IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

Mississippi Supreme Court Cause No. 2008-KA-01457-SCT
Rankin County Cause No. 17,779

DAVID ABERNATHY **APPELLANT**

v.

STATE OF MISSISSIPPI **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

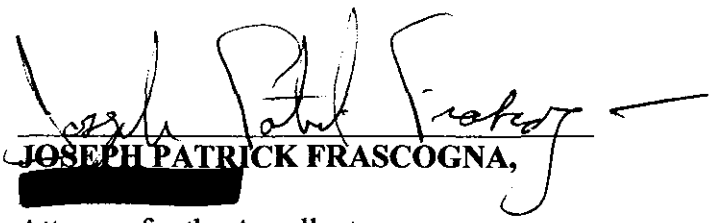
1. Honorable Samac S. Richardson, Rankin County Circuit Court Judge
2. Joseph Patrick Frascogna, Attorney for the Appellant
3. James Murphy, Attorney for the Appellant
4. Attorney General Jim Hood, Attorney for the Appellee
5. City of Pearl Police Department, Investigating Agency
6. Detective Dewitt Seal, Pearl Police Department
7. Lori Fayette Kemp, State Witness
8. John Emfinger, Rankin County Assistant District Attorney
9. James McBride, Rankin County Assistant District Attorney
10. Vicki Williams, Rankin County Assistant District Attorney

11. Michael Guest, Rankin County District Attorney

12. Dr. Howard Katz, Expert Witness

Respectfully Submitted,

DAVID ABERNATHY,
Appellant

BY: 
JOSEPH PATRICK FRASCOGNA,
[redacted]

Attorney for the Appellant
FRASCOGNA & FRASCOGNA, PLLC
234 East Capitol Street, Suite 100
Jackson, MS 39201
TEL: (601) 672-9058
FAX: (601) 985-3548

TABLE OF CONTENTS

Table of Authorities	ii
Statement of Incarceration	1
Statement of Issues	1
Statement of the Case	2
Summary of the Argument	6
Argument	8
ISSUE ONE	8
THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE EXPERT TESTIMONY OF DR. KATZ AND AS A RESULT, ABERNATHY WAS DENIED A FUNDAMENTALLY FAIR TRIAL AS GUARANTEED BY THE UNITED STATES AND MISSISSIPPI CONSTITUTIONS	
ISSUE TWO	31
THE TRIAL COURT ERRED BY UNFAIRLY LIMITING ABERNATHY'S EFFORTS TO PRESENT A FULL AND COMPLETE DEFENSE TO THE CHARGES AGAINST HIM IN VIOLATION OF HIS FUNDAMENTAL CONSTITUTIONAL RIGHTS TO PRESENT HIS THEORY OF THE CASE	
ISSUE THREE	34
THE EVIDENCE ELICITED AT THE TRIAL WAS WHOLLY INSUFFICIENT AS A MATTER OF LAW TO SUPPORT THE VERDICT OF THE JURY AND ABERNATHY'S CONVICTION AND SENTENCE SHOULD BE REVERSED AND VACATED, RESPECTIVELY	
Conclusion	36
Certificate of Service	37

TABLE OF AUTHORITIES

CASES:

Chinn v. State, 958 So.2d 1223 (Miss. 2007)	32
Claar v. Burlington N.R.R., 29 F.3d 499 (9th Cir. 1997)	28 fn4
Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2686 (1993)	passim
Davis v. Rocor International, 226 F.Supp.2d 839, 842 (S.D. Miss. 2002)	27 fn4
Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)	23 fn2
Geer v. Bunge, Co., 71 F.Supp.2d 592, 593 (S.D. Miss. 1999)	27 fn3
General Electric, Co. v. Joiner, 522 U.S. 136, 146 (1997)	28 fn4
Giles v. State, 501 So.2d 406 (1987)	31
Hamm v. State, 735 So.2d 1025 (Miss. 1999)	35
Holland v. State, 656 S0.2d 1192, 1196 (Miss. 1995)	35
Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 119 S.Ct. 1167 (1999)	passim
Manuel v. State, 667 So.2d 590 (Miss. 1995)	31
McRee v. State, 732 So.2d 246 (Miss. 1999)	35
Mississippi Transp. Com'n v. McLemore, 683 So.2d 31, 39 (Miss. 2003)	27 fn3
O'Bryant v. State, 530 So.2d 129 (Miss. 1988)	32
Phillipson v. State, 943 So.2d 670 (Miss. 2006)	32
Sheehan v. Daily Racing Form, Inc., 104 F.3d 940, 942 (7th Cir. 1997)	28 fn4
Taylor v. Illinois, 484 U.S. 400, 108 S.Ct. 646 (1988)	32
United States v. Downing, 753 F.2d 1224 (3rd Cir. 1985)	27

United States v. Scheffer, 523 U.S. 303, 118 S.Ct. 1261 (1998) 32

Wetz v. State, 503 So.2d 803 (Miss. 1987) 35

RULES:

Rule 401, Mississippi Rules of Evidence 29

Rule 403, Mississippi Rules of Evidence 29

Rule 702, Mississippi Rules of Evidence 27-29

Rule 703, Mississippi Rules of Evidence 24,27,28

Rule 704, Mississippi Rules of Evidence 24

OTHER AUTHORITIES:

Miss. Code Ann. §97-3-95 (1) (a) 2

Due Process Clause 6,31

Sixth Amendment, United States Constitution 6,24,31

Fourteenth Amendment, United States Constitution 6,24,31

Mississippi Constitution 6,24,31

Berger, M., *Reference Manual on Scientific Evidence*, Federal Judicial Center (2d ed. 2000) 26

STATEMENT OF INCARCERATION

David Abernathy is currently incarcerated and is being housed with the Mississippi Department of Corrections at the Winston-Choctaw County Regional Correctional Facility in Louisville, Mississippi.

