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NO. 52449-0

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II**

IN RE PERSONAL RESTRAINT OF

LEON L. REYES,

Petitioner.

REPLY IN SUPPORT OF PERSONAL RESTRAINT PETITION

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INTRODUCTION

Mr. Reyes was convicted of homicide by abuse and sentenced to forty years in prison based on Shaken Baby Syndrome ("SBS"), since rebranded Abusive Head Trauma ("AHT"). The deceased child in this case, Haydon, did not show the kind of significant external bruising that would suggest he had been violently assaulted. Shaking was thus the solution to the State's "dilemma"—that there would be this "amazing amount of internal injury" with "very little, if any, on the outside." Tr. 231:24–232:3.

The jury at Mr. Reyes's trial was faced with two alternatives: either Haydon fell from the bunk bed, as Mr. Reyes was told, or he was violently shaken, as the State claimed. Repeatedly invoking "doctors," "experts" and "medical people," Br. 14, 18, 27, 35 (citations omitted), the State elicited false testimony about how Haydon must have been shaken and could not have possibly fallen from a bunk bed. With this unrebutted testimony, the result was a foregone conclusion, as jurors "see within scientific evidence the level of certainty that makes them comfortable with a guilty verdict." Tom R. Tyler, *Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 YALE L.J. 1050, 1071 (2006).

Were Mr. Reyes tried today, the results "would probably be different because the medical community's now generally accepted understanding of brain trauma in children directly contradicts the medical theories that were

relied upon to convict [him]." *In re Fero*, 192 Wn. App. 138, 153, 367 P.3d 588 (2016). Mr. Reyes has presented new evidence of the current understanding of subdural hematomas, retinal hemorrhages, short falls, biomechanics, and the diagnostic validity of SBS—new evidence that would allow him to put forward, for the first time, a credible scientific defense. Br. 21–25. Indeed, many of the opinions espoused at trial would no longer be considered true ***even by SBS proponents***. Mr. Reyes can now fight on the State's ground and win.

The State's Response fails to engage with the substance of the Opening Brief, the Ophoven Declaration, or the Van Ee Letter. It does not address, let alone defend, any statement challenged in the Petition, whether by the State witnesses or the prosecutor. It does not attempt to make sense of the medical facts and findings. It does not engage with the scientific studies. It ignores the Swedish Report. It ignores the SBS video played to the jury. These failures make it difficult to take the Response seriously. The trial court found the sufficiency of evidence to support homicide by abuse to be a close call when SBS evidence was unopposed and unquestioned—certainly the result would likely change if the jury heard, as the State now concedes, that SBS is just a "theory," and a "controvers[ial]" one at that. Resp. 34–36, 39 n.38, 43. The scientific landscape has changed dramatically. The Petition should be granted.

ARGUMENT

I. MR. REYES IS ENTITLED TO A NEW TRIAL

A. The State's Case for Homicide by Abuse Depended on a Theory of Violent Shaking

Throughout its Response, the State suggests that "shaken baby syndrome" was "not relied upon [at] trial," Resp. 41, that the opinions of its experts were "plainly not [SBS] opinion[s]," *id*. at 18, and that the cause of death was "blunt head trauma" or "blunt force trauma," not "shaken baby syndrome," *id*. at 16, 18, 20, 23. This is disingenuous.

Although Haydon had significant ***internal*** head injuries, he did not have the kind of ***external*** injuries that would suggest a violent assault on the night of his collapse. *See* Tr. 231:24–232:3; Ophoven Decl. ¶ 64; Van Ee Ltr. at 8. There were no significant marks on the face or buttocks, no signs of choking, no neck injuries, no grip marks and no chest-to-chin marks. *Id*. The bone survey at the hospital—taken specifically to detect signs of abuse—turned up nothing. Br. 10–11. Police officers, paramedics, and medical professionals examined Haydon on the night of his collapse, and they did not recall significant bruising. Br. 40 & n.18.

Shaking was the key to this "dilemma," Tr. 231:24–232:3, and the State argued shaking every step of the way. The State told the jury, over and over, that "this type of trauma to the head occurs when an adult . . . shakes the child so violently and so ferociously, that the head whips back

and forth." Op. Tr. 5:18–25; *see* Tr. 177:11–17 ("shaking-type injury"); Tr. 257:7–8 ("shaking, with probable impact"); Tr. 303:5–7 ("shaken baby, with an impact").[1] It played an SBS video depicting a violent shaking. Tr. 224:23–225:8; 228:13–21. Indeed, it summarized its case for homicide by abuse as "the testimony of the experts . . . that the child was shaken violently, with such tremendous force, that it caused his brain to swell and . . . caused subdural hematoma." Tr. 744:24–745:5; Tr. 728: 12–14. And the State claimed that one could infer not only shaking, but that the shaking was extremely "violen[t]," Tr. 929:12–14; 933:25–934:1; 941:25–942:1; 945:4–946:7; 949:24–25, and suggestive of extreme indifference to human life, Tr. 727:21; 749:9–12; 757:22–25; 941:14-20; 944:14–18; 945:13–14; 970:22–24; 971:10–14. "He picked up that child," the State told the jury, "and he shook that child with such force, that it caused his brain to gush out of his skull . . . ." Tr. 967:5–7. The State cannot disavow shaking now.[2]

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[1] Tr. 227:3–10 ("M]echanism of injury that occurs with shaking" is that "head rotates all the way back and all the way forward around the neck"; "***the injury is specifically from that***" (emphasis added)); Tr. 228:13–21 (with "any shaking kind of motion . . . you're getting acceleration/deceleration forces and . . . shearing [of] veins"; "***that causes subdural hematoma***" (emphasis added)); Tr. 228:22–23 ("***[T]he subdural is a symptom of the shaking. It implies that that's what occurred***." (emphasis added)); *see also* Tr. 165:9–166:19; 177:11–17; 178:24–25; 229:18–24; 229:25–230:1; 231:24–25; 235:5–6; 259:7–8; 945:20–22; 949:24–25.

[2] The State also tries to disavow any notion that Haydon, who was two-and-a-half years old when he died, was a baby, Resp. 40 & n.39, even though the State referred to him as a "baby" at trial. Tr. 955:7; 956:15 ("baby"); Tr. 278:25; 286:3; 300:19; 304:24; 307:5; 307:25; 308:2 ("Baby Haydon," "Baby Kostelecky," or "the baby"). Indeed, the State now suggests that SBS is irrelevant because Haydon was too old for the theory to apply, Resp. 40 & n.39, a stunning admission that undermines the State's entire case. Br. 41.

In keeping with its avoidance of shaking, the Response refers to "blunt head trauma" whenever it can. Resp. 16, 22, 23, 29, 34. During trial, however, the State made no distinction between "blunt force trauma" and shaking, *e.g.*, Tr. 748:17–22, and the State's new expert throws the term in without performing any work with it, *see* Resp. app'x 105–13 ("Woods Decl."), ¶ 16. While it is true the medical examiner listed the cause of death as "blunt head trauma," Resp. 23; *see* Ex. N at 2, the State ignores his testimony as to shaking, Tr. 302:24–303:9, and fails to explain what the blunt force trauma was if not a fall from a bunk bed. A bump against the faucet, Resp. 30, does not account for the evidence.[3] Van Ee Ltr. 10.

B. New Medical Evidence Would Probably Change the Result of Mr. Reyes's Trial

New evidence shows that critical testimony presented at Mr. Reyes's trial was false. This is grounds for a new trial. *See Fero*, 192 Wn. App. at 153; *Del Prete v. Thompson*, 10 F. Supp. 3d 907, 955 n.8 (N.D. Ill. 2014); *Matter of Rihana J.H. (Quianna J.)*, 54 Misc.3d 1223, 2017 NY Slip. Op. 50283(U), at *2-4, n.5 (N.Y. Fam. Ct. 2017) (sea change in science of SBS "in the past ten years").

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[3] The State similarly isolates a few references to the word "impact," specifically Dr. Duralde's and Dr. Ramoso's testimony as to "shaken impact baby syndrome" or "shaking" with probable "impact." Resp. at 19–20 (citing Tr. 257:4–8); *id*. at 24 (citing Tr. 302:1–303:9). These are references to "shaken impact syndrome," an offshoot of SBS advanced to get around biomechanical criticism that shaking did not generate the force required to cause the triad. Resp. 19–20. In practical terms, they are one and the same.

1. New Evidence Raises Profound Questions About the Diagnostic Reliability of the SBS Hypothesis

At Mr. Reyes's trial, the State presented shaking to the jury as a matter of fact. As Dr. Norman Guthkelch, the originator of the SBS hypothesis, stated in 2012: it is not proper to testify about SBS as if it were a "proven medical or scientific fact[]" when it is a mere hypothesis. A.N. Guthkelch, *Problems of Infant Retino-Dural Hemorrhage with Minimal External Injury*, 12 HOUS. J. HEALTH L. & POL'Y 201, 206 (2012). Dr. Guthkelch called for a comprehensive, independent examination of SBS/AHT in 2012.[4] *Id.* at 207–08. He would get it four years later.

The Swedish Report, the first comprehensive and independent examination of SBS/AHT, concluded in October 2016 that the hypothesis was not supported by sufficient scientific evidence to show its diagnostic reliability. Br. 27–29; Ex. S at 5, 17, 22, 29–30. A related ethics committee called on medical professionals not to assert that "certain specific injuries in infants are automatically evidence that they were caused by shaking." *Id.* at 67. This new evidence directly contradicts the State's evidence regarding the mechanism of shaking. *See Fero*, 192 Wn. App. at 157 (new evidence contradicted "certainty of the doctors at trial"); Ophoven Decl. ¶ 30–33.

[4] "Since the issue is not what the majority of doctors (or lawyers) think but rather what is supported by reliable scientific evidence, the evidence should be reviewed by individuals who have no personal stake in the matter, and who have a firm grounding in basic scientific principles, including the difference between hypotheses and evidence." *Id.* at 207–08.

Amazingly, the Response does not mention, let alone discuss, the Swedish Report, waiving any argument that the Swedish Report or the portions of the Ophoven Declaration that discuss it are not "new evidence." *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (argument not raised in party's brief is waived). This alone justifies a grant of the Petition.

2. New Evidence Demonstrates that Key Statements Made by the State and the State's Witnesses Were False

a. Retinal Hemorrhages Not Pathognomonic

The State and its witnesses played up retinal hemorrhages as a key finding, and even as a ***telltale sign*** of shaking. Br. 32–33. This was common at the time, Ophoven Decl. ¶¶ 23–25, 35, but is now known to be false. Retinal hemorrhages have so many causes and associations that they are considered nonspecific, *id*. ¶ 36, particularly where, as here, they are "few" in number and easily explained by a seizure, prolonged hypoxia, CPR, and extensive emergency treatment and surgery. Br. 32–34. Indeed, even staunch SBS ***proponents*** would no longer infer shaking from the retinal hemorrhages in this case; "small numbers," as here, are now considered consistent with accidental injury. Ophoven Decl. ¶ 40 & n.32; *see also infra* n.8.

The State dodges these arguments, asserting instead that "no witness

in this case testified that the mere presence of retinal hemorrhages indicates shaking in every case." Resp. 39. This is hairsplitting. The State's experts did not have to declare with perfect certainty that retinal hemorrhages equal abuse in all cases to make clear that they regard retinal hemorrhages as a virtual smoking gun for SBS.

b. Subdural Hematomas Not Pathognomonic

The State's response to the new evidence as to subdural hematomas is the same: it claims that the new evidence can be ignored because no one testified "that subdural hematomas were ***exclusively*** caused by [shaking]." Resp. 40 (emphasis added). Whether or not the State's experts affirmed that infant subdural hematomas are invariably the result of shaking, they equated subdural hematomas with shaking throughout Mr. Reyes's trial. Br. 16, 34. *see* Tr. 228:22–23 ("***[T]he subdural is actually a symptom of the shaking. It implies that that's what occurred.***" (emphasis added)).[5] The jury was shown a video called "The Mechanism of Injury in [SBS]," which suggested that shaking was "the mechanism [of] . . . subdural hematoma." Tr. 224:23-225:8. This calls for a new trial. *See, e.g.*, *Commonwealth v. Millien*, 474

[5] Tr. at 227:3–10 ("head rotates all the way back and all the way forward around the neck"; "***the injury is specifically from that***" (emphasis added)); Tr. 228:13–21 (with "any shaking kind of motion . . . you're getting acceleration/deceleration forces and . . . shearing [of veins]"; "***that causes subdural hematoma***" (emphasis added)).

Mass. 417, 426–27, 436–38, 442, 50 N.E.3d 808 (Mass. 2016) (alternate cause of subdural hematoma).

c. Short Falls Can Cause Catastrophic Head Injuries

The State repeatedly and unequivocally told the jury that a fall from a bunk bed could not have caused Haydon's injuries: "this type of devastating trauma to the brain does not and cannot occur, ***no way, no how***, from a fall from a bunk bed." Op. Tr. at 5:12–16 (emphasis added). Likewise, the State told the jury that a fall from a bunk bed was "***not consistent*** with the medical evidence," Tr. 931:17-18, and that the medical evidence did not "***fit***" Mr. Reyes's story. Resp. 15, 17, 18, 19; Tr. 191:12–14 (Dr. Paschall); Tr. 234:22–25 (Dr. Duralde); Tr. 933:21–24. Although that may have been conventional wisdom at the time of Mr. Reyes's trial, it is now known to be false.[6] Ophoven Decl. ¶¶ 22–25, 41–42.

Rather than defend these statements, the State again urges the Court to ignore new evidence about short falls because no witness outright denied that they could "sometimes" cause the "triad" of subdural hematomas,

[6] Indeed, there have been at least two short falls ***this month*** that have caused the tragic death of young children. *See Boy dies after falling from wagon at children's hospital*, THE WASHINGTON POST (Oct. 11, 2019), https://www.washingtonpost.com/national/health-science/boy-dies-after-falling-from-wagon-at-childrens-hospital/2019/10/11/f0b4150c-ec52-11e9-a329-7378fbfa1b63_story.html; R. Krause & S. Rivest, *Toddler killed after falling off scooter being pushed by another child*, WAVE3 NEWS (updated Oct. 9, 2019), https://www.wave3.com/2019/10/08/toddler-killed-after-falling-off-scooter-being-pushed-by-another-child/.

retinal hemorrhages, or cerebral edema. Resp. 41. This elides Dr. Duralde's testimony that only "really severe falls" from "greater than 15 feet" could cause "bleeding inside the skull." Tr. 233:1–234:1. Even the "consensus statement" referenced by Dr. Woods, Woods Decl. ¶¶ 19–20 ("Consensus Statement"),[7] concedes that SBS injuries from falls of less than 4 to 6 feet, though "rare," can happen.[8] Consensus Statement at 1052. The State also does not account for other attending circumstances, such as chronic injuries or successive impact, that might have worsened the outcome. Ophoven Decl. ¶¶ 44 & n.39, 48–51. Had the jury learned that Haydon's injuries were consistent with a fall, it would have been unlikely to conclude that shaking and shaking alone was the cause.[9] *See, e.g.*, *Fero*, 192 Wn. App. at

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[7] Dr. Woods likely means to refer to Arabinda K. Choudhary et al., *Consensus Statement on Abusive Head Trauma in Infants and Young Children*, 48 PED. RADIOL. 1048, 1049, 1058 (2018). The title "Consensus Statement" exaggerates the extent to which it represents a true "consensus." It "was not approved," "voted upon," or "even subjected to debate." Keith A. Findley et al., *Feigned Consensus: Usurping the Law in Shaken Baby Syndrome/Abusive Head Trauma Prosecutions*, WIS. L. REV., at 18 (forthcoming 2019), https://ssrn.com/abstract=3328996.

