have committed murder while in the course of sexual battery *or the other statutorily enumerated felonies*." *Id.* (emphasis added) (citing Miss. Code Ann. 97-3-19 (Rev. 2006)); *see*, *e.g. Loden v. Epps*, No. 1:10CV311-NBB, 2013 WL 5243670, at *49 (N.D. Miss. Sept. 18, 2013) ("The Mississippi statute narrows the class of capital defendants who are eligible for the death penalty by its definition of capital murder, *see* Miss. Code Ann. § 97-3-19(2), and through the use of aggravating circumstances." (citing Miss. Code Ann. § 99-19-101)), *aff'd*

sub nom. Loden v. McCarty, 778 F.3d 484 (5th Cir. 2015). Indeed, we recognized in *Galloway* the United States Supreme Court's stance on aggravating circumstances as they relate to a sentencing phase. *Galloway*, 122 So. 3d at 680 (citing *Lowenfield v. Phelps*, 484 U.S. 231, 246, 108 S. Ct. 546, 98 L.Ed. 2d 568 (1988)).

¶50. In *Lowenfield*, the Court, while assessing Louisiana's capital murder scheme, provided that "the fact that the aggravating circumstance duplicated one of the elements of the crime does not make this sentence constitutionally infirm." *Lowenfield*, 484 U.S. at 246, 108 S.Ct. 546. Here, just as in *Lowenfield*, the Mississippi "scheme narrows the class of death-eligible murderers and then at the sentencing phase allows for the consideration of mitigating circumstances and the exercise of discretion." *Id.* "The Constitution requires no more." *Id.*

¶51. Additionally, Clark acknowledges that, under Mississippi Code Section 99-19-101(5)(d), "felonious abuse . . . of a child" is an aggravating factor for the purposes of section 99-19-101(3) sufficient to justify a jury's imposition of the death penalty. Miss. Code Ann. § 99-19-101(3) (Supp. 2019). We have recognized that "[f]elonious child abuse is an underlying felony, *as well as an aggravator*, in Mississippi's capital-sentencing scheme." *Moffett v. State*, 156 So. 3d 835, 863 (Miss. 2014) (emphasis added) (citing Miss. Code Ann. §§ 99-3-19(2)(f), 99-19-105(5)(d) (Rev. 2007)). Moreover, "evidence of an underlying crime can properly be used both to elevate the crime to capital murder and as an aggravating circumstance." *Id.* at 864 (internal quotation mark omitted) (quoting *Ross v. State*,

954 So. 2d 968, 1014 (Miss. 2007)). And "[t]he United States Supreme Court has held that the use of an underlying felony as an aggravator is not a constitutional error." *Id.* (citing *Tuilaepa v. California*, 512 U.S. 967, 971-72, 114 S. Ct. 2630, 129 L.Ed. 2d 750 (1994)). Thus, Clark's constitutional attack regarding felonious child abuse's use as both an aggravator in sentencing and an element to elevate a homicide to capital murder is without merit.

¶52. Next, citing *Duren v. Missouri*, 439 U.S. 357, 364, 99 S. Ct. 664, 58 L.Ed. 2d 579 (1979), Clark argues that the exclusion of a distinctive group—here potential jurors who expressed opposition to the death penalty—in the community violates the fair-cross-section requirement of the Sixth and Fourteenth Amendments. We have recognized that *Duren* provides the test for a prima facie violation of the fair-cross-section requirement of the Sixth Amendment. *Yarbrough v. State*, 911 So. 2d 951, 954 (Miss. 2005). To succeed on this assignment of error, Clark would need to show

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process.

Id. at 955 (citing *Duren*, 439 U.S. at 364, 99 S.Ct. 664).

¶53. We have previously addressed the veracity of an argument similar to Clark's argument here. In *Wilcher v. State*, 863 So. 2d 719, 767 (Miss. 2003) (citations omitted) quoting *Jordan v. State*, 786 So. 2d 987, 1028-29 (Miss. 2001)), we reiterated that

> a prospective juror's views on the death penalty do not make one a member of a distinctive class protected by *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L.Ed. 2d 69 (1986), and its progeny. . . . [E]xcusing all jurors who have conscientious scruples against the death penalty does not deny a defendant his right to a representative cross-section of the community.

(quoting Jordan v. State, 786 So.2d 987, 1028-29 (Miss. 2001)). In *Wilcher*, we also recognized that excluding jurors who express an inability to impose the death penalty does not equate to a fair-cross-section violation since the same jurors do not "constitute a distinctive group for fair cross section purposes." *Id.* at 768 (quoting *Buchanan v. Kentucky*, 483 U.S. 402, 415, 107 S. Ct. 2906, 97 L.Ed. 2d 336 (1987)); *Lockhart v. McCree*, 476 U.S. 162, 177, 106 S. Ct. 1758, 1767, 90 L.Ed. 2d 137 (1986) ("[W]e conclude that '*Witherspoon*-excludables' do not constitute a 'distinctive group' for fair-cross-section purposes, and hold that 'death qualification' does not violate the fair-cross-section requirement."[8]).

---

8. "*Witherspoon*-excludables" are "those prospective jurors who state[] that they could not under any circumstances vote for the imposition of the death penalty. . . ." *Lockhart*, 476 U.S. at 162, 106 S.Ct. 1758 (citing *Witherspoon v. Illinois*, 391 U.S. 510, 88 S. Ct. 1770, 20 L.Ed. 2d 776 (1968)).

¶54. Thus, Clark has failed to establish that his Sixth and Fourteenth Amendment rights to a fair cross section were violated by the exclusion of jurors opposed to the death penalty since he is unable to show that jurors opposed to the death penalty constitute a "distinctive group" for fair-cross-section purposes. Since jurors opposed to the death penalty do not constitute a "distinctive group," we decline to address the remaining two requirements for a fair-cross-section violation. Therefore, Clark's fourth additional assignment of error is without merit.

E. Whether the circuit court erred by excluding relevant defense evidence and permitting irrelevant prosecution evidence and whether such errors denied Clark a fair trial in violation of the Fourteenth Amendment.

¶55. Clark argues that the circuit court erred in three evidentiary rulings with each error constituting a denial of a fair trial and a violation of Clark's Sixth and Fourteenth Amendment rights. Each alleged error is addressed in turn below.

i. Whether the circuit court permitted irrelevant, highly prejudicial evidence regarding compensation of Clark's expert witness, Dr. Shuman.

¶56. In closing argument, the State commented on Clark's failure to subpoena the doctor that performed the autopsy on Kyllie Clark. Further, the State argued, with respect to Clark's expert witness, Dr. Shuman, that "[t]hey had

rather have a hired gun come in here from Florida, you pay him $10,000, he'll get up there and tell you anything you want to hear. Dr. Lakin gets paid nothing." The State also commented on Dr. Shuman's compensation with the following statement: "[i]f you pay some expert $8500 to come up here for an hour's testimony, they'll say it."

¶57. Clark argues that the circuit court permitted irrelevant, highly prejudicial evidence regarding compensation for Dr. Shuman's expert testimony. The State argues that any such abuse must cause prejudice and harm and that Clark has failed to demonstrate the same and that evidence of witness bias is admissible under Mississippi Rule of Evidence 616 to attack credibility.

¶58. Rule 616 provides that "[e]vidence of a witness's bias, prejudice, or interest—for or against any party—is admissible to attack the witness's credibility." MRE 616. And "[i]n general, evidence of an expert witness's possible financial economic bias is relevant and admissible." *Wright v. Turan-Foley Motors, Inc.*, 269 So. 3d 160, 168 (Miss. Ct. App. 2018). Thus, the trial court did not err by allowing the State to discuss financial compensation for Dr. Shuman's testimony in closing arguments to show Dr. Shuman's potential economically motivated bias.

¶59. Clark argues in the alternative that any probative value in testimony concerning Dr. Shuman's compensation was far outweighed by its prejudicial effect and, therefore, was inadmissible under Rule 403 of the Mississippi Rules of Evidence. Rule 403 provides that

Appendix E

> The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

MRE 403.

¶60. "The trial court generally is allowed wide discretion concerning the admission of evidence offered to suggest bias on the part of a witness against the defendant." *Ambrose v. State*, 254 So. 3d 77, 100 (Miss. 2018) (citing *Tillis v. State*, 661 So. 2d 1139, 1142 (Miss. 1995)). Further, "[w]e will affirm the trial court's exercise of discretion unless the ruling resulted in prejudice to the accused." *Id.* (internal quotation marks omitted) (quoting *Anthony v. State*, 108 So. 3d 394, 397 (Miss. 2013)).

¶61. The Court of Appeals' decision in *Dao v. State*, 984 So. 2d 352, 360-61 (Miss. Ct. App. 2007), is instructive. There, the trial judge did not say that he "found the evidence more probative than prejudicial." *Id.* at 361. Even so, the trial court in *Dao* "heard arguments from both parties regarding the admissibility of the evidence prior to reaching the conclusion that it should be admitted for the limited purpose of showing bias." *Id.* Likewise, we have recognized that a trial court may implicitly weigh undue prejudice against probative value even when a trial court does not use "magic words" regarding the danger of unfair prejudice and probative value of evidence but ultimately

rules on admissibility after hearing arguments from both parties. *Hoops v. State*, 681 So. 2d 521, 531 (Miss. 1996) (internal quotation marks omitted), *abrogated on other grounds by Willis v. State*, 300 So. 3d 999, 1009 n. 2 (Miss. 2020).

¶62. Here, Clark filed a motion in limine, as well as a renewed motion in limine, seeking to prohibit questions regarding expert-witness compensation. The Court denied Clark's motion in limine after hearing argument from Clark and the State on the issue. Additionally, and following the State's inference during closing argument of paying a "hired gun" $10,000 to say "anything you want to hear[,]" Clark's counsel objected: "[o]bjection. That statement is not support by the evidence." The State responded: "[t]his is argument and all reasonable inferences." It is clear from the record that the circuit court ruled on admissibility after hearing argument from both parties not only following the court's ruling on Clark's motion in limine but also following Clark's objection during the State's closing argument. We therefore find that the circuit court did not err, because it implicitly weighed the probative value of evidence regarding Dr. Shuman's expert witness compensation and any undue prejudice that would result from admission. *Dao*, 984 So. 2d at 361; *see Hoops*, 681 So. 2d at 531.

ii. Whether the trial court improperly denied Clark the opportunity to cross-examine Dr. Lakin to show bias.

¶63. Citing *United States v. Mayer*, 556 F.2d 245, 250 (5th Cir. 1977),[9] Clark also argues that the trial court improperly disallowed impeachment evidence of Dr. Lakin in violation of his Sixth Amendment Confrontation Clause rights. Specifically, Clark attempted to elicit testimony regarding Dr. Lakin's personal divorce and certain facts about Dr. Lakin's child, including bed-wetting and appointment of a guardian ad litem. According to Clark, this information would show Dr. Lakin's bias toward persons accused of child abuse. Clark's counsel, during cross-examination of Dr. Lakin, specifically asked questions regarding the appointment of a guardian ad litem and a psychologist for her two children. Following an objection from the State, the court sent the jury out of the courtroom.

¶64. Outside of the presence of the jury, counsel for Clark argued that the appointment of a guardian ad litem following report of a bed-wetting issue with one of her children showed that "[Dr. Lakin] has a personal reason to bias her testimony in this case" "if she was involved in that process[.]" The trial court responded:

> You are attacking her – or at least revealing things that has got not one thing to do with this.

9. In that case, the United States Court of Appeals for the Fifth Circuit held that a trial judge frustrated Mayer's full exercise of his Sixth Amendment rights by not allowing sufficient inquiry into the prosecution witness' motivation to testify. *Id.*

> The objection of the State will be sustained. You can make a proffer right now of whatever. I don't know. You're not going to ask her anymore questions. Just tell us what you think she will say.

In response to the trial court's invitation for a proffer, Clark's counsel requested the guardian ad litem order be marked for identification, and it was marked Defendant's Exhibit No. 7. Then, Clark's counsel stated that "[m]y presentation would be basically that this would relate to her bias as opposed to medical that's outside the medical context."