STATEMENT OF ISSUES

ISSUE ONE

THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE EXPERT TESTIMONY OF DR. KATZ AND AS A RESULT, ABERNATHY WAS DENIED A FUNDAMENTALLY FAIR TRIAL AS GUARANTEED BY THE UNITED STATES AND MISSISSIPPI CONSTITUTIONS

ISSUE TWO

THE TRIAL COURT ERRED BY UNFAIRLY LIMITING ABERNATHY'S EFFORTS TO PRESENT A FULL AND COMPLETE DEFENSE TO THE CHARGES AGAINST HIM IN VIOLATION OF HIS FUNDAMENTAL CONSTITUTIONAL RIGHTS TO PRESENT HIS THEORY OF THE CASE

ISSUE THREE

THE EVIDENCE ELICITED AT THE TRIAL WAS WHOLLY INSUFFICIENT AS A MATTER OF LAW TO SUPPORT THE VERDICT OF THE JURY AND ABERNATHY'S CONVICTION AND SENTENCE SHOULD BE REVERSED AND VACATED, RESPECTIVELY

STATEMENT OF THE CASE

David Abernathy, hereafter, "Abernathy," was charged by Grand Jury Indictment with the felony offense of Sexual Battery in violation of Miss. Code Ann. §97-3-95 (1) (a), and he waived arraignment on the charge and entered his plea of not guilty on August 24, 2006. (CP. 6 & 10) (RE. 13 & 14)

The incident charged in the indictment occurred on September 6, 2005, at the dwelling occupied by Justin Gordon, hereafter, "Gordon," and his then girlfriend, Jennifer Pigg, hereafter, "Jennifer." The events relevant to the charges herein took place at the Gordon home within the city limits of Pearl, Rankin County, Mississippi. (T.I. 48-49)

The victim of the sexual assault is Lori Fayette, hereafter, "Lori," and at the time of the incident was twenty-two (22) years of age. She was likewise a resident of Pearl, Mississippi, residing at 127 Greenfield Lane. (T.I. 49) As charged in the indictment, Abernathy was above the age of eighteen (18) years of age, having a birth date of July 11, 1962. (CP. 51-52; 59-63) (RE. 36-37; 42-46) It is noteworthy that Abernathy had no apparent criminal history at the time of the charges set forth in the indictment. (Ex. 1)

Detective Dewitt Seal, hereafter, "Seal," of the City of Pearl Police Department, was the primary investigating officer involved in this case and he was the first witness called by the state at Abernathy's jury trial. (T.I. 47-73) The trial was conducted on December 14, 2007, in the Circuit Court of Rankin County, Mississippi, and Seal informed the jury as to the particulars of his investigation, including the taking of statements from Lori, Jennifer and Gordon.

The proceeding resulted in a verdict of guilty as charged in the indictment and Abernathy was thereafter, sentenced to serve a term of thirty (30) years in the Mississippi Department of Corrections with twenty (20) years to be suspended and to be placed on supervised probation for

a period of five (5) years upon release from incarceration. (CP. 51-52; 59-63) (RE. 36-37; 42-46)

Abernathy's post-trial motions for Judgment of Acquittal Notwithstanding the Verdict and New Trial were summarily denied by the circuit judge. (CP. 53-56; 66-67) (RE. 38-41; 49-50)

At trial the State called four (4) witnesses in its case-in-chief: Seal, Jennifer, Gordon and the victim, Lori Fayette (Kemp). Following Seal's testimony, Jennifer testified. (T.I. 74-115) At the time of the incident Jennifer was the live-in girlfriend of Gordon and at trial she relayed her version of the relevant events of the evening of September 6, 2005. On that date Jennifer was a student and Gordon's bride to be, and at times had also worked at Custom Products Corporation of Flowood where Gordon and Abernathy were employed. (T.I. 75-76) Gordon and Abernathy were co-workers, friends and golfing buddies.

Jennifer related that Gordon arrived home from work during the afternoon hours, packing a 12 pack of Bud Light and he was followed shortly thereafter by Abernathy, who likewise was toting a 12 pack of beer. All were assembled for a planned cookout. The plan was to grill steaks and put Abernathy up for the night due to his having been between residences.

At some time during the daytime hours of September 6, 2005, Jennifer had a conversation with Lori and it was agreed that Lori would also spend the night at the Gordon home due to her boyfriend being out of town, together with her fear of staying home alone in his absence. (T.I. 80-81)

Shortly after Lori had arrived at the Gordon residence, she became ill and developed a severe headache described by her as a migraine. (T.II. 179) She stated to having been previously diagnosed as suffering from the same by her personal physician, Dr. Roy B. Kellum,

M.D.[1] Jennifer saw to it that Lori could relax and rest in a spare bedroom where she eventually remained and retired for the evening. (T.I. 86-88)

Throughout the course of the evening, Abernathy frequently checked on Lori's condition as he was concerned for her well being. Eventually, he was instructed by Jennifer and Lori herself, to not be of any further bother.

Gordon's testimony was unremarkable and basically added nothing startling to the issues at bar. It has been agreed by all present that at or about 10:00 to 10:30 in the evening, all were retired for the evening and well on their way to sleep. Abernathy was located in the living room watching television, where he was to sleep on the sofa that evening.

