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Unsound Methods: The Challenge of Overcoming Expert Witnesses who will Say Anything

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**UNSOUND METHODS: THE CHALLENGE OF OVERCOMING EXPERT
WITNESSES WHO WILL SAY ANYTHING**

by

Richard Jared Stepp

May 8, 2014

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I. Introduction

Expert testimony can be very useful in aiding the trier of fact to reach an informed decision. A competent expert testifying in a scientifically grounded area can make the understanding of technical and complex evidence possible to a layperson. What happens though when an expert testifies under bad faith? The consequences of such testimony can be disastrous. This paper examines the difficulty faced by criminal defense attorneys during a criminal trial when the expert witness is either lying or is flagrantly using unscientific methods to help the prosecution prove its case. First, by describing the actions of two prolific, forensic examiners from Mississippi who frequently testified in bad-faith. Second, by an analysis of how *Daubert* hearings are ill-equipped to deal with such experts. Third, possible avenues to exclude or reduce the damage for the defense of bad-faith expert testimony. Fourth and finally, how the standard of review for evidentiary matters prevents courts from overturning bad-faith experts. The flaws inherent in the *Daubert* hearing process, the difficulty of excluding bad-faith expert testimony, and the standard of review for the inclusion or exclusion of bad-faith experts results in the unjust conviction and sentencing of many innocent people.

Part one describes the actions of two expert witnesses who repeatedly acted in bad-faith. Dr. Stephen Hayne (“Hayne”) worked as a forensic pathologist in the state of Mississippi.¹ He testified on numerous occasions in criminal and civil trials as an expert witness.² Michael West (“West”) is a dentist who claimed to be an expert in Forensic Odontology.³ By himself, and in conjunction with Hayne, West testified as an expert witness many times.⁴ Both of these experts

¹ Campbell Robertson, *Mississippi Autopsies by Doctor in Question*, N.Y. Times, January 8, 2013, at A11.

² *Id.*

³ Radley Balko, *Manufacturing Guilt?*, REASON MAGAZINE (Feb. 19, 2009) <http://reason.com/archives/2009/02/19/manufacturing-guilt/print>.

⁴ *Id.*

used flawed science and unproven methods as a basis for their expert opinions, yet they were allowed to testify time and time again.⁵ The story of these experts demonstrates how difficult it is for defense counsel to prevent unreliable expert testimony from being admitted.

Part two examines and explains the requirements of the Federal Rules of Evidence as interpreted by *Daubert* for expert testimony. Three Supreme Court decisions: *Daubert v. Merrell Dow Pharmaceuticals*⁶, *Kumho Tire Co. v. Carmichael*⁷, and *General Electric v. Joiner*⁸ changed the face of expert testimony in the federal court system. Before *Daubert*, the standard for admission of expert testimony was established by *Fry v. United States*.⁹ Under *Fry*, an expert's opinion had to "have gained general acceptance in the particular field in which it belongs."¹⁰ The *Daubert* decision changed this standard, removing the general acceptance requirement and requiring the judge to act as a gatekeeper.¹¹ Many states have either adopted this new standard or their Supreme Courts have determined that their rules of evidence are in line with these decisions.¹² Additionally, this part examines two cases where an expert testifying in bad faith assisted the state in prosecuting an innocent person. Each of these cases was reversed and remanded for a new trial.

⁵ *Id.*

⁶ *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993) (holding that "general acceptance" is not required for expert testimony and that the trial judge is responsible for insuring the reliability of expert testimony).

⁷ *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) (applying *Daubert* to all expert testimony).

⁸ *Gen. Elec. v. Joiner*, 522 U.S. 136, (1997) (establishing an abuse of discretion standard of review for the admission of expert testimony).

⁹ *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923) (requiring that expert testimony gain general acceptance in its field before being admissible).

¹⁰ *Id.* at 1014.

¹¹ *Daubert*, 509 U.S. at 597.

¹² *See, e.g., Miss. Transp. Comm'n v. McLemore*, 863 So. 2d 31, 43 (Miss. 2003) (adopting a "modified *Daubert* test").

Part three examines what happens if an expert witness acting in bad-faith survives a *Daubert* hearing. One option to defense counsel is a motion in limine to keep the evidence out of court under Federal Rule of Evidence 403¹³ (“FRE”) or Mississippi Rule of Evidence 403¹⁴ (“MRE”). Counsel will have to demonstrate that the scientific methods and processes used by the expert witness are so unreliable, that they essentially have no probative value. One challenge with a FRE or MRE 403 motion is that essentially the same evidence that would be introduced to challenge the witness under a *Daubert* hearing will need to be used. If defense Counsel had no luck in a *Daubert* hearing than they may do no better under a 403 motion. Additionally, the standard for review for FRE and MRE 403 is abuse of discretion, so there is little hope on appeal.¹⁵ This section also considers how a jury responds to confident expert witnesses and looks at ways to counter them during cross-examination and summation. When dealing with experienced expert witnesses like Hayne and West who seem to have no qualms about exaggerating their abilities, it will be very difficult for defense Counsel to convince a judge to exclude their testimony or a jury to ignore it.

Part four examines the standard of review for evidentiary matters. The standard of review for admitted evidence in both Federal Court and the Mississippi State Courts is abuse of discretion. This makes it particularly challenging for someone convicted of a crime where the testimony of an expert witness was critical to be granted post-conviction relief. This standard of

¹³ Fed. R. Evid. 403 (“The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence”).

¹⁴ Miss. R. Evid. 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence”).