¶65. The trial court concluded by discussing the scope of permissible cross-examination:

> The Court: Now, everything – everything about the medical aspects of this, what she knows about this case is fair game.
>
> Mr. Webb: Yes, sir.
>
> The Court: Her qualifications and whatever. But I know of nothing that suggests what you're trying to get at. You can ask her, if you'd like, if she's biased, opinionated, prejudiced, or such thing in favor of child abuse –
>
> Mr. Webb: Well, Your Honor –
>
> The Court: – as a diagnosis.

While still outside the presence of the jury, Clark's counsel then asked Dr. Lakin if she was biased, to which she responded, "[o]f course I'm not biased."

¶66. "Defendants in criminal cases have a fundamental constitutional right to be confronted with the witnesses against them." *Hutto v. State*, 227 So. 3d 963, 983 (Miss. 2017) (internal quotation marks omitted) (quoting *Armstead v. State*, 196 So. 3d 913, 917 (Miss. 2016)). "And '[t]he right of a criminal defendant . . . to cross examine witnesses against him is at the heart of the [C]onfrontation [C]lause.'" *Id.* (alterations in original) (quoting *Armstead*, 196 So. 3d at 917). This right of confrontation extends to the full cross-examination of witnesses "on every material point relating to the issue to be determined that would have a bearing on the credibility of the witness and the weight and worth of his testimony." *Id.* (internal quotation mark omitted) (quoting *Scott v. State*, 796 So. 2d 959, 964 (Miss. 2001)). Moreover, "Mississippi allows wide-open cross-examination of any matter that is *relevant*, including the possible interest, bias, or prejudice of the witness." *Anthony v. State*, 108 So. 3d 394, 397 (Miss. 2013) (emphasis added) (citing *Meeks v. State*, 604 So. 2d 748, 755 (Miss. 1992)).

¶67. But "[t]he trial court generally is allowed wide discretion concerning the admission of evidence offered to suggest bias on the part of a witness against the defendant." *Ambrose*, 254 So. 3d at 100 (citing *Tillis*, 661 So. 2d at 1142). Further, "[w]e will affirm the trial court's exercise of discretion unless the ruling resulted in prejudice to the accused." *Id.* (internal quotation marks omitted) (quoting *Anthony*, 108 So. 3d at 397). And

> "[W]hile the [United States] Constitution thus prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury."

Id. at 100-01 (quoting *Holmes v. South Carolina*, 547 U.S. 319, 326-27, 126 S. Ct. 1727, 164 L.Ed. 2d 503 (2006)).

¶68. Further, "Rule 616 must be interpreted as it relates to other rules of evidence, particularly [Rules] 104, 401 and 402." *Id.* at 101 (internal quotation marks omitted) (quoting *Tillis*, 661 So. 2d at 1142). Rule 402 provides, in part, that "[i]rrelevant evidence is not admissible." MRE 402. Rule 401 provides that "[e]vidence is relevant if: **(a)** it has any tendency to make a fact more or less probable than it would be without the evidence; and **(b)** the fact is of consequence in determining the case." MRE 401. Once again, the circuit court, after halting defense counsel's questioning of Dr. Lakin regarding her divorce, her child's bed-wetting and appointment of a guardian ad litem for her child, stated that "[y]ou are attacking her—or at least revealing things that has got not one thing to do with this."

¶69. While the circuit court did not perform an explicit Rule 401 relevancy test or a Rule 403 balancing test, after reviewing the record we find that the circuit court did

not abuse its discretion by prohibiting Clark's counsel's questioning on cross-examination regarding Dr. Lakin's personal divorce and matters related to her children, as the same evidence was irrelevant per Rule 401 and, therefore, inadmissible under Rule 402. Indeed, the circuit court appears to analyze the relevancy of Clark's proffer: "[y]ou are . . . at least revealing things that has got not one thing to do with this." While not using the specific language of Rule 401, we find that the circuit court considered whether the evidence regarding Dr. Lakin's divorce and children had any tendency to make a fact of consequence in Clark's case more or less probable than they would have been without the same evidence. *See* MRE 401.

¶70. Furthermore, the circuit judge "was present when the examination transpired and he was in the best position to rule on its exclusion." *Wortham v. State*, 883 So. 2d 599, 607 (Miss. Ct. App. 2004). The circuit court also allowed Clark to ask Dr. Lakin directly whether she was biased in favor of a child abuse diagnosis. Dr. Lakin responded in the negative. We therefore find that Clark was not prejudiced by the circuit court's exclusion of evidence concerning Dr. Lakin's personal experiences with divorce or matters involving her children. Even if the circuit court abused its discretion in excluding otherwise relevant evidence that would have passed muster under a Rule 403 balancing test, Clark was still provided the opportunity to elicit testimony from Dr. Lakin that specifically dealt with any alleged bias in favor of child abuse diagnoses. To warrant reversal, "the admission or exclusion of evidence must result in prejudice or harm. . . ." *Ellis v. State*, 856

So. 2d 561, 565 (Miss. Ct. App. 2003) (quoting *Jackson v. State*, 594 So. 2d 20, 25 (Miss. 1992)). Thus, we find this assignment of error to be without merit.

iii. Whether the circuit court erroneously denied Clark's request to introduce evidence of Bethany Clark's drug-related felony conviction.

¶71. Clark additionally argues that the trial court erred by disallowing testimony of Bethany Clark's prior drug conviction in violation of Mississippi Rule of Evidence 609(a). Outside the presence of the jury, the trial court addressed the State's motion in limine seeking to exclude evidence of Bethany Clark's drug-related felony conviction. The trial court acknowledged that the State attempted to exclude evidence of the conviction for a non party witness, making note of Mississippi Rule of Evidence 609. The State then responded that the time between Kyllie Clark's death and Bethany Clark's drug conviction made such evidence "absolutely collateral and irrelevant to the facts. . . ."

¶72. After recognizing that "this is evidence intended to attach the character, truthfulness, and so forth of the witness by demonstrating she's been convicted of a felony sometime after all of this took place and was done[,]" the trial court, citing Rule 403, went on to determine that evidence of Bethany Clark's conviction "has little probative value." Further, the court reasoned that "there will be adequate testimony to indicate [Bethany Clark's] drug use . . . " and decided to exclude the conviction evidence.

Appendix E

¶73. Rule 609(a) provides, in pertinent part, the following:

> **(a) In General.** The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:
>
> **(1)** for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:
>
> **(A)** must be admitted, subject to Rule 403, when the witness is not a party;

MRE 609(a). And again, Rule 403 provides that

> The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

MRE 403.

¶74. While Bethany Clark is certainly a nonparty and Clark attempted to introduce evidence of a felony conviction to attack Bethany Clark's character for truthfulness, Clark overlooks the requirement for a Rule 403 analysis contained in Rule 609(a)(1)(A). As discussed above, the trial court performed a Rule 403 balancing test and determined that evidence of Bethany Clark's subsequent conviction held little probative value.

¶75. "[T]he standard of review regarding Rule 403 determinations is an "abuse of discretion."" *Fitch v. Valentine*, 959 So. 2d 1012, 1022 (Miss. 2007) (alteration in original) (internal quotation mark omitted) (quoting *Baldwin v. State*, 784 So. 2d 148, 160 (Miss. 2001)). Further, "[w]here a trial court determines that potentially prejudicial evidence possesses sufficient probative value, it is within that court's sound discretion whether or not to admit the same, since [Rule] 403 does not mandate exclusion but rather provides that the evidence *may* be excluded." *Jones v. State*, 904 So. 2d 149, 152 (citing *Baldwin*, 784 So. 2d at 156). And "[t]he task of an appellate court in reviewing such a determination is not to conduct its own de novo Rule 403 balancing, but simply [to] determine whether the trial court abused its discretion in weighing the factors and in admitting or excluding the evidence." *Id.* (citing *Foster v. State*, 508 So. 2d 1111, 1117-18 (Miss. 1987), *overruled on other grounds by Powell v. State*, 806 So. 2d 1069, 1080 (Miss. 2001)).

¶76. We agree with the trial court's analysis that, under Rule 403, evidence of Bethany Clark's subsequent drug conviction held little, if any, probative value. Further, even assuming that the trial court did abuse its discretion by excluding evidence of Bethany Clark's felony drug conviction, we hold that any such error was harmless. "[F]or a case to be reversed on the admission or exclusion of evidence, it must result in prejudice and harm or adversely affect a substantial right of a party." *Hammons v. State*, 918 So. 2d 62, 65 (alteration in original) (internal quotation mark omitted) (quoting *Holladay v. Holladay*, 776 So. 2d 662, 672 (Miss. 2000)). And "[e]rror is reversible only where

it is of such magnitude as to leave no doubt that the appellant was unduly prejudiced." *Id.* (internal quotation mark omitted) (quoting *Holladay*, 776 So. 2d at 672). Moreover, "[t]he Constitution does not guarantee a perfect trial, but it does entitle a defendant in a criminal case to a fair trial." *Id.* (citing *Clark v. State*, 891 So. 2d 136, 141 (Miss. 2004)). When a trial court improperly restricts a defendant's ability to impeach a witness, certain factors may be examined to determine whether the error was harmless, including "the extent of cross-examination otherwise permitted. . . ." *Id.* (internal quotation mark omitted) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L.Ed. 2d 674 (1986)).

¶77. Here, testimony regarding Bethany Clark's illegal drug use was presented to the jury. Indeed, after excluding evidence of Bethany Clark's conviction, the trial judge stated that "I think it's fair game for you to inquire about what happened at or about the time of this incident." During cross-examination of Bethany Clark by defense counsel, Bethany Clark admitted to having "used street drugs" "[b]efore the pregnancy. . . ." It is apparent that the extent of cross-examination permitted by the trial court renders any potential error in excluding evidence of Bethany Clark's conviction harmless.

¶78. Indeed, "[h]armless error will result if the same evidence improperly excluded comes in by another means." *Holland v. State*, 705 So. 2d 307, 344 (Miss. 1997) (citing *Jackson v. State*, 594 So. 2d 20, 25 (Miss. 1992)). Since evidence of Bethany Clark's drug use before and after Kyllie Clark's death "[came] in by another means, [any

potential] exclusion error is rendered harmless." *Wilson v. State*, 156 So. 3d 808, 810 (Miss. 2013) (citing *Holland*, 705 So. 2d at 307). Therefore, notwithstanding our holding that the circuit court did not abuse its discretion by excluding evidence following a Rule 403 test of Bethany Clark's felony drug conviction subsequent to Kyllie Clark's death, we find that any potential error was rendered harmless by both the extent of cross-examination by Clark and the presentation of evidence of Bethany Clark's drug use.

F. Whether the admission of the medical report of nurse practitioner Ashley Weiderhold violated Clark's confrontation rights under the Sixth Amendment.

¶79. Finally, Clark argues that his rights under the Confrontation Clause of the Sixth Amendment were violated when Ashley Weiderhold, a nurse practitioner who dictated Dr. Lakin's report upon which Dr. Lakin relied for her own testimony at trial, was not present at trial for cross-examination by Clark. Clark asserts that Dr. Lakin simply reviewed, opened, closed and signed the report. Clark submits that the inability to cross-examine Weiderhold required reversal of his conviction. The State instead argues that Clark's Sixth Amendment Confrontation Clause rights were satisfied when Dr. Lakin reviewed the report for accuracy and signed it as a technical reviewer.

¶80. "Defendants in criminal cases have a fundamental constitutional right to be confronted with witnesses against them." *Armstead*, 196 So. 3d at 917 (citing U.S.

Const. amend. VI; Miss. Const. art. 3, § 26). Per *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 174 L.Ed. 2d 314 (2009), and *Bullcoming v. New Mexico*, 564 U.S. 647, 664-665, 131 S. Ct. 2705, 180 L.Ed. 2d 610 (2011), "forensic reports created specifically to serve as evidence against an accused at trial are among the 'core class of testimonial statements' governed by the Confrontation Clause." *Armstead*, 196 So. 3d at 918. We have approved the admission of reports through the testimony of "technical reviewers, who had examined reports generated by other analysts and verified that the data supported the conclusions of the reports." *Id.* at 920 (citing *Jenkins v. State*, 102 So. 3d 1063, 1064, 1069 (Miss. 2012); *Grim v. State*, 102 So. 3d 1073, 1074, 1081 (Miss. 2012)).

