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11 October 2022

Mr. XXXXXXXXXX, Attorney at Law
XXXXXXXXXXXXXXXX

Re: (1) Cross-Examination of State's Pathologist, Dr. Cristin XXXXXXXXXX; (2) Motion to exclude Selected Opinions of State's Pathologist, Cristin XXXXXXXXXX, MD in STATE V. XXXXXX

Motion to Exclude Cristin XXXXXXXXXX, MD's Testimony
In
STATE V. XXXXXXXXXX

Dr. XXXXXXXXXX is a well-trained, well-qualified forensic pathologist, licensed to practice medicine in XXXXXXXXXX, employed by the State of XXXXXXXXXX as a Medical Examiner.

Dr. XXXXXXXXXX does not care for live patients and has no expertise or experience with live patients: none. In this case she exceeds her training and expertise, offering opinions about live children, offers unsupported speculative testimony on the causes of death and upon who caused death. In XXXXXXXXXX's autopsy, she and includes and relies upon and then defers to the opinion of another pathologist. This pathologist is not subject to cross-examination, XXXXXXXXXXXXXXXX, from XXXXXXX, and who, otherwise, is a consulting expert witness.

Dr. XXXXXXXXXX received the decedent's body along with considerable collateral non-medical narrative and assistance, so it appears, from the Prosecutor and with immediate attendance (and I assume input from) at the autopsy of a law enforcement officer.

Additionally, Dr. XXXXXXXXXX watched, in its entirety, various video recordings of the Defendant and his wife / child's mother. Usually, in my experience, the state's Medical Examiner, does not engage in any form of investigatory conduct other than "from the autopsy table;" maybe read the law enforcement scene investigation. What she has done here is extra-ordinary an unscientific in drawing medical conclusions from a video recording.

In addition, apparently, because Dr. XXXXXXXXXX doesn't not have sufficient neuropathology expertise, she sent wet tissue and slides to XXXXXXXXXX in XXXXXXXXXX. Dr. Amanda Fisher is an expert witness who must be subjected to examination, as with any expert witness.

The Defendant has not had an opportunity to challenge XXXXXXXXXX's submission and, unless this Court orders that examination, Defendant will be unable to challenge the witness or the report.

Other than the usual methods of the routine forensic pathology examining tissue, to which the Defendant does not object, Dr. XXXXXXXXXX engaged in *ultra vires* conduct, to which Defendant does object. That is the subject of this Motion.

In these areas, the Court must limit and exclude her testimony:

Grand Jury Testimony:

Dr. XXXXXXXXXX's Opinions as expressed at Grand Jury, 7 November 2018, pp. 28-41: (I recommend that you append this as an exhibit)

GJ-p. 28

p. 28
I'm a Deputy Medical Examiner for the State of XXXXXXXXXX and
5 I perform autopsies on bodies of people who die sudden,
6 unexpectedly, often violent deaths or unnatural deaths or
7 of unknown causes.

Dr. XXXXXXXXXX has no background, skills, training, or experience with live pediatric patients and any opinions expressed relating to a living child must be excluded:

GJ-pp. 30-31
p. 30
10 A To become a medical examiner here in XXXXXXXXXX and many
11 other places, I did a -- an undergraduate degree in
12 biology and pre-medicine and got my Bachelor's Degree in
13 Biology and Pre-Medicine at XXXXXXXXXXXXXXXXXXXXXX

Dr. XXXXXXXXXX has no credentials for homicide investigation, other than her undisputable medical expertise in the pathology analysis from data she derived on her autopsy table.

Dr. XXXXXXXXXX learns the case facts from third-hand narratives:

GJ p. 32:
Well she was brought here from the hospital after being
8 declared brain dead or brain death. After an alleged
9 history of violent injury to her head.

GJ. P. 32:
…how that determination of brain death occurred?
20 *** That was from the hospital notes
21 and from the investigative notes that she was no longer
22 able to breath on her own and was -- the brain function,
23 the higher brain functions were absent and she was
24 unconscious as well as not being to breath on her own,
25 had to be assisted with a respirator.