[8] The Consensus Statement also asserts that SBS/AHT is not diagnosed based on the triad, but "only after careful consideration of all historical, clinical and laboratory findings" with "the collaboration of a multidisciplinary team." *Id.* at 1050. Compare the State's expert testimony that shaking may be inferred from subdural hematoma, Tr. 228:22–23, 281:2–3, 177:11–20, and retinal hemorrhage, Tr. 235:4–17, 258:18–259:12, 165:9–16, all on their own. Likewise, the Consensus Statement says that retinal hemorrhage is "specific" for abuse if it is "too numerous to count, multilayered and extending to the ora serrata," Consensus Statement at 1053, while the State's witnesses diagnosed abuse based on a "few" "in each eye," Tr. 258:4–13, 193:21–25.

[9] The State claims that Tristan "contradict[ed]" Haydon's bunk bed fall, Resp. 16, but this is wrong. Though the trial court sustained an objection during opening argument, Tr. 5:3–16, the prosecutor repeated this claim to her first witness, drawing another objection, Tr. 12:7–12. When Tristan finally testified, he was unable to distinguish concepts like "truth" and "lie." Tr. 520:15–25. He also repeatedly conflated the night that Haydon went

157; *Del Prete*, 10 F. Supp. 3d at 955, 957; *Commonwealth v. Epps*, 474 Mass. 743, 763–768, 53 N.E.3d 1247 (Mass. 2016); *People v. Bailey*, 47 Misc.3d 355, 370, 999 N.Y.S.2d 713 (N.Y. Crim. Ct., Monroe Cty. 2014), *aff'd*, 144 A.D.3d 1562 (N.Y. Ct. App., 4th Dept. 2016).

d. Statements About Amount of Force Applied to Haydon Were False

The State wrongly linked testimony about shaking and internal head injuries to the mens rea element of homicide by abuse—extreme indifference to human life. The State and its witnesses spoke of how violent the inferred shaking must have been, *see supra* at 3–4, and made analogies to multi-story falls or high-speed motor vehicle accidents now considered "scientifically unfounded, highly misleading, and in error." Ophoven Decl. ¶¶ 12, 61; Van Ee Ltr. at 9; Br. 37–38. This too is grounds for a new trial. *See People v. Roberts*, 2017 Mich. App. LEXIS 901, at *25 (June 6, 2017).

The State now claims that none of its witnesses testified at trial that massive force had been applied to Haydon. Resp. 42. This is absurd, as the State's whole case was built on inviting the inference that Mr. Reyes applied a great amount of force to Haydon. *See, e.g.*, Tr. 728:12–16; 744:24–745:5.

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to the hospital with an earlier fall from the bunk bed in which Haydon hurt himself, not only failing to "contradict" Mr. Reyes but corroborating dangerous play around the bunk bed. Tr. 526:15-529:14. After three failed attempts to elicit damaging testimony, the prosecutor gave up. With Tristan's testimony a wash, the State is left with a police officer's hearsay retelling of a seven-year-old's statement during a chaotic episode. Resp 16.

3. New Medical Evidence Shows that Shaking Was Not the Necessary or Even Likely Cause of Death

Considered alongside the testimony at trial, the new medical evidence reveals a fall from the bunk bed to be by far the most likely cause of Haydon's death. Br. 39–43. The trial judge almost threw out homicide by abuse on sufficiency grounds. Tr. 727:19–728:3, 729:23, 759:15–760:4. The medical examiner had to be dragged into an SBS opinion. Tr. 302:24–303:9. The neurosurgeon, Dr. Brown, found malignant cerebral edema more problematic than the subdural hematomas. Ex. H. There were significant preexisting head injuries, Ophoven Decl. ¶¶ 13, 56–58, and corroborated testimony about dangerous play around the bunk bed, Br. 6–7. In the light of the new evidence, a bunk bed fall is the best fit.

4. Mr. Reyes Could Not Have Been Convicted Without the Now-Refuted Medical Evidence

Perhaps to deflect attention from shaking, the State spends considerable time discussing other injuries that Haydon sustained at other points in his life. Resp. 1–13. This is unavailing for three reasons.

First, the State focuses on the wrong element of homicide by abuse, "pattern or practice," Resp. 31, as opposed to the "caus[ation]" and "extreme indifference" elements relevant to this Petition. RCW § 9A.32.050(1). The State has already conceded that evidence of other

injuries is only relevant to "pattern or practice,"[10] Br. 43–44, and the medical examiner clearly stated that Haydon's head injuries were the sole cause of death, Tr. 291:6–10. Second, the State's argument is riddled with confirmation and hindsight biases—once one is primed to see Mr. Reyes as an abuser, one tends to find confirmation everywhere. But there is no hint that any doctor, schoolteacher, or family member thought the other injuries were suspicious or that Leon abused Haydon prior to the State's SBS diagnosis. Br. 6, 44–46. Third, the State's theories about these injuries have been inconsistent. For example, the State claimed dramatically and prejudicially at trial that Mr. Reyes "stomped" on Haydon's stomach, Tr. 943:20–24, 946:14–22, 950:4–6, 952:7–9, 970:9–12, a baseless notion that the trial court ultimately excluded, Tr. 1044:24–1045:8. Now the State abandons "stomping" in favor of a new theory—"squeez[ing]." Resp. 31–32. The State's shifting theories should be treated with skepticism.

C. New Evidence Was Discovered After Trial and Could Not Have Been Discovered Before Trial

One of the State's refrains is that Mr. Reyes could have discovered the new medical evidence presented in the Petition prior to his trial in 2007.

[10] "[W]hen we're talking about the State having to prove the element of pattern o[r] practice, we have to show prior injuries, not just how the child died as a result of the blunt force trauma to the head. Any injuries that shows [sic] that the injuries had occurred prior to the 20th is all very relevant and pertinent to the pattern and practice element. If the Court rules—I mean, if the State no longer has homicide by abuse, then none of those prior injuries even become relevant." Tr. 732:10–733:3.

Resp. 27, 36–37, 41. But the groundbreaking Swedish Report issued in ***October 2016***. Ophoven Decl. ¶¶ 15–34. SBS proponents acknowledged that shaking was inconsistent with biomechanical data in ***April 2017***. Van Ee Ltr. at 7–8. Criticism of the current evidence base of SBS reached the highest levels of government in ***September 2016*** and ***March 2015***. Br. 47. The so-called Consensus Statement came out in ***April 2018***.

These recent developments reveal an SBS landscape sharply different from the one that existed at the time of Mr. Reyes's trial. As Dr. Ophoven explains, the 2001 technical statement of the American Academy of Pediatrics ("AAP"), the position paper of the National Association of Medical Examiners, and Department of Justice manuals all backed a strong version of the SBS hypothesis and supported the kinds of statements made at Mr. Reyes's trial.[11] Ophoven Decl. ¶¶ 22–24. Indeed, anyone who dared to challenge SBS at that time would have "look[ed] foolish."[12] Brian K. Holmgren, *Prosecuting the Shaken Infant Case*, in THE SHAKEN BABY SYNDROME: A MULTIDISCIPLINARY APPROACH, at 319 (Stephen Lazoritz and Vincent J. Palusci, eds., 2001).

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[11] Though the State cites isolated examples of courts overturning SBS convictions in 2007 or earlier, it makes no attempt to relate the "new evidence" in those earlier cases to the medical findings presented at Mr. Reyes's trial. Resp. 27, 36–37.

[12] The State's suggestion that Dr. Ramoso testified that SBS was "controversial," Resp. 23, mischaracterizes the testimony. When asked whether "shaken baby syndrome" and "shaken impact baby syndrome" were separate diagnoses, Dr. Ramoso said ***that*** was controversial, not the entire SBS rubric. Tr. 302:21–303:7.

These statements have slowly been rescinded, abandoned, or superseded by standards far more limited in their claims than they used to be. *See* Findley, *supra* note 7, at 7–8. This satisfies RAP 16.4(c)(3).[13] *See Fero*, 192 Wn. App. at 161 ("paradigm shift" was "recent" development "not in place when [defendant] was tried").

II. THE STATE'S RESPONSE DOES NOTHING TO REFUTE THE SUBSTANCE OF MR. REYES'S NEW EVIDENCE

A. Mr. Reyes Did Not Confess To Killing Haydon in Presentence Statements

The State's spurious claim that Mr. Reyes admitted to killing Haydon in presentence statements, Resp. 28–31, is a gross mischaracterization. Mr. Reyes stated that he shook Haydon ***after he had collapsed and gone into seizures*** in an attempt to revive him.[14] *See* Tr. 105:6–12, 115:19–22; Resp. 29 ("shaking him in hopes he would wake up").

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[13] The State's reliance on *Sissoko v. State*, 236 Md. App. 676, 182 A.3d 874 (2018), *cert. den.*, 460 Md. 1, 188 A.3d 917 (2018), is curious. *See* Resp. at 35. The defendant in *Sissoko* won a new trial for the same reason Mr. Reyes should here: the jury did not hear about the present controversy at his original trial. 236 Md. App. at 679. The defendant was convicted on retrial, and should Mr. Reyes prevail on this Petition, nothing prevents the State from trying for the same result here. *In re Faircloth*, 177 Wn. App. 161, 311 P.3d 47 (2013), is distinguishable. *See* Resp. 27–28. There, the petitioner admitted he could have presented a particular defense at trial but chose not to, 177 Wn. App. at 170 n.6, where here the new evidence post-dates Mr. Reyes's trial.

[14] *See* Sentencing Tr. at 18:3–5 ("[T]o sit here and say it was murder, false; to sit here and say it was homicide, false; to sit here and say I beat and abused my son is false."); Resp. app'x at 0019 (PSR) ("Reyes denies ever intentionally hurting H.K. and that his only actions on the night of his death were to help him."). When Mr. Reyes refers to "actions" taken "to save [his] son's life" that may have contributed to Haydon's death, he means his failure to effectively administer CPR. Resp. 29 (quoting PSR) ("doing it wrong"); Tr. 105:23–24 (". . . [H]e didn't know what he was doing.").

Such "resuscitative shakes" are common during apparently life-threatening events, and used to be recommended in response to a non-responsive child. *See* Randy Papetti, THE FORENSIC UNRELIABILITY OF THE SHAKEN BABY SYNDROME 155–156 & n.438 (Christopher Milroy, MD, ed., Acad. Forensic Pathology Int'l, 2018). As stated in the Swedish Report: "If the child was shaken because it suddenly showed signs of being unwell, . . . it is . . . reasonable to assume that the child's condition was already cause for concern before it was shaken and thus the symptoms were not attributable to the shaking." Roberts Decl. Ex. S at 29. The same applies here.[15]

In any case, a confession induced by suggesting that Mr. Reyes's own explanation of events is medically impossible is "worthless as evidence." *Aleman v. Vill. of Hanover Park*, 662 F.3d 897, 907 (7th Cir. 2011) (Posner, J.).[16] What is more, an interview by a corrections officer without counsel present would violate the Sixth Amendment. *See State v. Everybodytalksabout*, 161 Wn.2d 702, 707, 166 P.3d 693 (2007). But the Court need not reach any of this, as the inquiry is whether new evidence would have changed the result of ***the trial Mr. Reyes had***, not some

[15] Reyes's desperate attempt to wake Haydon, after his collapse, is nothing like *State v. Adams*, 138 Wn. App. 36, 42, 50, 155 P.3d 989 (2007) (Resp. at 30), in which the defendant admitted to headbutting his infant son and shoving socks in his mouth, prior to collapse, just to get him to stop crying.

[16] *See also People v. Thomas*, 8 N.E.3d 308, 316, 22 N.Y.3d 629 (N.Y. 2014) (explanations for symptoms were "suggested" by interrogators); *State v. Hogeland*, 285 Ore. App. 108, 395 P.3d 960, 964 (Or. Ct. App. 2017) (same).

hypothetical future trial. *See State v. Ramel*, 65 Wn.2d 326, 327, 396 P.2d 988 (1964) ("there would not have been a conviction" if new evidence "had been available"); *In re Bradford*, 140 Wn. App. 124, 131, 165 P.3d 31 (2007) (similar).

B. The Woods Declaration Does Not Meet the Requirements of ER 702 or *Frye*

Curiously, the State does not present Dr. Duralde, Dr. Paschall, or Dr. Ramoso to vouch for their previous statements. Instead, the State submits a new doctor, Dr. Elizabeth Woods. *See* Woods Decl. But the State fails to show that Dr. Woods is qualified under ER 702. *State v. Copeland*, 130 Wn.2d 244, 256, 922 P.2d 1304 (1996). The State also fails to show that Dr. Woods's opinion is based on generally accepted principles or methods under the *Frye* rule. *State v. Cauthron*, 120 Wn.2d 879, 883–84, 846 P.2d 502 (1993) (quoting *Frye v. United States*, 293 Fed. 1013, 1014 (D.C. Cir. 1923)), *overruled in part on other grounds, State v. Buckner*, 133 Wn.2d 63, 941 P.2d 667 (1997). Accordingly, the State fails to present facts sufficient to show that her opinion would be admissible at a reference hearing. *In re Rice*, 118 Wn.2d 876, 886–87, 828 P.2d 1086 (1992).

1. Dr. Woods Is Unqualified To Testify as to Forensic Pathology or SBS/AHT

To testify in this matter, an expert witness must have "genuine expertise" in forensic pathology and the science behind SBS/AHT. *See*

Stephan R. Paul & Sandeep K. Narang, AAP Committee on Medical Liability and Risk Management, *Expert Witness Participation in Civil and Criminal Proceedings*, PEDIATRICS, Vol. 139, No. 3, March 2017, at 1, 2, https://pediatrics.aappublications.org/content/pediatrics/139/3/e20163862.full.pdf. According to the AAP policy statement on expert witness participation, physicians who testify as experts should "[b]e board certified by the relevant board" or possess "sufficient training and clinical experience . . . to be qualified and accepted as an expert by the relevant specialty board(s)." *Id*. Dr. Woods is not board-certified in child abuse.

Moreover, the AAP statement provides that only physicians with "special knowledge and/or extensive experience in the field" should testify in child abuse and neglect cases. But Dr. Woods lacks experience with forensic pathology or postmortem examination. Woods Decl. ¶ 3. Dr. Woods has been in the child abuse field for only two years, *id.*, and lacks any special knowledge of SBS/AHT. At most, she attended a couple of conferences. *Id.* Though Dr. Woods notes that she is "familiar" with the "literature," genuine expertise or special knowledge is not apparent from her report—in fact, she cites not a single SBS/AHT article by title and journal. *Id.* ¶ 4. Dr. Woods falls short of qualifying as an expert in this complex homicide by abuse case. *See, e.g.*, *In re Pers. Restraint of Morris*, 189 Wn. App. 484, 494–95, 355 P.3d 355 (2015) (40 years of practice, with

28 as a specialist; two board certifications); *State v. Melendrez*, 2015 Wash. App. LEXIS 3072, at *20 (Dec. 28, 2015) (7 years and 900 examinations).