¶81. The case against finding a constitutional violation is even stronger here than in *Armstead* or *Grim*.[10] Rather than a technical reviewer simply reviewing the work of an analyst and signing off on a report, Dr. Lakin testified at

10. *See Armstead*, 196 So. 3d at 920-21 (When an expert forensic science witness who served as a technical reviewer for tests performed on a substance suspected to be cocaine reviewed the data provided by the primary analyst and verified the primary analyst's conclusions and testified about her involvement in the testing procedures, we held that the expert witness's testimony "did not violate Armstead's rights under the Confrontation Clause."); *see also Grim*, 102 So. 3d at 1081 (When a testifying laboratory supervisor witness was not involved in the testing of a substance, but "reviewed the report for accuracy and signed the report as the 'case technical reviewer[,]'" we held that Grim's rights under the Sixth Amendment were satisfied because Grim was able to cross-examine the supervisor.).

trial—subject to Clark's cross-examination—regarding a report that Weiderhold dictated for Dr. Lakin and that Dr. Lakin later reviewed and signed. Simply stated, Clark's fundamental right to confront the witness against him was not violated by an inability to confront a party that dictated a medical report. Clark's assertion, that Weiderhold rather than Dr. Lakin wrote the report, is without merit and does not demonstrate a violation of Clark's rights under the Confrontation Clause.

¶82. Since the circuit court did not err by admitting the medical report dictated by Weiderhold that was reviewed and signed by Dr. Lakin and since Dr. Lakin was present at trial for cross-examination, Clark has failed to show that a constitutional violation occurred here. Accordingly, Clark's sixth and final remaining assignment of error is without merit.

CONCLUSION

¶83. We reverse the decision of the Court of Appeals, and we reinstate and affirm the decision of the Itawamba County Circuit Court.

¶84. **THE JUDGMENT OF THE COURT OF APPEALS IS REVERSED. THE JUDGMENT OF THE ITAWAMBA COUNTY CIRCUIT COURT IS REINSTATED AND AFFIRMED.**

Appendix E

MAXWELL, BEAM AND GRIFFIS, JJ., CONCUR. RANDOLPH, C.J., CONCURS IN RESULT ONLY WITHOUT SEPARATE WRITTEN OPINION. ISHEE, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY KITCHENS AND KING, P.JJ., AND COLEMAN, J.

ISHEE, JUSTICE, DISSENTING:

¶85. "Battle of the experts" is a misnomer. The State failed to establish that its expert was anything more than a qualified pediatrician. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L.Ed. 2d 469 (1993), requires the prosecution to show reliable methodology: that Dr. Lakin could reliably establish that Kyllie was injured in Clark's custody and that her injuries were caused by abusive head trauma. The State failed to do so, and, as such, I must respectfully dissent.

¶86. Justice Chamberlin emphasizes that this Court "must not allow ourselves to become the gatekeeper." Chamberlin Op. ¶ 13. I too am "confident that our learned trial judges can and will properly assume the role as gatekeeper on questions of admissibility of expert testimony." *Miss. Transp. Comm'n v. McLemore*, 863 So. 2d 31, 40 (Miss. 2003). *Daubert* endorses "trial-court discretion in choosing the manner of testing reliability." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 158, 119 S. Ct. 1167, 1179, 143 L.Ed. 2d 238 (1999) (Scalia, J., concurring). But this discretion "is not discretion to abandon the gatekeeping function." *Id.* at 158-59, 119 S. Ct. 1167, 1179. "[I]t is not

discretion to perform the function inadequately. Rather, it is discretion to choose among *reasonable* means of excluding expertise that is *fausse* and science that is junky." *Id.* at 159, 119 S. Ct. 1167, 1179. "This Court and the Mississippi Court of Appeals have reversed and remanded cases in which the trial court erroneously included or excluded expert testimony." *Inv'r Res. Servs. Inc. v. Cato*, 15 So. 3d 412, 416 (Miss. 2009). It is the duty of this Court to determine whether the trial court abused its discretion as the gatekeeper. *Id.*

¶87. Here, the trial court held a *Daubert* hearing regarding the admissibility of Dr. Lakin's expert testimony. As an experienced pediatrician of almost twenty years and a board-certified child-abuse specialist, Dr. Lakin was qualified to render an expert opinion within the field of pediatrics. But an extensive voir dire of Dr. Lakin revealed that the methodology behind her opinion failed to meet the reliability prong.

¶88. The defense asked Dr. Lakin whether there was disagreement in the scientific community over SBS/AHT methodology. She conceded there was. When asked whether she could cite any specific scientific source to substantiate the methodology, she referred generally to the American Academy of Pediatrics. The defense asked Dr. Lakin if the field of pediatrics was the sole discipline to study SBS/AHT; she replied that it was not.

¶89. According to Dr. Lakin, physiologists, pathologists, radiologists, neurosurgeons, and engineers have also analyzed the theory. She acknowledged that many

disciplines discount SBS/AHT as a reliable diagnosis. When the State asked Dr. Lakin her conclusion as to Kyllie's cause of death, she replied that despite a lack of external trauma to Kyllie and a lack of history of any type of trauma, Kyllie's internal hemorrhages as well as her rib fractures led Dr. Lakin to conclude SBS/AHT was the cause of death.

¶90. Dr. Lakin testified during the hearing that she could, to a degree of medical certainty, render an opinion as to the timing of Kyllie's injury. She opined that Kyllie's injury could not have occurred before 3 p.m., meaning that Kyllie's injury must have occurred while she was in the sole custody of Clark. Dr. Lakin was extensively questioned regarding her degree of certainty as to the timing of the injury.

¶91. Dr. Lakin also opined that the more severe the neurological symptoms, the closer in time the injury must have occurred. She reasoned that because Kyllie's symptoms manifested themselves quickly, her injury took place within the precise window of 3 p.m. to 5:30 p.m., when Kyllie was in the care of Clark. Dr. Lakin's opinion was the only evidence establishing what happened to Kyllie and when it must have occurred. In order for Dr. Lakin's testimony to pass muster under *Daubert*, the State was required to show that her testimony reliably established when Kyllie was injured and connected that time with Clark's sole custody of Kyllie. *See* 509 U.S. at 589-90, 113 S.Ct. 2786.

¶92. On cross-examination, the defense inquired as to the specific injuries that Dr. Lakin diagnosed. By her own account, Dr. Lakin could not connect Kyllie's rib fractures, which were healing, to January 5 and could certainly not say they were inflicted during the two-hour span that day in which Clark had sole custody of Kyllie. Clark further questioned Dr. Lakin about whether the numerous resuscitation attempts made on Kyllie could have impacted Kyllie's diagnosis. The pathologist's report listed "aggressive cardiopulmonary resuscitation" (CPR) as one of the injuries observed at the autopsy. Dr. Lakin admitted that several attempts were made to resuscitate Kyllie. When questioned about whether the CPR could have caused Kyllie's subdural hemorrhages, Dr. Lakin could not rule the possibility out.

¶93. The *Daubert* Court held that whether the underlying theory can be tested is the key question in whether the methodology is reliable. *Daubert*, 509 U.S. at 593, 113 S.Ct. 2786. The defense asked if Dr. Lakin could state how much force was required to cause SBS/AHT:

> Q. All right. So what studies do you have to talk about how the velocity with which a human being can shake a baby? What studies do you have about that?
>
> A. Well, that's the problem. You can't do a study on what forces are generated when a baby is shaken because we can't shake a human baby and measure the force.

> Q. So you can't say how much force it takes, then, to cause shaken baby syndrome?
>
> A. That's correct.

¶94. Dr. Lakin admitted that she could not state the amount of force required to cause Kyllie's injuries. At the *Daubert* hearing, when asked to produce any literature affirming the validity of SBS/AHT within the medical community, Dr. Lakin replied that she did not have any articles with her. Instead, she pointed generally to the position paper of American Academy of Pediatrics. Dr. Lakin admitted that she did not know of any studies regarding the error rate of SBS/AHT diagnosis. In fact, the State never offered any scientific literature to support Dr. Lakin's position. Clark, on the other hand, provided multiple articles, studies, and other sources criticizing the validity of SBS/AHT.

¶95. Dr. Lakin admitted that a SBS/AHT diagnosis creates an assumption about the caregiver due to the lack of explanation for the infant's injuries. She also acknowledged that because she was not a pathologist, she did not have the training nor expertise to determine cause of death. Dr. Lakin testified that there is literature stating that the more severe the injury, the more likely it is for symptoms to immediately appear, but she could not name any specific source.

¶96. Instead of determining whether Dr. Lakin's testimony was reliable, the circuit court erroneously found only that Dr. Lakin was in fact an expert. The record undeniably

reflects Dr. Lakin's competence and expertise as a pediatrician and child-abuse treatment provider. But this is inadequate to support a conclusion that her methodology was reliable. It is the task of the trial court, not the jury, to determine whether proffered expert testimony is reliable.

¶97. Justice Chamberlin opines that "the real problem in this case" is "not so much the testimony of Dr. Lakin as it is the fact that the SBS/AHT diagnosis has been increasingly challenged and questioned in recent years." Chamberlin Op. ¶ 24. Certainly I am concerned about the validity of the science behind SBS/AHT, but the validity of SBS/AHT is not before the Court per se. The real problem is that Dr. Lakin did not establish the required reliability of her methodology as required by *Daubert*.

¶98. The trial court made only cursory findings as to the admissibility of Dr. Lakin's opinion testimony. In fact, the trial court's only finding regarding Dr. Lakin's testimony was that "she is qualified to testify." The trial court did not address the reliability or the relevance of Dr. Lakin's testimony. Justice Chamberlin hand waves that the trial court lumped the *Daubert* findings of relevance and reliability under the trial court's term "qualified." Chamberlin Op. ¶ 20. Justice Chamberlin is correct that there are no "magic words" required under *Daubert*, but there are still demands that must be met—namely, reliability. Chamberlin Op. ¶ 20 (citing *Jones v. State*, 920 So. 2d 465, 476 (Miss. 2006)). I would emphasize that the qualifications of the witness are not what establishes reliability under *Daubert*. The trial judge as gatekeeper must determine if the witness's proffered methodology

is reliable, not whether the expert herself is reliable. *See* 509 U.S. at 589-90, 113 S.Ct. 2786.

¶99. Dr. Lakin was given extensive opportunity to defend her proposed methodology, but she could not. She could not cite or name any specific article supporting her methodology. Simply stating that peer-reviewed articles exist is not providing evidence of acceptance in the scientific community. The defense expert on the other hand thoroughly discredited SBS/AHT by providing ample documentation criticizing the validity of the diagnosis. If Dr. Lakin's position in support of SBS/AHT really is recognized by the scientific community as a viable alternative, Dr. Lakin failed to prove it. The trial judge abused his discretion in admitting her testimony.

¶100. Finally, I would echo the Court of Appeals in stating that

> Our reversal is not meant to serve as a determination that all scientific testimony regarding SBS is insufficiently reliable to serve as a basis for civil or criminal liability. Our reversal is instead intended to encourage the proponents of SBS testimony to solidly provide courts with true "expert" testimony grounded on sound methodology, principles, or techniques.

Clark v. State, No. 2017-KA-00411-COA, 2019 WL 5566234, at *1 n.1 (Miss. Ct. App. Oct. 29, 2020). If the State had another bite at the apple, Dr. Lakin could very

well establish that her opinion regarding SBS/AHT is reliable enough under *Daubert* to aid a jury. ¶101. I would find that the Court of Appeals correctly held that the circuit court abused its discretion by admitting Dr. Lakin's testimony. I respectfully dissent.

KITCHENS AND KING, P.JJ., AND COLEMAN, J., JOIN THIS OPINION.

APPENDIX F — OPINION OF THE MISSISSIPPI COURT OF APPEALS, FILED OCTOBER 29, 2019

363 So.3d 880
COURT OF APPEALS OF MISSISSIPPI

NO. 2017-KA-00411-COA

JOSHUA ERIC HAWK CLARK a/k/a
JOSHUA CLARK,

Appellant,

v.

STATE OF MISSISSIPPI,

Appellee.

10/29/2019
|
Rehearing Denied March 3, 2020

OPINION

TINDELL, J., FOR THE COURT:

¶1. An Itawamba County jury convicted Joshua Clark (Josh) of the second-degree murder of his four-month-old daughter, Kyllie Clark. At trial, the State's case against Josh relied upon the diagnosis that Kyllie died from shaken-baby syndrome (SBS) and the expert-opinion testimony provided by pediatrician Dr. Karen Lakin as

to the timing of Kyllie's fatal injuries. In this opinion, we address whether Dr. Lakin's expert testimony on SBS met the reliability prong of Mississippi's modified *Daubert* standard as required by Mississippi Rule of Evidence 702; *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999); *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); and *Mississippi Transportation Commission v. McLemore*, 863 So. 2d 31 (Miss. 2003).