The child was alive until it was decided (*Edit* -we need these records and death certificate) to remove her from medical care. I suspect that the Defendant was coerced into authorization of organ donation. (*Edit* Get consent forms.)[1]

Dr. XXXXXXXXXX is unable to express an opinion as to how long this child would have survived with medical care because in her profession her subjects are dead.

GJ p. 36:
A Yeah, her death was what I -- we call it Hypoxic Ischemic
5 Encephalopathy, that's basically brain death due to blunt
6 force injuries of the head with subdural hematoma and
7 basic through brain -- and brain injury. Contributing
8 condition would be just blunt force injuries of the
9 extremities and trunk.

This child was admitted to the hospital on 10/19/21 and died from organ donation on 10/21/18, not from an act perpetrated by or performed by Mr. Schraeder.

XXXXXXXXXX Autopsy Report:

Dr. XXXXXXXXXX's entire report, relating to this child's death on 10/21/2018, fails to include her opinion on what injuries were present or the child's condition on the date of admission differentiating the condition upon admission, and the resultant deterioration, two days later, leading to death.

Edit Exhibit: I recommend appending the entire 32 pages of the autopsy report

EXTERNAL AND INTERNAL EVIDENCE OF RECENT THERAPY:
1. An endotracheal tube is in place in the mouth and in the trachea.
2.' There is a nasogastric tube in the stomach which contains yellowish, bile-like liquid.
3. There is an intravenous catheter of the dorsum of the right band. There is a puncture on the anterior right wrist. There is an intraosseous puncture on the anterior left tibia. There are heel stick-like punctures ofthe feet.
EVIDENCE OF TISSUE DONATION: There is a recent vertical incision of the chest down to the pubic region. Upon opening of the trunk, there is a midline sternotomy incision of the sternum and there is absence of the heart, portions of the diaphragm, right and left kidney and

[1] In view of the possible and dramatic legal consequences, I believe that Mr. Schraeder needed legal representation at that decisional time.

> adrenals, portion of the spleen and liver: The intestines remain, as well as a loose gallbladder in …
>
> XXXXXXXXXX Autopsy, (file p.11; Discovery p. 000724)

The child's death was artificial, not natural, and was prematurely ended by organ donation when the organs were harvested. Dr. XXXXXXXXXX makes no mention of findings in her autopsy relating to the absence of those organs or the influence in her analysis of performing an autopsy after the effects of several days of medical care and the effects that medical care had on her findings.

This child was admitted to the hospital on 10/19/21 and died 10/21/18. Dr. XXXXXXXXXX's entire report, relating to this child's death on 10/21/2018, fails to include conclusions of what was likely present on admission, for which she has no competence, compared to deterioration days later.

> IX. Postmortem[2] Organ Donation.
>
> A. Donation of heart, kidneys, adrenals, liver, and portion of spleen.

XXXXXXXXXX Autopsy, p. 9; 00722

> 24 hours after the child was resuscitated the first brain death exam was completed, 10/20 1400. The exam showed no response to stimuli and no breaths with an apnea test pCO2 rising from 37 to 82. The child has continued to receive low dose pressors to keep a MAP of 60. Her ventilation has kept a goal pCO_2 of 40. Her volume status has been maintained with infrequent doses of DDAVP q12-20hrs. During the course of her second night after admission her pressor requirements doubled despite a low HR of 110. Cortisol level was drawn and solu-cortef was given at stress doses. Cortisol level resulted low at 1.9. She has remained critically stable. Her second brain death exam was completed 10/21 1400 by a second examiner Dr. Lovrich. Spinal reflexes only were noted. Apnea testing with a pCO2 47 increasing to 80. Time of death declared 10/21 14:41.
>
> LifeCenter NW was present, their family support service were offered to this family prior to the first brain death exam. The mother and father expressed wishes to donate. She was placed back on the ventilator after death was declared.

[2] Some of this case hangs on the definition of death; when is death present? One may argue that death occurred at the time and moment the harvesting team removed the heart; that until that time and moment, this child was alive and had the medical capability, with appropriate medical support, could continue living. This appellate point Mr. Schraeder may seek the XXXXXXXXXX Supreme Court to decide.