¹⁵ *Old Chief v. United States*, 519 U.S. 172, 191 (1997) (holding that the appellate standard of review for a 403 balancing test is abuse of discretion).

review for the exclusion or admittance of expert testimony is especially troublesome when an expert is allowed to testify using unscientific methods. Appellate courts are not eager to overturn cases based on an abuse of discretion standard. The standard of admitting expert evidence under *Daubert*, the challenges of excluding experts under other rules of evidence, and the deferential standard of appellate review make it extremely difficult for defense counsel to stop bad-faith experts from giving unscientific and unreliable testimony to a jury.

II. Trouble in Mississippi — Faulty Science and Faulty Experts

It is difficult to find a more flagrant and tragic example of improper expert testimony being allowed into court than that of Dr. Stephen Hayne (“Hayne”) and Michael West D.D.S. (“West”) in Mississippi. For a period of over twenty years Hayne and West testified in hundreds of court cases, using faulty science and unreliable methods.¹⁶ Their testimony resulted in the death penalty and imprisonment of many individuals who were later exonerated, and countless others who may yet be proven not guilty.¹⁷ Hayne started working as a forensic pathologist in the early 1980’s and was able to cement himself into the Mississippi criminal court system by positioning himself to personally conduct the majority of autopsies in the state.¹⁸ West is a dentist who held himself to be an expert in forensic odontology (or forensic dentistry).¹⁹ He testified in at least 100 trials and in many cases extended his expert qualifications far outside the

¹⁶ Mark Hansen, *Out of the Blue*, ABA Journal (Feb. 1, 1996), http://www.abajournal.com/magazine/article/out_of_the_blue (detailing the career of West); See also Robertson, *Supra* at A11 (Examining Hayne’s career).

¹⁷ See, e.g., *Edmonds v. State*, 955 So. 2d 787, 799 (Miss. 2007) (Court reversed and remanded for a new trial partly due to the admission of Hayne’s testimony, the accused was 13 at the time he was convicted of murder through a dubious two-shooter, one-gun theory); Jerry Mitchell, *Defense lawyers want review of cases involving pathologist Dr. Steven Hayne*, The Clarion-Ledger, June 16, 2013 (reporting on the acquittal of Tyler Edmonds after his new trial and the Mississippi Innocence Projects call for an investigation of the cases where Hayne testified as an expert witness).

¹⁸ Robertson, *Supra* at A11.

¹⁹ Hansen, *Supra*.

realm of forensic dentistry.²⁰ Both of these individuals relied on unsound science and unproven methods to generate evidence that led to the successful prosecution of many innocent people.

a. Dr. Stephen Hayne

Hayne is forensic pathologist and a graduate of Brown University Medical School.²¹ He began working as a forensic pathologist in the state of Mississippi in the early 1980's.²² Conducting between 15,000 and 16,000 autopsies a year,²³ Hayne quickly came to dominate the field of forensic pathology in Mississippi.²⁴ This number is considerably higher than the 400 autopsies per year that the National Association of Medical Examiners recommends.²⁵ This breaks down to between 28 and 30 autopsies a week. In addition to this heavy workload, Hayne worked as the medical director of a hospital and testified in court two to four times a week in Mississippi and Louisiana.²⁶

Hayne testified between 2,500 and 3,000 times in court as a forensic pathologist.²⁷ Despite all his testimony, Hayne has never been certified by the American Board of Pathology.²⁸ He attempted to take the certification exam on one occasion in the 1980's, but has testified he walked out because the questions were absurd.²⁹ This forced him to resign from the position of Interim State Medical Examiner, which he held for approximately two years, because this

²⁰ *Id.* (discussing the other areas in which West would testify including shoe-print identification).

²¹ Transcript of Testimony of Dr. Steven Hayne, Arrington v. Gilmore Mem'l Hosp., 2006 Trial Trans. LEXIS 1553, at *2-3 (No. CV01-109).

²² Robertson, *Supra* at A11.

²³ Transcript of Hayne Testimony, *Supra* at *39-41.

²⁴ Robertson, *Supra* at A11.

²⁵ Transcript of Hayne Testimony, *Supra* at *39-41.

²⁶ Radley Balko, *Cross Country: CSI: Mississippi*, The Wall Street Journal, October 6, 2007, at A20.

²⁷ Transcript of Trial at 541-19, State v. Harvard, (2002) (No.0141).

²⁸ Radley Balko, *CSI: Mississippi*, REASON MAGAZINE, October 8, 2007, <http://reason.com/archives/2007/10/08/csi-mississippi/print>.

²⁹ *Id.*

position requires certification by the American Board of Pathology.³⁰ Other than Hayne's tenure, and a few other brief periods, the position of State Medical Examiner for Mississippi has remained unfilled since 1995.³¹ Hayne filled in by conducting the vast majority of the state's autopsies, until he was forced to stop in the mid 2000's.³²

One notable example of Hayne's "creative" forensic methods was when he exhumed a boy several weeks after he had been buried because of a statement by the boy's brother that his mother's boyfriend had killed him.³³ Hayne made a cast of the boy's face, and compared it with his notes from the previous autopsy he had conducted.³⁴ The boyfriend was later convicted of the murder because Hayne testified that the marks on the cast were consistent with a "large male hand."³⁵ Another example, which will be discussed in greater detail later, is the case of Kennedy Brewer.³⁶ Brewer was prosecuted for raping and killing his girlfriend's three year old daughter.³⁷ Hayne and West both testified that they identified bite marks on her body that matched Brewer.³⁸ Brewer was convicted in 1992. In 2001, DNA evidence was discovered that exonerated him.³⁹ He was granted a new trial in 2002 and found not guilty in 2008.⁴⁰ These brief examples illustrate the type of forensic pathology that Hayne practiced and his comfort in testifying based on limited evidence.

³⁰ *Id.*

³¹ Shelia Byrd, *Watchdog Suggests Miss. Change Death Review System*, THE ASSOC'D PRESS, October 20, 2008.