2. The Woods Declaration Is Conclusory, Speculative, and Unhelpful

Dr. Woods' declaration blesses the testimony of Dr. Paschall and Dr. Duralde *in toto* and rejects the declaration of Dr. Ophoven *in toto* without any analysis or explanation. Woods Decl. ¶¶ 10–12. There is no evaluation of Haydon's neurological or ophthalmological injuries, no meaningful rebuttal of Dr. Ophoven's or Dr. Van Ee's conclusions, and no real engagement with the scientific literature. This is not helpful.[17] *See Queen City Farms, Inc. v. Cent. Nat'l Ins. Co.*, 126 Wn.2d 50, 103–104, 882 P.2d 703 (1994) (rejecting expert opinion "no basis other than theoretical speculation" and lacking "sufficient foundational facts").[18]

Dr. Woods's analysis-free diagnosis of "non-accidental trauma over a period of time," Woods Decl. ¶ 17, is so vague as to be meaningless. Such "conclusory or speculative expert opinions lacking an adequate foundation

[17] Dr. Woods' declaration is also filled with inaccuracies. For example, Dr. Woods states that Haydon's abdominal injury was "acute," Woods Decl. ¶ 17, while the medical examiner, Dr. Ramoso, testified that it was days to weeks old and did not contribute to Haydon's death, Resp. 22–23. Dr. Woods' failure to properly distinguish between new and old injuries and injuries that did and did not contribute to the fatal event is troubling.

[18] *See also State v. Lewis*, 141 Wn. App. 367, 389, 166 P.3d 786 (2007) (no "speculative testimony," even "from an expert"); *Miller v. Likins*, 109 Wn. App. 140, 148, 34 P.3d 835 (2001) ("conclusory or speculative expert opinions lacking an adequate foundation will not be admitted").

will not be admitted." *Stedman v. Cooper*, 172 Wn. App. 9, 16, 292 P.3d 764 (2012) (citation omitted). Indeed, a bare declaration of abuse with no scientific support or analysis usurps the jury's role in determining guilt. *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987); *see also State v. Quaale*, 182 Wn.2d 191, 199–202, 340 P.3d 213 (2014) (rejecting opinion stated "in absolute terms" and implying "scientifically certain results"); *cf.* Tr. of Ruling at 2:2–4, 2:21–25, *State v. Ally*, CR 12-8143 (S.D. Cir. Ct. Feb. 18, 2014) (excluding "the term 'abusive head trauma'" and opinion that "abuse occurred") (Supplemental Roberts Declaration, Ex. W).

3. The State's Expert Evidence Is No Longer Generally Accepted Under *Frye*

Under the *Frye* rule, "scientific evidence will be admitted only if it is generally accepted in the relevant scientific community." *Cauthron*, 120 Wn.2d at 883–84. Dr. Woods's declaration not only fails to meaningfully rebut Dr. Ophoven's or Dr. Van Ee's opinions, it demonstrates all by itself that the opinions presented at Mr. Reyes's trial—which Dr. Woods endorses as currently valid, ¶¶ 10–11—are no longer generally accepted, even by child abuse pediatricians. And it does so by citing the Consensus Statement published by the Society for Pediatric Radiology. *See supra* n.7. Even where a scientific method or principle has been previously admitted under *Frye*, "courts must still undertake the *Frye* analysis if one party produces

new evidence which seriously questions the continued general acceptance or lack of acceptance as to that theory within the relevant scientific community." *Cauthron*, 120 Wn.2d at 888 n.3. It is unlikely that the State will be able to get away with its overbroad claims again.

Not only does Dr. Woods's endorsement of the State's SBS theory fail under *Frye*, but the pediatric "consensus" she relies on is not itself based on generally accepted principles. In explaining why the SBS hypothesis rests on "low quality evidence," the Swedish Report's authors noted serious flaws in its only scientific support—a handful of studies based on "confessions." Niels Lynøe, et al., *Insufficient Evidence for "Shaken Baby Syndrome"—A Systematic Review*, 106 ACTA PAEDIATR. 1021, 1025 & nn.41–42 (2017). The Consensus Statement cites the same flawed studies, Consensus Statement at 1051 & nn.30–32, but makes no attempt to address the Swedish Report's findings, *id.* at 1059 & nn.203, 206–210. Absent "empirical evidence" to suggest SBS is valid—and facing plenty to the contrary—the "consensus" means nothing. Ex. T (PCAST Report) at 6.

The State has failed to present facts permitting an inference that Dr. Woods's opinions are admissible under *Frye*. *See* Order at 2, *State v. Johnson*, No. 15-CF-018630-A (Fla. Cir. Ct. Oct. 17, 2018) (granting motion in limine to exclude references to SBS) (Supplemental Roberts Declaration, Ex. X); *State v. Jacoby*, 2018 WL 5098763, at *13 (N.J. Super.

Ct. Aug. 17, 2018) (excluding under *Frye* where no "general consensus" that shaking alone causes subdural hematoma and retinal hemorrhage); *cf.* Letter from Court at 8–9, *State v. Two Bulls*, Cr. 10-2890 (S.D. Cir. Ct. Apr. 27, 2011) (SBS evidence inadmissible under *Daubert*) (Supplemental Roberts Declaration, Ex. Y).

C. A Full *Frye* Analysis of the Ophoven Declaration Is Neither Necessary nor Appropriate at This Stage

In arguing that Dr. Ophoven's declaration fails under *Frye*, the State ignores the procedural posture of this Petition. To the extent *Frye* applies and Mr. Reyes makes out a prima facie case for admissibility, the most the State can do is show that general acceptance is a "disputed question[] of fact" to be resolved at a reference hearing. RAP 16.9(a); *see also State v. Martin*, 169 Wn. App. 620, 626, 281 P.3d 315 (2012) (hearing required). The State fails to meet this burden for both Dr. Ophoven and Dr. Van Ee.

The State acknowledges that only "new methods of proof or new scientific principles" are subject to a *Frye* analysis. Resp. 33 (quoting *State v. Lizarraga*, 191 Wn. App. 530, 566, 364 P.3d 810 (2015)). The State omits, however, that an expert's conclusion regarding "the specific causal connection" between the injury at issue and its potential cause need not be "generally accepted." *L.M. v. Hamilton*, 193 Wn.2d 113, 130-131, 436 P.3d 803 (2019). Accordingly, the State does not and cannot argue that Dr.

Ophoven's ultimate conclusions—*e.g.*, that the "medical testimony" at trial "does not allow a forensic pathologist to conclude with reasonable medical certainty that Haydon suffered abusive injuries," Ophoven Decl. ¶ 68—implicate *Frye*.

The State also does not—and cannot—argue that Dr. Ophoven used novel "methods." Dr. Ophoven merely reviewed the "relevant medical literature" in forensic pathology, biomechanical engineering, and others, "as well as case studies appearing in that literature," and drew inferences from it. *President & Dirs. of Georgetown Coll. v. Wheeler*, 75 A.3d 280, 292 (D.C. 2013). The sources reviewed include a seminal textbook on postmortem examination of the brain. Ophoven Decl. ¶¶ 36–38, 42–43, 45, 49–50 & nn.26–27, 29, 35–36, 39, 41, 44–45 (citing Jan E. Leestma, FORENSIC NEUROPATHOLOGY (2014)). This is clearly a "generally accepted" means of drawing a conclusion "regarding medical causation." *Georgetown*, 75 A.3d at 292. The State instead isolates a handful of statements from context and asserts that each is not "generally accepted." Resp. 38–42 (citing Ophoven Decl. ¶¶ 36, 40–42, 48, 52–53). These statements, however, are not novel "methods" or "principles" subject to *Frye*, but straightforward inferences from the relevant medical literature. "*Frye* does not require every deduction drawn from generally accepted theories to be generally accepted," *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593,

611–12, 260 P.3d 857 (2011), and the State finds no specific fault with the articles cited.[19]

Not only does the Ophoven Declaration make out a prima facie case for admissibility under *Frye*, but the State mounts no meaningful challenge to it. Resp. 38–42; *State v. Gregory*, 158 Wn.2d 759, 833, 147 P.3d 1201 (2006) (not "a single appellate case or scientific article" in rebuttal), *overruled in part on other grounds*, *State v. W.R.*, 181 Wn.2d 757, 336 P.3d 1134 (2014); *State v. Hayden*, 90 Wn. App. 100, 107, 950 P.2d 1024 (1998) (no "literature or other evidence"). Because the State offers no nonconclusory reason to think that any method or principle on which Dr. Ophoven relies is not "generally accepted," it fails to raise a "disputed question[] of fact" as to admissibility under *Frye*.

D. The State Wrongly Ignores the Van Ee Letter

The State's Response ignores the Van Ee Letter altogether, presumably on the ground that it is not technically "evidence." Resp. 25–26. But at the Petition stage, Mr. Reyes need only show that he can present "competent and admissible evidence" to prove his allegations if a reference

[19] Even if Dr. Ophoven's inferences are somehow scientific "principles" subject to *Frye*, that she drew them from numerous forensic pathology and biomechanics publications suffices at this stage to show general acceptance in those fields. *See L.M. v. Hamilton*, 200 Wn. App. 535, 549, 402 P.3d 870 (2017) (general acceptance based on "[e]xtensive peer reviewed literature"), *aff'd*, 193 Wn.2d 113 (2019); *Advanced Health Care, Inc. v. Guscott*, 173 Wn. App. 857, 872, 295 P.3d 816 (2013) ("articles and publications").

hearing is granted. *In re Crow*, 187 Wn. App. 414, 420, 349 P.3d 902 (2015) (citing *Rice*, 118 Wn.2d at 886). Where Mr. Reyes relies on "knowledge in the possession of others," such as expert witnesses, Mr. Reyes may submit either "their affidavits," as he did for Dr. Ophoven, or "other corroborative evidence" of what they will say, as he did for Dr. Van Ee. Both are appropriate. *Rice*, 118 Wn.2d at 886. Having ignored the Van Ee Letter, the State leaves unrebutted important new biomechanical evidence that would have likely changed the result of Mr. Reyes's trial.

CONCLUSION

Mr. Reyes respectfully requests that the Court grant the Petition and vacate his conviction under RAP 16.4(c)(3). The death of a child is one of life's most devastating tragedies. But the mere fact of a conviction does not mean that justice has been done for the child, his family, or the accused. Mr. Reyes is mindful of legitimate interests in punishment and finality. But the State has already extracted thirteen years of punishment from him for an crime he did not commit. The Petition should be granted.[20]

[20] The Petition may be granted without a reference hearing because neither the Response nor the Woods Declaration raises any "material disputed questions of fact" that "cannot be determined solely on the record." *Rice*, 118 Wn.2d at 885-886; RAP 16.11(b). A reference hearing should not afford the State a second chance to raise issues it failed to raise in its Response. *Cowiche Canyon*, 118 Wn.2d at 809. Petitioner preserves all arguments with regard to his right to new sentencing, Br. 49–50, which the State fails to address.

Dated: October 23, 2019

By: _____

John C. Roberts Jr., WSBA #44945
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Counsel for Petitioner Leon L. Reyes

CERTIFICATE OF SERVICE

I certify that on the 23rd day of October, 2019, I caused a true and correct copy of Petitioner's Reply in Support of Personal Restraint Petition to be served on the following via email and by placing it in the U.S. mail:

Mark Von Wahlde
Deputy Prosecuting Attorney
PIERCE COUNTY PROSECUTING ATTORNEY'S OFFICE
930 Tacoma Avenue South, Room 946
Tacoma, WA 98402

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed on October 23, 2019 at Seattle, Washington.

By: _____

John C. Roberts Jr., WSBA #44945
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October 23, 2019 - 2:42 PM

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

IN RE THE PERSONAL RESTRAINT OF LEON L. REYES, *Petitioner*.	NO. 524494-0 **SUPPLEMENTAL DECLARATION OF JOHN C. ROBERTS JR.**

I, John C. Roberts Jr., declare:

1. I am an associate attorney at the law firm of Wilson Sonsini Goodrich & Rosati P.C. and counsel for petitioner Leon L. Reyes. Unless otherwise stated, I have personal knowledge of the following facts and could competently testify thereto.

2. Attached as **Exhibit W** is a true and correct copy of a transcript ruling in *State v. Ally*, CR 12-8143 (S.D. Cir. Ct. Feb. 18, 2014).

3. Attached as **Exhibit X** is a true and correct copy of an order in *State v. Johnson*, No. 15-CF-018630-A (Fla. Cir. Ct. Oct. 17, 2018).

4. Attached as **Exhibit Y** is a true and correct copy of a letter ruling in *State v. Two Bulls*, Cr. 10-2890 (S.D. Cir. Ct. Apr. 27, 2011).

5. I declare under penalty of perjury under the laws of the State of Washington that I believe the foregoing is true and accurate.

Dated: October 23, 2019

By: _____

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Counsel for Petitioner Leon L. Reyes

CERTIFICATE OF SERVICE

I certify that on the 23rd day of October, 2019, I caused a true and correct copy of the Supplemental Declaration of John C. Roberts Jr. to be served on the following via email and by placing it in the U.S. mail:

Mark Von Wahlde
Deputy Prosecuting Attorney
PIERCE COUNTY PROSECUTING ATTORNEY'S OFFICE
930 Tacoma Avenue South, Room 946
Tacoma, WA 98402

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed on October 23, 2019 at Seattle, Washington.

By: _____

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Counsel for Petitioner Leon L. Reyes

EXHIBIT W

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT

SECOND JUDICIAL CIRCUIT

* *

STATE OF SOUTH DAKOTA, *

Plaintiff, * CR. 12-8143

v. *

MANAGABE ALLY, *

Defendant. *

MOTION IN LIMINE
RE OPINION TESTIMONY

* *

Managabe Ally, by his attorneys, Traci Smith and Kenny Jacobs of the Minnehaha County Public Defender's Office, respectfully moves the Court for an Order prohibiting the prosecutor from eliciting opinion testimony as to the cause of death or timing of the injuries to the decedent unless that witness has been qualified as a specialist in the field of pathology or forensic pathology, on the grounds that to allow such testimony would violate the standard for admission of expert testimony as set forth in Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993) and State v. Hofer, 512 N.W. 2d 482, 484 (S.D. 1994).

To date, Dr. Kenneth Snell, a forensic pathologist and the county coroner, is the only State's witness of which defense counsel has been made aware who would be qualified to opine as to cause of death or timing of injuries.

THEREFORE, Defendant respectfully requests an Order prohibiting the State from eliciting opinion testimony, other than from Dr. Snell, as to cause of death or timing of injuries, unless a showing is made, outside the presence of the jury that would allow the Court to exercise its gatekeeping function as set forth in Kuper v. Lincoln-Union Electric, 557 N.W. 2d 748, 760 (S.D. 1996).

Respectfully submitted this ___ day of May, 2013.

_____
Traci Smith
Minnehaha County Public Defender

_____
Kenny Jacobs
Deputy Public Defender
Attorneys for Defendant

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT

SECOND JUDICIAL CIRCUIT

* *

STATE OF SOUTH DAKOTA, *

Plaintiff, * CR. 12-8143

v. *

MANAGABE ALLY, *

Defendant. *

MOTION IN LIMINE
RE OPINION TESTIMONY
(AMENDED)

* *

Managabe Ally, by his attorneys, Traci Smith and Kenny Jacobs of the Minnehaha County Public Defender's Office, respectfully moves the Court for an Order prohibiting the prosecutor from eliciting opinion testimony as to the cause of death or timing of the injuries to the decedent unless that witness has been qualified as a specialist in the field of pathology or forensic pathology, on the grounds that to allow such testimony would violate the standard for admission of expert testimony as set forth in Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993) and State v. Hofer, 512 N.W. 2d 482, 484 (S.D. 1994).