Providence XXXXXXXXXX Medical Center (PAMC) p. 3

Amanda Fischer-Hubbard, MD is an expert witness who must be properly challenged:

Amanda Fischer-Hubbard, MD's report of 7 pages must be excluded:

Dr. XXXXXXXXXX is a properly licensed physician in XXXXXXXXXX. Her autopsy of 32 pages stands admissible only upon her medical licensure in XXXXXXXXXX and position of authority. However, Dr. XXXXXXXXXX incorporates an independent medical report[3] from **Amanda Fischer-Hubbard, MD**, XXXXXXXXXX Autopsy 25-29; Discovery pp. 738-742, adopting conclusions from Amanda Fischer-Hubbard, MD, a physician licensed in XXXXXXXXXX, not in XXXXXXXXXX; not admitted as an expert witness in XXXXXXXXXX.

This neuropathology report of 4 pages must be excluded and Dr. XXXXXXXXXX may not, in any way rely upon, reference, or use in any way the report in reaching her conclusions unless and until the report meets evidentiary muster. Dr. Fischer-Hubbard is unlicensed in XXXXXXXXXX and for the purposes of being an expert witness in XXXXXXXXXX, has not been properly admitted by the Court. Defendant is entitled to examine Amanda Fischer-Hubbard, MD.

Further, because Amanda Fischer-Hubbard, MD has not been admitted as a testifying expert witness in XXXXXXXXXX, Dr. XXXXXXXXXX's testimony based upon Amanda Fischer-Hubbard, MD's work is inadmissible.

More specifically, in her own autopsy, Dr. XXXXXXXXXX deferred to **Amanda Fischer-Hubbard, MD's expertise in neuropathology.**

[3] In an ordinary medical practice sense, this form of consultation is proper and would be without medical objection. In this legal setting, however, Defendant must object for the reasons stated since this consulting physician is not licensed in XXXXXXXXXX and neither she nor her report is subject to the Defendant's examination, thus depriving him of crucial Constitutional federal and state protections.

In particular and specifically, because Dr. XXXXXXXXXX's conclusions, XXXXXXXXXX Autopsy pp. 8-9, 0071-0072, are NOT based upon her work but deferred in her opinion to Dr. Fischer-Hubbard, these conclusions must be struck:

> I. Blunt Impacts of Head, Trunk and Extremities.
> E. Global cerebral edema with early herniation of cerebellar tonsils with clinical diagnosis of ischemic encephalopathy (See neuropathology report).
>
> K. Optic nerve, scleral, orbital soft tissue and retinal hemorrhages (See neuropathology report).
>
> L. Scattered individual beta amyloid precursor protein-positive axonal varlcosities/speroids with regions of patchy, streaky beta amyloid precursor protein axonal staining of cerebral white matter, brain stem, optic nerves, bilateral retina, spinal cord and spinal nerve roots (See neuropathology report).
>
> XXXXXXXXXX Autopsy pp. 8-9; 00721-00722.

Further this diagnosis, which is NOT a medical diagnosis but a bootlegged, third-party opinion, must be struck because this data does not appear in or arise from Dr. XXXXXXXXXX's the autopsy tissue findings:

> N. Evidence of manual strangulation by paternal caregiver per surveillance video.

XXXXXXXXXX Autopsy (file p. 08; Discovery p. 00721)

Dr. XXXXXXXXXX provides no measurements or any form of details or quantifications relating to this alleged conduct by the "parental caregiver" in her autopsy. Her opinion is pure speculation and must be excluded.

This global conclusory statement does not meet scientific standards for specificity or of sensitivity. Dr. XXXXXXXXXX does not detail what she saw in the video with references to time markings and fails to show how these injuries specifically caused any form of medical consequence and must be excluded.

Following the incident at the parental home, the child remained in the hospital where she died when organs were donated two days later:

VIII. Therapeutic Procedures.
A. Endotracheal intubation,
B. Intravascular and intraosseous catheterizatíon.
C. Nasogastric intubation.
D. Urinary catheterization,
IX. Postmortem Organ Donation.
A. Donation of heart, kidneys, adrenals, liver, and portion of spleen.