³² *Id.*

³³ Robertson, *Supra* at A11.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Brewer v. State*, 819 So. 2d 1169, 1171 (Miss. 2002).

³⁷ Shelia Byrd, *Sept. Trial of Miss. Man in Toddler Deaths Set*, THE ASSOC'D PRESS, June 10, 2008.

³⁸ *Id.*

³⁹ *Brewer*, 819 So. 2d at 1176.

⁴⁰ SHELIA BYRD, *SEPT. TRIAL OF MISS. MAN IN TODDLER DEATHS SET*, THE ASSOC'D. PRESS, JUNE 10, 2008.

b. Michael West D.D.S.

Michael West is a Dentist who practiced and testified as an expert witness in primarily in forensic dentistry.⁴¹ He operated out of Mississippi and worked alongside Hayne.⁴² West testified in nearly 100 trials as an expert witness.⁴³ He used a method to find bite marks and other evidence that he called “the West Phenomenon.”⁴⁴ This method consisted of pointing a blue ultra-violet light at an area of skin, in a completely dark room, and examining the skin while wearing orange tinted glasses.⁴⁵ He compared his accuracy using this, and other methods to “something less than the error rate of [his] savior, Jesus Christ.”⁴⁶

West frequently assisted Hayne in his autopsies.⁴⁷ He was brought into court to testify many times.⁴⁸ This may have been because while using the “West Phenomenon” he was able to see evidence that no one else was able to see (even while using his method).⁴⁹ Or, it may be that he was liked by the prosecution for his ability to fabricate evidence. In at least one case there is video evidence of West roughly pressing a dental mold of a suspect onto a victim’s skin in multiple places, including over bruises.⁵⁰ Rather than use the standard phrase of “to a medical

⁴¹ Newsweek Staff, *A Dentist Takes the Stand*, NEWSWEEK, Aug. 19, 2001, *Updated* July 1, 2010. <http://www.newsweek.com/dentist-takes-stand-151357>.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Radley Balko, *CSI: Mississippi*, REASON MAGAZINE, October 8, 2007, <http://reason.com/archives/2007/10/08/csi-mississippi/print>.

⁴⁸ Shelia Byrd, *Mississippi Bite-Mark Expert Breaks Silence for Lawsuit*, THE ASSC’D PRESS, May 1, 2009.

⁴⁹ Newsweek Staff, *A Dentist Takes the Stand*, NEWSWEEK, Aug. 19, 2001, *Updated* July 1, 2010. <http://www.newsweek.com/dentist-takes-stand-151357>.

⁵⁰ Radley Balko, *Manufacturing Guilt?*, Reason Magazine (Feb. 19, 2009), <http://reason.com/archives/2009/02/19/manufacturing-guilt>.

certainty” while giving his “expert” opinion, West insisted on saying “indeed and without a doubt.”⁵¹

Along with Hayne, West’s testimony helped put multiple people in prison who have since been exonerated.⁵² He testified in the aforementioned Kennedy Brewer case⁵³, and he used his “West Phenomenon” to help convict Anthony Keko of murdering his ex-wife.⁵⁴ Keko’s conviction was overturned three years later because the Louisiana appeals court determined that the trial court erred in admitting West’s testimony.⁵⁵ West has since given up on forensic dentistry, stating “I don’t want to do any more death information” and that “I’ve lost faith in the system.”⁵⁶ It is unclear how many innocent people their testimony has landed in prison, either through conviction or settlement, because Mississippi has yet to conduct a systematic review of cases they worked on.⁵⁷

III. Difficulty in Stopping Bad-Faith Expert Testimony from Being Heard by the Jury

The admission of expert witness testimony in Federal Court is governed by Rule 702 of the Federal Rules of Evidence (“FRE”).⁵⁸ Before 1993 the controlling case on the admission of

⁵¹ Hansen, *Supra*.

⁵² Radley Balko, *CSI: Mississippi*, REASON MAGAZINE, October 8, 2007, <http://reason.com/archives/2007/10/08/csi-mississippi/print>.

⁵³ Melanie Lasoff Levs, *Bite-Mark Evidence Loses Teeth*, ABA Journal (May 1, 2008), http://www.abajournal.com/magazine/article/bite_mark_evidence_loses_teeth/.

⁵⁴ Jim Fisher, *FORENSICS UNDER FIRE* 157-158 (1st ed. 2008).

⁵⁵ *Id.*

⁵⁶ Shelia Byrd, *Miss. Bite-Mark Expert Breaks Silence for Lawsuit*, The Assoc’d. Press, May 1, 2009.

⁵⁷ Robertson, *Supra*.

⁵⁸ FED. R. EVID. 702:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

expert testimony was *Fry v. United States*.⁵⁹ The standard for admitting expert testimony under *Fry* was that a particular skill or expertise be recognized as valid in the expert's field.⁶⁰ In 1993 the Supreme Court held in *Daubert* that "general acceptance" is not mentioned in FRE 702 and that *Fry* was superseded by the adoption of the FRE.⁶¹ The court named the trial judge as a gatekeeper⁶² and listed several factors for consideration in determining whether to allow an expert to testify.⁶³ In many ways *Daubert* has improved the quality of the science behind expert witness testimony that is allowed into court, but it does not seem to help when bad-faith experts like Hayes and West take the stand.⁶⁴

a. *Daubert, Kumho, and Joiner, the Judge as the Gatekeeper*

In *Daubert*, the Supreme Court stepped away from the old *Fry* standard, determining that FRE 703 superseded *Fry*. The Court stated that the trial judge would act as a gatekeeper,⁶⁵ responsible for determining if an expert's testimony "rests on a reliable foundation and is

-
- (b) the testimony is based on sufficient facts or data;
 - (c) the testimony is the product of reliable principles and methods; and
 - (d) the expert has reliably applied the principles and methods to the facts of the case.