¶2. Josh's appeal arises from a prosecutorial model for a category of cases involving similar facts: Kyllie died in 2008 when SBS charges were common; Josh claimed his innocence; no witness purported to have seen Josh shake or ever abuse Kyllie in any way; no apparent indications of recent trauma existed; yet, solely on the basis of Dr. Lakin's expert testimony, the jury found Josh, who had no prior criminal record and was a father of three young children, guilty of second-degree murder. Kyllie was under Josh's exclusive care for approximately three hours before she began gasping for air and went limp. Josh, along with Kyllie's mother, Bethany Clark, rushed Kyllie to the hospital. Despite multiple resuscitation attempts and medical intervention, Kyllie died.

¶3. In reversing Josh's conviction and sentence and remanding for a new trial, we find that Dr. Lakin's expert-opinion testimony failed to meet the *Daubert* standard and was so unreliable as to render portions of her testimony inadmissible under the rules of evidence. Dr. Lakin may have been competent in her expertise as a pediatrician and child-abuse-treatment provider. Her competence, however,

was not the focus of the *Daubert* hearing. Rather than focusing mainly on Dr. Lakin's expert qualifications, the circuit court was required to also examine the substance and methodology of her proffered testimony regarding SBS as a reliable theory and, in particular, the reliability of her opinion on the timing of Kyllie's fatal injuries. As further discussed below, we therefore find reversible error in the circuit court's admission of Dr. Lakin's testimony. Because we reverse Josh's conviction and sentence and remand his case on this issue, we decline to address his remaining assignments of error on appeal.[1]

FACTS

¶4. Josh and Bethany, along with their three children, Cadence, and twins Kyllie and Quinton, moved to a rented home in Itawamba County, Mississippi, in late 2007. On January 5, 2008, Cadence was two years old, and Kyllie and Quinton were four months old. Two teenaged friends of Bethany's, Haley Parker and Morgan Wright, also lived in the Clarks' home. Bethany's oldest child, five-year-old Savannah, also sometimes stayed with the Clarks.

¶5. Josh typically came home from his out-of-state construction job on Friday afternoons and spent the weekends with his family. From Friday nights until early

1. Our reversal is not meant to serve as a determination that all scientific testimony regarding SBS is insufficiently reliable to serve as a basis for civil or criminal liability. Our reversal is instead intended to encourage the proponents of SBS testimony to solidly provide courts with true "expert" testimony grounded on sound methodology, principles, or techniques.

on Monday mornings, Josh took care of the children. Josh let Bethany sleep through the night on his weekends home while he got up every two or three hours to feed the twins. At trial, no one testified to seeing Josh harm any of the four children, and Bethany considered Josh to be a good father.

¶6. On Saturday, January 5, 2008, Josh arose at 9 a.m. and let Bethany and the teenagers, Haley and Morgan, sleep until they awoke around 2 p.m. Josh fixed breakfast and lunch for the two older children, Savannah and Cadence. Josh testified that he fed and burped Quinton and tried to feed Kyllie. Josh noticed that Kyllie was fussy that day, and he assumed that she felt badly. Around 3 p.m., Bethany and the teenagers left to run errands. Bethany testified that when she and the teenagers left, Kyllie was fine. The four children were then left in Josh's exclusive care until Bethany and the teenagers returned home at 5:30 p.m.

¶7. Josh testified that maybe five or ten minutes before Bethany and the teenagers returned, Kyllie made a gasping sound. Upon returning and seeing Kyllie's condition, Morgan called 911. Josh testified that he needed to get dressed, and he took Kyllie into the bedroom with him. At this point, Kyllie went limp. Bethany brought Kyllie back out to the living room and attempted CPR. Josh and Bethany decided to take Kyllie to the hospital.[2]

---

2. One significant factual difference existed between the statements given by Josh and the teenagers. Josh testified that he wanted to take Kyllie to the hospital when he and the teenagers realized Kyllie had gone limp, but the teenagers each said that Josh, at least immediately, did not want to go to the hospital.

As Bethany ran into the hospital with Kyllie, Bethany "popped" Kyllie against the door. Medical records reflect that the examining doctor at the local hospital noted Kyllie may have suffered from sudden-infant-death syndrome.

¶8. Local hospital staff sent Kyllie to Memphis, Tennessee, for specialized care at Le Bonheur Children's Hospital. Prior to and after her arrival at Le Bonheur, multiple vigorous CPR attempts were made. The Le Bonheur staff who examined Kyllie diagnosed her with rib fractures, retinal and subdural hemorrhages, and brain swelling. Dr. Lakin consulted on Kyllie's case at Le Bonheur. Kyllie's brain showed the presence of subacute or acute-on-chronic hematoma. This finding was described at trial as an older stage of blood in Kyllie's brain as well as a new bleed, indicating there had been past bleeding in Kyllie's brain. Tragically, at Le Bonheur the staff declared Kyllie brain dead and took her off life support.

¶9. The police investigated Kyllie's death based, at least in part, on the initial information from Le Bonheur and Dr. Lakin. Although the medical records reflected no indication of recent accidental trauma to Kyllie in the days or weeks before her death, Haley admitted seeing Cadence fall on Kyllie. Additionally, Jacqueline Fifield, who sometimes babysat the twins, testified that she once found Kyllie on the floor and that Cadence told her that Bethany had dropped Kyllie. A social worker noted in Kyllie's Le Bonheur medical records that Kyllie's injuries were suggestive or consistent with SBS or child abuse. Dr. Lakin opined that, with no history of any type of significant trauma, the hospital's findings of brain trauma, retinal

hemorrhages, and rib fractures combined to support her opinion that Kyllie died due to SBS. Officer Hillhouse, one of the investigating officers, testified that the Le Bonheur medical records referred to Kyllie's injuries as consistent with SBS or "an adult . . . [grabbing] the torso of the child and [shaking] the child." Officer Hillhouse interpreted the note to mean that either Josh or Bethany had injured Kyllie. While the police could not pinpoint the exact time Kyllie's injuries had been inflicted, they ruled out Bethany as the perpetrator because Kyllie's breathing trouble started when Kyllie was in Josh's exclusive care.

¶10. On March 26, 2008, an Itawamba County grand jury indicted Josh on Count I, the commission of felonious child abuse and capital murder "by violently shaking [Kyllie], causing rib fractures and internal injuries . . . ," and Count II, the felonious child abuse of Kyllie's twin, Quinton.

¶11. Pursuant to a plea bargain, Josh agreed to plead guilty in 2010 to the reduced charge of Kyllie's depraved-heart murder. Josh's counsel then allowed Josh to enter into the plea agreement without retaining an expert to examine and rebut the State's SBS theory on the cause and timing of Kyllie's fatal injuries.[3] The circuit court sentenced Josh to life imprisonment. Later, the circuit court granted Josh's motion for post-conviction relief (PCR) after finding that Josh's trial counsel had rendered ineffective assistance by failing to introduce expert testimony to rebut the State's SBS expert testimony. The

3. At the plea hearing, the State presented its offer of proof, which consisted solely of Dr. Lakin's opinion as to the cause of death, and the defense accepted the State's offer of proof.

order granting Josh relief noted that "there is considerable conflict within the medical community concerning [SBS]." The circuit court's ruling on the PCR motion both assured Josh of his right to expert assistance and actually required Josh to retain an expert to rebut the State's SBS theory.

¶12. With both new counsel and an expert to dispute the State's SBS testimony, Josh faced a new trial on the charge of Kyllie's capital murder. Before trial, Josh moved to preclude the State's introduction of Dr. Lakin's testimony about SBS/abusive head trauma (SBS and/or AHT).[4] Josh argued that SBS is no longer a generally accepted diagnosis in the absence of evidence of external injuries and that SBS could not be used to accurately determine the time of Kyllie's injuries. Josh supported his motion with numerous articles, studies, and criticisms of SBS. The circuit court held what it referred to as a *Daubert* hearing, after which the circuit judge stated, "[T]his thing is identified in my mind, at least, as [an SBS] case." The circuit court summarily denied Josh's motion.[5]

---

4. In the past, certain medical providers used the term "SBS" generally to refer to an infant with certain unexplained intercranial/subdural hemorrhages (bleeding on the brain), retinal hemorrhages (bleeding in the eye), and no history of traumatic accidental injury. Now, medical providers use the term "AHT" to refer to that same diagnosis, generally expanding the cause of an infant's condition to include not only a violent shaking but also some type of impact. According to Dr. Lakin, "SBS" and "AHT" are sometimes used interchangeably.

5. In our summary of the facts, we present only Dr. Lakin's trial testimony. We reserve a discussion of her *Daubert*-hearing testimony for the analysis portion of our opinion.

¶13. In opening statements, the State articulated its theory of the case that Josh must have been responsible for Kyllie's death because she was in his sole care for almost three hours before she began to experience breathing trouble and other symptoms. The State treated the case as a shaken-baby case and theorized that Josh abused Kyllie during that time period, which resulted in her fatal injuries. The State primarily relied upon Dr. Lakin's trial testimony. Dr. Lakin opined at trial that someone killed Kyllie by shaking her, with the possibility that Kyllie's head impacted something. Dr. Lakin further testified that the injuries that killed Kyllie could only have occurred during the three-hour window Kyllie was in Josh's exclusive care. Dr. Lakin testified that, after sustaining her injuries, Kyllie would not have functioned normally, would have lost consciousness very quickly, and would not have been able to eat or to be fed.

¶14. In support of her trial opinions and conclusions, Dr. Lakin cited only the American Academy of Pediatrics (AAP) and stated that the AAP recognizes AHT as an entity with SBS as a component. According to Dr. Lakin, under the AAP statement, AHT is supported by findings of intracranial hemorrhages, which may or may not be associated with fractures and retinal hemorrhages. Dr. Lakin claimed that Canada's version of the AAP also recognizes SBS/AHT and that the Center for Disease Control funds research for SBS/AHT. She testified that challenges to the theories of SBS/AHT come less from the pediatric sciences and more from other sciences and the legal arena. While Dr. Lakin stated that numerous peer-reviewed articles support that the disciplines of pediatrics,

ophthalmology, neurosurgery, and neurology recognize AHT, she could not name or cite to any of those articles.

¶15. On cross-examination at trial, Dr. Lakin agreed that, according to the AAP, "[t]he mechanisms and result of injuries of accidental and abusive head injury overlap[,] and there is no single or simple test to determine the accuracy of the diagnosis." This AAP statement was the updated version upon which her opinions were based, yet she was unaware of the exact statement. Further, Dr. Lakin admitted she was unaware that in 2009, the AAP removed language that presumed child abuse when subdural hematoma, retinal hemorrhages, and brain swelling exist.

¶16. Dr. Lakin further admitted at trial that, upon evaluation at Le Bonheur, Kyllie's rib fractures appeared to be healing rather than recently sustained, the fractures would have taken several days to develop, and it was unlikely they occurred on January 5, 2008, during the time Kyllie was with Josh. Dr. Lakin confirmed that she did not mean to suggest that Josh had anything to do with the rib fractures, and she stated, "There is not a time/date stamp on the [rib] fracture that tells you that it happened one week before or two weeks before. But we know that the healing starts to appear around 5-7 days in an infant."

¶17. Although Dr. Lakin opined that many different accidental and nonaccidental causes potentially existed for each of Kyllie's individual injuries (subdural hemorrhages, retinal hemorrhages, and rib fractures), she stated the combination of the injuries was inconsistent with a natural

cause of death. She agreed that to eliminate the other possible causes of Kyllie's death, the medical providers would have to go through a process called differential diagnosis. Dr. Lakin also agreed that no differential-diagnosis process was completed on Kyllie, no test was done to look for neck injuries, and Kyllie had no external head injury.