XXXXXXXXXX Autopsy (file p. 09; Discovery p. 00722)

Dr. XXXXXXXXXX fails to delineate or otherwise describe the effects of two days' hospitalization upon lesions she concludes caused injury or death. Dr. XXXXXXXXXX, because she does not treat live children, confused and mischaracterized the child's genetic condition of *epidermolysis bullosa* with anasarca, which worsened during medical treatment and was not present upon admission.

See, e.g.: PAMC p. 4 Elizabeth M Galloway, MD (Physician)

III. Clinical Epidermolysis Bullosa with Lesions of Hands and Feet.
A. Scaling lesions of hands and feet with no active bullus is seen
B. History of familial epidermolysis bullosa.

Dr. XXXXXXXXXX's opinion on who was the perpetrator is speculative and without foundation and derives from her reading medical records NOT from her investigation of the pathology specimens:

GJ. P. 32:
…how that determination of brain death occurred?
20 A Mm-hm (affirmative). That was from the hospital notes
21 and from the investigative notes that she was no longer
22 able to breath on her own and was -- the brain function,
23 the higher brain functions were absent and she was
24 unconscious as well as not being to breath on her own,
25 had to be assisted with a respirator.

Dr. XXXXXXXXXX's opinion upon who was the perpetrator must be struck. Dr. XXXXXXXXXX was unable to provide a specific chain of events causing death:

p. 36
There was written information as well from the police as
16 well as video of the -- of a perpetrator injuring the
17 child, such as squeezing the neck, carrying the baby by
18 the neck. The -- the shaking, side to side against the
19 chest area of the perpetrator. There was also evidence,
20 I think I said, the squeezing of the neck by the hands.
21 There's also biting or chewing on the feet, possibly the
22 hands.

Her conclusions in this regard are speculative and lack any form of sensitivity and specificity and are not scientifically valid. No evidence ties Mr. Schraeder to causing death, for which he is charged.

In her testimony Dr. XXXXXXXXXX, derived from watching a video, she fails to identify exactly and with precision when the neck squeezing occurred and whether, if it took place, it was sufficient, medically, to interrupt oxygen flow to the brain, sufficient enough to cause the brain damage which she states caused death. Dr. XXXXXXXXXX offers no measurement. Dr. XXXXXXXXXX fails to provide the nature of the forces, in terms of force applied over time and area, to cause this brain injury.

GJ p. 37
And then did -- did you observe any -- what's the risk,
4 medical risk or injury risk for an act of strangulation?
5 A What happens is that he's cutting the circulation to the
6 brain, basically. And -- and this is -- was repeatedly
7 done and caused damage over time. Hypoxic or lack of
8 oxygen injury to the brain.

Dr. XXXXXXXXXX did not describe manual finger indentations or ligature marks, typical findings for strangulation. Her opinion in her autopsy is without medical foundation and must be struck:

N. Evidence of manual strangulation by paternal caregiver per surveillance video.

XXXXXXXXXX Autopsy (file p. 08; Discovery p. 00721)

In her Grand Jury testimony Dr. XXXXXXXXXX provides no medically competent evidence that what is seen on the video was manual strangulation by the Defendant. (XXXXXXXXXX XM- p. 13)

Here, Dr. XXXXXXXXXX speculates:

> GJ p. 37
> And then did -- did you observe any -- what's the risk,
> 4 medical risk or injury risk for an act of strangulation?
> 5 A What happens is that he's cutting the circulation to the
> 6 brain, basically. And -- and this is -- was repeatedly
> 7 done and caused damage over time. Hypoxic or lack of
> 8 oxygen injury to the brain.

Dr. XXXXXXXXXX offers no findings of sensitivity or specificity and offers this conclusion based upon observing a video.