⁵⁹ *Daubert, Supra* at 585 ("In the 70 years since its formulation in the Frye case, the "general acceptance" test has been the dominant standard for determining the admissibility of novel scientific evidence at trial").

⁶⁰ *Frye, Supra* at 1014 ("Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a 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 in which it belongs").

⁶¹ *Daubert, Supra* at 587.

⁶² *Id.* at 597.

⁶³ *Id.* at 593-594.

⁶⁴ *See, e.g., Weisgram v. Marley Co., 528 U.S. 440, 455-456 (2000)* (affirming the exclusion of an unreliable witness).

⁶⁵ *Daubert, Supra* at 597.

relevant to the task at hand.”⁶⁶ Later, the Court held in *Kumho Tire Co. v. Carmichael* that the judge’s gatekeeping function applied to all expert testimony and that *Daubert* style questions can be asked regardless of whether an expert is testifying on a scientific subject or not.⁶⁷

Additionally, in *General Elec. v. Joiner* the court held that the proper standard of review for decisions to allow or disallow scientific expert testimony is abuse of discretion.⁶⁸

In *Daubert*, the petitioners sought to overturn a lower court decision to exclude their expert witnesses based on the *Fry* standard.⁶⁹ The *Fry* standard required that the scientific bases for expert testimony must have “gained general acceptance in the particular field in which it belongs.”⁷⁰ The framework set forth in *Daubert* established a gatekeeping roll for the judge in determining the scientific validity of expert testimony.⁷¹ FRE 701 is mirrored by Rule 702 of the Mississippi Rules of Evidence (“MRE”).⁷² In the 1993 case of *Daubert v. Merrell Dow Pharmaceuticals Inc.* the Supreme Court of the United States outlined the factors required for the

⁶⁶ *Id.* at 597.

⁶⁷ *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 151 (1999).

⁶⁸ *GE v. Joiner*, 522 U.S. 136, 146 (1997) (“We hold, therefore, that abuse of discretion is the proper standard by which to review a district court's decision to admit or exclude scientific evidence”).

⁶⁹ *Daubert*, *Supra* at 583.

⁷⁰ *Frye*, *Supra* at 1014.

⁷¹ *Daubert*, *Supra* at 597.

⁷² MISS. R. EVID. 702:

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.

admission of expert testimony.⁷³ The *Daubert* framework was ruled to apply to MRE 702 by the Mississippi Supreme Court in 2003.⁷⁴

The Court in *Daubert* laid out a series of factors for judges to consider when determining if a “theory or technique is scientific knowledge.”⁷⁵ The first is “whether it can be (and has been) tested.”⁷⁶ Second, “whether the theory or technique has been subjected to peer review and publication.”⁷⁷ Third, the “known or potential rate of error” for a scientific technique.⁷⁸ Forth, how generally accepted is the theory or technique?⁷⁹ These factors are not dispositive and judges are able to tailor them to fit a particular situation.⁸⁰

The first factor described in *Daubert*, “whether it can be (and has been) tested” is the most important and fundamental factor.⁸¹ Looking at West’s claims, he used a blue ultra-violet light and orange goggles to find bite-marks on bodies.⁸² He calls this method the “West Phenomenon.”⁸³ Under this light he has claimed to see evidence that other forensic scientist can’t replicate.⁸⁴ Reproducible results from independent researchers are vital to the scientific method. A process such as the “West Phenomenon” that can’t be reproduced clearly falls out of

⁷³ *Daubert, Supra* at 590.

⁷⁴ *Miss. Transp. Comm'n v. McLemore*, 863 So. 2d 31, 39 (2003).

⁷⁵ *Daubert, Supra* at 593-594.

⁷⁶ *Id.* at 593.

⁷⁷ *Id.* at 593.

⁷⁸ *Id.* at 594.

⁷⁹ *Id.* at 594.

⁸⁰ *Id.* at 594-595 (“the inquiry envisioned by Rule 702 is, we emphasize, a flexible one. 12 Its overarching subject is the scientific validity — and thus the evidentiary relevance and reliability — of the principles that underlie a proposed submission”)

⁸¹ *Id.* at 593 (testability is a “key question to be answered”).

⁸² Radley Balko, *CSI: Mississippi*, REASON MAGAZINE, October 8, 2007, <http://reason.com/archives/2007/10/08/csi-mississippi/print>.

⁸³ *Id.*

⁸⁴ Mark Hansen, *Out of the Blue*, ABA Journal (Feb. 1, 1996), http://www.abajournal.com/magazine/article/out_of_the_blue.

the bounds of science. A lone researcher testing equipment he developed cannot say that he has proven his equipment works until someone else tests it out.

Hayne and West gave expert testimony that purported to be scientific, but much of it was actually experienced based. After *Daubert* there was some dispute over whether the *Daubert* factors applied only to scientific testimony or to expert testimony in general.⁸⁵ In *Kumho* the Supreme Court held that all expert testimony is subject to *Daubert* analysis.⁸⁶ *Kumho* was a products liability case over an alleged defective tire.⁸⁷ One of the issues was whether or not *Daubert* applied to an engineer testifying as an expert witness.⁸⁸ The Court stated that the list of factors in *Daubert* was meant to be flexible, not definitive.⁸⁹ These factors can also be applied to experienced based expert testimony.⁹⁰ Therefore, in light of *Kumho*, the *Daubert* analysis applies to expert medical testimony and would apply to both Hanye's and West's testimony.

b. Daubert's Fails in the Presence of Bad-Faith Expert Testimony

The following two cases demonstrate how testimony from experts acting in bad-faith can get through a *Daubert* hearing and be presented to a jury. The first case is Tyler Edmonds, a 13 year old boy from Mississippi who was convicted of murder with the assistance of Hayne's two-person, one-gun theory.⁹¹ The second case is that of Kennedy Brewer. Brewer was convicted of

⁸⁵ See *Carmichael v. Samyang Tire*, 131 F.3d 1433, 1435 (11th Cir. 1997), *overruled by Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) (holding that the *Daubert* factor only apply to scientific expert testimony). See also *United States v. Nichols*, 169 F.3d 1255, 1265 (10th Cir. 1999) *overruled by Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

⁸⁶ *Kumho*, *Supra* at 591 (holding the *Daubert* factors are "to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field")

⁸⁷ *Id.* at 142.