¶18. After Dr. Lakin's full trial testimony, the circuit court held a bench hearing on new information received and on Josh's request to recross Dr. Lakin, particularly with regard to her understanding of histology slides and their use in determining the time of Kyllie's brain injury. In reference to Dr. Lakin's testimony, the circuit judge stated, "I don't know that she's ever testified to anything other than that she could not quantify the time. . . ." However, Dr. Lakin had specifically testified that the injuries occurred after Kyllie last appeared "fine" before 5 p.m., or after Josh last fed Kyllie. Dr. Lakin testified that Kyllie's being healthy, eating, and playing between 3 p.m. and 5 p.m. was inconsistent with Kyllie's collapsing, stopping breathing, and dying within 24 to 36 hours. Then, in contradiction to her earlier testimony, Dr. Lakin admitted on cross-examination that she had not and could not determine the exact time of Kyllie's injuries. Dr. Lakin agreed that she would defer to a pathologist on the subject of pathology.

¶19. Another State's witness, Dr. Mark LeVaughn, a forensic pathologist and the chief medical examiner for the State of Mississippi, testified that the time Kyllie's subdural hemorrhage occurred could not be determined.

Dr. LeVaughn explained that a cellular view of a hematoma could give a more precise time of when the injury occurred but not an exact time. He reviewed the histology slides of Kyllie's subdural hematoma and found that they were of no diagnostic value in determining the time of the hemorrhage. The State rested with its case dependent upon Dr. Lakin's trial testimony.

¶20. Dr. Mark Shuman, also a forensic pathologist, testified on Josh's behalf that the cause of Kyllie's death was probably blunt head injury or impact head injury. While he could not testify as to how or when Kyllie's injuries occurred, Dr. Shuman testified that shaking did not cause the injuries. Dr. Shuman discussed the evolution of SBS and AHT as medical theories and explained that studies had been done with test dummies to determine the shaking forces needed to cause fatal brain injuries in infants without also injuring an infant's neck. Dr. Shuman discussed biomechanical engineer studies regarding the forces generated by shaking an infant. He testified that the force of dropping a baby a few feet or stepping on an infant could cause the injuries seen in Kyllie.

¶21. As Dr. Shuman explained, even with minor head injuries, it is standard hospital practice to provide a discharge instruction to monitor a child for 24 hours and to perhaps even wake the child every hour to make sure he or she is okay. Dr. Shuman stated this is because, unlike Dr. Lakin's immediate-symptom-onset theory, the symptoms and severe consequences of head injury can be delayed. Someone can appear completely normal at first but later lose consciousness.

¶22. Dr. Shuman and Dr. LeVaughn both testified that, had a proper sample histology slide of Kyllie's dura been prepared, they could have given an opinion as to the approximate date and time of Kyllie's brain injury. A histology slide of the dura matter would have allowed the pathologists to determine how long the blood under Kyllie's dura had been there—whether a few days, a week, or a month. But the histology slides were poorly prepared under the supervision of a State-contracted doctor, and of the thirteen tissue slides provided to Josh's defense expert, none of the slides were of the dura. The pathologists therefore testified that the best way to determine the time of Kyllie's injuries had been rendered impossible.

¶23. In contradiction to Dr. Lakin, Dr. Shuman testified that retinal hemorrhages do not demonstrate that some type of child abuse has occurred. Although a number of studies have been performed to show that retinal hemorrhages occur from shaking, it has never been proven. He instead testified that since 1957, experimentation has shown that pressure inside the head can cause retinal hemorrhages. Resuscitation efforts, he testified, increase intracranial pressure, causing retinal hemorrhages. As the trial testimony reflected, multiple resuscitation efforts were attempted on Kyllie.

¶24. Also unlike Dr. Lakin, Dr. Shuman opined that short falls can cause significant head injury. He supported his testimony with an expert report listing numerous and various academic and peer-reviewed studies. Dr. Shuman further named the doctors who wrote the articles

supporting his testimony and those who performed the studies upon which his opinions were based. Although he agreed that the majority of pediatricians believe in SBS, he stated that pediatricians treat children and childhood diseases while, in comparison, forensic pathologists focus on autopsy, pathology, trauma, and the legal issues associated with these areas. He explained that forensic pathologists, like himself, use autopsies, examinations, and pathology to determine the cause and manner of death. Dr. Shuman personally disagreed with the existence of the SBS theory and testified that no scientific evidence shows a human can shake a child hard enough to cause a primary brain injury.

¶25. Dr. Shuman testified that when children suffer a fatal head injury, they sometimes are asymptomatic. He explained that, especially with a baby of Kyllie's age, the symptoms can be very subtle and may include vomiting, sleepiness, and irritability. These are all things that can either be a symptom of a head injury or just a normal fussy baby. Thus, Josh's observation that Kyllie had been acting fussy all day on January 5, 2008, could have been an earlier manifestation of Kyllie's injuries. This fact, along with Dr. Lakin's admission that she could not provide the date and time of Kyllie's injuries, reflected a missing piece of the State's case—the causal connection between Kyllie's injuries and the few hours she was solely in Josh's care.

¶26. Dr. Shuman testified that blunt head injury can be accidental or intentional and that examination of the body and medical history cannot, in a case like Kyllie's, disclose whether the injury was inflicted intentionally as opposed

to accidentally. In sum, Dr. Shuman testified that although SBS was once a generally accepted scientific theory, now, based on current and expanding scientific research and literature, the theory has been questioned. He stated the theory alone cannot be used to link an infant's diagnosable injuries and the assumptions made under the SBS theory to the conclusion that a certain fatal injury occurred at a certain time.

¶27. Josh also testified on his own behalf and denied ever abusing Kyllie. Further, no witnesses testified that Josh shook Kyllie, and the State presented no physical evidence of any witnessed trauma to Kyllie. After both the State and the defense rested, the jury convicted Josh of Kyllie's second-degree murder. The circuit court sentenced Josh to serve forty years in the custody of the Mississippi Department of Corrections. Josh unsuccessfully moved for a directed verdict and a new trial. Aggrieved, Josh appeals.

STANDARD OF REVIEW

¶28. We review the admission or exclusion of evidence, including expert testimony, for abuse of discretion. *Inv'r Res. Servs. Inc. v. Cato*, 15 So. 3d 412, 416 (¶2) (Miss. 2009). Thus, a trial judge's ruling will stand "[u]nless we conclude that the discretion was arbitrary and clearly erroneous, amounting to an abuse of discretion. . . ." *Puckett v. State*, 737 So. 2d 322, 342 (¶57) (Miss. 1999).

Appendix F

DISCUSSION

¶29. Our analysis regarding the admissibility of Dr. Lakin's expert testimony focuses on the principles and methodology she applied to form her opinions. *See McLemore*, 863 So. 2d at 36-37 (¶13) ("The focus of this analysis [on the admissibility of expert witness testimony] must be solely on principles and methodology, not on the conclusions they generate." (internal quotation mark omitted)). The question before this Court is whether the circuit court abused its discretion by ruling that Dr. Lakin's qualifications as a pediatrician and child-abuse treatment provider adequately supported her opinion that a causal connection existed between Kyllie's medically identifiable injuries and her conclusion as to the specific timing of Kyllie's purported SBS injuries.

¶30. Rule 702, which governs the admissibility of expert testimony, states:

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

¶31. Thus, when determining the admissibility of expert testimony, courts must first determine whether the expert is qualified to give his or her opinion and then whether the expert's opinion is based on scientific knowledge (reliability) and will assist the trier of fact in understanding or determining a fact in issue (relevance). *McLemore*, 863 So. 2d at 38 (¶16). As Rule 702 states, the testimony must be "based on sufficient facts or data" and "the product of reliable principles and methods." M.R.E. 702.

¶32. Experts are supposed to educate and assist the trier of fact on those fields outside the realm of common-sense understanding. *Peters v. Fire Star Marine Serv.*, 898 F.2d 448, 450 (5th Cir. 1990); *McMichael v. Howell*, 919 So. 2d 18, 24 (¶15) (Miss. 2005). Expert evidence can be both powerful and quite misleading because of the difficulty jurors may have evaluating it. *Daubert*, 509 U.S. at 595, 113 S.Ct. 2786. Under such circumstances, when an expert is allowed to testify about specific scientific knowledge or scientific methodology, the risk of prejudice is very high because such testimony may tend to mislead or tempt the jury to decide the case on an improper basis. M.R.E. 403 advisory committee note; *accord* Fed. R. Evid. 403 advisory committee notes. Thus, the circuit court is vested with the "gatekeeping responsibility" for expert-testimony admissibility. *McLemore*, 863 So. 2d at 36 (¶11) (quoting *Daubert*, 509 U.S. at 589, 113 S.Ct. 2786).

¶33. Previously, in *Middleton v. State*, 980 So. 2d 351, 353 (¶4) (Miss. Ct. App. 2008), Dr. Lakin was accepted as an expert in pediatrics with a subspecialty in child abuse, and she testified that a child's injuries most likely resulted

from SBS.[6] Regardless of any similarities between her testimony in that case and this case, however, we note that Dr. Lakin's prior acceptance as an expert does not automatically award her continued certification as an expert in her field or subspecialty in any future litigation. *See Gause v. State*, 65 So. 3d 295, 306-07 (¶¶35-36) (Miss. 2011) (Kitchens, J., specially concurring), *limited on other grounds by Hall v. State*, 127 So. 3d 202, 207 (¶15) (Miss. 2013). Further, in light of Josh's presented evidence that showed the reliability of SBS as a diagnosis is being increasingly challenged and questioned, Dr. Lakin was required to establish anew in this case that, under the exact circumstances presented, SBS reliably explained Kyllie's death. Thus, any reliance on similarities with Dr. Lakin's prior testimony in *Middleton* is misplaced. *See King v. Singing River Health Sys.*, 158 So. 3d 318, 326 (¶33) (Miss. Ct. App. 2014) (recognizing that the automatic introduction of expert opinions based on personal experience but contradicted by scientific evidence would effectively nullify Rule 702 and *Daubert*).

¶34. Like the dissent, we acknowledge the present record reflects Dr. Lakin's competency in her expertise as a pediatrician and child-abuse treatment provider. No dispute exists as to her qualifications to render an expert opinion in those areas. Dr. Lakin's nearly twenty years of experience focused solely in pediatrics and child-abuse treatment supported her qualification as an expert in those particular fields. The record also clearly shows that

6. Although *Middleton* refers to Dr. Lakin as "Dr. Larkin," we recognize this to be a scrivener's error.

Dr. Lakin's testimony was relevant. The State had no factual-witness testimony regarding when and how Kyllie was injured. The State therefore relied upon Dr. Lakin's expert testimony to explain not only what happened to Kyllie but also when her injuries occurred.

¶35. Unlike the dissent, our focus is not on whether Dr. Lakin was qualified to testify as an expert but whether her expert opinions, especially as to the causation and timing of Kyllie's injuries, met *Daubert*'s standards for admission. Thus, our analysis concentrates on the *reliability* of Dr. Lakin's expert testimony. *Daubert* provides a list of illustrative, but not exhaustive, factors that may be considered to assess the reliability of proffered expert testimony and the principles and methodology underlying an expert's opinion. *McLemore*, 863 So. 2d at 36-37 (¶13) (citing *Daubert*, 509 U.S. at 592-94, 113 S.Ct. 2786). These factors include:

> [(1)] whether the theory or technique can be and has been tested;
>
> [(2)] whether it has been subjected to peer review and publication;
>
> [(3)] whether, in respect to a particular technique, there is a high known or potential rate of error;
>
> [(4)] whether there are standards controlling the technique's operation; and
>
> [(5)] whether the theory or technique enjoys general acceptance within a relevant scientific community.

Id. at 37 (¶13). The applicability of these factors in a particular case "depends on the nature of the issue, the expert's particular expertise, and the subject of the testimony." *Id.* The trial court should consider the *Daubert* factors "where they are reasonable measures of the reliability of expert testimony." *Id.*

¶36. The *Daubert* standard we apply in Mississippi is a narrower and stricter standard than simply demonstrating the general validity of SBS. The *Daubert* standard requires experts to prove that their offered opinion evidence is fundamentally scientifically reliable and not just generally accepted by peers in their specific discipline. *Adcock v. Miss. Transp. Comm'n*, 981 So. 2d 942, 947 (¶16) (Miss. 2008). Thus, here the State needed to show at the *Daubert* hearing that Dr. Lakin's precise theory was sufficiently reliable to perform "the task at hand"—to inform the jury on how and when Kyllie's fatal injuries occurred. *See Daubert*, 509 U.S. at 597, 113 S.Ct. 2786. Dr. Lakin needed to establish that a qualified pediatrician can reliably diagnose a child with Kyllie's injuries (subdural hemorrhages and retinal hemorrhages) as a child suffering from injuries caused by SBS. Further, the State needed Dr. Lakin to reliably establish the timing of Kyllie's SBS-caused injuries to the specific time period when Kyllie was in Josh's exclusive care.