GJ p. 38

Then:

GJ: p. 38

> 4 A -- we had multiple behaviors and outside of the squeezing
> 5 and of the neck and depriving the brain of oxygen, the
> 6 baby's also shaken violently and the head hitting the
> 7 chest causing the brain to -- to keep moving when the
> 8 head comes to a stop and then causing tearing and injury
> 9 inside the brain itself and then, you know, the cells
> 10 would be torn, the neurons. The -- there's also slapping
> 11 of the face where it was slapped hard enough to move the
> 12 baby's head.

These conclusions are pure speculation. Dr. XXXXXXXXXX provides no evidence that Mr. Schraeder in any way deprived this child of oxygen or that what she observed on the video and which she calls shaking caused any harm. Dr. XXXXXXXXXX offers no measurements of any sort.

GJ p. 38

13 Q So, also that causing that jarring of the brain similar
14 to the shaking incident?
15 A Yes. It was -- so there were multiple things going on
16 all throughout the videotape.

Here, Dr. XXXXXXXXXX generally speculates where she subsumes her observations of the video record and concludes that what she observed caused any injury with no measurements or quantification of any sort. In her autopsy, she provides no evidence of tracheal bruising, narrowing, any mention of the laryngeal cartilage, no evidence or measurements of any sort to support this conclusion.

Bire Marks are not present:

GJ p. 38:

21 Q You said there was biting of the feet?
22 A Yeah. And that definitely explained the findings that I
23 had in the feet. They weren't just the normal blisters
24 that were on this child that was seen in her -- her
25 condition of her skin. There was bruising underneath and
p. 39
1 I was kind of at -- at a loss for explaining 1 that until I
2 saw the video where he was biting the feet.

Dr. XXXXXXXXXX in her autopsy does not state that she observed bite marks or in any way quantified her observation. This opinion is speculation.

Dr. XXXXXXXXXX expresses an opinion about a live patient with whose condition, live, she has no experience:

9 A There was -- there was record of an older injury to the
10 upper lip and there was a laceration there. And then
11 inside the mouth it's healing. And that it's not a
12 normal appearing, you know, mouth on the inside. Again,
13 you know, the

GJ p. 39

Here, Dr. XXXXXXXXXX offers more opinions far outside of her field of expertise:

A I'm not that great at explaining that. It's, like, yeah,
you -- you did it great. Stick your tongue in there,
between your teeth and your front upper lip, there's
this -- there's one on the lower lip too, but it's not as
pronounced. But the upper lip one is a little flap of
skin.
Q And in your training and experience, is that type of
injury typically consistent with -- is it a normal
occurring injury, let me ask that?
A It -- sometimes a child can tear it by falling or bumping
its head or something like that. But this is a -- this
is a really big tear. It's kind of unusual for a little
four-month old because four-month old's aren't walking
and falling on to tables and things like that.
Q So, whether it's accidental from a child falling or from
some other cause, is it typically associated with some
type of impact to the -- to the child?
A Yeah, the impact is a blunt force injury to the head.

GJ p. 39-40

Then:

Q In your -- your assessment of the development of this
child, were you aware of this child being able to crawl
or otherwise move on its own?
A Yeah, she's only four-months old and probably could roll
and things like that, but couldn't walk and, you know,
fall and stuff like that.
Q Okay.
A Definitely couldn't do that. She's small.
Q All right.
A Only four months.

GJ p. 41

This testimony must be struck. Dr. XXXXXXXXXX has far exceeded her clinical field.

Legal Analyses:

XXXXXXXXXX Rules of Evidence:[4]

> Rule 702. Testimony by Experts. (a) 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.
>
> Rule 703. Basis of Opinion Testimony by Experts. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. Facts or data need not be admissible in evidence, but must be of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.
>
> Rule 704. Opinion on Ultimate Issue. Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.
>
> Rule 705. Disclosure of Facts or Data Underlying Expert Opinion. (a) Disclosure of Facts or Data. The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event disclose on direct examination, or be required to disclose on cross-examination, the underlying facts or data, subject to subdivisions (b) and (c). (b) Admissibility. An adverse party may request a determination of whether the requirements of Rule 703 are satisfied before an expert offers an opinion or discloses facts or data. (c) Balancing Test—Limiting Instructions. When the underlying facts or data would be inadmissible in evidence for any purpose other than to explain or support the expert's opinion or inference, the court shall exclude the underlying facts or data if the danger that they will be used for an improper purpose outweighs their value as support for the expert's opinion. If the facts or data are disclosed before the jury, a limiting instruction by the court shall be given upon request.