It was after Jennifer and Gordon retired for the evening, when Lori stated that Abernathy entered the spare bedroom where she was resting and began to assault her sexually. She stated on direct examination that he climbed on top of her, pulled down her panties, spread her legs apart and placed his finger into her vagina, as well as touching her inappropriately on different parts of her anatomy. (T.II. 171-176)

Following Lori's testimony, the State rested. (T.II. 207)

Abernathy's motion for a directed verdict at the close of the State's case-in-chief was denied by the circuit judge. (T.II. 207)

Abernathy had planned to have three (3) witnesses, including himself, testify in his case-in-chief. One of the three witnesses to be called was Dr. Howard Katz who was to be called as an expert witness whose particular expertise encompassed the subject matter of migraine

---

[1] Dr. Roy B. Kellum is a medical doctor with the Jackson Healthcare for Women, P.A., whose office is located at 1047 N. Flowood Drive, Flowood, Rankin County, Mississippi. Telephone No. (601) 932-4185.

headaches. After a very brief discussion, the judge disallowed for the moment, the testimony and as basis for his ruling, opined that there had been no medical testimony that Lori suffered from such headaches. Further, the judge recognized the appropriateness of a *Daubert* hearing and expressed his intentions to conduct one later in the trial. However, he completely neglected thereafter to reconsider the qualifications of Dr. Katz or even entertain an offer of proof as to what the substance of his expert testimony would be. Abernathy's request to allow Dr. Katz to offer expert testimony was denied. (T.II. 208-212)

The defense called Sandra Newman as its first witness. Sandra Newman was a co-worker of Abernathy at Custom Products Corporation and her testimony was essentially one of bolstering Abernathy's good character. She had no first hand knowledge of relevant facts, however in spite of the allegations against Abernathy and what she had heard at the shop, her opinion of him had not changed and they remained good friends. (T.II. 214-221)

Abernathy testified and flatly denied having assaulted Lori, sexually or otherwise, and re-affirmed that his actions were honorable and solely an attempt to check on her well being.

After Abernathy had finished testifying, the defense rested. (T.II. 263)

The State called Gordon in rebuttal and his testimony added nothing remarkable or material to the allegations levied against Abernathy.

At the conclusion of Gordon's rebuttal testimony, the State finally rested. (T.II. 266)

The trial judge selected the instructions to be charged to the jury and following arguments of counsel, the jury retired for deliberations. (RE. 18-28) (T. 267-275)

The jury returned to the courtroom following deliberations and returned a verdict of guilty as charged in the indictment. (CP. 51) (RE. 36) (T.II. 294)

The jury was polled and the verdict declared unanimous by the court. (T.II. 294)

Abernathy filed post-trial Motions for Judgment of Acquittal Notwithstanding the Verdict or, in the Alternative Motion for a New Trial, and the same were denied by the trial court. (CP. 53-56; 66-67) (RE. 38-41; 49-50)

Abernathy was sentenced by the court and thereafter, timely appealed his conviction and sentence. (CP. 52; 60-63) (RE. 37; 43-46)

SUMMARY OF THE ARGUMENT

It is abundantly clear from the documents filed in this cause by Abernathy, and his timely disclosure of his intention to utilize expert testimony at his trial. The prosecutor was timely noticed as to the expert and the substance of such testimony as was the trial court. The ability to place reliance on the expert testimony of Dr. Howard Katz, was crucial to Abernathy's readiness to present his theory of the defense to the trial jury as well as his desire and fundamental right to present a full and complete defense to the charges against him.

The trial judge's denial of the use of Dr. Katz was based on specified facts which were completely and fully contradicted by the testimony of the witnesses, and the evidence in the record. Abernathy was denied his fundamental constitutional right to present material witnesses to testify on his behalf, in violation of the Due Process Clause and the Sixth Amendment to the Unites States Constitution as well as the corresponding portions of the Mississippi Constitution.

Abernathy was ready, willing, able and fully prepared to respond to a *Daubert* hearing as tentatively scheduled at one time by the trial judge, at sometime during the course of the proceedings but he was never given an opportunity to so do. The trial judge unfairly neglected his gate-keeping role and erroneously denied, without hearing, the defense the benefit of Dr.

Katz's testimony. Dr. Katz possessed specialized knowledge, education and training beyond that of the average citizen and his expert testimony would have aided the trial jury in resolving the critical issues presented in the case. The trial court refused to provide a preliminary assessment of whether the reasoning or methodology underlying the proffered testimony was scientifically valid and whether that reasoning or methodology properly could have been applied to the facts at issue. It is academic that *Daubert* applies to all expert testimony. The court is a gatekeeper and must make a preliminary assessment as to whether the offered testimony is scientifically valid. This was not done in Abernathy's case and the denial is respectfully submitted to be plain reversible error.

Thus, the above and herein applies to two of the three issues raised on appeal: (1) the trial court's erroneous denial of expert witness testimony and, (2) the trial court's denial of allowing Abernathy to present his theory of the defense and to present a full and complete defense to the charges against him. The third issue raised on appeal is the insufficiency of the evidence presented undergirding the conviction and sentence imposed. The case is simply one of Lori's word against that of Abernathy's. There is absolutely no testimony or evidence corroborating Lori's version of the facts and therefore the conviction must not stand. The testimony of Gordon, Jennifer and Seal fails to offer any credible support to Lori's version of the events of the evening. There were no eye-witnesses to the charged acts, there were no confessions or admissions nor was there any rape kit performed or any other scientific evidence presented to support the verdict of the trial jury. If allowed to stand, the system fails.

In sum, the conviction and sentence of the court must fail and the same should be reversed and vacated, respectively.

ARGUMENT

ISSUE ONE

THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE EXPERT TESTIMONY OF DR. KATZ AND AS A RESULT, ABERNATHY WAS DENIED A FUNDAMENTALLY FAIR TRIAL AS GUARANTEED BY THE UNITED STATES AND MISSISSIPPI CONSTITUTIONS

A. RELEVANT PROCEDURAL BACKGROUND

1. Abernathy had planned to have three (3) witnesses, including himself, testify in his case-in-chief. One of the three witnesses to be called was Dr. Howard Katz, who was to be called as an expert witness whose particular expertise encompassed the subject matter of migraine headaches. After a very brief discussion early in the trial the judge disallowed for the moment the testimony, and as basis for his ruling opined that there had been no medical testimony that Lori suffered from such headaches. However, the judge properly recognized the appropriateness of a *Daubert* hearing and expressed his intentions to conduct one at some point in time, later in the trial. However, the judge completely neglected thereafter to reconsider the qualifications of Dr. Katz, or to even entertain any offer of proof as to what the substance of his expert testimony would be and why it might be relevant to the facts at issue. The State successfully convinced the trial judge that any such testimony would not be relevant and would serve only to confuse the jury. As a result, Abernathy's request to allow Dr. Katz to offer expert testimony was eventually denied. (T.II. 208-212); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2686 (1993)