Further, Defendant respectfully moves the Court for an Order prohibiting the prosecutor from eliciting opinion testimony that would invade the province of the jury, or attempting to offer any criminal analysis of the case through an

expert witness under the guise of a medical diagnosis.

Specifically, the Defendant would respectfully request the Court issue an order precluding the State from offering any witness testimony that the child suffered from "abusive head trauma." This line of testimony is subject to a legal analysis based on witness statements, and cannot be made exclusively on a physical diagnosis. None of the state's witnesses are qualified to offer any expert opinion that the child suffered from "Abusive head trauma." Their medical conclusions should be limited to their medical diagnosis. In the absence of scientific and kinetic analysis, the defense is not aware of any medical clinician who can offer anything more than a medical diagnosis, which is that the child suffered from blunt force trauma to the head, and/or a traumatic brain injury.

THEREFORE, Defendant respectfully requests an Order prohibiting the following:

(1) That the State be prohibited from eliciting opinion testimony, other than from Dr. Snell, as to cause of death or timing of injuries, and that unless a showing is made, outside the presence of the jury that would allow the Court to exercise its gatekeeping function as set forth in Kuper v. Lincoln-Union Electric, 557 N.W. 2d 748, 760 (S.D. 1996).

(2) That the State be prohibited from eliciting any expert opinion testimony from any expert that the child suffered from

"abusive head trauma," in the absence of a showing that the medical opinion constitutes a specific "medical diagnosis" rather than a category of abuse that includes a criminal analysis, and that the witness is qualified to offer such an opinion.

Allowing the jury to hear unfounded opinion testimony would violate the Due Process and Confrontation Clauses of both the federal and state constitutions. In order to avoid the inevitable prejudice from having the jury hear improper opinion testimony, the defendant respectfuly requests the Court conduct a hearing outside of the presence of the jury before any such expert testimony is proffered by the state.

Respectfully submitted this _4th__ day of February, 2014.

_____
Traci Smith
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February 17, 2014

The Honorable Mark Salter
Circuit Court Judge
Minnehaha County Courthouse
425 N. Dakota Ave.
Sioux Falls, SD 57104

Re: State v. Manegabe Ally, Cr. 12-8143

Letter Brief in Support of Defendant's
Motion in Limine re: Opinion Testimony

Your Honor:

The following is Defendant's letter-brief in support of the Motion in Limine re: Opinion Testimony previously filed and originally set for hearing on February 13, 2014, and held over until further hearing on February 18, 2014 at 8:30 a.m.. The Statement of Facts below is what is expected to be set forth at the hearing.

Facts

On December 24, 2012, Metro Communications received a call for help at approximately 1442. Based on this call, first responders with the Sioux Falls Fire Department, Sioux Falls Police Department, and Rural Metro Ambulance were dispatched to 401 Sycamore Ave #104. First responders arrived to find M.K. lying on his back on the floor of a bedroom near the foot of the bed. Officers also arrived and spoke briefly with Manegabe Ally, the adult present in the apartment. While Officers spoke with Mr. Ally, M.K. was transported to Avera McKennan Hospital.

About 25 hours after the initial call, M.K. was declared to be deceased. Subsequent investigation followed including an autopsy by Dr. Kenneth Snell on December 26, 2012. In both the provisional anatomic diagnosis and the final post mortem diagnosis, Dr. Snell indicated the main trauma to M.K. was blunt force injury of the head, but listed the cause of death as abusive head trauma.

Anaylsis

The Defendant has not changed his position as far as seeking to preclude Dr. Snell, or any of the other State witnesses from testifying. Defendant is only asking the Court to make a preliminary determination as to the qualifications of each expert who the State seeks to call to issue an expert opinion. This is to ensure that no expert is permitted to issue a diagnostic impression that exceeds his or her qualifications or offer testimony that invades the province of the jury.

Dr. Snell can certainly testify as to his qualifications and observations made in the course of his employment as a forensic pathologist. However, he should not be able to provide a "medical opinion" that the child died from child abuse at the exclusion of all other possibilities in the absence of the necessary expert qualifications to do so.

Federal Rule of Evidence 702 permits a district court to allow the testimony of a witness whose knowledge, skill, training, experience, or education will assist a trier of fact in understanding the evidence or to determine a fact in issue. See Fed.R.Evid. 702. Defendant would argue that the ultimate issue doctrine does not just go to guilt or innocence of a defendant, but relates to any ultimate issue in a case. See State v. Werner, 482 NW2d 286, 291 (SD 1992)(Defendant's expert was not permitted to testify as to an ultimate issue in the case, which was whether the testifying witnesses had in fact been influenced by the DCI agent. This was a determination for the jury as trier of fact. citing McCafferty v. Solem, 449 N.W.2d 590 (S.D.1989)); The Court held that any small aid the expert testimony might have provided would be outweighed by the unfair prejudice which might have resulted because of "the aura of reliability and trustworthiness" surrounding the scientific evidence. Werner, 482 NW2d at 292 (citing 463 N.W.2d at 678). See also, State v. Hill, 462 NW2d 674 (SD 1990) (exclusion of eye-witness identification expert was not improper as the expression of opinions as to other witnesses violates public policy).

Recently, in State v. Buchholtz, 2013 S.D. 93, the South Dakota Supreme Court reversed a conviction and upheld the premise that "[o]pinions merely telling a jury what result to reach are impermissible as intrusive, notwithstanding the repeal of the ultimate issue rule." Quoting State v. Guthrie, 2001 S.D. 61, ¶33, 627 N.W.2d 401, 415 (SD 2001) (citing Zens v. Harrison, 538 NW2d 794, 795 (SD 1995); McCormick on Evidence § 12 (4th ed 1992); State v. Barber, 1996 SD 96, ¶ 38, 552 N.W.2d 817, 823). In Guthrie, although the expert was not asked to specifically address the Defendant's guilt or innocence, the Court held that his opinion approached the impermissible when he told the jury that "Sharon Guthrie did not die by suicide." Id. at 415. See Zens, 538 N.W.2d at 796. The Court found the testimony to be impermissibly intrusive and inadmissible under the Daubert standard, but also provided, [i]t left the inference that she was murdered, or perhaps died accidentally, a far less likely deduction in view of the pathologist's conclusions. It is one thing to state that few of the factors typically found in suicide can be seen in this case. It is another thing to declare as scientific fact that based on a psychological profile the death was not suicide. One assists the jury, but allows it to draw its own inferences from the psychological knowledge imparted. The other simply tells the jury what inference to draw.

Id.

Here, as a corner, Dr. Snell's testimony should be limited to his findings that M.K. died of blunt force trauma of the head. When asked about the degree of force necessary to cause a depression injury like one in this case by Don Hanson during the Grand Jury proceedings on January 9, 2013, Dr. Snell responded with "that is one of those things that the biomechanical engineers will try their best to create… It would take, um, more force that it would for you if you fell simply and fell and hit your head on the floor because that's a simple skull fracture. This is actually a depressed skull fracture that takes much more energy, much more force to get a depressed skull fracture over a simple linear skull fracture. Beyond that at this point, I don't – I'm not going to be able to further give numbers to that effect." Grand Jury Hr'g Tr. 50 (January 9, 2013).

Conclusion

Defendant is not seeking an order from the Court to exclude testimony by Dr. Snell as to his observations during the course of the autopsy in this case. However, by allowing Dr. Snell to testify that the cause of death in this case is "abusive head trauma" as opposed to "blunt force trauma" would give a similar inference of child abuse to the jury that the South Dakota Supreme Court excluded in both Buchholtz and Guthrie. Therefore, Defendant is seeking an order only to exclude Dr. Snell and any other witness from using the term "abusive head trauma" as a diagnosis.

Sincerely,

Traci Smith
Chief Public Defender

Kenny Jacobs
Deputy Public Defender

Cc: Mr. Don Hanson
Ms. Tara Palimotto
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Sioux Falls, SD 57104

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS
COUNTY OF MINNEHAHA) SECOND JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,) CR 12-8143
)
Plaintiff,)
) DAUBERT HEARING
vs.)
)
MANEGABE CHEBEA ALLY)
)
Defendant.)

BEFORE: THE HONORABLE MARK SALTER, Circuit Judge, at Sioux Falls, South Dakota, on the 18th of February, 2014.

APPEARANCES: Donald Hanson & Tara Palmiotto
Minnehaha County State's Attorney's Office
Sioux Falls, South Dakota

Appearing on behalf of the plaintiff;

Traci Smith & Kenny Jacobs
Minnehaha County Public Defender's Office
Sioux Falls, South Dakota

Appearing on behalf of the defendant.

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1 THE COURT: Good morning. We are here this morning for
2 a hearing, a Daubert hearing, pursuant to the defense
3 motion. Dr. Snell is here. I'd like to get to his
4 testimony as quickly as we can. Does either party have any
5 brief opening comments they wish to make before we get to
6 that testimony? Mr. Hanson.
7 MR. HANSON: No, Your Honor. We'll rely upon the
8 State's brief.
9 THE COURT: Thank you. Ms. Smith or Mr. Jacobs.
10 MR. JACOBS: It will be me, Your Honor. Just that I
11 did e-mail a PDF format of a short brief to the Court
12 yesterday. I wanted to make sure the Court got that. Also,
13 we got some articles that Dr. Snell is going to be relying
14 on today at about five or six -- after five last night, so
15 I've had a chance to look take a look at those, but not very
16 in-depth because of the late nature of getting those. So I
17 just wanted to make the Court aware of that.
18 THE COURT: I understand. I did read your brief and
19 the one Ms. Palmiotto sent as well. Let's go ahead with
20 Dr. Snell's testimony, Mr. Hanson.
21 MR. HANSON: The State calls Kenneth Snell.
22 **KENNETH SNELL**
23 Called as a witness, having been first duly sworn, testified
24 as follows:
25 **DIRECT EXAMINATION**

1 Q (BY MR. HANSON) Would you state your name and spell
2 your first and last name?
3 A Yes. It is Kenneth Snell. S-N-E-L-L.
4 Q And what is your current occupation?
5 A I am currently employed as the Minnehaha County Coroner
6 and Medical Examiner.
7 Q What are your duties as the coroner and medical
8 examiner for Minnehaha County?
9 A I serve as the coroner, which has the legal
10 responsibility for determining the cause and manner of death
11 in cases that die in this county. Not under the care of a
12 physician or that are nonnatural in manner.
13 Q What is the difference between cause of death and
14 manner of death?
15 A The cause of death is the physiological derangement
16 that results in the death of an individual. While the
17 manner of death is interpretation of that cause that was
18 listed in relation to the events that took place leading up
19 to the death.
20 Q Do you hold any professional licenses?
21 A I'm licensed by the South Dakota Medical Board to
22 practice medicine in South Dakota.
23 Q Are you currently or have you previously been licensed
24 in other states?
25 A Yes. Alabama, North Carolina, and Tennessee.

1 Q Can you tell us your educational background?
2 A I have a Bachelor's of Science Degree in Biomedical
3 Sciences from the University of South Alabama. From the
4 same institution I have a Doctorate of Medicine and trained
5 in Anatomic and Clinical Pathology. And from the University
6 of North Carolina I have a fellowship training in Forensic
7 Pathology and I'm board certified in Anatomic, Clinical, and
8 Forensic Pathology.
9 Q What is pathology?
10 A Pathology is the study of the disease processes that
11 affect the body and the outcome of those disease processes.
12 Q Does that include things such as trauma?
13 A A subspecialty training of pathology is forensic
14 pathology which specializes in the effects of trauma on the
15 body.
16 Q Can you give us a summation of your professional job
17 experience?
18 A I have worked in Charlotte, North Carolina as an
19 associate medical examiner. I worked in Memphis, Tennessee
20 as the deputy chief medical examiner. And I served in
21 Alabama as a senior medical examiner, deputy chief medical
22 examiner, and chief state medical examiner. And then I
23 moved here in January of 2011 to serve as the coroner and
24 medical examiner for this county.
25 Q Were your previous medical examiner duties similar to

1 those that you described here in South Dakota?
2 A Yes. With the addition of supervision of other medical
3 examiners and staff.
4 Q Have you also been involved in some teaching
5 experience?
6 A Yes. I lecture to law enforcement, to coroners, and
7 currently here I lecture to medical students and pathology
8 residents.
9 MR. HANSON: May I approach, Your Honor?
10 THE COURT: Yes.
11 Q (BY MR. HANSON) Dr. Snell, I'll show you what I have
12 marked Exhibit 1, can you tell the judge what that is?
13 A Yes. This is the my CV reflecting my current and past
14 experiences.
15 MR. HANSON: State would offer Exhibit 1.
16 MR. JACOBS: I have no objection, Your Honor.
17 THE COURT: Thank you, Mr. Jacobs. Exhibit 1 is
18 received.
19 (State's Exhibit Number 1 received into evidence.)
20 Q (BY MR. HANSON) Dr. Snell, does your professional
21 experience include the performance of autopsies?
22 A Yes, sir.
23 Q Do you know approximately how many autopsies you have
24 performed or participated in?
25 A Approximately 1,500.

1 Q Did those include autopsies of children under the age
2 of two?
3 A Yes, sir.
4 Q Do you know a number approximation of how many of those
5 you have performed?
6 A Around 150.
7 Q And of the autopsies you participated in did those
8 include investigations of death resulting from head trauma?
9 A Yes, sir.
10 Q And also including children under the age of two who
11 have died from head trauma?
12 A Yes, sir.
13 Q And did that include Merveil Kasanga?
14 A Yes, sir.
15 Q And do you know how many of head traumas, including
16 children, you have investigated?
17 A It would be in the several hundred range.
18 Unfortunately, I don't keep track of strictly head injuries
19 including children, but it would be several hundred of them.
20 Q Doctor, have you previously been qualified to testify
21 as an expert in the area of forensic pathology?
22 A Yes. In each of the states that I've practiced.
23 Q Have you also testified in federal courts?
24 A Yes, sir.
25 Q Do you know how many times you've testified as an

1 expert?
2 A If I remember correctly, it's around 300 times.
3 Q Have you testified previously as to the cause of death?
4 A Yes, sir.
5 Q Have you testified previously as to the manner of death
6 or injury?
7 A Yes, sir.
8 Q And do those cases include testimony concerning head
9 trauma?
10 A Some of them have. Yes, sir.
11 Q Would that include head trauma to children under the
12 age of two?
13 A Yes, sir.
14 Q Doctor, in addition to your training and experience in
15 the cause and manner of death, have you also had occasion to
16 review medical literature in that area?
17 A As part of my continual education I routinely review
18 articles on cause, manner of death, and injuries.
19 Q What is the source of those materials?
20 A They can be published text or they can be peer review
21 journal articles. And they can also be presentations at
22 national meetings.
23 Q What do you mean when you say "peer reviewed articles?"
24 A A peer review article is an article that's submitted
25 for publication and then is provided to several other

1 physicians in the same field to review, to offer comments
2 and suggestions. And those comments and suggestions are
3 then given to the author to address prior to the article
4 being allowed to be published, if it is allowed to be
5 published.
6 Q And are these articles relied upon by yourself and
7 others in the medical community for your continuing
8 education?
9 THE INTERPRETOR: Can you repeat that, please?
10 Q (BY MR. HANSON) Are these articles relied upon yourself
11 and others in the medical community for your continued
12 education?
13 A Yes, sir.
14 Q Dr. Snell, are you familiar with the term 'abusive head
15 trauma' or injury?
16 A Yes, sir.
17 Q And in the medical community how is that term used?
18 A In the medical field the term 'abusive head injury' is
19 used by physicians to document a constellation of injuries
20 to the head and the brain that result from being inflicted
21 by another individual onto a child or infant.
22 Q Does the term encompasses both the cause and manner of
23 the injury?
24 A Yes, sir, it does.
25 Q How long has that term been in use in the medical

1 community?
2 A The term was officially put into use by the American
3 Academy of Pediatrics in 2009.
4 Q Is it considered a valid diagnosis?
5 A Yes. Both in the clinical and in the forensics fields
6 it is considered to be a diagnostic terminology that is used
7 to describe the findings as I mentioned.
8 Q Does it currently have widespread use in both clinical
9 and research or studies?
10 A Yes. With the caveat that some literature instead of
11 using the term 'abusive head injury,' they prefer the term
12 'non-accidental head injury.'
13 Q Would non-accidental head injury then be the same
14 diagnosis as abusive head injury?
15 A Yes. With the minor caveat that it does not include a
16 built-in manner of death.
17 Q And by "built-in manner of death," what does that mean?
18 A The word 'abusive' indicates that it is a head injury
19 that's inflicted by another individual. The definition in
20 the manner of death for homicide means the injury's
21 inflicted by another individual. I just wanted to say by
22 having the word abusive you're already including the manner
23 of death. Whereas when you're saying 'non-accidental,'
24 you're saying it's not an accident which could leave suicide
25 homicide, or undetermined.