⁸⁸ *Id.* at 145-146.

⁸⁹ *Id.* at 151

⁹⁰ *Id.*

⁹¹ *Edmonds v. State*, *Supra* 790.

the rape and murder of his girlfriend's three year old daughter.⁹² Either Hayne or West testified in each of these trials as an expert witness. Edmonds and Brewer were eventually exonerated.⁹³

i. Tyler Edmonds — Expert Witnesses Testifying in Bad-Faith are Difficult to Detect under *Daubert*

The decision of the trial court to allow Hayne to testify outside his area of expertise shows a weakness in the *Daubert* factors when applied to experts testifying in bad-faith. Under *Daubert* the court should consider a series of factors to determine if an expert's methodology and testimony follows scientific principles.⁹⁴ Tyler Edmonds was charged with murdering his half-sister's husband in 2003.⁹⁵ He was 13 years old at the time.⁹⁶ Edmonds was picked up by his half-sister, with whom he shared a father, to stay at her house over the weekend.⁹⁷ His sister asked him to bring his .22 rifle with him when he came over to her house.⁹⁸ At approximately 4:00am Edmonds was awoken by his sister and they ostensibly shot his sister's husband with the .22.⁹⁹ Both siblings turned themselves in to the police and Edmonds confessed to the Murder.¹⁰⁰ His sister remained silent. Edmonds was later convicted of the murder by a jury and sentenced to life in prison.¹⁰¹ At trial, Hayne testified that based on the injuries he observed in the victim,

⁹² Brewer v. State, *Supra* 1171.

⁹³ See Jerry Mitchell, *Pathologist's Credibility on Line*, THE CLARION-LEDGER (Nov. 6, 2012) (reporting the acquittal of Tyler Edmonds in a new trial after his prior conviction was reversed and remanded); Shelia Byrd, *Sept. Trial of Miss. Man in Toddler Deaths Set*, THE ASSOC'D. PRESS, June 10, 2008 (reporting the acquittal of Kennedy Brewer in his new trial).

⁹⁴ *Daubert*, *Supra* at 592-593.

⁹⁵ Edmonds v. State, 955 So. 2d 864, 869 (Miss. Ct. App. 2006), *overruled by* Edmonds v. State, 955 So. 2d 787 (Miss. 2007).

⁹⁶ Edmonds, *Supra* 955 So. 2d at 700.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 701

¹⁰¹ *Id.*

the gun was held by two individuals who both pulled the trigger at the same time.¹⁰² Edmond's attorney raised an objection and requested a *Daubert* hearing, but the trial court denied the request.¹⁰³ The court did, however, allow both counsel to approach the bench and argue whether or not Hayne's testimony was outside his scope of expertise.¹⁰⁴ On appeal the Supreme Court held that the court erroneously allowed Hayne to testify.¹⁰⁵ They reversed and remanded on several grounds. Edmonds was given a new trial and he was acquitted.¹⁰⁶

Hayne's testimony was based on opinion, and not a very sound one. By admitting Hayne's testimony, the court allowed bad science to be heard by the jury. This is directly opposed to the principles of sound science championed by *Daubert*. The question is, what is a defense attorney supposed to do? When confronted by an expert witness who begins to wonder outside his realm of expertise, how can one stop the testimony? In this case the attorney objected and asked for a *Daubert* hearing, which the court denied. This does not bode well for defense attorneys because the standard of review for evidentiary appeals is an abuse of discretion.¹⁰⁷ The inability of a defense attorney to prevent the jury from hearing unscientific expert testimony when that expert is acting in bad-faith, and then is hamstrung on appeal by a deferential standard of review, demonstrates a serious problem under the current rules of evidence.

ii. Kennedy Brewer — Doubling Down on Bad Science

A second problem with the current rules of evidence when an expert is testifying in bad-faith occurs when the defense hires its own expert to counter that of the prosecution. A battle of the experts can ensue, where both experts are relying on unproven science and lending each-

¹⁰² *Id.* at 791-792.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 792.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 799.

¹⁰⁷ Joiner, *Supra* at 142-143.

other credibility. Kennedy Brewer was left to baby-sit his girlfriend's daughter while she went out with her sister.¹⁰⁸ When his girlfriend returned she went to bed without checking on her daughter.¹⁰⁹ In the morning when she and Brewer woke up, her daughter was missing.¹¹⁰ She was later found dead behind their house.¹¹¹ Hayne was brought in to conduct an autopsy.¹¹² He determined that the girl was raped and strangled to death.¹¹³ He also found what he believed to be bite marks, so he called in West to examine the body.¹¹⁴ West determined that the teeth marks belonged to Brewer to a "reasonable medical certainty."¹¹⁵ The defense's expert witness testified that none of the marks were bite-marks because there were no marks from a lower jaw.¹¹⁶ Brewer was found guilty of capital murder while engaged in sexual battery and was sentenced to death by lethal injection¹¹⁷

On appeal, the Brewer raised the issue of West's qualification as an expert.¹¹⁸ The appellant court denied relief, even though Brewer demonstrated past instances where West had stepped outside the bounds of proven science.¹¹⁹ The court ruled that his past use of unscientific methods should go to the weight and credibility of the evidence, not to his qualifications as an expert.¹²⁰ Additionally, the defense's own expert agreed that the technique of matching a mold

¹⁰⁸ Brewer v. State, 725 So. 2d 106, 112 (Miss. 1998).