2. Initial attempts to clear the way for Dr. Katz's expert testimony are best illustrated by the following portion of the record:

> **MR. MCBRIDE:** Your Honor, it's my understanding the defense is wanting to call Dr. Katz as an expert in this case, and I believe he's in the courtroom right now –
>
> **THE COURT:** Okay.
>
> **MR. MCBRIDE:** – to which we would have an objection to. I think it's his motion so I will let him go first.
>
> **THE COURT:** Okay.
>
> **MR. FRASCOGNA:** Your Honor, Dr. Howard Katz is here today and he's been noticed as an expert – as an expert witness in this case. Dr. Katz is an expert in migraine headaches. He's not here today to offer his opinion on what events were that night in September of '05.
>
> All he's here to do is to discuss and explain what a migraine headache involves and the physiological events as well as psychological, generally, on those who suffer from it, and that has relevance in this case because the victim in this case has alleged that she was compromised physically because of the migraine headache and that she was unable to protect herself in some regard and to some degree from the defendant. She talks about faking a seizure or something.
>
> Dr. Katz is basically here to merely explain what the migraine headache is and how it affects someone such as Ms. Fayette in this case.

MR. MCBRIDE: Judge, we would object and claim it's completely irrelevant. I think in this case, whether it was a migraine or not, it is not an issue.

As your Honor knows, the jurors, because of their qualifications, and sometimes they put a greater weight on their testimony just by the very fact the eh Court calls an expert. There's no – I don't think there's anyone in this courtroom, Dr. Katz included, who can say for sure she ever had a migraine headache or not. I don't think she was ever diagnosed with it. She wasn't feeling well. She went to bed the next thing you know she testified she wakes up with the defendant on top of her. I don't see how a discussion of a migraine headache is in any way relevant and I think it's going to sway the jury from the fact at issue so I would strongly object to having Dr. Katz testify.

THE COURT: Anything else?

(Motion by Mr. Frascogna)

MR. FRASCOGNA: Your Honor, the discussion of her migraine and the fact she was weak, she could not – pardon the court – she was too weak to get him off her and so forth. I would disagree with the State's assertion and say it is very much an issue of relevance in this case because she's made it one as far as describing her condition at the time of the alleged offense in the guest room.

THE COURT: Well, we're not going to get through this trial today. It's going to go into tomorrow at this point. *But, I'm not going to rule on that right now. I'll do a Daubert hearing on it at the proper time. But we need to*

get the rest of the testimony in and we can get it all in except Dr. Katz and then I'll do the Daubert hearing and ever long it takes, it takes. We're going to stay until we get through with it. I don't care if it's Sunday.

MR. MCBRIDE: Should Dr. Katz remain in the courtroom, judge?

THE COURT: I don't see what difference it would make at this point. I mean, what could he glean from this testimony that's going to help? Nothing.

MR. FRASCOGNA: Nothing.

THE COURT: Then he can get outside the courtroom. There's no sense in him staying in here and being board by this.

Okay. Put the jury back in the box.

(Jurors enter the courtroom)

(T.I. 113-115) [Emphasis added]

3. Justifiably, Abernathy placed reliance on the assurances of the trial judge that the court would at some point during course of the trial, conduct a *Daubert* hearing and fulfill it's gatekeeping responsibilities concerning the proposed expert testimony of Dr. Katz. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2686 (1993).

4. The trial progressed to the point at which the State rested it's case-in-chief after the testimony of the victim Lori Fayette. The court re-visited the issue of the expert testimony of Dr. Katz and made the following comments and ruling:

THE COURT: Okay. And how many witnesses have you got?

MR. FRASCOGNA: A total of, with Dr. Katz and the Defendant, will be three.

THE COURT: Okay. We'll go ahead and hear from Dr. Katz now since I've heard the testimony of the victim's witnesses. Tell me why you want to call Dr. Katz.

(Motion in limine.)

MR. FRASCOGNA: Your Honor, the victim in this case, just a few moments ago, said that she has been diagnosed, since high school, with a migraine headache condition of some sort. She has suffered from those since that age, since high school age. Dr. Katz is here to not – not to offer any kind of conclusion or expert opinion on what David Abernathy may or may not have been involved in at that house that evening, but merely to describe for the jury the migraine headache and what it means as far as its affect or possible effects on suffering and such.

THE COURT: Which would prove what? Which would prove or disprove what?

MR. FRASCOGNA: Your Honor, the migraine – the migraine headaches, and this is what Dr. Katz will show, migraine headaches are responsible for a wide variety of, let's say misperceived, misperceived events in one's life while they're having such. In other words, the sufferer of a migraine headache may perceive something about their environment that is not actually

there, which is not part of that environment, and testimony today would be merely to give case history an example of that and nothing more.

THE COURT: And are any of these people that he's going to give case histories on related to this victim?

MR. FRASCOGNA: No, sir.

THE COURT: Is that all? Anything else?

MR. FRASCOGNA: That's all, your Honor.

THE COURT: Mr. McBride, any response?

(Response by Ms. Williams.)

THE COURT: Ms. Williams?

MS. WILLIAMS: I just believe that this Dr. Katz will not assist the jury whether or not she had a migraine headache to determine the fact issue. I don't think that it's relevant. It's certainly going to confuse them. They're going to get off on this migraine headache stuff. We don't even know for sure there is any medical records about the diagnosis from her OB-GYN that diagnosed this headache.

THE COURT: They usually don't look at somebody's head.

MS. WILLIAMS: Exactly. I think it's just a ploy to confuse the jury by putting Dr. Katz up there and it is not relevant. You know, we don't know if it is a migraine headache. We don't know what type of migraine headache. Dr. Katz apparently has done some work on migraine disturbance on a brain injury, but I don't know what that has to do with the OB-GYN. He said it was a headache medication.