1 Q When reviewing some of the articles I saw the
2 abbreviation AHT; what is that an abbreviation for?
3 A AHT represents accidental head trauma.
4 Q And when we say NAHT, what does that signify?
5 A Non-accidental head trauma.
6 Q Dr. Snell, in your review of the literature, did you
7 discover literature and studies comparing short or simple
8 falls with abusive head trauma or non-accidental head
9 trauma?
10 A There's a large number of articles that look at the
11 difference between short falls and inflicted or
12 non-accidental or abusive head injury. These articles are
13 both from the clinical setting, the research setting.
14 Q And what do we mean by "clinical?"
15 A Clinical represents cases that are brought into the
16 hospital setting where a physician treats the individual.
17 They also can represent cases that are brought into a
18 forensic pathologist for examination.
19 Q Doctor, does this literature, when combined with your
20 training and experience, provide you with a methodology to
21 distinguish between head trauma resulting from short or
22 simple falls as distinguished from non-accidental head
23 trauma?
24 A Yes, sir. It allows us to look at the injuries that
25 are seen, the symptomology of the patient, and the extent of

1 both the symptoms and the injuries seen. Based on that a
2 distinction should be able to be made by a trained forensic
3 pathologist.
4 Q And have those articles been subject to peer review
5 within the medical community?
6 THE INTERPRETOR: I'm sorry.
7 Q (BY MR. HANSON) Have those articles been subject to
8 peer review?
9 A The majority of the articles I use have been. However,
10 there are a few articles that are presented at national
11 meetings that are not peer reviewed. Those are used with a
12 step of caution because they are not peer reviewed.
13 Q Has the medical science of distinguishing between short
14 or simple falls and non-accidental head trauma gained
15 acceptance within the medical community?
16 A Yes, sir. The literature that has been published has
17 made it easier for us to understand what happens in short
18 falls, the extent of injuries that can occur and do occur in
19 short falls, and also allows us to take those injuries that
20 go beyond what the research has done through clinical stuff
21 to say if I have injuries beyond what the research is
22 showing, then we're able to look at what other things can be
23 causing that type of injury. So the literature has greatly
24 helped in that manner.
25 MR. HANSON: If I could approach.

1 THE COURT: Yes, sir.
2 Q (BY MR. HANSON) Doctor, I'm going to hand you what's
3 been marked Exhibit 2. And I understand, I guess, it's not
4 really labeled, but do you recognize that as a CD that you
5 presented to Ms. Palmiotto and myself yesterday?
6 A Yes, sir.
7 Q Or perhaps I should ask you: You presented us with a
8 CD yesterday containing articles that you reviewed and
9 relied upon at this hearing, correct?
10 A Yes, sir.
11 Q And you previously provided us with other articles and
12 materials also that you relied upon in this hearing and
13 previously, correct?
14 A Yes, sir.
15 Q And are these -- would those be the articles and
16 materials that you referred to in your testimony here today?
17 A Yes, sir.
18 MR. HANSON: We would offer Exhibit 2.
19 MR. JACOBS: Your Honor, could I *voir dire* the witness
20 for purposes of establishing an objection?
21 THE COURT: Yes.
22 MR. JACOBS: Thank you.
23 Q (BY MR. JACOBS) Dr. Snell, in those articles you
24 provided you did not take part in any of those studies, did
25 you?

1 A No, sir.
2 Q And you didn't write any of those articles, did you?
3 A No, sir.
4 MR. JACOBS: Your Honor, at this point I'm going to
5 object that it's hearsay. It's statements that are being
6 used from outside the Court. They are being used to prove
7 the truth of the matter asserted. Dr. Snell didn't
8 participate in any of those, he didn't write any of those.
9 As I further indicated to the Court before we started, they
10 were provided to us at a very late nature last night, so.
11 THE COURT: Objection is overruled. Basis one: Rules
12 of evidence, strictly speaking, do not apply at this hearing
13 because I view it as a hearing to determine the
14 admissibility of evidence.
15 Furthermore, even if the rules of evidence did apply,
16 an expert offering testimony in Rule 702 -- an expert
17 offering testimony in the Rule 702, can rely upon evidence
18 which is not itself admissible for his testimony.
19 Is there anything else you wanted to add, Mr. Hanson,
20 on this?
21 MR. HANSON: There is. I did neglect to ask before I
22 presented this to the Court.
23 Q (BY MR. HANSON) Doctor, did you also prepare a summary
24 of the articles yourself that is also included in this CD?
25 A Yes, sir.

1 Q And is that your summary of the articles put into what
2 would have been an outlined form for the assistance of
3 counsel in reviewing those articles?
4 A Yes, sir.
5 Q That would be your work product?
6 A Yes, sir.
7 Q Thank you.
8 MR. HANSON: Your Honor, I just wanted to make sure
9 that I didn't forget that's also included on the CD.
10 THE COURT: It's on the disk.
11 MR. HANSON: Yes, it's on the disk. I didn't want to
12 have something on there that we hadn't told the Court and
13 counsel.
14 THE COURT: I understand.
15 MR. JACOBS: Your Honor.
16 THE COURT: Mr. Hanson, any other questions?
17 MR. HANSON: No.
18 THE COURT: Cross-examination, Mr. Jacobs.
19 MR. JACOBS: Your Honor, no cross-exam in addition on
20 that. I just would like to renew my objection. In addition
21 that the product that Mr. -- or Dr. Snell provided is
22 cumulative, the articles that have already been admitted or
23 accepted by the Court. So further, it includes statements
24 of his writing he didn't testify to here today.
25 THE INTERPRETOR: I'm sorry.

1 MR. JACOBS: It includes statements he didn't testify
2 to here today.
3 THE COURT: Well, when we talk about admissibility of
4 Exhibit 2, it's limited to this hearing of course. And the
5 determination is ultimately mine as a gatekeeper of under
6 Rule 702 in the Daubert case. I appreciate the objection
7 and the additional basis being offered. Nevertheless, my
8 ruling remains the same. I'm going to overrule the
9 objection. I'll accept and receive Exhibits 2 for purposes
10 of the same.
11 (State's Exhibit Number 2 received into evidence.)
12 THE COURT: All right. And you didn't have exam in
13 addition otherwise, cross-examination? You do.
14 MR. JACOBS: I have questions to ask him if Mr. Hanson
15 is done.
16 THE COURT: He is.
17 MR. HANSON: I'm not quite done.
18 THE COURT: Oh, you are not.
19 MR. HANSON: I do have just a few more questions.
20 THE COURT: Go ahead, please.
21 Q (BY MR. HANSON) Dr. Snell, Exhibit 2 does not contain
22 all literature available in the field; is that correct?
23 THE INTERPRETOR: I'm sorry.
24 Q (BY MR. HANSON) In this field.
25 A That is correct.

1 Q Would I be correct there's a large volume of materials
2 dating back over the years in this area?
3 A That is correct.
4 Q And how did you select these materials for your review?
5 A I chose several articles that represented direct
6 attention to the distinction between accidental and
7 non-accidental head injuries over the last 12 years.
8 Q Dr. Snell, did you apply the principles and methodology
9 from your training, experience, and review of the medical
10 literature to the autopsy in Merveil Kasanga?
11 A Yes, sir.
12 Q Was that the basis of the conclusions and opinions
13 expressed previously in your final autopsy report?
14 A Yes, sir.
15 Q And your testimony before the grand jury?
16 A Yes, sir.
17 Q That's all I have. Thank you, Doctor.
18 THE COURT: Mr Jacobs, go ahead, please.
19 Cross-examination.
20 **CROSS-EXAMINATION**
21 Q (BY MR JACOBS) Dr. Snell, during the autopsy in this
22 case there were other people present besides you and your
23 assistants, correct?
24 A That is correct.
25 Q One of those was Detective Carda?

1 A That is correct.
2 Q The other one was Aaron McGowan from the State's
3 Attorney's Office?
4 A Yes, sir.
5 Q And the term 'abusive head trauma,' that would be
6 considered death by child abuse; is that correct?
7 A It is death by an inflicted injury from another
8 individual.
9 Q So, it's death by child abuse?
10 MR. HANSON: Judge, asked and answered, Your Honor.
11 THE COURT: Sustained.
12 Q (BY MR. JACOBS) If this were an adult that would have
13 died by a head trauma you would have declared this to be
14 blunt force trauma, correct?
15 A Depending on what the injury is it would either be
16 traumatic brain injury with blunt force injuries or blunt
17 force injury to the head depending on what the actual
18 findings were.
19 Q You testified at the grand jury on what was, I think,
20 January 9th, 2013?
21 A I'll take your word for it.
22 Q But you did testify in front of the grand jury?
23 A That is correct.
24 Q And do you recall testifying, "If this were somebody
25 our age it would be blunt force trauma to the head?"

1 THE INTERPRETOR: I'm sorry.
2 Q (BY MR. JACOBS) Do you recall testifying, "If this were
3 somebody our age it would be blunt force injury to the
4 head?"
5 A No, I do not.
6 MR. JACOBS: May I approach the witness, Your Honor.
7 THE COURT: Yes.
8 Q (BY MR. JACOBS) I'll grab the rest of it so you can see
9 the whole thing. On Page 52 of this transcript, you did
10 say, "If this were somebody our age it would be blunt force
11 injury to the head, correct?"
12 A You're leaving out the addition of that says, "To
13 assault."
14 Q So you did say it would be blunt force injury to the
15 head if it was somebody our age?
16 A Due to assault, yes, I add that in there.
17 Q Okay. But because it's a child you change it to
18 abusive head trauma?
19 A Because that's what the clinical pediatric literature
20 and forensics literature use as a term for that.
21 MS. SMITH: We need to stop.
22 (A discussion was had between the defendant and his
23 counsel off the record.)
24 Q (BY MR. JACOBS) But because it's a child you change
25 that to say it's abusive head trauma, correct?

1 A Since the term abusive head injury is an accepted
2 clinical and forensic pathology term in children and
3 infants, that term is used in that setting.
4 Q Doctor, are you aware of the excluded injuries from the
5 term 'abusive head trauma?'
6 A I'm not understanding your question.
7 Q Are gunshots included in abusive head trauma?
8 A No, sir.
9 Q Is that a no?
10 A No, sir.
11 Q Are stab wounds or piercing wounds abusive head trauma?
12 A No, sir.
13 Q Are car accidents considered abusive head trauma?
14 A Of course not, they are an accident. They are not
15 inflicted by another individual. There's no way it can be
16 abusive head trauma.
17 Q So by that, falls would not be included in there?
18 A Again, a fall would be an accidental death and
19 therefore it would not be inflicted by another individual,
20 so it can't be in there.
21 Q Doctor, in our autopsy report you did a provisional
22 diagnosis before the final diagnosis, correct?
23 A Yes, sir, I did.
24 Q And that diagnosis was blunt force injury of the head?
25 A I don't -- I don't have that in front of me, so I can't

1 answer that.

2 MR. HANSON: Your Honor, I'm going to object. The

3 testimony seems to be going beyond the scope of the Daubert

4 hearing that the State has been attempting to establish the

5 validity of the diagnosis and now we're getting into whether

6 the diagnosis was correctly applied to the facts of our

7 case.

8 THE COURT: So your objection is beyond the scope?

9 MR. HANSON: Beyond the scope of this hearing.

10 THE COURT: Mr. Jacobs.

11 MR. JACOBS: Judge, as was cited in our brief

12 yesterday, *State versus Guthrie* and *State versus Buchholz*,

13 the Supreme Court ruled that the cause or manner of death

14 coming into those trials, that invaded the province of the

15 injury. And as we cited in our brief and discussed in our

16 brief, that's one of the reasons we don't want the term

17 'abusive head trama' in this case. Further, he did testify

18 as to the diagnosis in this case, so I don't believe it's

19 outside the scope of that.

20 THE COURT: Well, I want to talk about your argument

21 about invading the province of the jury. Because when we

22 were together last Thursday for that last hearing, I

23 understood maybe incorrectly that this was more of a Daubert

24 hearing unless a controversy about using the term 'abusive

25 head trauma.'

1 But in any event, I think that the questions, the
2 applicability of Guthrie and Buchholz to this case,
3 implicate the holdings for discussion -- or I should say the
4 required discussion of the holdings in those cases, more so
5 than evidence in this hearing. If your purpose is to
6 cross-examine Dr. Snell about his opinions you can do that,
7 but it needs to be directed somehow at the reliability or
8 the relevance of his opinions, perhaps, what he's relied
9 upon here. What I hear is disagreement about the diagnosis
10 itself and that is beyond the scope of this hearing. I'll
11 sustain the .
12 THE INTERPRETOR: I'm sorry, Your Honor.
13 THE COURT: I'll sustain the objection.
14 Q (BY MR. JACOBS) Doctor, you have given no presentations
15 on short falls, have you?
16 A No, sir.
17 Q And in looking at your publications you have not
18 written about short falls, have you?
19 A No, sir.
20 Q And in review of your CV it appears your most recent
21 publication was looking at tattoos in young suicide victims
22 as a possible marker for risks; is that correct?
23 A What can I say, I don't like writing.
24 THE INTERPRETOR: I'm sorry.
25 A No, sir.

1 Q (BY MR. JACOBS) And before that it's fair to say that
2 your publications focused on heart or cardiac related
3 issues?
4 A I was doing research. And so those are research
5 articles, they are not clinical based articles. It's
6 unrelated.
7 Q And that would have been around the same time many of
8 your presentations were based on the cardiac or heart
9 related issues as well; is that fair to say?
10 A Yes, sir.
11 Q Doctor, in the articles that you provided the State's
12 Attorney's Office yesterday, none of those articles said
13 that depressed skull fractures are not caused by short
14 falls; is that correct?
15 A If I understand your question, you're saying did the
16 articles state that short falls can create depressed skull
17 fractures; is that what you're saying?
18 Q None of them said they could not.
19 A I'm sorry. I'm having trouble understanding what
20 you're asking me. Can you clarify?
21 Q None of the articles that you provided the state's
22 attorney yesterday afternoon, none of those articles said
23 that the depressed fracture is not caused by a short fall?
24 A I believe the answer would be yes.
25 MR. JACOBS: I have no other questions.