¹⁰⁹ *Id.* at 113.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 115.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 115-116.

¹¹⁵ *Id.* at 116.

¹¹⁶ *Id.* at 116.

¹¹⁷ *Id.* at 117.

¹¹⁸ *Id.* at 125.

¹¹⁹ *Id.* at 126.

¹²⁰ *Id.*

of Brewer's teeth to marks on the body was acceptable and is the same method he used.¹²¹ In 2001, a DNA test excluded Brewer as the murderer and he was given a new trial.¹²² He was found not guilty in 2008.¹²³

A problem in this case is that when the defense hires its own expert witness to rebut the prosecution's witness, and the underlying science that both parties are using is unreliable, then a battle of the experts arises where neither side can effectively attack the other experts underlying methodology. The "science" of bite mark analysis is far from settled.¹²⁴ When an expert for the prosecution is allowed to testify and will be basing that testimony on bad science, it puts the defense in a difficult position. If they do not bring in their own witness to rebut, the jury will only hear the prosecution's expert. If they bring in a witness, and that witness uses the same bad science as the prosecution's witness, then they will have increased the credibility of the prosecution's witness. This demonstrates a flaw, in at least the application of *Daubert* and the unwillingness of courts to seriously examine the underlying science behind expert testimony.

IV. The Probative Value of Bad Evidence

One mode of attack against an expert witness who is suspected of using unscientific methods or testifying in bad-faith in addition to a *Daubert* challenge is a motion in limine to exclude him under FRE 403.¹²⁵ If a *Daubert* challenge and a motion to exclude under 403 are ineffective, the

¹²¹ *Id.*

¹²² *Brewer v. State*, 819 So. 2d 1169, 1176 (Miss. 2002).

¹²³ Shelia Byrd, *Sept. Trial of Miss. Man in Toddler Deaths Set*, THE ASSOC'D. PRESS, June 10, 2008.

¹²⁴ NAT'L RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 172-174 (2009) (describing the lack of scientific study done to prove the accuracy of bite mark evidence and the serious problems with maintaining an accurate imprint on dead tissue over time).

¹²⁵ *Daubert*, *Supra* at 595 (discussing the power of expert testimony and its ability to be excluded under rule 403).

defense is limited to cross-examination and summation to convince the jury to discount the expert's testimony.

a. FRE 403 and MRE 403

FRE 403 provides a balancing test between the probative value of proffered evidence and the danger of unfair prejudice.¹²⁶ If defense Counsel can demonstrate that the methods of an expert witness are unscientifically based then their probative value is significantly decreased.

Additionally, if some doubt as to the expert's credentials can be shown then the scales of the probative value vs. unfair prejudice scales tip in the favor of unfair prejudice. Generally, courts are reluctant to exclude testimony based on FRE 403 because even beginning the 403 analysis tends to show that the evidence in question has some probative value.¹²⁷ In a situation when a defense attorney is dealing with an expert who is able to make pseudoscience sound believable, it is very difficult to argue that the witness' testimony has no probative value. It is possible to get a limiting instruction, telling the jury to focus only on the testimony that the expert witness is qualified to give.¹²⁸ This is a poorer option than having the witness completely excluded because no matter what instructions the judge gives to a jury, no one can control what happens in deliberations and no one knows what the jury is actually thinking.

If a *Daubert* challenge and a motion in limine to exclude under FRE 403 are unsuccessful than it is up to defense counsel to convince the jury in cross-examination and summation that they should discount the expert's testimony. This can be very difficult, especially with seasoned

¹²⁶ Fed. R. Evid. 403 (“The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence”).

¹²⁷ See *United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 384 (2008).

¹²⁸ *United States v. Williams*, 717 F.3d 35, 41 (1st Cir. 2013).

experts like Hayne and West who are able to articulate their pseudoscience with confidence and statements like “indeed and without a doubt.”¹²⁹

b. The Challenge of Convincing a Jury to Disregard Expert Testimony

If an expert witness testifying in bad-faith gets past a *Daubert* hearing and survives a 403 motion, then the jury will hear the expert’s testimony. A confident witness will likely seem more credible to jurors. Someone with the trial experience of Hayne¹³⁰, or the self-confidence of West.¹³¹ There is some evidence that juries are more differential towards the opinions of experts.¹³² This link between confidence and credibility and the difficulty in challenging experts who testify in bad faith make it especially difficult to convince jurors to disregard expert testimony.

i. The Link between Confidence and Credibility

Beyond the common sense problem of jurors naturally respecting and giving extra weight to expert testimony, there are studies that show jurors believe experts who are confident in their testimony.¹³³ A 2009 study showed that jurors may overcome a conflicted conscious about sentencing a defendant to death due to testimony when an expert “is perceived to possess

¹²⁹ Hansen, *Supra*.

¹³⁰ Transcript of Trial at 541-19, State v. Harvard, (2002) (No.0141).

¹³¹ Fisher, *Supra* at 156 (“defense attorneys who asked Dr. West to estimate his bite-mark identification error rate would get this answer ‘Something less than my Savior, Jesus Christ’”).