(Motion denied.)

THE COURT: *Okay. Normally, you hold a Daubert or Delbert hearing to determine whether or not the evidence, testimony offered is – and whoever came up with the term, I don't particularly like it, but they want the courts to be the gate keeper to determine if it's junk signs. I don't believe for one minute that what Dr. Katz would testify to would be junk signs. But because we all know migraine headaches exists, there are different causes for them, and people react to them and in different ways.*

That being said, my observation at this point is this that, (1) I hadn't heard any testimony that – of a medical nature that would classify this headache this lady had as a migraine headache. There's no medical testimony to that. She said she had a headache. She said that it – she used the term migraine headache to describe it. But other than her saying that, I don't know that it's a migraine. There's been no testimony to indicate that this lady has ever suffered from any hallucinations with or without a headache. We don't know the severity of the degree of the headache. There's no evidence about that.

Unless I'm told otherwise, I'm not sure that Dr. Katz knows what the medical history of this victim is, if it's ever even been reviewed by him. I don't know whether or not he's ever examined this victim.

Medications taken. The witness is not even sure what medication she's taken, whether – or what it was, so we don't know how that would affect this headache.

If Dr. Katz is going to testify as to generally the case histories and generally to how migraine headaches affect people, that doesn't mean that it affects this woman that way. It might. It might not. Unless you can come up with something to tie his testimony to this witness, it's not relevant as far as I'm concerned and I'm deciding it on a relevancy issue and not on a medical issue.

So with that, seat the jury and call your first witness. If you think you can get it to that point, that's, you know, I'll reconsider it. But at this point, I don't see how.

MR. FERRELL: Your Honor, I'm Wayne Ferrell and I'm here representing Dr. Katz when we – when it was announced that there would be a Daubert hearing. I'm here to represent him individually as far as his qualifications and, you know, being disqualified on what – on his expertise. That's the reason I'm here in the courtroom.

THE COURT: Okay. Well, right now it's not relevant and we're not even getting over into that boat.

MR. FERRELL: All right.

(T.II. 208-212) [Emphasis added]

5. Throughout the remainder of the trial, the issue of expert testimony from Dr. Katz was firmly decided adversely to Abernathy without the benefit of a Daubert analysis. The issue was raised on last at the hearing of Abernathy's motions for judgment of acquittal notwithstanding the jury verdict and for a new trial. Once again, defense counsel provided the trial judge with an opportunity to seriously reconsider the Katz issue, and appealed to the court

in vain to grant Abernathy appropriate relief. However, the judge denied the motions and the issue was preserved for appeal purposes. The relevant dialogue is evidenced by the following part of the record:

THE COURT: State of Mississippi v David Abernathy.

MR. MURPHY: May I proceed , your Honor.

THE COURT: Yes, Sir.

(Motion by Mr. Murphy)

MR. MURPHY: Your Honor, this is, as your Honor stated, State of Mississippi v David Abernathy, Cause 17779. It's a motion for judgment of acquittal notwithstanding the jury verdict or an alternative motion for a new trial.

And, your Honor, there are a number of issues presented in the motion itself, and we would focus today, your Honor, on – on the issue with regard to the exclusion of Dr. Katz's testimony as an expert testimony witness at this – at the trial of this matter.

As the court no doubt is aware, your Honor, a basic tenet of the rules of evidence with regards to the relevance of evidence is – is whether any piece of evidence, whether it be testimony or physical evidence, whether that testimony or whether that evidence, excuse me, would tend to make a fact or consequence more or less likely or more or less probable than that fact or consequence would have been without that – that particular piece of evidence.

In this case, one of the facts or consequence at the trial was whether or not the victim, as alleged, was – accurately recalled the events that – that were testified to.

There were two basis, basically, in which – in which to attack the voracity or the reliability of that testimony:

Number 1 was the attack of voracity, whether or not she was telling the truth.

Number 2 was whether or not she accurately recalled the facts and events that she testified.

The second basis upon which Dr, Katz's testimony would have been relevant, Dr. Katz was proffered to testify with respect to the effects of migraine headaches upon individuals, and in particular the propensity – the propensity that migraine headaches, among other things, caused not necessarily hallucinations, but cause the possibility that a migraine could cause a person to inaccurately recollect events that unfolded during that period of time that the person was suffering from migraine headaches.

So we submit, your Honor, that – that this proffered testimony would no doubt, there's no question that this would have been relevant to the issue of whether or not the victim, as alleged, accurately recalled the events of propensity to the sexual battery.

And, of course, there are other considerations when an expert witness is involved Rule 7 (2) of the Mississippi Rules of Evidence require that an expert's testimony be – that the expert himself, the credentials and qualifications

be – be – that he be qualified and that his credentials are such that – that – that he's respected in the scientific community.

And, number two, there is a requirement that the reliability of his opinions as an expert be – that there be a basis in fact and those opinions be reliable.

Your Honor, I do not have the transcript of the proceedings before me. We have requested those, but we have not yet receive them. So I'm not – I do not know precisely the basis for the court's ruling in excluding Dr. Katz as – as – as proffered. But, we would just submit that there was no question, and based on what I learned from trial counsel opposite, I was not counsel for the defense at the trial of this matter, but from what I've gathered from trial counsel, there were no specific finding with respect to the credibility of Dr. Katz, or – or – or at least that was not the basis for excluding his testimony, and – and from what I gather, there were no specific findings with respect to the reliability of opinions that he was to give.

I was informed that there were some – it – it was alluded to that the victim – that – that the victim was pregnant and it was alluded to that that may have been the cause for the nausea and perhaps the attending headache.

But, your Honor, from what I've learned, there's – there's no basis from – there were no basis for – for that – for – for that to be submitted as a possibility to explain the headache and/or the nausea.

I was also informed that there were some reference to the fact that the diagnosis for the victim's migraine was made by a gynecologist and,

therefore, it would not have been – provided a sufficient basis to allow the testimony of Dr. Katz.