Dr. XXXXXXXXXX fails to provide underlying facts and data for her opinions and her opinions must be struck.

Discussion and Analysis:

State v. Coon, Supreme Court No. S-6893, 974 P.2d 386 (XXXXXXXXXX 1999), 5 March 1999 is the XXXXXXXXXX authority on the admissibility of Dr. XXXXXXXXXX's testimony. Dr. XXXXXXXXXX offers no evidence to show that her method of reviewing a video

[4] https://public.courts.XXXXXXXXXX.gov/web/rules/docs/ev.pdf

recording and then drawing pathology conclusion on causation is generally accepted in the medical community. 974 P.2d 386, 388

The State is required to show that this expert testimony fulfills *Coon* requirements.

> … while courts will go a long way in admitting expert testimony deduced from well recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained *general acceptance in the particular field* [Emphasis added] in which it belongs. 974 P.2d 386, 389

The State makes no showing that Dr. XXXXXXXXXX's methodology, adopting a foreign physician's work as if it were her own work, and interpreting video recordings and then making medical conclusions, conforms to the standards of the medical community and is generally accepted.

> It reasoned that the State had not presented evidence concerning the relevant scientific community and whether that community generally accepted voice spectrographic analysis. 974 P.2d 386, 388 (citing *M.R.S. v. State*, 897 P.2d 63, 66 (XXXXXXXXX 1995); *see also Hernandez-Robaina v. State*, 849 P.2d 783, 785 n. 2 (XXXXXXXXX 1993); *Guin v. Ha*, 591 P.2d 1281, 1284 n. 6 (XXXXXXXXX 1979). 974 P.2d 386, 389

Further, and of the most significance, the State has made no showing that

> (1) whether the proffered scientific theory or technique can be (and has been) empirically tested (i.e., whether the scientific method is falsifiable and refutable); (2) whether the theory or technique has been subject to peer review and publication (although publication "is not a *sine qua non* of admissibility"); (3) whether the known or potential error rate of the theory or technique is acceptable, and whether the existence and maintenance of standards controls the technique's operation; and, echoing *Frye*, (4) whether the theory or technique has attained general acceptance.
> *Coon*, 974 P.2d 386, 390

Defendant relies upon *Daubert*, which "requires trial courts to ensure that scientific evidence is both relevant and reliable. The opinion is widely regarded as imposing a more rigorous "gatekeeper" function on trial courts than *Frye* did.

Coon, 974 P.2d 386, 390

What the State is attempting to do here is to admit unreliable and untested evidence and methodology.

The fact that Dr. Fischer-Hubbard is not licensed in XXXXXXXXXX, without more, excludes her work before this Court. Defendant is entitled to independently challenge her work and to require her actual (physical) appearance in XXXXXXXXXX (or maybe Zoom?) identical to the requirements for Dr. XXXXXXXXXX. Dr. Fischer-Hubbard must be properly admitted and her work tested:[5]

> Several of our evidence rules bear on the admissibility of scientific evidence. *393 Evidence Rule 104(a) assigns to the trial court the duty to determine preliminary questions concerning the qualification of a person to be a witness and the admissibility of evidence. Evidence Rule 401 defines what evidence is relevant. Evidence Rule 403 allows exclusion of relevant evidence for such reasons as prejudice, confusion, and waste of time. Evidence Rule 702 allows experts to offer helpful opinion testimony. Evidence Rule 703 allows experts to base opinions on facts or data of a type reasonably relied upon by experts in the field. Thus, expert opinion evidence is admissible if the trial court (exercising its authority under Rule 104(a)) determines that (1) the evidence is relevant (Rule 401); (2) the witness is qualified as an expert (Rule 702(a)); (3) the trier of fact will be assisted (Rule 702(a)); (4) the facts or data on which the opinion is based are of a type reasonably relied upon by experts in the particular field in forming opinions upon the subject (Rule 703); and (5) the probative value of the evidence is not outweighed by its prejudicial effect (Rule 403).
> *Coon,* 974 P.2d 386, 392-393