¹³² See *Daubert, Supra* at

¹³³ Robert Cramer et al., *Expert Witness Confidence and Juror Personality: Their Impact on Credibility and Persuasion in the Courtroom*, 37 J. Am Acad. Psychiatry Law 63, 72 (2009) (demonstrating through a psychological study that expert witnesses who are confident but not strident garner more trust from jurors).

sufficient knowledge and to convey an air of trust or integrity.”¹³⁴ Additionally, different jurors react different to experts depending on the juror’s personality.¹³⁵

An expert with as much experience as Hayne or West is in a position to seem confident on the stand. This confidence has the power to influence jurors and make them seem more impressive. No matter how unscientifically grounded their testimony, there is a good chance that the jury will give extra weight to their statements. In addition to experience building confidence, the sheer number of cases that Hayes has testified in has the tendency to build jury confidence. This is a tactical consideration that a defense attorney would want to carefully ponder before cross-examination.

ii. The Challenge of Challenging — Cross Examination of Experts who are Testifying in Bad-Faith

If an expert witness is believed to be exaggerating their abilities, lying about the scientific basis for their analysis, or stepping outside their realm of expertise cross examination may, or may not, be a great opportunity to reduce their credibility. If the expert is comfortable on the stand, and willing to stand by their statements, it may be difficult to trip them up.

The Federal Rules of Criminal Procedure¹³⁶ govern the discovery process for expert witnesses in a criminal case. This is a much more limited discovery process than the depositions available in

¹³⁴ *Id.* at 72

¹³⁵ *Id.* at 69-70.

¹³⁶ Federal R. Crim. P. 16(g):

At the defendant's request, the government must give to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) and the defendant complies, the government must, at the defendant's request, give to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial on the issue of the defendant's mental condition. The

a civil matter. This makes cross-examination all the more difficult. A defense attorney doesn't have depositions to use to demonstrate a prior inconsistent statement. They will have to use whatever summary the expert provides to prepare for trial and try to impeach the witness based on their direct examination.

V. The Abuse of Discretion Standard for Appellate Review

The standard of review for evidentiary appeals is abuse of discretion.¹³⁷ This standard of review gives particularly strong deference to a trial court's decision.¹³⁸ This is the same standard of review given to other evidentiary decisions by a court.¹³⁹ A deferential standard for expert witness exclusion or non-exclusion makes sense in a lot of ways, but it can be disastrous for a criminal defendant facing an expert witness who is acting in bad-faith.

a. The Standard of Review for Expert Exclusion as set by *Joiner*

After *Daubert*, *Joiner* set the standard of review for the decision of a court to exclude or allow expert testimony in a *Daubert* hearing as abuse of discretion.¹⁴⁰ The plaintiff in *Joiner* called an expert witness to testify that his lung cancer was "promoted" by his exposure to certain plastics at work.¹⁴¹ The trial court granted a defense motion for summary judgment after excluding the plaintiff's expert witness testimony under a *Daubert* analysis.¹⁴² The Eleventh Circuit Court of Appeals reversed the decision.¹⁴³ The Supreme Court reversed the Eleventh

summary provided under this subparagraph must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.

¹³⁷ *Joiner*, *Supra* at 142-143.

¹³⁸ *Id.*

¹³⁹ *Id.* at 141-142.

¹⁴⁰ *Joiner*, *Supra* at 139.

¹⁴¹ *Id.*

¹⁴² *Id.* at 140.

¹⁴³ *Id.*

Circuit decision stating that abuse of discretion is the correct standard of review for evidentiary decisions.¹⁴⁴

Similarly in Mississippi, where Hayes and West made the vast majority of their appearances as expert witnesses, the standard of review for trial court exclusion of experts is abuse of discretion.¹⁴⁵ This has led to higher courts consistently affirming lower court decisions to allow Hayne and West to testify, despite the widespread knowledge about the problems with their testimony.¹⁴⁶

b. The Difficulty with *Joiner* as Applied to Expert Witnesses Testifying in Bad-Faith

After *Daubert* trial court judges play a much larger role in determining what expert opinions get in front of a jury. These judges, though not unintelligent, are generally not scientists by training. The abuse of discretion standard makes it much more likely that they will show deference to the lower court's evidentiary rulings.¹⁴⁷

When expert witnesses like Hayne or West testify in bad-faith, the defense can easily fall into a bad situation. If an expert makes it through a *Daubert* hearing and the defense loses, it will be very difficult to overturn that decision.

¹⁴⁴ *Joiner*, *Supra* at 143-144.

¹⁴⁵ McLemore, *Supra* at 34 (holding that the abuse of discretion standard of review for admitting evidence is well settled).

¹⁴⁶ *See, e.g.* *Moffett v. State*, 49 So. 3d 1073, 1111 (Miss. 2010) (Affirming the admission of Hayne as an expert witness); *Keys v. State*, 33 So. 3d 1143, 1150 (Miss. Ct. App. 2009) (finding no abuse of discretion where a defendant objected to the content of Hayes' testimony but not his credentials).

¹⁴⁷ *See* *Flaggs v. State*, 999 So. 2d 393, (Miss Ct. App. 2008) (affirming the trial court's decision to allow Hayne to testify about blood spatter found at the crime scene)

c. David Williams — the Value of Raising Objections

David Williams, a college student at the University of Mississippi, was convicted of the murder of his girlfriend.¹⁴⁸ She was found dead in the closet of his home with a stab wound in her chest.¹⁴⁹ Williams He claimed that they had a suicide pact and that when they decided to go through with it, he was too drunk and high to kill himself and he lost consciousness.¹⁵⁰ When he awoke he found his girlfriend dead with a kitchen knife in her chest.¹⁵¹ Williams waited several days before telling his parents what had happened.¹⁵² His parents contacted an attorney, contacted the authorities, and checked Williams into a hospital.¹⁵³ Williams was charged with murder.¹⁵⁴ Hayne testified at his trial that it was unlikely his girlfriend had committed suicide because of bruising around the neck and the rarity of someone stabbing themselves in the chest to commit suicide.¹⁵⁵ No objection to Hayne’s testimony was raised and the defense provided their own expert who did not share Hayne’s opinion about the existence of bruising around the deceased’s neck.¹⁵⁶ Williams was convicted and sentenced to life in prison.¹⁵⁷

On appeal, Williams claimed that the court erred by allowing Hayne to testify.¹⁵⁸ The court determined that since Williams had not raised an objection to Hayne’s testimony at trial, that a standard of plain error for his testimony to be excluded.¹⁵⁹ Needless to say the court did

¹⁴⁸ Williams v. State, 53 So. 3d 761, 762 (Miss. Ct. App. 2009) *overruled by* Williams v. State, 53 So. 3d 734 (Miss. 2010).