But again, your, Honor there was no – I was advised that the State did not present any type of conflicting or competing testimony to establish the fact that a gynecologist is not qualified to give the opinion of a person suffering from migraine headaches.

So from what I was informed with respect to what proceeded at trial, the victim did testify that she was diagnosed with migraines and, therefore, we submit that there was sufficient basis to allow Dr, Katz to expound on what that particular condition – what symptoms that particular condition could cause and specifically how that particular condition could have affected the accuracy of the victim's recollection of the – of the events.

THE COURT: Anything else?

MR. MURPHY: No, sir, your Honor.

THE COURT: All right. Mr. Emfinger, anything?

(Response by Mr. Emfinger)

MR. EMFINGER: Just briefly. I didn't try the case. No one is here, I don't think, that tried the case. I'm sure that you have heard and considered the argument that was presented by both the State and the Defense at the time and you made the findings that you felt were appropriate to the extent that counsel opposite is trying to inject any additional knowledge that has come to his knowledge since the time of trial. I think it would be inappropriate to consider that here for a motion for a new trial.

But, I've talked to Beth here and I don't know that there was any testimony that she suffered from migraines to the extent that it cause any memory loss or that this doctor had in any way examined her or had anything relevant or specific to this particular witness. That would have given him firsthand knowledge of this person's or this witness's particular condition.

But outside of that, judge, I would defer to your memory of the facts and what the arguments presented. But it seems to me like you've already heard this, you considered it and made the ruling and it should stand.

(By Mr. Murphy)

MR. MURPHY: Just briefly, your Honor. I don't believe that Dr. Katz would have testified specifically with respect to whether or not this victim suffered memory loss on the might in question, gut – but rather whether it's possible that the same occurred, and – and to this he would have testified specifically to the effects that migraine typically or have had on individuals that suffer from same, and that's, I believe, your Honor, would have been the basis and extent of Dr. Katz's testimony.

(Motion Denied)

THE COURT: *If I remember the evidence correctly, I think the lady testified that she had a headache, but it was not a migraine headache, that she had them before.* And if she didn't have a migraine headache, the Dr. Katz's testimony was not necessary. It was not relevant.

If she had testified that she had them, experienced a migraine headache that night, then you've got a whole different situation. She didn't testify

to that. That was something that the defendant brought to the court's attention, and since he was drunk, I don't know he knew she had a migraine headache. So, the motion is denied.

(End of Motion Proceeding)

(T.III. 300-305) [Emphasis added]

6. Several other facts of record are significant to the resolution of this issue and are necessarily pointed out at this juncture. During the process of pre-trial discovery, Abernathy's counsel of record timely advised the Office of the Rankin County District Attorney that he intended to avail himself of the use of expert testimony and provided the name of Dr. Howard Katz as the expert to be called to testify. Additionally, Dr. Katz's area of expertise and a brief statement as to the substance of his expert testimony was timely provided. (C.P. 36-38) (R.E. 29-31) To the best of Abernathy's information and belief, the State accepted the notice of Dr. Katz as an expert witness in regards to physiological and psychological effects of migraine headaches without inquiry into the qualifications of Dr. Katz as an expert in the particular scientific field. The first objection to Dr. Katz was presented while the jury trial was in progress. (T.I. 113)

7. Further, the State's assertion, and the trial court's reliance thereon, that the victim had not been diagnosed as suffering from migraine headaches was contradicted by the victim herself. On direct examination of Lori, she stated that she had a headache "all afternoon and it just got worse as the night went on. While we were riding around it got really bad and by the time we got home, I asked her for something to take to make it feel better. So she gave me – I don't know what it was. It was probably Tylenol or an Excedrin or something. But I took that

and for the rest of the night it just got worse and worse. . . . She – she and I both had migraines in the past and I knew she would have something to take for it, because I didn't bring anything with me." (T.II. 165)

8. Further, when questioned as to what she would normally take for a migraine she responded by stating that she used Darvocet. Darvocet is a schedule narcotic and may legally be obtained by prescription only from a qualified medical person. So it is accurate to say that the fact that Lori had been diagnosed as having migraines and being prescribed pain medication for the same are facts which have been placed in the record, contrary to the expressed recollection of the trial judge and the assistant district attorneys. (T.II. 165; T.III. 300-305)

9. On cross-examination Lori specifically admitted that she was suffering from a migraine headache at the times relevant to the case at bar. The record reflects when asked, "[o]n September 6th, 2005, when you were at Jennifer's, Jennifer's and Justin's home – you were suffering from a migraine headache; is that correct?" To which Lori responded, "Yes, sir."

10. It is additionally noteworthy that the State in the course of responding to Abernathy's discovery request informed counsel that Lori (Laura) was going to testify at trial that she suffered from a migraine headache that particular evening. Assistant District Attorney Jamie McBride in the State's Disclosure of Trial Witnesses Pursuant to Uniform Circuit Court Rule 9:04 A informed Abernathy's counsel that the victim would testify to the following: *"Ms. Fayette will testify that on the evening of September 6, 2005, that she was suffering from a migraine headache and was feeling very ill."* (C.P. 30) (R.E. 32) [emphasis supplied] How then could the same assistant district attorney argue before the trial court that there was no evidence of the victim having suffered from a migraine that evening and/or that it was not an issue in the case? (T.I. 114; T.II. 209; T.III. 304)

11. The question to be resolved at this point is whether or not there was sufficient evidence in the record to justify the relevance of the expert testimony of Dr. Katz. Accepting that the answer would be in the affirmative, would a *Daubert* hearing have been appropriate and required as to an examination of Dr. Katz's qualifications and the scope of the expert testimony to be proffered? Abernathy would state without hesitation that the record contains a sufficient basis to justify the expert testimony and a *Daubert* hearing.