1 THE COURT: Thank you. Redirect, Mr. Hanson.

2 **REDIRECT EXAMINATION**

3 Q (BY MR. HANSON) Is the depression of a skull fracture
4 the only factor considered by yourself or in the literature.
5 A In relation to?
6 Q The question of short fall versus inflicted.
7 A No. To make the distinction between accidental falls
8 and inflicted or abusive head trauma it's a constellation of
9 those symptoms and the story that's provided. You cannot
10 look at a single injury and make that distinction.
11 MR. HANSON: No other questions. Thank you.
12 THE COURT: Mr. Jacobs.
13 MR. JACOBS: Thank you. Just a few. Could I approach
14 with one of the articles, Your Honor?
15 THE COURT: Yes.

16 **RECROSS-EXAMINATION**

17 Q (BY MR. JACOBS) Is that one of the articles that you
18 provided the state's attorney?
19 A Yes, sir.
20 Q And they provided to us late yesterday afternoon as
21 well?
22 A I couldn't speak to when they gave them to you.
23 Q In this article doesn't it say, depressed skull
24 fractures can result from short falls when the head hits the
25 surface area?

1 A Yes, sir.
2 MR. JACOBS: I have no other questions. Thank you.
3 Thank you, Doctor.
4 MR. JACOBS: Nothing further. Thank you.
5 THE COURT: All right, Doctor, hang on a second if you
6 could, please.
7 THE WITNESS: Mm-hmm.
8 THE COURT: If I understand your testimony correctly,
9 the reason why you might have an opinion that a child
10 suffered abusive head trauma versus blunt force head trauma
11 or something like that, for a child with the same symptoms
12 or the same, as you said, constellation of findings, is that
13 the American Academy of Pediatrics or perhaps other bodies
14 have authorized or accepted, I should say, that is a finding
15 or a diagnosis; is that correct?
16 THE WITNESS: That's correct.
17 THE COURT: Okay. Then is it fair to say the term
18 'abusive head trauma' simply has not been applied outside
19 the context of children?
20 THE WITNESS: There is a move to use it in the elderly
21 individuals that fall under the care of another individual.
22 That is a growing movement. So the answer is right now just
23 in children. It is growing towards those that are elderly
24 that are under the care of other individuals as well.
25 THE COURT: I've used two terms this morning in that

1 previous question; one, diagnosis and another, opinion. As
2 it relates to abusive head trauma, is there a distinction in
3 your view as to a diagnosis or opinion of abusive head
4 trauma?
5 THE INTERPRETOR: Can you repeat, please?
6 THE COURT: Is there a difference between diagnosis and
7 opinion of abusive head trauma?
8 THE WITNESS: A diagnosis is a medical -- is a term
9 that's recognized by a medical treating body as something we
10 would use for a constellation of symptoms. To reach that
11 diagnosis a doctor reaches an opinion that agrees with a
12 listed diagnosis. So there is a small difference because an
13 opinion is what I have the diagnosis is what is established
14 by the medical -- the medical field.
15 THE COURT: I think this is the final question. Is the
16 principle difference between abusive head trauma versus
17 non-accidental head trauma the fact the latter does not
18 describe a manner of death?
19 THE WITNESS: That's correct. And, Your Honor, just to
20 add to that, there are some forensic pathologists that don't
21 use the abusive head term simply because they don't want the
22 manner to be incorporated into the diagnosis. So they
23 would use non-accidental or inflicted head trauma and do the
24 manner as homicide, just so you don't combine the two.
25 That's the only reason some forensic pathologists don't use

1 the term is to keep a true separation between cause and
2 manner.
3 THE COURT: All right. Then just as to the cause of
4 death, just on the manner of death for a moment, could the
5 term 'abusive head trama' and 'non-accidental head injury,'
6 both describe the same cause of injury?
7 THE WITNESS: Yes, sir.
8 THE COURT: Thank you. I don't have any other
9 questions, thank you. Anything in light of mine?
10 MR. HANSON: Nothing from the State.
11 THE COURT: Mr. Jacobs.
12 MR. JACOBS: No, Your Honor.
13 THE COURT: All right. Thank you. Thank you, Dr.
14 Snell. You can step down. Thank you.
15 THE WITNESS: This is the summary that's on the disk,
16 so you don't have to print it out.
17 THE COURT: Thank you. I've got it pulled up right
18 here, actually. Mr. Hanson, argument.
19 MR. HANSON: Your Honor, we have no other witnesses. I
20 would only ask the Court to incorporate prior testimony and
21 exhibits at other hearings into this determination as to the
22 relevance of the doctor's testimony and opinions and
23 diagnosis to the facts of this case. Specifically,
24 interviews by Detective Carda with Mr. Ally where the child
25 was reported to have fallen, thus making the accidental

1 versus non-accidental nature of the injuries relevant to the
2 case. The State would rest.
3 THE COURT: Thank you. Mr. Jacobs.
4 MR. JACOBS: Thank you, Judge.
5 Judge, I know when we left last week you indicated the
6 purpose of Daubert is to determine opinions here reliable
7 such as they can be introduced as evidence in this case.
8 And I know that's what we left with last week with that
9 statement. But in looking at the motion again and, you
10 know, thinking about this a little more over the weekend, it
11 occurred to us that State v. Guthrie and State v. Buchholz
12 might apply with the abusive head trauma or abusive head
13 injury diagnosis. And that if we use the term 'abusive head
14 trauma' in this case the jury is left with the implication
15 that there was abuse here.
16 THE COURT: I understand that argument. Which, as I
17 read your brief yesterday, did reflect your obvious thoughts
18 over the weekend as you just described. But here's my
19 question: How do Guthrie or Buchholz impact or support your
20 argument precluding -- seeking to preclude the use of that
21 term?
22 MR. JACOBS: Judge, in Buchholz, the most recent case,
23 the Court allowed doctors to testify that it was child
24 sexual abuse. In this case with the terminology of abusive
25 head trauma we're essentially allowing doctors to get up and

1 say that there was child abuse without any real diagnosis of
2 child abuse besides the skull fracture.
3 THE COURT: The problem with that argument though is
4 that in Buchholz there was a diagnosis of sexual abuse
5 accompanied by no objective physical findings and resting
6 apparently upon the forensic interview of the child. Here
7 those concerns don't seem to be present. We have medical
8 findings to be sure and no statements from a victim that
9 would be bolstered by this testimony, so that does seem to
10 be the distinction.
11 MR. JACOBS: I agree that there is that distinction,
12 Your Honor. However, here we're having a diagnosis based on
13 statements from the officers that were -- Detective Carda
14 who was present at the autopsy, as well as the statements
15 that were relied on that the State wants you to use in
16 making this determination were on the video. So they're
17 using that evidence to support the manner of death.
18 THE COURT: I don't want to quarrel, but I thought that
19 the testimony -- the only testimony I have on the issue is
20 that Dr. Snell applied the principles, knowledge, training
21 and this is in the context of talking about the articles to
22 his diagnosis, I did not hear him saying he relied upon
23 Detective Carda's statements. Tell me how Guthrie supports
24 your view.
25 MR. JACOBS: Your Honor, if I could briefly go back to

1 Detective Carda being present.
2 THE COURT: You can.
3 MR. JACOBS: The Court had kind of cut me off early
4 based on Mr. Hanson's objection about the diagnosis that was
5 made at the autopsy. So, you know, I realize that's not in
6 evidence at this point in time, so that's as far as I'll
7 comment on that.
8 Regarding Guthrie, in that case the Court allowed a, I
9 think it was a doctor to testify, that this was -- or that
10 the death in that case, I forget exactly how it was worded,
11 Your Honor, so --
12 THE COURT: She did not die by suicide.
13 MR. JACOBS: Right, yeah. I think it was something
14 along those -- non-suicidal, something along those lines.
15 And the Supreme Court in that case overruled saying that
16 took that away from the jury's ability to decide that or
17 not.
18 THE COURT: There were some problems and the Supreme
19 Court found error in that testimony. Whatever problems
20 there were with the opinion on the ultimate issue, they were
21 subsidiary to the expert's methodology, seems to me. As I
22 read the case, the Supreme Court held, among other things,
23 that the methodology of psychological autopsies will not
24 survive Daubert. But I'll say this, and I'm going to talk
25 to Mr. Hanson about it too: I am sensitive to the idea that

1 this opinion does not leave sufficient room for the jury to
2 determine what happened in this case. So it may be that the
3 argument is that the term itself, if you will, too
4 prejudicial or itself invades the province of the jury.
5 I'll let you get back to your argument. Before you do
6 I looked, I could not find a single case in which this term
7 has been excluded. But if it's excluded that may not be an
8 issue on appeal, but if it were included it seems like it
9 would be an issue on appeal if it were problematic.
10 Have you found any case -- I'm sorry, have you found
11 any cases where it's been excluded, abusive head trauma has
12 been excluded or should have been excluded?
13 MR. JACOBS: As I said, I haven't reviewed -- are you
14 talking to me or Mr. Hanson? I'm sorry. Were you talking
15 to me or Mr. Hanson?
16 THE COURT: I am. Have you found any of those cases?
17 MR. JACOBS: I didn't specifically look for that, Your
18 Honor. I can look over the lunch hour.
19 THE COURT: Let me make sure I understand your argument
20 too. Is it -- is your argument something essentially almost
21 a motion *in limine* to prohibit the use of abusive head
22 trauma?
23 MR. JACOBS: Yes, Your Honor.
24 THE COURT: Do you acknowledge that opinion, as long as
25 it satisfies Daubert, of non-accidental head trauma or

1 injury could still be admitted?
2 MR. JACOBS: Based on the testimony and my review of
3 the literature that was provided, I do think that was
4 something that can still be used, yes.
5 THE COURT: I don't want to relegate it to an issue of
6 semantics.
7 MR. JACOBS: I would say that when Dr. Snell was
8 testifying when he was going between the differences between
9 accidental and non-accidental, he did say non-accidental can
10 be things such as suicide or undetermined deaths even. So I
11 think, you know, yep.
12 THE COURT: Yeah. The abusive head trauma takes that
13 additional step and offers an opinion on the manner of
14 death. Okay. I don't want to cut you off, but I do want to
15 ask Mr. Hanson this question: Is in determining the matter
16 of death, if you will, in the homicide case such as this, a
17 determination for the jury?
18 MR. HANSON: Ultimately, yes. But the expert can offer
19 an opinion in this case whether the injuries are consistent
20 with a short fall or simple fall, specifically from a bed,
21 the dimensions of which we intend to put into evidence.
22 This is not a case where Dr. Snell is testifying as to
23 the guilt of Mr. Ally. We had other motion hearings on the
24 admissibility of statements by Mr. Ally because those
25 statements, along with other evidence, placing him as the

1 caregiver of the child, in combination with Dr. Snell's
2 findings, is the essence of the State's case against
3 Mr. Ally. For example, if Mr. Ally was to have reported or
4 someone was to testify that the child was in the care of
5 another at that time, that would not alter the testimony of
6 Dr. Snell, but it might alter the jury's determination as to
7 Mr. Ally's guilt which is why this is not a Buchholz case
8 because Dr. Snell is bolstering no one's testimony. Thank
9 you.
10 THE COURT: Is the State, in your view, Mr. Hanson, and
11 you tell me and this doesn't affect my determination
12 ultimately I'm just curious, what advantage does the State
13 obtain by using the term 'abusive head trauma' versus
14 'non-accidental head trauma?'
15 MR. HANSON: The final autopsy uses the term 'abusive
16 head injury.' In all honesty, the focus on the term
17 'abusive head trama' has been placed mostly by the defense.
18 Whether we -- well, my concern is I don't want to limit
19 medical testimony from using terms that they use in their
20 practice and diagnosis. Whether we use that term or say
21 it's non-accidental, to the layperson they have small
22 difference. But I don't think it's proper to limit the
23 testimony of expert medical personnel to exclude valid terms
24 and diagnosis. Thank you.
25 THE COURT: Thank you. Mr. Jacobs, I interrupted you a

1 bit, is there anything else you would like to add?
2 MR. JACOBS: If I could just have one second to review
3 my notes, Your Honor.
4 THE COURT: Yes.
5 MR. JACOBS: Well, Your Honor, just that, you know,
6 looking at the Daubert standard again, Dr. Snell testified
7 that he hasn't done any presentations, hasn't written any
8 papers on this, and he's relying on articles to make this
9 decision. So just that line of argument.
10 THE COURT: I don't want to leave this issue lingering
11 about Detective Carda even though I sustained the objection.
12 Is it your contention, though it's not in evidence at this
13 time, that this diagnosis is bolstering statements by other
14 witnesses including Detective Carda, perhaps?
15 THE INTERPRETOR: Can you please repeat that, Your
16 Honor?
17 THE COURT: Yes. Is it your contention that this
18 diagnosis is bolstering statements of other witnesses
19 including Detective Carda?
20 MR. JACOBS: Your Honor, I think it would be because in
21 the autopsy report there's a diagnosis section and there's a
22 cause of death section and a manner of death section. And
23 under the diagnosis section Dr. Snell listed the injury as
24 blunt force injury of the head is what it's listed at. So I
25 think -- and you heard from the testimony that because the

1 involved a child that's one of the reasons it changed to
2 abusive head trauma. So I think that when, you know, I
3 assume when Detective Carda comes in and testifies that, you
4 know, he was the only caretaker, Manegabe was the only
5 caretaker, with the term abusive head trauma there's going
6 to be that determination that there was abuse here.
7 THE COURT: You may be right. I don't know how the
8 jury will assess that, but that is very likely how the
9 State's evidence fits together in this case. That fact is
10 not in of itself lead to bolstering of, you know, Detective
11 Carda's testimony even if what you say is correct. It's
12 just the sequence of witnesses and their testimony and what
13 the jury may determine from it.
14 All right. So I want to be clear, make sure I don't
15 leave anything unruled. You're challenging -- you've got,
16 if you will, the motion *in limine* type relief you're
17 requesting on abusive head trauma, that's one. Are you also
18 contending that Dr. Snell is -- that his testimony is barred
19 by Daubert? I should say, does not pass the Daubert
20 standard.
21 MR. JACOBS: Yes, Your Honor.
22 THE COURT: All right. I'll rule on those two. Is
23 there something else out there that you're seeking with
24 respect to this testimony that I need to rule on?
25 MR. JACOBS: No. That's it.