¹⁴⁹ *Id.* at 163

¹⁵⁰ *Id.* at 763-764.

¹⁵¹ *Id.* at 764

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 762.

¹⁵⁵ *Id.* at 765

¹⁵⁶ *Id.* at 766-767

¹⁵⁷ *Id.* at 762.

¹⁵⁸ *Id.* 776-777.

¹⁵⁹ *Id.*

not find a reason to exclude the testimony.¹⁶⁰ The appellate court affirmed Williams' conviction but the case was overturned by the Mississippi Supreme Court on other grounds.¹⁶¹ Williams entered into a plea deal for culpable negligent manslaughter and was sentenced to 20 years in prison.¹⁶²

This change in the standard of review is an important consideration when determining the defense's trial strategy. Even if the defense council knows that the expert will be allowed to testify, it makes a lot of sense to raise a reasonable objection to an expert to preserve the client's rights on appeal. Hayne was important to the prosecution and the forensic medical examiner community in Mississippi because of the massive number of autopsies that he performed.¹⁶³ That importance, combined with the controversial nature of his testimony, may have been why he was personally named, and cited as an expert witness who could testify in several Mississippi Supreme Court Cases.

First, in *Edmonds v. State* although the court says his evidence should not be admissible, it goes out of its way to mention that Hayne is "qualified to proffer expert opinions in forensic pathology."¹⁶⁴ In his concurrence, Justice Diaz states that the court should not qualify Hayne as an expert¹⁶⁵ because "one generation's expert is another's quack"¹⁶⁶ It seems that his concerns were valid because two years later in *Nelson v. State* the *Edmonds* opinion cited *Edmonds* stating that Hayne was qualified to give expert opinions in forensic pathology.¹⁶⁷

¹⁶⁰ *Id.* at 778.

¹⁶¹ *Williams v. State*, 53 So. 3d 734, 746 (Miss. 2010) (case reversed and remanded with instruction to instruct the new jury about the lesser charge of assisted suicide).

¹⁶² Brumfield, *Williams Pleads Guilty in Bracy Death*, *Supra* .

¹⁶³ Transcript of Hayne Testimony, *Supra* at *39-41.

¹⁶⁴ *Edmonds*, *Supra* at 792.

¹⁶⁵ *Id.* at 799, *Concurring Op'n*.

¹⁶⁶ *Id.* at 802.

¹⁶⁷ *Nelson v. State*, 10 So. 3d 898, 904-905 (Miss. 2009).

Reliance on previous acceptance of Hayne as an expert to justify current acceptance is not limited to those two cases. In *Lima v. State*, the Supreme Court of Mississippi made sure to explain that Hayne was an expert in the field of forensic pathology.¹⁶⁸ The court stated that although Hayne performs many more autopsies than is recommended, he “does not take vacations and works nearly every day of the year, for approximately sixteen hours a day.”¹⁶⁹ Then in a case decided by the same court less than two months later, the court cites *Lima* and reiterates that “we find that Hayne was qualified to testify as an expert. And we find no evidence to establish that his testimony was unreliable.”¹⁷⁰ It is clear that even after *Edmonds*¹⁷¹ and all the previously cited news stories and cases of exhumations, the Supreme Court of Mississippi was not ready to give up on allowing Hayne to testify as an expert witness.

VI. Conclusion

Expert witnesses who lie, base their testimony off of unscientific and unproven forensics, or who testify outside their area of expertise do damage not only to the lives of those who are wrongly convicted, but to our entire legal system. The story of Hayne and West and their flagrant disregard for accurate forensics analysis is very disturbing. From the lack of oversight¹⁷² to the number of cases that Hayne worked on¹⁷³ raises serious concerns as to what would be found if a serious examination of Hayne and West’s past cases were to occur.

¹⁶⁸ *Lima v. State*, 7 So. 3d 903, 907-908 (Miss. 2009).

¹⁶⁹ *Id.* at 908.

¹⁷⁰ *Dehenre v. State*, 43 So. 3d 407, 416-417 (Miss. 2010).

¹⁷¹ *Edmonds*, *Supra* 955 So. 2d 787.

¹⁷² *Byrd*, *Change Death Review System*, *Supra*.

¹⁷³ Transcript of Hayne Testimony, *Supra* at *39-41.

The difficulty that courts face in excluding experts who testify in bad-faith under *Daubert*, even under the guiding factors is very serious.¹⁷⁴ Examining cases like those of Tyler Edmonds and Kennedy Brewer helps illuminate problems with the current system.

A real problem for practitioners is how to convince courts that there is a lack of probative value to an expert witness testifying in bad-faith. Additionally, it is very difficult to convince a jury to ignore or reduce their reliance on expert testimony. Finally, the standard of review as abuse of discretion poses a particular challenge in cases where an expert witness is only discovered to have been testifying using unscientific methods after a conviction.

The flaws inherent in the *Daubert* hearing process, the difficulty of excluding bad-faith expert testimony, and the standard of review for the inclusion or exclusion of bad-faith experts will be a serious challenge going forward. Only through the continued improvement of real, science based forensic methods will we be able to reduce the number of wrongly convicted people who are sent to prison.

¹⁷⁴ *Daubert*, *Supra* at 593-594.