¶37. Circumstances exist where "[a] court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Denham v. Holmes ex rel. Holmes*, 60 So. 3d 773, 788 (¶53) (Miss. 2011) (citing *Watts v. Radiator Specialty Co.*, 990 So. 2d 143, 149 (¶17) (Miss. 2008)). As this Court has previously explained:

> [W]hen the reliability of an expert's opinion is attacked with credible evidence that the opinion is not accepted within the scientific community, the proponent of the opinion under attack should provide at least a minimal defense supporting the reliability of the opinion. The proponent of the expert cannot sit on the side lines and assume the trial court will ignore the unrebutted evidence and find the expert's opinion reliable. Were we automatically to allow introduction of expert opinions which are based upon nothing more than personal experience in cases where those opinions are contradicted in the scientific literature, we would effectively render Rule 702 and *Daubert* a nullity.

King, 158 So. 3d at 326 (¶33).

¶38. At the *Daubert* hearing, Dr. Lakin initially testified that three diagnosed injuries formed the basis for her opinion that Kyllie died due to SBS: (1) bleeding beneath the outer layer of the dura surrounding the brain; (2) retinal bleeding; and (3) the presence of rib fractures. Notwithstanding the absence of any other signs of abuse, this triad of injuries, as described by Dr. Lakin, not only purported to explain to the jury the mechanism of Kyllie's alleged abuse but also purported to allow identification of the timing of the abuse and the perpetrator—the last caregiver to be in Kyllie's presence during her final lucid moments.

¶39. At the *Daubert* hearing, Dr. Lakin explained how SBS (which is today identified as AHT) was a condition seen primarily in infants who had unexplained significant hemorrhages in the space between their skull and their brain with no physiological explanation as to their cause. Dr. Lakin admitted that a shaken-baby diagnosis assumes a conclusion about a caregiver based on the lack of explanation for an infant's injuries. Notably, Dr. Lakin defined SBS/AHT as the terminology used when medical providers "are not present when [an infant's injury] occurs to say that [is] the actual mechanism as to what occurred."

¶40. Dr. Lakin testified her answers were based on her training and experience as a practicing pediatrician and the information she collected from the evidence, data, medical history, and Kyllie's evaluation. In support of her opinions and conclusions given during the *Daubert* hearing, Dr. Lakin cited only the AAP and stated that the AAP recognizes AHT as an entity with SBS as a component. According to Dr. Lakin, under the AAP statement, AHT is supported by findings of intracranial hemorrhages, which may or may not be associated with fractures and retinal hemorrhages.

¶41. Dr. Lakin agreed that many articles in many different disciplines, from neuropathology to biomechanical engineering, discount SBS as a reliable diagnosis. Dr. Lakin further admitted that she did not know how much force would cause Kyllie's injuries and that she had not published anything regarding SBS/AHT. She was unaware of any studies regarding the error rate of SBS as a diagnosis, and she admitted she had not personally

done any research to eliminate short falls as a cause of these types of injuries. Further, Dr. Lakin admitted that no test was done to look for neck injuries to Kyllie and that Kyllie had no external head injury evidencing an impact.

¶42. Dr. Lakin further admitted that, unlike a pathologist, she had no training or expertise in determining cause of death. She could name no scientific literature to support the idea that one could pinpoint to within two hours when these types of injuries occur. In fact, she testified that one of her professors authored a scientific article concluding that, in these types of cases, one could not give any indication of time of injury except for the 24-hour period prior to the symptoms' appearance. To support her SBS/AHT theory, Dr. Lakin had only her brief recall of an AAP statement and her own opinion that "there is" literature that states the more severe the injury the more likely it is for the symptoms to appear immediately. Despite promises from the State and its witnesses to produce articles or other materials to support the opinions given in the *Daubert* hearing, the State never produced any article to attach to the hearing record as an exhibit. Unlike the State, the defense provided numerous articles, studies, and criticisms of SBS to support its argument that SBS is no longer as widely accepted in the medical community as it once was.

¶43. The circuit judge stated at the *Daubert* hearing that he was not "insensitive to the fact that there may be some difficulty or some difference of opinion about that which is called SBS." Although he recognized the disagreement surrounding the validity of SBS, the circuit

court still failed to perform its vital gatekeeping function of determining whether the State had shown Dr. Lakin's expert opinion testimony on SBS to be reliable. *See* M.R.E. 702 advisory committee note. As stated by the circuit judge himself, the *Daubert* hearing he conducted was only to determine "the matter of [Dr. Lakin's] qualification to testify as an expert." The circuit court undertook no *Daubert* analysis of SBS itself or its competing theories. When Josh's attorney requested the opportunity to additionally voir dire Dr. Lakin on the reliability of her expert testimony, the circuit judge stated, "Well, I made a determination she is qualified to testify . . . you can cross-examine her any way you want . . . I think [that is] what cross-examination is all about. . . ."

¶44. This statement by the circuit judge highlights the precise issue upon which our reversal of Josh's conviction and sentence is based. The whole purpose of Mississippi's *Daubert* standard is to ensure that expert testimony provided to a jury is both relevant and reliable, not to determine whether the proposed expert is in fact an expert. *McLemore*, 863 So. 2d at 36 (¶11). After all, it is our *Daubert* standard that requires the court, not the jury, to be the gatekeeper of evidence. *Id.* at 37 (¶14). Here, however, the circuit court left the determination of reliability to the jury and the cross-examination skills of Josh's trial attorney.

¶45. We also note that, other than stating that he had determined Dr. Lakin was qualified to testify, the circuit judge made no actual on-the-record findings regarding her qualifications or the reliability of her expert testimony.

We find this to be an abuse of discretion. In *Carlson v. Bioremedi Therapeutic Systems Inc.*, 822 F.3d 194, 201 (5th Cir. 2016), the Fifth Circuit of the United States Court of Appeals found "the district court clearly abused its discretion by not conducting a *Daubert* inquiry or making a *Daubert* determination on the record."[7] As the Fifth Circuit explained:

> [W]e agree with three of our sister circuits that a district court must still perform its gatekeeping function by performing some type of *Daubert* inquiry and by making findings about the witness's qualifications to give expert testimony. At a minimum, a district court must create a record of its *Daubert* inquiry and articulate its basis for admitting expert testimony.

Id. at 201 (citations omitted). Furthermore, as the Fifth Circuit noted, "[a]n expert's testimony must be reliable at each and every step or else it is inadmissible." *Id.* (internal quotation mark omitted).

¶46. SBS as a scientific methodology or diagnosis on its own must also be shown to be reliable. *See McLemore*, 863 So. 2d at 37 (¶13). Yet Dr. Lakin failed to, and was wholly unable to, cite any specific studies supporting

7. While not binding on this Court, we still find the Fifth Circuit's holding insightful and relevant, especially in light of the fact that the Mississippi Supreme Court restyled the Mississippi Rules of Evidence in 2016 to be consistent with the Federal Rules of Evidence. M.R.E. 101 advisory committee note.

SBS as a diagnosis. Dr. Lakin's SBS theory was, by her own admission, based upon assumptions. Dr. Lakin did not apply any known and tested theories or consult any citable current literature. She relied on a statement from the AAP—a position statement that was updated in 2008-2009 to focus not on SBS but to utilize the term AHT.[8]

---

8. The AAP's current statement on SBS, reaffirmed in 2017, expressly states that the authors were compelled "to modify our terminology to keep pace with our understanding of pathologic mechanisms. Although shaking an infant has the potential to cause neurologic injury, blunt impact or a combination of shaking and blunt impact cause injury as well." Cindy W. Christian, Robert Block, & the Committee on Child Abuse and Neglect, *Abusive Head Trauma in Infants and Children*, Pediatrics, Vol. 123, Issue 5, 1409 (American Academy of Pediatrics May 2009). It further states:

> [M]edical and biomedical research, clinical and pathologic experience, and radiologic advances have improved our understanding of the range of mechanisms that contribute to brain injury from AHT, yet controversy remains. . . . Controversy is fueled because the mechanisms and resultant injuries of accidental and abusive head injury overlap, the abuse is rarely witnessed, an accurate history of trauma is rarely offered by the perpetrator, there is no single or simple test to determine the accuracy of the diagnosis, and the legal consequences of the diagnosis can be so significant. . . . Pediatricians also have a responsibility to consider alternative hypotheses when presented with a patient with findings suggestive of AHT. A medical diagnosis of AHT is made only after consideration of all the clinical data. . . . Consultants in radiology, ophthalmology, neurosurgery and other subspecialties are important partners in the medical

Yet, Dr. Lakin could not directly quote the statement. Nor did she analyze SBS methodology in light of its criticisms to determine if SBS remains a reasonable diagnosis. Dr. Lakin explained only that SBS was a reasonable diagnosis because it was based on the AAP statement.

¶47. For the reasons discussed above, we conclude the circuit court abused its discretion because Dr. Lakin's expert testimony as to the cause and timing of Kyllie's death, though relevant, was unreliable and failed to meet the criteria required by *Daubert* and Rule 702. We further find the error of admitting Dr. Lakin's testimony was magnified since Dr. Lakin's testimony as to those issues was the only evidence to support the State's theory of the case.[9] The defense attacked SBS's reliability with credible evidence, in the form of numerous cites to studies and peer-reviewed articles, that reflected the scientific community may no longer wholly accept SBS.[10] Thus,

---

> evaluation and can assist in interpreting date and reaching a diagnosis.

Id. at 1410.

9. The dissent maintains that the State presented additional evidence to support Josh's conviction. The additional evidence to which the dissent refers, however, is speculative at best and focuses on Josh's reaction once Bethany and the other girls expressed concern about Kyllie's condition rather than providing support for the State's theory as to the cause and timing of Kyllie's injuries.

10. In cases ranging from the United States Supreme Court to the courts of our sister states, challenges to the science of SBS/AHT reflect that SBS/AHT as a diagnosis falls well short of being judicially noticed. *See Cavazos v. Smith*, 565 U.S. 1, 13-14,

at the very least, the State should have provided either a minimal defense of articles or other expert testimony to support the reliability of the opinion. *See Patterson v. Tibbs*, 60 So. 3d 742, 750 (¶28) (Miss. 2011) ("[W]hen an expert renders an opinion that is attacked as not accepted within the scientific community, the party offering that expert's opinion must, at a minimum, present the trial judge with some evidence indicating that the offered opinion has some degree of acceptance and support within the scientific community."). This the State failed to do.

¶48. Our review reflects that Dr. Lakin's proffered testimony fell well short of *Daubert*'s expectations and should therefore have been excluded. There was no proof that the medical science, as opined by Dr. Lakin, reliably explained the biomechanical processes by which SBS or AHT develop. There was also no proof that the medical science, as discussed by Dr. Lakin, reliably aided the jury in understanding the cause and timing of Kyllie's injuries. Dr. Lakin was unable to provide the court or jury with any scholarly literature to support the validity of her diagnosis. No differential diagnosis was considered. In short, neither the State nor Dr. Lakin provided any scientific studies or medical literature—current or otherwise—to support the indictment's charge of injury inflicted by shaking or to support Dr. Lakin's opinion that Kyllie's breathing

---

132 S.Ct. 2, 181 L.Ed.2d 311 (2011) (Ginsburg, J., dissenting); *Del Prete v. Thompson*, 10 F. Supp. 3d 907, 954-57 (N.D. Ill. 2014); *Commonwealth v. Epps*, 474 Mass. 743, 53 N.E.3d 1247, 1260-66 (Mass. 2016); *People v. Bailey*, 47 Misc.3d 355, 999 N.Y.S.2d 713, 724-27 (N.Y. Cty. Ct. 2014); *State v. Edmunds*, 308 Wis.2d 374, 746 N.W.2d 590, 596-99 (Wis. Ct. App. 2008).

troubles started at approximately the same time as the infliction of the injuries. For these reasons, we find that Dr. Lakin's testimony on SBS was unreliable and that the circuit court erred in admitting it.