Additionally:

> Even though Rule 403 might be deemed sufficient protection against the dangers of relatively untested evidence, Rule 703 is drafted so as to remind trial judges that innovative attempts to offer expert evidence may involve evidence that is superficially attractive, but which is problematic for one or more of the following reasons: . . . 3) while the expert evidence is plainly relevant, the rate of error associated with the technique that produced the evidence is unknown and the trier

[5] I anticipate an evidentiary hearing and we would challenge her work. The Court will admit her as an expert but we would challenge her work on a medical and scientific basis since she received several buckets of preserved tissue and had no idea where it came from or how it was selected. It is impossible to know, a reasonable degree of medical certainty, reflects what was present at the time of death or whether there are subsequent changes and artifacts which render the results questionable. Dr. XXXXXXXXXX performed her autopsy, and probably harvested the tissue on 10/24/18, XXXXXXXXXX Autopsy p. 3, 00716, three days after death, XXXXXXXXXX Autopsy p. and sent these tissue samples to Dr. Fisher-Hubbard on 03-29-2019, p. 2, 00715, transmission chain of custody document 4/08/2019. XXXXXXXXXX Autopsy record p. 1, 00XX. Dr. Fisher-Hubbard performed her evaluations and signed her report, p. 2, 01/08/2019. XXXXXXXXXX Autopsy p. 26, 00739. Dr. Fisher-Hubbard had no role in selecting the tissue yet her opinion relies upon Dr. XXXXXXXXXX's judgment in site selection. Defendant should argue that unless Dr. Fisher-Hubbard participated in and controlled the tissue samples' sites sent to her for examination, there is no way to know whether there was any form of exculpatory (*Brady*) information, and, therefore, the entire examination is unreliable.

> of fact is therefore unable to properly evaluate the evidence; 4) the expert evidence is the subject of great controversy among the nation's experts and it would be inappropriate for a court or jury to resolve the controversy in any particular case. *See,e.g., People v. Kelly*, 17 Cal.3d 24, 130 Cal.Rptr. 144, 549 P.2d 1240 (1976) (rejecting voiceprint evidence). 974 P.2d 386, 393

Defendant challenges the admissibility of portions of Dr. XXXXXXXXXX's testimony that she did not generate. In essence she is vouching for XXXXXXXXXX.

> Our evidence rules give trial courts both the authority and the responsibility to determine the admissibility of such evidence without being limited to the general acceptance standard. They preclude this inquiry from focusing exclusively on general acceptance or any other single factor. Our evidence rules contemplate a broader inquiry, allowing a proponent to establish admissibility even if general acceptance is absent, and allowing an opponent to challenge admissibility even if general acceptance is present. 974 P.2d 386, 393

Dr. XXXXXXXXXX's methodology of watching a video and then reaching a medical conclusion, absent any measurements or even corroborating autopsy data, is not subject to any form of empirical testing, as required by *Daubert*. Unless Dr. XXXXXXXXXX is able to provide data supporting her conclusions, then it remains unable to be falsified or to be refuted.

> The factors identified in *Daubert* provide a useful approach: (1) whether the proffered scientific theory or technique can be (and has been) empirically tested (i.e., whether the scientific method is falsifiable and refutable); (2) whether the theory or technique has been subject to peer review and publication; (3) whether the known or potential error rate of the theory or technique is acceptable, and whether the existence and maintenance of standards controls the technique's operation; and (4) whether the theory or technique has attained general acceptance. *Daubert*, 509 U.S. at 593-94, 113 S.Ct. 2786.

Coon, 974 P.2d 386, 395

Further, XXXXXXXXXX's technique or theory is like reading tea leaves and does not appear in peer-reviewed sources or anywhere else. There is no error rate because her opinion is entirely subjective. There is no general acceptance. Dr. XXXXXXXXXX's method does not derive from well accepted methods.