1 THE COURT: Well, I'm first going to rule that Dr.
2 Snell is qualified to render opinions in the area of
3 forensic pathology. He is board certified in pathology. He
4 described it as anatomical, forensic, and clinical
5 pathology. He is a medical doctor. I'm relying upon his
6 statements concerning his educational background as he
7 testified to here today and also as it's contained within
8 Exhibit 1.
9 He is, in addition to being a physician, someone who
10 underwent a fellowship in pathology at the University of
11 North Carolina, has participated in approximately 1,500
12 autopsies, perhaps as many as 150 of them relating to
13 children under the age of two. He has evaluated children
14 with head injury cases previously in his professional
15 experience. He Has testified approximately 300 times in
16 other courts. His opinions in this case are based upon his
17 own examination and combined with his training and
18 experience and education. The methodology he's described in
19 distinguishing between accidental versus non-accidental head
20 trauma has been the subject of a number of publications,
21 both peer reviewed and presentations that are not peer
22 reviewed. Though he's not personally written those articles
23 or presented on that topic -- on the topic of head trauma
24 involving children, he is nevertheless familiar with many of
25 them and has used them to assist him in his work in this

1 case. They're contained in the disk, which is Exhibit 2
2 which I've actually put in my computer and looked through
3 them while I'm on the bench, though, of course, I can't go
4 through all the articles. The articles do, however, seem to
5 concentrate upon comparisons between non-accidental causes
6 of head injury and accidental causes of head injury. The
7 methodology associated with making that distinction not
8 necessarily testable in a strict sense, but as I understand
9 the articles there has been study upon individuals having or
10 suffering from short distance falls. That literature, in
11 Dr. Snell's view, has made it easier to understand what
12 happens in short falls. Contrasting those injuries from
13 injuries which are more extensive appears to be a valid
14 methodology to the Court. Those publications as I indicated
15 have been peer reviewed and gained, according to Dr. Snell,
16 acceptance within the medical community.
17 I'll note further in this regard that the term or the
18 diagnosis of 'abusive head trama' has been officially
19 approved by the American Academy of Pediatrics since 2009.
20 So in the sometimes colloquial Daubert language, this is
21 valid science, not junk science.
22 Further, considering the totality of the record and the
23 allegations contained in the indictment, the expert
24 testimony and the cause of death is relevant to a fact in
25 this issue -- to a fact which is in issue. And it can

1 assist the jury on the questions they must determine in this
2 case. So I'll find that Dr. Snell is able to render the
3 opinions concerning the cause of the child's death,
4 Merveil's death in this case.
5 I'm going to take an hour or two and think about
6 whether the term 'abusive head trama' has a place in the
7 trial, however. But I'll let the parties know when I decide
8 very shortly.
9 THE INTERPRETOR: Can you repeat, please?
10 THE COURT: I'll let the parties know what I decide
11 very shortly.
12 THE COURT: But at a minimum, Dr. Snell can testify
13 that these injuries are consistent with non-accidental
14 injuries. The only thing he might possibly not be able to
15 say or use is the term abusive head trauma. All right.
16 That's my ruling on that. Any questions?
17 MS. SMITH: Not at this time, Your Honor.
18 MR. JACOBS: No, Your Honor.
19 THE COURT: We've got -- the jury came in at 10:30.
20 Let's go off the record.
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1 STATE OF SOUTH DAKOTA)
:SS
2 COUNTY OF MINNEHAHA)

3

4 CERTIFICATE OF REPORTER

5

6 I, Jenna Sechser, Official Court Reporter, Notary
7 Public in and for the State of South Dakota, hereby certify
8 that I was present for and reported the proceedings as
9 described on page 1 herein, and that this transcript
10 contains a true and correct record of the proceedings so
11 had.
12 To all of which I have hereunto set my hand this 19th
13 day of February, 2014.

14

15 _____
JENNA SECHSER
16 Official Court Reporter

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STATE OF SOUTH DAKOTA) IN CIRCUIT COURT

:SS

COUNTY OF MINNEHAHA) SECOND JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,	) CR 12-8143
Plaintiff,	)
	) JUDGE'S RULING
vs.	)
MANEGABE CHEBEA ALLY	)
Defendant.	)

BEFORE: THE HONORABLE MARK SALTER, Circuit Judge, at Sioux Falls, South Dakota, on the 18th of February, 2014.

APPEARANCES: Donald Hanson & Tara Palmiotto
Minnehaha County State's Attorney's Office
Sioux Falls, South Dakota

Appearing on behalf of the plaintiff;

Traci Smith & Kenny Jacobs
Minnehaha County Public Defender's Office
Sioux Falls, South Dakota

Appearing on behalf of the defendant.

1 THE COURT: Okay. Thank you. All right. Finally I'm
2 going to rule on the motion *in limine.* I'm going to grant
3 the motion *in limine* prohibiting reference to the term
4 'abusive head trauma.' In argument -- or in the State's
5 case-in-chief, it's possible that the door to that term
6 could be opened either in cross-examination or in the
7 defense case. If counsel believes that the door has been
8 opened, please ask to approach and have a bench conference
9 before you proceed to use the term.
10 I've considered the authorities on this and
11 particularly the cases in Buchholz and Guthrie -- the cases
12 of Buchholz and Guthrie, neither one of them control the
13 outcome in this case. But in each of them the South Dakota
14 Supreme Court, I believe, is telling trial judges to be very
15 careful with expert testimony and to ensure that juries have
16 enough latitude to form their own inferences about what
17 happened in a particular case.
18 Abusive head trauma is a legitimate diagnosis and I
19 think that Dr. Snell is competent to make an opinion or
20 render a opinion about whether it exists in this case. But
21 I still worry because abusive head trauma encompasses not
22 only the cause but also the manner of death. I worry his
23 testimony will not say merely that the injuries aren't
24 consistent with non-accidental injuries, but that in fact he
25 knows that abuse occurred in this case.

1 I'll note as a side event this diagnosis of abusive
2 head trauma applies at this point only in cases involving
3 children. Leading me to believe that if same or similar
4 injuries were present in an alleged adult victim we would
5 not be confronting this issue. Even though the term
6 'abusive head trauma' can not be used or should not be used,
7 Dr. Snell and any qualified physician can testify that the
8 injuries in this case were consistent with non-accidental
9 factors or influences.
10 He can also testify that the, as he says, constellation
11 of injuries he observed in Merveil is consistent with abuse.
12 He should not otherwise diagnose anything or restrict his
13 opinions to opinions formed within a reasonable degree of
14 medical certainty. All right.
15 MR. HANSON: Can you repeat that last part, Judge?
16 THE COURT: I think his testimony should be phrased in
17 terms of opinions held to a reasonable degree of medical
18 certainty.
19 There was a particular concern with the term
20 'diagnosis' in the Buchholz case and I'm seeking to avoid
21 that issue. With the exception of the use of the actual
22 term 'abusive head trauma' and the term 'diagnosis,' medical
23 testimony is otherwise nonrestrictive. I don't know there
24 would be error to allow the use of the term. This issue has
25 obviously not been addressed by our Supreme Court, but I'm

1 exercising my discretion here to pursue a more cautious
2 course. It still allows testimony that I think will be
3 helpful or could be help depending on how the jury assesses
4 it. Other questions before it? That's my ruling.
5 Mr. Ally, have you any problems to report about the
6 translation during this afternoon session have you been able
7 to understand the interpreter?
8 THE DEFENDANT: I understand. I have no problem with
9 any interpretation.
10 THE COURT: Okay. Thank you. Anything else we need to
11 do before we go? I'd liked -- I've asked the jurors to come
12 here at 8:30, I was thinking we could maybe -- of course we
13 had that short form from Ms. Iveland, that will take her
14 probably about 15 minutes or so perhaps to fill out and
15 we'll be able to get that to you folks. How long did it
16 take for them to fill out the short form questionnaire?
17 THE BAILIFF: I've got them coming in early enough
18 tomorrow we can be ready to go in the courtroom at 8:30.
19 THE COURT: I'll be ready to go at 8:30. Is that okay
20 for the parties?
21 MR. HANSON: Yes. And I don't think the State's *voir*
22 *dire* is going to be nearly as long. I think we should have
23 plenty of time.
24 THE COURT: Thank you, Mr. Jacobs.
25 MR. JACOBS: What time is the second panel coming in?

1 THE COURT: They are coming at 11:00 and we may benefit
2 ourselves with surplus time.
3 MS. PALMIOTTO: I don't expect my voir dire to take
4 over two hours or maybe --
5 THE COURT: But -- and one event we would encounter an
6 individual *voir dire* or something like that, it's tough.
7 Thank you. We're in recess.
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1 STATE OF SOUTH DAKOTA)
:SS
2 COUNTY OF MINNEHAHA)

3

4 CERTIFICATE OF REPORTER

5

6 I, Jenna Sechser, Official Court Reporter, Notary
7 Public in and for the State of South Dakota, hereby certify
8 that I was present for and reported the proceedings as
9 described on page 1 herein, and that this transcript
10 contains a true and correct record of the proceedings so
11 had.
12 To all of which I have hereunto set my hand this 20th
13 day of February, 2014.
14
15 _____
JENNA SECHSER
16 Official Court Reporter
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EXHIBIT X

IN THE THIRTEENTH JUDICIAL CIRCUIT COURT FOR HILLSBOROUGH COUNTY, FLORIDA
Criminal Justice and Trial Division

STATE OF FLORIDA **CASE NO.: 15-CF-018630-A**

v.

KENT JOHNSON, **DIVISION: A**
Defendant.
_____/

ORDER GRANTING "DEFENDANT'S AMENDED MOTION IN LIMINE TO EXCLUDE ANY TESTIMONY REGARDING SHAKEN BABY SYNDROME OR IN THE ALTERNATIVE REQUEST FOR A FRYE HEARING"

THIS MATTER came before the Court on "Defendant's Amended Motion in Limine to Exclude any Testimony Regarding Shaken Baby Syndrome or in the Alternative Request for a Frye Hearing," filed June 19, 2018. Related to this motion, the Defendant, through undersigned counsel, also filed "Defendant's Standard of Review for Admissibility of Testimony on Shaken Baby Syndrome (Daubert Standard)," dated July 2, 2018 and the State filed "State's Argument Against Defendant's Motion in Limine to Exclude Testimony Regarding Shaken Baby Syndrome," dated August 29, 2018. On September 6, 2018, the Court held a hearing on the matter and heard argument from the parties and testimony from various witnesses concerning Defendant's motion. Following the September 6, 2018 hearing, the Court took the matter under advisement. After reviewing the Defendant's motion, court file, record, transcripts, testimony, case law, and argument presented, the Court finds as follows:

In Defendant's motion, Defendant, through undersigned counsel, requests that this Court limit the use of and reference to the terms "shaking," "shaken baby," "Shaken Baby Syndrome (SBS)," "rotation acceleration," or "acceleration-deceleration force" in Defendant's trial.

The Court finds that the term "Shaken Baby Syndrome" and related terms set forth above to be supported by insufficient scientific data and evidence. The Court finds that after reviewing the motion, argument, and testimony from various witnesses, there is ample evidence to demonstrate that the terminology does not adequately describe the range of potential causes of head injuries. There is no established science to support "Shaken Baby Syndrome" as a valid diagnosis. Thus, Defendant's motion is granted and the Court limits the use of the phrase "Shaken Baby Syndrome" and related phrases stated in this Order from being used in the course of Defendant's trial.

It is therefore **ORDERED AND ADJUDGED** that "Defendant's Amended Motion in Limine to Exclude any Testimony Regarding Shaken Baby Syndrome or in the Alternative Request for a Frye Hearing" is **GRANTED.**

DONE and ORDERED in Chambers in Hillsborough County, Florida, this ____ day of _____, 2018.

Electronically Conformed 10/17/2018

Barbara Twine Thomas

HON. BARBARA TWINE THOMAS,
Circuit Judge

Copies to:

Office of the Public Defender, Assistant Public Defender, Theda James, Esq., Division A

Office of the State Attorney, Assistant State Attorney, Aaron Hubbard, Esq., Division A

EXHIBIT Y

CIRCUIT COURT OF SOUTH DAKOTA
SECOND JUDICIAL CIRCUIT

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JUDGE JOSEPH NEILES

April 27, 2011

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Re: State v. Dustin Two Bulls, Cr. 10-2890

Dear Counsel:

The defendant Dustin Samuel Two Bulls, Sr. is charged in an Indictment with Murder in the Second Degree and Manslaughter in the First Degree. These charges arise out of the death of a child identified in the Indictment by the initials D.E.W. with a date of birth of January 21, 2009. The crime was alleged to have been committed on or about April 19th or 20th, 2010. The defendant, through his attorneys, has filed a number of pretrial motions, most of which are uncontested. One of the motions that was contested is a "Daubert" motion, asking the Court to determine the admissibility, on a preliminary basis, of certain testimony of a medical and/or scientific nature related to the injuries to the child. Specifically, Counsel has moved the Court for an order determining (1) the admissibility of any proposed medical and scientific evidence that manual shaking can cause subdural hematomas and retinal hemorrhaging in infants; (2) Whether Shaken Baby Syndrome meets the Daubert criteria for admissibility as a scientific theory to explain the injuries to the victim in this case; (3) The admissibility of proposed scientific evidence that subdural hematomas and retinal hemorrhaging in infants can only be caused by manual shaking; (4) The admissibility of any proposed medical and scientific evidence that the symptoms of subdural hematomas and retinal hemorrhaging would necessarily be scientific opinions that the injuries sustained by the infant are consistent with Shaken Baby Syndrome.

A hearing on the motion was first heard on February 28, 2011, but because of the number of witnesses and the availability of witnesses, the hearing was not concluded that date but was continued. A second hearing date was held on March 28, 2011, and at the conclusion of the

hearing, the court took the matter under advisement. Counsel for both the state and the defense have had the opportunity to submit written arguments and the Court has had the benefit of those arguments as well.

THE FACTS

The facts of the case in brief are that the child, Deryun, identified in the indictment as D.E.W. was left in the care of mother's boyfriend, the defendant, Dustin Two Bulls, Sr. Mother was apparently running an errand for a family member. At some point in time the defendant texted on a cell phone to mother that the child was apparently injured. Mother returned home and they eventually took the child to the emergency room at Avera McKennan Hospital in Sioux Falls. Ultimately, the child died from the injuries he had suffered. The defendant is charged with Murder in the Second Degree and Manslaughter in the First Degree arising out of the Death of D.E.W. The State would apparently intend to call several medical personnel that were involved in this case in some way to testify at the trial. The defendant challenges as inadmissible some of the medical testimony that the state would propose to offer. The primary point of contention is the question of whether the witnesses should be allowed to testify to something called "shaken baby syndrome", although the defendant's motion is broader than that.

In the brief submitted by defense counsel, there is reference to several "facts" that were not presented in court, either by the testimony of witnesses or by stipulation. Likewise, the state's brief makes reference to a few "facts" that I did not hear testimony about during the course of the hearings. The Court is unable to consider those "facts" based solely upon their inclusion in defendant's brief or the state's brief. The "facts" as determined by the court come from the testimony and evidence presented at the hearings. Certainly, counsel could have stipulated to facts for the court to consider, but did not. However, none of these omitted "facts" really affect the court's decision in a significant way and are probably relevant only for the ultimate issue of guilt, but probably not relevant to the issue of admissibility of this expert opinion testimony. The Court will consider those "facts" as merely background information to provide context and explanation as to what happened in the case as it developed.

Dr. Nancy Free, a Board Certified Pediatrician and an employee on staff at Child's Voice[1] testified first for the State. She testified that the term "shaken baby syndrome" (hereinafter referred to as SBS) is a term used in the lay community to describe injuries that a child might receive if it was excessively shaken by an adult. She further testified that the term used by doctor's to describe the type of injuries that are commonly referred to as SBS is "Abusive Head Trauma (hereinafter referred to as AHT). She testified that AHT is a bigger umbrella that includes a number of injuries that might occur to children, including injuries that might be attributable to shaking and other trauma. She further testified that the American Academy of Pediatrics continues to recognize AHT as a legitimate diagnosis when a doctor discovers a triad of symptoms, including retinal hemorrhages, subdural hematoma, and brain swelling hypoxic ischemic encephalopathy. The State offered Exhibit #3, a policy statement from the American Academy of Pediatrics, in support of this testimony.

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[1] Child's Voice is a Child Advocacy Center that provides forensic sexual and physical abuse exams and interviews for children through at a location in Sanford Hospital in Sioux Falls. According to a website with the U.S. Dept. of Health and Human Services, Child's Voice was started in 2002.