CONCLUSION

¶49. Because we find the circuit court abused its discretion by admitting into evidence Dr. Lakin's expert testimony at the *Daubert* hearing, we reverse Josh's conviction and sentence for second-degree murder. Due to our discussion and disposition on these issues, we decline to address Josh's remaining issues on appeal, and we remand this case to the circuit court for a new trial consistent with this opinion.[11]

---

11. *See Lockhart v. Nelson*, 488 U.S. 33, 40, 109 S.Ct. 285, 102 L.Ed.2d 265 (1988) (holding that "the Double Jeopardy Clause allows retrial when a reviewing court determines that a defendant's conviction must be reversed because evidence was erroneously admitted against him, and also concludes that without the inadmissible evidence there was insufficient evidence to support a conviction" when, "clearly *with* that evidence, there was enough to support the sentence"); *Campbell v. State*, 798 So. 2d 524, 530 (¶22) (Miss. 2001) (reversing the defendant's murder conviction and remanding for a new trial after finding error in the admission of both the defendant's statement to authorities and his blood-stained clothing and holding that the remaining admissible trial evidence was insufficient to support his conviction); *Hillard v. State*, 950 So. 2d 224, 230-31 (¶¶28-30) (Miss. Ct. App. 2007) (reversing the defendant's convictions after finding error in the admission of accomplice testimony and holding that, even though "there was quite meager evidence to sustain" one of the convictions, the proper result was still to remand for a new trial); *Gavin v. State*, 785 So. 2d 1088, 1095 (¶28) (Miss. Ct. App. 2001)

¶50. **REVERSED AND REMANDED.**

GREENLEE, WESTBROOKS, McDONALD, McCARTY AND C. WILSON, JJ., CONCUR. J. WILSON, P.J., CONCURS IN RESULT ONLY WITHOUT SEPARATE WRITTEN OPINION. LAWRENCE, J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY BARNES, C.J., AND CARLTON, P.J.

LAWRENCE, J., DISSENTING:

¶51. I respectfully disagree with the majority that the circuit court erred in admitting Dr. Lakin's testimony. The majority's claim that her testimony "failed to meet the *Daubert*[12] standard and was so unreliable as to render portions of her testimony inadmissible" is misplaced. For over twenty years, the standards set forth in *Daubert* have governed admission or denial of expert testimony in trial courts across the United States. These standards, however, are not an exhaustive list that trial courts must check off to determine if a witness is qualified as an expert. *Miss. Trans. Comm'n v. McLemore*, 863 So. 2d 31, 36 (¶13) (Miss. 2003). In fact, when the supreme court adopted the standards of this State, set forth in *McLemore*, it made crystal clear:

("Even when the *only* evidence on an issue has been declared inadmissible, the proper procedure is to remand.").

12. *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

> We are confident that our learned trial judges can and will properly assume the role as gatekeeper on questions of admissibility of expert testimony. . . . The trial court can identify the specific indicia of reliability of evidence in a particular technical or scientific field. . . .

McLemore, 863 So. 2d at 39-40 (¶25). Further, the supreme court said, "We are certain that the trial judges possess the capacity to undertake this review." *Id.*

¶52. Respectfully, I fear that the majority's opinion will now either be precedent to create an expert-admission standard so high that it will be impossible to reach, or it will be considered a new declaration that this Court will now take it upon itself to be the gatekeeper of expert testimony and no longer trust the trial courts to do their jobs. Here, the circuit judge heard hours of testimony from Dr. Lakin at the *Daubert* hearing and applied his discretion in determining that Dr. Lakin was qualified to be accepted as an expert and that her opinions were sufficiently reliable. The majority asserts that determination was an abuse of discretion. I disagree.

¶53. The reason for my dissent is threefold. First, I do not believe the circuit court abused its discretion by allowing Dr. Lakin to testify as an expert witness about the injuries she found on Kyllie and the effect those injuries would have had on that child. Second, I disagree with the statements made by the majority concerning the facts of this case and that Dr. Lakin's opinions were the sole basis for

guilt. Finally, this trial was a battle of the experts. Both parties proffered experts witnesses offering different opinions. Those experts were vigorously cross examined by each side. The jury heard both experts' testimonies and arguments of the parties as to their opinions and found contrary to Josh's. This Court should not now second guess that battle of the experts only because Josh argues on appeal that one expert was unreliable while his expert was reliable. For these distinct reasons, I respectfully dissent.

I. Dr. Lakin's Qualifications

¶54. The majority reverses Josh's conviction because it finds that Dr. Lakin was unqualified to testify based on the unreliability of the science used to form her conclusions. I disagree. Before this Court summarily announces Dr. Lakin's opinions as unreliable, a review of her qualifications is essential. Dr. Lakin is a medical doctor practicing in the specialty of pediatrics. She is licensed as a pediatrician in both Tennessee and Mississippi. She has an undergraduate degree from Duke University, a graduate degree in public health from the University of North Carolina at Chapel Hill, and a medical degree from East Carolina University Medical School. She completed her residency in pediatrics at Le Bonheur Children's Hospital and at the University of Tennessee. She is Board Certified in the specialty field of child-abuse pediatrics by the American Academy of Pediatrics, which requires an examination and a prolonged period of practice in the field. She has practiced pediatric medicine for many years and presently serves as the director of Le Bonheur Children's Hospital. Dr. Lakin is currently an assistant professor of

pediatrics at the University of Tennessee and a general practicing physician in Tennessee and Mississippi. Dr. Lakin was recognized in the field of pediatrics through her invitation only induction to the Helfer Society, which is a nonprofit honorary society for child abuse pediatricians. Dr. Lakin's professional background included working for the Raleigh Group in Memphis, Tennessee, and practicing as a general pediatrician at the University of Tennessee. Dr. Lakin began assisting the primary child-abuse physician at Le Bonheur Hospital in 1999, and she later became the medical director for the Le Bonheur Cares Team in 2006.

¶55. Dr. Lakin testified that she has lectured "extensively" on abusive head trauma (AHT). As discussed above, she is an assistant professor of pediatrics at the University of Tennessee, which requires her to maintain up-to-the-minute knowledge of her field in order to speak to groups and lecture her students. She is a member of the American Academy of Pediatrics and the Tennessee Academy of Pediatrics. She serves on the Shelby County Child Fatality Review, which was an advisory committee for the State of Tennessee's Department of Children Services. She also worked with a state-wide advisory committee that handled child abuse exclusively in Shelby County, Tennessee. Finally Dr. Lakin has been named as one of the "Best Doctors" between the years 2002 to 2013, and was a 21st Century Scholar in the Department of Preventative Medicine. She has also received awards for cancer work and a medical humanities award.

¶56. Dr. Lakin has been recognized as an expert and testified as an expert in child-abuse pediatrics for both

the prosecution and the defense in "over a hundred" cases in Arkansas, Tennessee, Missouri, and Mississippi. Notably, she was never refused as an expert in those cases. Dr. Lakin has been recognized by courts all over this state, time and time again, as an expert physician with a specialty in the area of child abuse. There are numerous cases where she has testified similarly to the issues in this case, and those cases were affirmed by this Court and the Mississippi Supreme Court.[13] To say the trial court

13. In *Middleton v. State*, 980 So. 2d 351 (Miss. Ct. App. 2008), this Court recognized that Dr. Lakin's "testimony regarding child trauma and abuse was appropriate, and the trial court did not err in allowing her testimony." *Id.* at 359 (¶31). The majority claims that "any reliance on similarities with Dr. Lakin's prior testimony in *Middleton* is misplaced." I wholeheartedly disagree for two distinct reasons. First, this Court has held that Dr. Lakin is qualified as an expert in her field. Second, in that case, the defendant argued that SBS was not a "generally accepted theory in the medical community," and we were charged with considering that argument. *Id.* at 356 (¶17). In *Middleton*, we found that the experts presented at trial, including Dr. Lakin, were able to testify to "the types of injuries present and clearly indentif[y] their basis for concluding the injury was most likely cause by adult intervention." *Id.* at 356 (¶20).

Also, in *Isham v. State*, 161 So. 3d 1076 (Miss. 2015), Dr. Lakin testified that a abused child showed signs of similar hemorrhages to Kyllie and that these "were consistent with abusive head trauma." *Id.* at 1080 (¶17). While the supreme court overturned Isham's conviction because he was not afforded an opportunity to hire an expert witness to rebut Dr. Lakin's testimony, the supreme court noted that it was only because "the trial court deprived Isham of his right to a fair trial when it denied him funds to procure opposing experts." *Id.* at 1084 (¶38). The supreme court did not make any mention of Dr. Lakin's inability to issue such an expert opinion.

abused its discretion in its gatekeeper function now when she has been recognized as such an expert in four states and affirmed as such expert by the appellate courts of this state, is a stretch of legal significance and has far reaching ramifications in child-abuse cases. To find her testimony unreliable after a career of studying, treating, and teaching child abuse cases raises reliability hurdles so high as to essentially make it impossible to know with certainty what is the rule and what is the exception. I would find the circuit court did exactly what the supreme court has ask that the courts do. Specifically, I would find that the circuit court did not abuse its discretion in finding Dr. Lakin imminently qualified to render an expert opinion about Kyllie's injuries. Further, I would find that the opinions rendered by Dr. Lakin were not unreliable, untested, or unscientific. In sum, her opinions were based on what type of injuries Kyllie had, what symptoms would come from those injuries, and what someone with Kyllie's injuries could or could not do.

II. Admissibility of Dr. Lakin's Opinions

¶57. The majority takes issue with Dr. Lakin's analysis and conclusions concerning the window of time that Kyllie's injuries could have occurred. The majority reasons that the science behind Dr. Lakin's conclusions is flawed. As a result, the majority finds that Dr. Lakin inappropriately testified to the range of time in which Kyllie was injured. I disagree.

¶58. The State presented an abundance of evidence about Kyllie's injuries to the jury. Those injuries were extensive.

Dr. Lakin walked the jury through each and every injury that the child presented at Le Bonheur Children's Hospital. The four month old suffered a cerebral edema, otherwise known as swelling of the brain. Her CT scan also indicated she had a subdural hemorrhage, along with a intraventricular and intraparenchymal hemorrhage. Both of these injuries, in layman's terms, result from bleeding in different parts of the brain. Dr. Lakin testified that not only was Kyllie's brain bleeding, but the brain tissue was also bruised. Kyllie's eye exam revealed bilateral retinal hemorrhages that Dr. Lakin testified were particularly significant "because the more extensive the hemorrhages are, then the more they correlate with the acceleration/deceleration type injuries." The child also presented with what physicians thought to be a right healing clavicle fracture and healing fractures on her right and left ribs. Dr. Lakin testified that there were no external injuries to Kyllie's head, which could have indicated a fall and was the defense's alternative theory. Dr. Lakin found that the swelling of Kyllie's brain is what ultimately caused her death.

¶59. On direct examination, Dr. Lakin described for the jury what injuries of this nature would have symptomatically produced:

> Q. After receiving these fatal injuries, would Kyllie have been able to function?
>
> A. No. Well, when you say function, her – her typical activities, which are not a whole lot of activities in a four-month-old, but would not be considered normal, no.

Q. In other words, her – well, I won't put it in other words. But would she have been able to cry –

A. No.

Q. – after suffering these injuries?

A. Not – no.

Q. Okay.

A. Probably during the event, but no – she would lose consciousness very quickly.

Q. Would she have been able to eat or be fed?

A. No.

It is important to note that Dr. Lakin never pinpointed an exact time that the child was harmed. She did not provide an arbitrary time-stamp of guilt, which I think is what concerns the majority. Dr. Lakin instead explained that based on the statements Josh made to the medical team treating his daughter, Kyllie was acting normally when she ate around 5:00 p.m. but was gasping for air around 5:30 p.m. when Bethany arrived at the house. On direct examination, her testimony was further explained as follows:

Q. Based on the history given to you – and you remember I asked you early on to the parameters of what I would ask you to base your answers

on early on in this examination. Based on those factors and the history given to you, do you have an opinion to a medical certainty as to a range of time when these injuries would have been received by Kyllie Clark?

A. Based on the history that was given to me, it would have to be sometime between her most recent normal activity, it would be sometime after her most recent normal activity to the time when she was found unconscious. And so, in my experience, the symptoms are immediate.