B. *DAUBERT* AND THE RELEVANT LAW

12. Prior to the adoption of the Federal Rules of Evidence, all federal and most state courts followed the *"Frye"* test to determine the admissibility of scientific evidence.[2] In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2686 (1993), the United States Supreme Court held that the Federal Rules of Evidence, and in particular, Fed. R. Evid. 702, suspended *Frye's* "general acceptance test." The analytical criteria for the admissibility of expert testimony was announced in the two United States Supreme Court cases of *Daubert* and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167 (1999) (*Daubert* applies to *all* expert testimony), hereafter, "*Kumho Tire Co.*"

13. When faced with a proffer of expert scientific testimony, as in the present case, the trial court is charged with the role of "gatekeeper" and must initially determine pursuant to Rule 702, M.R.E., whether the expert is proposing to testify to scientific knowledge that will assist the trier of fact to understand or determine a fact in issue. This decision demands an evaluation of

---

[2] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Under the *Frye* test, scientific evidence was admissible only if the principle upon which it was based was "sufficiently established to have gained general acceptance in the particular field in which it belongs."

whether the reasoning or methodology underlying the testimony is scientifically valid and can be applied to the facts at issue. *See also* Rules 703 and 704, M.R.E.

14. The Sixth Amendment to the United States Constitution, as well as the corresponding portion of the Mississippi Constitution, require that a defendant be afforded legal process to compel witnesses to appear and testify, but another apparent purpose of the provision was to make inapplicable in trials the common-law rule that in cases of treason or felony, the accused was not allowed to introduce witnesses in his defense. The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury, so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law, applicable to the states by way of the Fourteenth Amendment. It is significant to note that Abernathy fully and timely provided the State, through pre-trial discovery, the identity of the defense witnesses. (C.P. 36-38) (R.E. 29-31)

15. The refusal or failure to afford Abernathy his fundamental right to a *Daubert* hearing and to thereafter, present the expert testimony of Dr. Katz for the hearing of the trial jury unfairly compromised his fundamental constitutional rights. Merely providing Abernathy a Daubert hearing was no guarantee that the proposed expert could or would satisfy the threshold requirements for admittance into evidence, however, Abernathy was entitled to at least be heard on the issue pursuant to the holding in *Daubert*. *See* Rule 702, M.R.E.

16. As this Court is aware, a *Daubert* hearing "entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and

whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2686, 2796 (1993).

17. The *Daubert* Court held that a trial court must undertake a preliminary determination of whether the methodology of the expert's proposed testimony is scientifically reliable. To accomplish this end with the greatest judicial economy, and to avoid junk science creeping into the case, a *Daubert* hearing is the appropriate method for challenging an expert whose methodology is questionable.

18. It is especially important for the Court, as gatekeeper, to distinguish between a number of meaningful issues:

(a) Is the particular expert qualified?

(b) Do the qualifications of this expert fit the facts of the case?

(c) What is the scientific *validity* of the *methodology* the expert has used?

(d) What is the scientific *reliability* of the *methodology* the expert has used?

(e) What is the scientific *validity* of the underlying *data* the expert bases his or her opinion on?

(f) What is the scientific *reliability* of the underlying *data* the expert bases his or her opinion on?

(g) To what extent is the expert's *reliance* on that data reasonable?

19. These are analytically distinct concepts. In answering these gatekeeping questions, the Court must evaluate the experts, their opinions, and the foundations for those opinions on a case-by-case basis. In conducting a *Daubert* hearing, this Court may rely on another expert's evaluation of the underlying data. Nonetheless, reliance on other experts must not take the place of this Court's gatekeeping role.

20. In her work for the Federal Judicial Center's *Reference Manual on Scientific Evidence*, Professor Margaret Berger describes a two-pronged approach to evaluate the qualifications of the proffered expert. To ascertain whether a proposed expert is qualified to act as a witness, a court must undertake a two-step inquiry:

> (a) The court should determine whether the proffered expert has minimal educational or experiential qualifications in a field that is relevant to a subject which will assist the trier of fact.
>
> (b) If the expert passes this threshold test, the court should further compare the expert's area of expertise with the particular opinion the expert seeks to offer. The expert should be permitted to testify only if the expert's particular expertise, however acquired, enables the expert to give an opinion that is capable of assisting the trier of fact.
>
> This two-pronged analysis is best handled in a *Daubert* hearing.

21. Having accomplished this two-pronged analysis, the court must determine whether the expert's particular background and training actually fits the facts in issue. Indeed, the fact that an expert possesses a particular title or degree is not dispositive in qualifying an expert. An expert's credentials or experience may enable the expert to meet a threshold test; but before the expert is found qualified to offer an opinion about a particular issue, the gatekeeper must make further inquiry. The court must *also* decide whether the qualifications of the expert enable him or her to assist the trier of fact with regard to each *controverted issue*. This is the first level of fit necessary for the admission of proffered expert testimony, *i.e.*, does the proposed expert possess the kind of background and experience to fit the facts in controversy?

22. Next, the court in its gatekeeping role must ascertain whether the proffered expert is basing his or her opinion on methodology that is a valid and reliable application to the facts of the case. In this determination, the gatekeeper must be mindful that the methodology utilized by

an expert witness should not allow the expert to disregard facts or other evidence inconsistent with his or her opinions, or to disregard countervailing factors. The court must determine that the factual basis for the proffered expert witness's opinion is accurate and precise. The United States Supreme Court endorsed this approach in *Daubert* when it located within Rule 702 (Federal Rules of Evidence) the obligation of the trial court to determine whether the proffered scientific evidence "properly can be applied to the facts in issue." This is the second level of fit. *See also* Rule 702, M.R.E.[3]

23. It is helpful to remember that the Supreme Court adopted terminology used by Judge Becker in *United States v. Downing*, 753 F.2d 1224 (3rd Cir. 1985), and characterized this consideration as one of fit. In this way, Rule 702, rather than Rule 703, is the proper vehicle for excluding expert opinions that do not meet this second level of fit. It should not be forgotten, however, that in assessing the admissibility of expert testimony, the primary focus of the gatekeeper should be upon the Rule 702 requirement that the testimony *fit* the facts. When the

---

[3] Mississippi adopted a new Comment to its State Rule 702 on May 29, 2003, rejecting *Frye* and adopting the more modern test based on the *Daubert* case. The new Comment explicitly endorses *Daubert* and *Kumho Tire Co.*, since the Mississippi Supreme Court clearly recognizes the gatekeeping responsibility of the trial court to determine whether the expert testimony is relevant and reliable. The State and Federal Rule 702 are exactly the same.