Dr. Free further testified regarding the history of SBS and AHT among the medical community. She claimed that it was first described in papers in the 40's, 50's and 60's, and has continued to be the subject of numerous studies ever since. She acknowledged that there is not one single test that can be administered to a child to determine if it is the victim of AHT, but claimed that where there are certain physical findings, and no history of other causes, then a doctor can "feel quite secure in your diagnosis of abusive head trauma."

She further testified that for obvious reasons, the medical and scientific community cannot test their theories in this area on baby brains, that is, they cannot take a healthy young child and violently shake it to see if injuries such as here described ultimately result. The testing that has been done has been with animals, such as monkeys, and with non-living models, including recently computer models. In addition, other testimony in the case reveals that some of the testing that was done with animals was not done by shaking, but rather with animals strapped to a machine to simulate moderate speed vehicle crashes. However, baby brains are different than animal brains, and baby brains are different than adult brains, and so the testing that has been done is incomplete. It appears in large part some of the support for these theories relies upon "confessions" of the perpetrators that they were involved in shaking the child.

Dr. Free acknowledged that she is not able to testify as to the cause of a death in a child, and does not determine the mechanism of a death or the manner of how a death occurred.

At the second hearing date, the State also presented the testimony from Dr. Kenneth Snell, a Board Certified Forensic Pathologist and now the Minnehaha County Coroner, recently hired to that position. He did not perform the autopsy in this case, but had reviewed the findings and notes of Dr. Brad Randall, then the Minnehaha County Coroner and the forensic pathologist that did perform the autopsy.[2] He testified that AHT is the preferred diagnosis, and he would not use the term SBS unless there was a witness to the act or a confession by the perpetrator to definitely diagnose this. He further testified that the National Association of Medical Examiners (NAME) published a position paper in 2003 (Exhibit #5) that changed the focus of this diagnosis from SBS to AHT. He admitted this paper was published on their website, but was not published in their formal journal. Review of Exhibit 5 reveals a notation that the paper was prepared at the direction of the Board of Directors of NAME to prepare a position paper for NAME on SBS. The note further comments that the paper was reviewed by three editors of the American Journal of Forensic Medicine and Pathology, and while deemed worthy of publication, it should not be published as a position paper because of the controversial nature of the subject. The Board of Directors responded that position papers always deal with controversial subjects. So it was not published in the Journal, but was available on the website of NAME for a period of time.

I note that in that article, the authors state: "If there are focal injuries, such as skull fractures, scalp bruises, or subgaleal hemorrhage, an impact can be assumed, but coexistent shaking cannot be excluded. <u>In the absence of signs of an impact, however, shaking alone should not be presumed because there may well have been an impact that cannot be identified</u>."

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[2] Dr. Randall apparently did not mention AHT in his report, but rather spoke of Blunt Force Trauma. Dr. Snell testified that essentially they mean the same thing.

(Emphasis mine). This statement comes after a discussion about how some impact injuries might be reflected in the scalp if the striking surface is padded, or if it is broad and firm.

The defense called Dr. Janice Ophoven, a Board Certified Forensic Pathologist from the State of Minnesota. She was hired by the defense to give an independent medical opinion on the cause of death in the present case.

Among other things, with respect to the issue at hand, Dr. Ophoven testified that when a child comes in for examination or treatment with brain swelling and rapid herniation, law enforcement should be looking back 72 hours from that time to examine the cause of the injury. That is, if I understand her testimony correctly, the symptoms that result from AHT may result in immediate symptoms, or it may result in symptoms that manifest themselves up to 72 hours later. This would be consistent with an example given by Dr. Snell in cross-examination, where a child had fallen from some monkey bars and initially was brought in for examination, still lucid, but later died. He testified that there is no way to tell how long a child with a head injury could still be mobile.

Dr. Ophoven also testified about the history of the use of the term SBS and AHT. She noted that a study in the late 1990's by Dr. Duhaime, working with mechanical engineers, determined that shaking a baby could not generate more than 10 G's of force, and a lot more than that would be required to do the damage found in children diagnosed with SBS. In addition, other studies in the late 1990's by neural pathologists went looking for the sheared nerves predicted by earlier studies, without success.

She testified that in 2003 a study showed that a drop of a child only three feet could cause the type of injuries that are here discussed. At that point, most forensic pathologists quit using SBS, with a few exceptions. A Canadian study into past convictions regarding SBS cast further doubt on these theories.

Her testimony was that Exhibit #5, the Ad Hoc Committee paper mentioned by Dr. Snell failed peer review and was not published for that reason. It was posted on the website by the Committee despite that failure. Later, NAME created another committee to re-write the paper, but it has never been produced. According to Dr. Ophoven, this paper expired in 2008 and is no longer valid.

Dr. Ophoven testified that in the field of Forensic Pathology, the acceleration/deceleration theory is a real diagnosis, but can only be diagnosed with other evidence to support it. It would not be proper to diagnose such an injury just because there are no other obvious injuries or causes.

LAW, ANALYSIS AND DECISION

Admissibility of scientific or medical evidence is controlled in South Dakota courts by a decision by the United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Prior to that decision, South Dakota and nearly every state had followed the *Frye*[3] test for admissibility of scientific evidence. Daubert ruled that the adoption of the Federal Rules of Evidence changed the rules for admissibility of scientific evidence. The rule that controls admissibility in general is Rule 702, codified in South Dakota under SDCL § 19-15-2:

"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."

After first acknowledging that the adoption of the rules was generally intended to relax the barriers to the admissibility of evidence, the Court went on to recognize that the trial court still had a role to play in deciding whether such evidence would be heard by the jury, for such evidence must still be relevant and reliable. In the words of the Daubert court, "the adjective 'scientific' implies a grounding in the methods and procedures of science…In order to qualify as 'scientific knowledge', an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation-i.e., 'good grounds', based on what is known. In short, the requirement that an expert's testimony pertain to 'scientific knowledge' establishes a standard of evidentiary reliability."

The process as described by Daubert, for the court to evaluate the admissibility of proffered scientific evidence first requires the trial court to determine at the outset, pursuant to Rule 104(a), codified in South Dakota under SDCL § 19-9-7,[4] "whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid, and of whether that reasoning or methodology properly can be applied to the facts in issue." Daubert, 509 U.S. at 812.

Daubert noted that the key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested. A second consideration is whether the theory or technique has been subjected to peer review and publication. While publication is not the be-all and end-all, submission to scrutiny and scientific community is a component of "good science", in part because it increases the likelihood that the substantive flaws in the methodology will be detected. In addition, the court should consider the known or potential rate of error, and the existence and maintenance of standards controlling the technique's operation. Finally, "general acceptance" can also have a

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[3] Frye v. United States, 54 App. D.C. 46, 293 F. 1013 (1923), in which that court required that before expert opinion based upon scientific technique is admissible, the technique must be "generally accepted" as reliable in the relevant scientific community.

[4] "Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of § 19-9-8. In making its determination it is not bound by the rules of evidence except those with respect to privileges."

bearing on the inquiry, since a known technique that has been able to attract only minimal support within the community may be viewed with skepticism.

All of this trial court review has been described frequently as the "gate keeper function" of pretrial review of the evidence.

After the decision in Daubert, the Supreme Court issued a second relevant decision in Kumho Tire Co., Ltd. V. Carmichael, 526 U.S. 137 (1999), wherein the Court required the Daubert approach to be applied to all expert opinions, including technical opinions that may not be scientific in nature. Shortly after, in 2000, Daubert and its progeny were incorporated in the Federal Rules of Evidence by amendment to Rules 701[5] and 702[6]. However, South Dakota has not adopted these modifications.

South Dakota adopted Daubert and its rationale in State v. Hofer, 94 SDO 164, 512 N.W.2d 482 (SD 1994). Hofer involved the admissibility of the results of an intoxilyzer test result in a drunk driving conviction out of this circuit. The Court noted the holding Daubert, and used its rationale to authorize admissibility of the test there.

It is well-known that the medical profession has a long history, including use of procedures in the past that doctors and others today would find repulsive. When this country was founded, it was not unusual for a person finding themselves ill to go to a doctor to be "bled". Some speculate that the treatment actually caused the death of many patients, and had they not received that treatment, they would have lived. The theory was that the blood contained "toxins" causing the illness, and the act of letting blood would get rid of those toxins. In his biography of our first President, *His Excellency, George Washington* Joseph J. Ellis reported that when Washington fell ill in December, 1799, doctors called in to treat him drained some five pints of his blood, and also administered strong laxatives, all in an attempt to purge the poison in his body. If they had been able to administer antibiotics instead, Washington would very well have lived. Instead, he died a horrible and painful death, aggravated by the torture inflicted upon him by his doctors. No doubt, the procedures used were then thought to be the correct procedure in such cases, generally accepted in the medical community. I don't know if there were medical journals at the time, but certainly there were schools where doctors learned their profession, and these procedures were no doubt taught. I don't know if there had been any testing of these procedures in a scientific method as we know today, but I suspect not.

Medical science has, from time to time, developed other theories about the human body and its diseases, some of which later turned out to be untrue. In recent years, AIDS was initially

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[5] Rule 701 now provides: "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."

[6] Rule 702 now provides: "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) the 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.

misunderstood, and called a disease infecting only gay people, the "gay cancer" according to some. However, in time it was realized that AIDS could infect anyone, regardless of their lifestyle. Nevertheless, despite the advances of Medical Science, it is a disease that continues to infect millions around the world.

Likewise, I think, it is true that various theories have been advanced as to causes of injury and death to young children. As mentioned by Dr. Free, early on it was thought by some inconceivable that an adult would harm a small child by blunt force, or shaking, or in any other fashion. Advances in medical science and forensics have unfortunately proven that to be wrong. The testimony has shown, and my own experiences in the legal system have shown that SBS developed as a theory in the late twentieth century, and while some uncertainty remains, it seems likely a true conclusion that shaking alone is hardly ever the explanation for these type of injuries. Only Dr. Free would want to testify to SBS as a viable diagnosis, based upon the testimony I heard. Dr. Randall's autopsy does not apparently support it. Dr. Snell's testimony was that he would not diagnose SBS unless there was either a witness to the act or a confession to the act, in addition to the physical findings. The paper published on the NAME website, fairly discredited by the defense, even concedes that a diagnosis of shaking alone would not be appropriate because not all impact injuries are readily apparent. Finally, Dr. Ophoven strongly showed the court that SBS could only be diagnosed if there was real other evidence to support it, and in the absence of such other evidence, acceleration/deceleration injuries should not be diagnosed.

Certainly this Court is not equating opinions about SBS to blood-letting on the list of questionable medical procedures. The point is, doctors like any other person can be "certain" about their beliefs, and still be wrong. I suppose it possible that an appropriate test will be developed some day that will either prove or disprove this theory as it relates to injuries to children. But the fact that there are no real tests to prove it to be true, and all recent tests tend to show it to be untrue, but are not conclusive does not mean that doctors can opine about it in court without restriction, just because doctors have not been able to come up with other explanations as to the injuries.

Applying the Daubert analysis to this evidence, it is clear that at this point in time the conclusion is clear. The first analysis is whether the theory has been tested. Here, it has not been tested on live babies, but I suspect no such theory in this field ever will be tested on live babies. There have been attempts to create tests for the theory, first with the monkey and 30 mph impacts, and then with dolls and other models. However, the results of these tests do not, in this court's opinion, support the theory, and in fact disprove the theory; at least the most recent tests seem to do that. Most significantly, I find the testimony about the inability of a person to create the G forces necessary to duplicate these injuries to be most persuasive. The tests which the proponents use to support their theory are frankly not on point. While I hesitate to use the term often used by those discussing Daubert, that term, "junk science" seems to be somewhat applicable to those that have proposed this theory.

The second consideration is whether the theory or technique has been subjected to peer review and publication. I think it fair to say from all of the testimony that almost all of the recent publications testified to in court do not support the theory, or at least substantially call into

question some of the conclusions supporting it. The one recent paper the state could point to, the online publication of the Ad Hoc Committee set up by the Board of Directors of NAME, is no longer considered valid, and has expired according to Dr. Ophoven, and was not accepted for publication. And as pointed out, some parts of that paper do not support the state's position.

The third consideration mentioned by Daubert is the rate of error, and the existence and maintenance of standards controlling the technique's operation. I interpret this to be with respect to the testing done. Frankly there was no testimony on this, and the court excludes that consideration from either side. Finally, as noted general acceptance in the relevant scientific community can also have a bearing on the inquiry still, since a known technique that has been able to attract only a minimal support within the community may be viewed with skepticism. Here, SBS did have general acceptance in the late twentieth century in the medical community, until many individuals began to analyze it further. Based upon the failure of NAME to publish the Ad Hoc Committee's proposed position paper, and the failure of the subsequent committee to formulate a new position paper, I think it fair to say that among Forensic Pathologists, SBS does not enjoy general acceptance today, at least as a "default" diagnosis when no other explanation for the injuries is apparent.

That brings us to the specific motion here made by the defense. In analyzing this, I think it imperative to remember why we are here. The defendant is charged with "killing" this infant. Evidence that does not relate to this killing is of questionable admissibility. In other words, the state, to prove evidence admissible, must not only prove that the evidence is true, it must prove that the evidence is relevant, that is, that it tends "…to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." SDCL § 19-12-1. Dr. Free admits she is not competent to opine as an expert witness as to the cause of the death of this child. That is the job of the forensic pathologists. On the other hand, I think all would agree that a Board Certified Pediatrician is competent to opine as to a diagnosis of a disease, or to describe an injury to a child by its appearance. In the present case, it seems to me that a pediatrician ought to be able to testify, for instance, that he or she observed retinal hemorrhages, or subdural hematoma, or signs of brain swelling, and it further seems to me that a doctor ought to be able to testify that these symptoms are consistent with AHT if they are. But by her own admission, Dr. Free cannot testify as an expert witness as to the cause of the death of this child.

The defense has specifically asked the Court to rule on five points: First, the question raised is whether the Court should allow testimony that manual shaking can cause subdural hematomas and retinal hemorrhaging. Based upon the testimony I have heard, my answer would be in the negative. Second, whether shaken baby syndrome meets the Daubert criteria as a scientific theory to explain the injuries to the victim in this case. Based upon the testimony I have heard, my answer would be in the negative. Third, the admissibility of proposed medical and scientific testimony that subdural hematomas and retinal hemorrhaging in infants can only be caused by manual shaking. Based upon the testimony I have heard, I would answer in the negative. Fourth, the admissibility of any proposed medical or scientific testimony that the symptoms of subdural hematoma and retinal hemorrhaging would be immediately apparent. My answer would be definitely in the negative. Fifth, as to the admissibility of any proposed

scientific or medical opinions that the injuries sustained by the infant are consistent with Shaken Baby Syndrome. My answer is definitely in the negative.

To be clear, my decision relates to the proposed testimony of Shaken Baby Syndrome, which was the subject of the defendant's motion. Abusive Head Trauma appears to be a valid diagnosis that a doctor might reach in examining a child, and no part of this decision prohibits the doctors from testifying that the observations they made were consistent with AHT.

Counsel for the defense is directed to prepare the appropriate Findings of Fact and Conclusions of Law and Order for the Court's signature.

Sincerely,

Joseph Neiles
Circuit Court Judge

WILSON SONSINI GOODRICH & ROSATI, P.C.

October 23, 2019 - 2:44 PM

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