Q. And the last time of normal activity, as given to you in the history, was?

A. 5:00 when she ate.

Dr. Lakin was merely testifying to what Josh reported to her, not giving an expert medical opinion that the injury happened at a certain time. Her medical opinion was that this child could not act normally with the injuries she found. That opinion is certainly within her medical expertise and was fully cross examined by the defense. To further show that she did not do what Josh claims, consider the following which occurred on direct examination:

Q. And so you're not saying who committed the abuse?

A. That's correct.

Q. And you're just diagnosing it as that?

A. That's correct.

It is clear from this exchange that Dr. Lakin was not pointing a finger of guilt at anyone in particular. In fact, when the above two exchanges on direct examination are read together, along with her other testimony about the types of injuries Kyllie had, it is clear that she was merely repeating the time frame Josh gave her and not saying that Josh committed this crime because of that time frame. On cross examination, Dr. Lakin explicitly testified five different times that she could not say "who" caused the injuries found on Kyllie. That is a major distinction that should be taken into consideration when evaluating the reliability of Dr. Lakin's opinions at trial. Josh's argument that she eliminated everyone except him is simply not true. She stated she could not say who committed the abuse.

¶60. Dr. Lakin concluded that Kyllie was a victim of abusive head trauma based on the history Josh gave her, along with the injuries discussed above. At the *Daubert* hearing, Dr. Lakin told the court that the severity of the injury was crucial in determining the timing of the injuries themselves. At trial, Dr. Lakin consistently testified that "the more severe the injury, the closer in time it is as to when it has occurred."

¶61. Further, when someone has a severe brain injury, as was seen in this case, that person cannot function normally (i.e., eating, breathing, etc.). On direct examination, Dr. Lakin told the jury that she would not have expected Kyllie

to eat "at all" with a head injury of this magnitude. The majority claims that Dr. Lakin contradicted herself on cross examination when she told the jury that she "could not determine the exact time of Kyllie's injuries." That is exactly what Dr. Lakin testified to on direct examination. Her expert medical opinion was expressed during cross examination as follows:

> I'm not saying that you can put it down to a couple of hours based on the radiological data or the path – the autopsy findings. What I'm saying is that the – there is literature talking about the fact that a severe head injury would not – the child would not have an absence of symptoms and develop [the symptoms] later. And the more severe the injury, the more likely it is the shorter period of time because they can't survive.

Dr. Lakin simply explained that a child would display symptoms more quickly, depending on the severity of the injury.

¶62. Based on Dr. Lakin's training, education, and experience, she was certainly qualified to render that opinion. Dr. Lakin did not make up the times. She did not formulate her conclusions based on some unreliable expert opinion. Her opinions, as presented to the jury, were supported by Josh's statements to her concerning Kyllie's history and the axiomatic medical doctrine that the more severe the injury the quicker one would see symptoms.

Appendix F

III. Additional Evidence of Guilt Presented to the Jury

¶63. The majority complains, in an effort to heighten the seriousness of the alleged error by the circuit court, that the State relied "solely on the basis of Dr. Lakin's expert testimony" and that Josh was found guilty of second-degree murder as a result of that testimony. I disagree that Dr. Lakin's opinions were the sole basis for a jury conviction. While it may be true that Dr. Lakin's testimony explained the science behind Kyllie's cause of death and her functionality in the moments leading up to it, the jury was still presented with a myriad of evidence from both the State and the defense to support a conviction.

¶64. One of the most crucial pieces of evidence given to the jury was Josh's sworn statement. The statement, which Officer John Hillhouse took the day after Kyllie died, was entered into evidence and read into the record at the trial. Josh testified that the statement and the facts contained within were "as accurate as [he could] recall." The statement indicated that Bethany was asleep until around 2:00 p.m. on January 5, 2008. Bethany, Morgan, and Haley went to run errands while Josh stayed home with the twin babies. The babies were fed and burped and, according to Josh, were "being good." Josh then sat Kyllie in an arm chair while he played video games. After a little time had passed, Josh went to the restroom for "thirty seconds." When he returned, he stated that he noticed "[Kyllie] made a gasping sound before [Bethany] got home." This occurred five to ten minutes before Bethany returned. Kyllie gasped more than once during that time period. During his testimony at trial, Josh told the jury

that "[he] never assumed that anything was wrong with Kyllie" while she was struggling to breathe. Once Bethany and the children got home, instead of immediately calling 911, Josh took Kyllie to the bedroom.

¶65. The jury also heard the testimonies of Bethany Clark and Haley Parker. Bethany specifically outlined her observation of Josh's reaction to their daughter's condition. Bethany testified that when she returned home from running errands, Haley immediately dropped her bags at the door and said, "[O]h, my god, what happened?" Bethany walked through the door of the home and saw Kyllie lying in the corner of the recliner next to Josh. Josh was playing a video game while the four month old "was gasping for breath," and Bethany immediately knew something was wrong. Bethany told the jury that her daughter's eyes were "clouded over" and that she could see "nothing in [Kyllie's] face." The scenario that Bethany described next is chilling:

> A. And I said, *What happened?* He said, *Nothing.* I said, *She's got to go to the doctor.* He said, *She's fine.* I said, *No, she's not.* And he picks her up and he's holding her, and her body is just limp. And he walks to the back.
>
> Q. All right. Tell me what happened once he – once he picked up the baby, I believe you said he headed to the back of the home?
>
> A. Yeah, he went to the bedroom. He was headed to our room at the end of the trailer, and I followed

> him back there. And he went to lay her down, and I went to get her. As soon as I went to get her, he come back and he was, like, *No.* He didn't want me to get her. And I was, like, *I got to take her.* And he's, like, *No, she's fine.* And I had to push him off so I could take her. And I got to the living room, and I hit the floor and I started CPR.

The evidence presented to the jury was that Kyllie's condition was so dire that Bethany had to immediately begin CPR once she finally was able to pry Kyllie away from Josh.

¶66. Haley Parker, who lived with Josh and Bethany at the time, described a similar scenario for the jury. When she arrived home with Bethany, Haley saw that Kyllie "had one eye that looked like it was, like closed, and one eye open." She told the jury that Kyllie "would take one little breath, and then it would stop," and that the child was "gasping for air." She saw Josh pick the child up and take Kyllie to the bedroom. During this whole time, Haley testified that Josh kept saying "she's fine" and that "[s]he's been doing that all day."

¶67. Before the jury ever heard from Dr. Lakin, they were given Josh's sworn statement, the testimony of Officer Hillhouse about how that statement was acquired, and Bethany's testimony that detailed Josh's strange actions once Kyllie began to exhibit symptoms of distress. After hearing all of this evidence, the jury then heard Dr. Lakin's testimony. During her cross examination, Dr. Lakin told the court that the history obtained from the parents was

the first step in any diagnosis. Dr. Lakin testified that based on the "history obtained from the parents, [Kyllie] had been at home and had been in the care of [Josh]." That history also included the following facts:

> And there were three other children, I believe, that were in the home at the time. [Kyllie] was playing – by history, [Kyllie] was playing around 3:00 p.m. in a playpen, and she was four months old and also had a twin. All the children were fed. The twins were fed formula and cereal around 5:00 p.m. And [Josh] reported to us that [Kyllie] gasped. And around 5:30, the mother came home with two other friends, and they noticed that [Kyllie] was having difficulty breathing.

¶68. The defense put forth the theory that Kyllie's death was caused by being dropped, which could have occurred before Kyllie was in Josh's sole care. The defense's expert, Dr. Shuman, testified that the injuries seen in Kyllie did not automatically indicate shaking had occurred. Furthermore, Dr. Shuman testified that resuscitation efforts, like performing CPR, can make some of the injuries, like Kyllie's retinal hemorrhages, more pronounced. The jury heard Dr. Shuman's testimony and was able to consider a clear alternative to Dr. Lakin's conclusion of AHT.

¶69. *Daubert* made clear that "[v]igorous cross examination, presentations of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate

means of attacking shaky but admissible evidence." *McLemore*, 863 So. 2d at 36 (¶12) (citing *Daubert*, 509 U.S. at 595-96, 113 S.Ct. 2786). This statement, I suspect, was designed to calm the nerves of trial lawyers and judges in knowing that the familiar tools of cross examination and presentation of contrary evidence were still available despite the new rule of admission of expert testimony. After *McLemore*, it is clear that the parties are still allowed to attack the opposing expert's opinions and call their own experts in that effort. *Galloway v. State*, 122 So. 3d 614, 632 (¶¶27-28) (Miss. 2013). The only limitation on that effort is that the expert must be properly qualified, their opinions sufficiently reliable, and the testimony relevant to the issues in the litigation. *Id.* That is exactly what happened in this trial.

¶70. The defense extensively cross examined Dr. Lakin about her opinions and how she came to her conclusions. The defense went through articles and other expert opinions questioning the type of injuries that Dr. Lakin found in this case. The defense presented every possible explanation for Kyllie's death besides SBS. They exhaustively cross examined Dr. Lakin about Kyllie's symptoms, other possible causes of those symptoms, other medical explanations of those symptoms, and their own expert's theories. As if that was not enough, on cross examination the defense went further. They even asked Dr. Lakin about her own divorce, psychological projection, past lawsuits, times she had previously testified in a case where a former Tennessee Assistant District Attorney had been fired, and papers that she had published concerning the topics of SBS. To say this was a lengthy

cross examination does not do justice to the vigor to which it was carried out. I do not fault the defense for this. In fact, I commend the defense for performing an essential and necessary trial function that, more often than not, allows the truth to surface. In addition to that lengthy and thorough cross examination of the State's expert witness, the defense offered its own expert witness who gave contrary opinions to Dr. Lakin and presented alternative theories of injuries.

¶71. The majority notes in footnote nine that this abundance of evidence is "speculative, at best." Respectfully, I disagree. The testimony and evidence presented to the jury was theirs to consider. The circuit court instructed the jury to make their decision "based on the evidence and the law and not upon speculation, guesswork or conjecture." Here the jury did just that and found Josh guilty of killing Kyllie. This Court should not second guess a jury verdict and imply prejudice by the State's expert when the whole trial was a battle of the experts and the defense not only fully cross examined Dr. Lakin but also was allowed to introduce its own contrary expert testimony to the jury.

¶72. At that point, the decision was in the hands of the jury. It is not the job of this Court to overlook the entirety of the evidence presented before the jury and overturn a conviction because there is "some disagreement" in the medical community about an issue that was fully vetted in front of the jury. The jury determines the factual issues in dispute in a trial and prescribes the credibility or not of the witnesses who testified before the jury. Because

I believe that the circuit court appropriately performed its function as a gate keeper in determining Dr. Lakin's expertise and the reliability of her opinions, and because there is no evidence to suggest the circuit court abused its discretion in that process, I would affirm Josh's conviction.

BARNES, C.J., AND CARLTON, P.J., JOIN THIS OPINION.

APPENDIX G — ORDER OF THE CIRCUIT COURT OF ITAWAMBA COUNTY, MISSISSIPPI, FILED MARCH 3, 2017

IN THE CIRCUIT COURT OF
ITAWAMBA COUNTY, MISSISSIPPI

No. CR08-031
COUNT 1

STATE OF MISSISSIPPI

VS

JOSHUA ERIC HAWK CLARK

Filed March 3, 2017

ORDER

This day into open Court came the Defendant, **JOSHUA ERIC HAWK CLARK**, and his Attorney, **DAN WEBB AND JIM WAIDE** and the Defendant having been found guilty of **SECOND DEGREE MURDER** by a jury in this cause on a former day in this Court, and said Defendant now being before the Court for sentence.

Therefore, for said offense and on said verdict of the Jury of guilty of, **SECOND DEGREE MURDER** it is hereby ORDERED AND ADJUDGED that the said **JOSHUA ERIC HAWK CLARK** be and he/she is hereby sentenced to **serve a term of Forty (40) years in the custody of the Mississippi Department of Corrections at a facility to be designated.**

Appendix G

Defendant shall pay court cost.

Defendant is remanded to the custody of the ITAWAMBA County Sheriff's Department to await transportation.

ORDERED AND ADJUDGED, this 3rd day of March, 2017.

/s/ [illegible]
CIRCUIT COURT JUDGE

APPENDIX H — JURY DECISION OF THE CIRCUIT COURT OF ITAWAMBA COUNTY, MISSISSIPPI, FILED AUGUST 13, 2015

We, the jury, find the Defendant, Joshua Eric Hawk Clark, not guilty of Capital Murder as charged.

We, the jury, find the Defendant, Joshua Eric Hawk Clark, guilty of Second Degree Murder.