> Other factors may apply in a given case. After the Supreme Court issued its decision in *Daubert*, the
> Ninth Circuit suggested two ways to satisfy *Daubert*'s requirement that the testimony be "derived by the scientific method [or] . . . based on scientifically valid principles." As described by Kesan, "either (a) the expert's proffered testimony must grow out of prelitigation research, or (b) the expert's research must be subjected to peer review." Coon, 974 P.2d 386, 395

Nowhere in medical science or literature or in any legal case anywhere does Dr. XXXXXXXXX's conduct appear: watching an investigatory video and drawing medical conclusions. There is no publication of this method.

> Nonetheless, publication is at least more likely to provoke scrutiny and response, and reveal methodological deficiencies.
> 48 *Daubert v. Merrell Dow Pharm., Inc.*, (*Daubert IV*), 43 F.3d 1311, 1316 (9th Cir. 1995).
> 974 P.2d 386, 395

By this Motion, Defendant seeks the trial court to exclude this extra-autopsy-table investigations and conclusions.

> It is for the trial court to determine whether the expert is qualified to testify and the proffered evidence is admissible. Determining reliability for judicial purposes is unavoidably the responsibility of trial
> courts, and should not be delegated to an expert's peers.
> 56
> 56 *See* XXXXXXXXX R.Evid. 104(a).
> 974 P.2d 386, 396

Dr. XXXXXXXXXX's work is entirely subjective in these areas and should be inadmissible. Further, Dr. XXXXXXXXXX speaks through a loud bullhorn of apparent authority as the Medical Examiner, which the jury is likely to believe. Her opinions are "Junk Science" and would sway impressionable XXXXXXXXXX jurors and must be excluded.

> " *Junk science*." Several amici argue that juror susceptibility to the persuasive power of scientific
> evidence mandates a conservative reliability standard, such as *Frye*'s general acceptance test, to
> prevent admission of "junk science."[61]
> 61 *See generally People v. Kelly*, 17 Cal.3d

> 24, 130 Cal.Rptr. 144, 549 P.2d 1240, 1245 (1976) ("Lay jurors tend to give considerable weight to `scientific' evidence when presented by `experts' with impressive credentials. We have acknowledged the existence of a `. . . misleading aura of certainty which often envelops a new scientific process, obscuring its currently experimental nature.'") (citations omitted); *see also Contreras v. State*, 718 P.2d 129, 135 (XXXXXXXXX 1986). 974 P.2d 386, 396

In *Coon*, the Court admitted the testimony on voice spectrography, finding that

> because **voice spectrography** has been subjected to empirical testing, it is both falsifiable and refutable, and that testing has not refuted the technique or shown that it is falsified. The court determined that when voice spectrography is properly performed by a qualified person, it has attained widespread acceptance within the relevant scientific community – amongst forensic scientists and scientists in acoustics and speech-related fields with experience using the technique.

Coon, 974 P.2d 386, 400

By contrast Dr. XXXXXXXXXX and the State offer no such proof that a forensic pathologist can draw reliable conclusions using her technique of watching a video or third-party information submissions.

At a minimum, Defendant demands an evidentiary hearing to (a) determine whether any of Dr. XXXXXXXXXX's testimony relating to watching the video and drawing conclusions as well as her conclusions citing third-party contributions to her opinions, merit scientific validity; (b) whether, without more, any of XXXXXXXXXX's contribution may be allowed to support Dr. XXXXXXXXXX's testimony; (c) whether Defendant is entitled to examine XXXXXXXXXX in the same manner as he is entitled to examine Dr. XXXXXXXXXX.

> In determining whether evidence is generally accepted within the scientific community, courts
> have generally looked to three sources for guidance: (a) judicial opinions; (b) scientific literature; and (c) expert testimony presented at an evidentiary hearing.[83]
>
> 83 *See, e.g., Windemere, Inc. v. International Ins. Co.*, 522 A.2d 405, 408 (N.J. 1987). 974 P.2d 386, 402

Sincerely,

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