See also Mississippi Transp. Com'n v. McLemore, 683 So.2d 31, 39 (Miss. 2003) (after an exhaustive review of cases, the McLemore court deemed that "entirely speculative" testimony would fail Mississippi's *Daubert* standard. *Id.* at 41; *Geer v. Bunge, Co.*, 71 F.Supp.2d 592, 593 (S.D. Miss. 1999) (if a party fails to establish that expert testimony is based upon appropriate scientific methodology as commanded by *Daubert*, then that testimony will be excluded; *Davis v. Rocor International*, 226 F.Supp.2d 839, 842 (S.D. Miss. 2002) testimony excluded that appeared to be based on conjecture and/or speculation that is not supported by the record and is not within his personal, scientific knowledge).

expert testimony fits the facts, it assists the trier of fact "to understand the evidence or to determine a fact in issue." Rule 702, M.R.E.[4]

24. The second sentence of Rule 703 provides that an expert opinion need not be based upon admissible evidence. The interaction of Rule 702 and 703 demonstrate that it is sufficient for an expert's opinion to rest on data "reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.

25. The Rules do not allow an expert to base his or her opinions on assumptions and data that are so contrary to the evidence in the record, or on assumptions that are so speculative, that they amount to conjecture and speculation. Clearly, the court has a duty to inquire into the trustworthiness of the underlying data; and it can exclude testimony where an expert has not reasonably based his or her opinion on trustworthy underpinnings. Indeed, the court's determination whether an expert is truly qualified for the circumstances of the particular case must take into account the fact that his or her opinion may be based on untrustworthy underpinnings. *Daubert* and *Kumho Tire Co.* inform, that this trustworthiness standard must be

---

[4] The Advisory Committee Notes to the 2000 Amendment to federal Rule 702 summarized five other factors courts have developed to determine whether expert testimony is sufficiently reliable to be considered by the trier of fact. These factors include:

(1) Whether experts are "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their own opinions expressly for purposes of testifying." *Daubert*, 43 F.3d 1311, 1317 (9th Cir. 1995);

(2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion. *General Electric, Co. v. Joiner*, 522 U.S. 136, 146 (1997);

(3) Whether the expert has adequately accounted for obvious alternative explanations. *Claar v. Burlington N.R.R.*, 29 F.3d 499 (9th Cir. 1997);

(4) Whether the expert is being as careful as he would be in his regular professional work outside his paid litigation consulting. *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997);

(5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give. *Kumho Tire Co.*, 119 S.Ct. at 1175.

grounded in the reasoning and methodology of science. By using the term "scientific," said the United States Supreme Court, the witness implies a "grounding in the methods and procedures of science." The word "knowledge," stated the Court, connotes more than subjective belief or unsupported speculation. The Court made it clear that:

> . . . 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. *Daubert*, 113 S.Ct. at 2795.

26. Pursuant to the guidelines concerning the Court's gatekeeping responsibilities, Abernathy respectfully submits that the trial court was required to conduct a *Daubert* hearing inquiring into the proffered expert's qualifications to determine whether the proffered witness was, in fact, an acceptable expert in the relevant field . Questions in this vein would have involved the proffered witness's education, background, and training. Also of concern is the proffered experts' grasp of the datum of the discipline, its basis in empiricism, and its methodology.

27. A *Daubert* hearing would have aided the trial court in determining whether the Dr. Katz's particular qualifications fit the facts in issue in this case. While a proposed expert may indeed be an expert in some manner, it may very well be the case that the expert's particular qualifications do not reliably fit the facts in issue in this case. These important questions all go to the basic qualifications of the proffered witnesses to be deemed experts and to be seen as ones who may provide reliable testimony with the scope of Rules 401, 403 and 702 of the Mississippi Rules of Evidence.

28. The Rules do not allow an expert to base his or her opinion on assumptions and data that are so contrary to the evidence in the record, or on assumptions that are so speculative, that they amount to conjecture and speculation. *Daubert* and *Kumho Tire Co.* inform that the court has a duty to inquire into the trustworthiness of the underlying data, and it can exclude testimony where an expert has not reasonably based his or her opinion on trustworthy underpinnings. In the proposed *Daubert* hearing it would have been the intent of the Abernathy to aid the trial court's determination as to whether Dr. Katz's opinions were based on untrustworthy underpinnings. As this Court is aware, *Daubert* and *Kumho Tire Co.* inform that this trustworthiness standard must be grounded in the reasoning and methodology of science.

29. In summary of the instant issue, Abernathy would state unto the Court that the trial erred in refusing to conduct a *Daubert* hearing on the proffered testimony of expert witness Dr. Katz. Without question there exists ample evidence in the record to support the relevance and materiality of the issues at bar. Assuming satisfying the two-pronged Daubert test, there exists a sufficient factual basis in the trial record to justify the expert testimony of Dr. Katz in regards to migraine headaches. The undisputed facts of the record satisfy the relevance requirement and the denial of Abernathy's motions violated his due process rights, as well as his Sixth and Fourteenth Amendment rights to compulsory process.

30. Abernathy's conviction and sentence should be reversed and vacated, respectively, and a new trial ordered.

ISSUE TWO

THE TRIAL COURT ERRED BY UNFAIRLY LIMITING ABERNATHY'S EFFORTS TO PRESENT A FULL AND COMPLETE DEFENSE TO THE CHARGES AGAINST HIM IN VIOLATION OF HIS FUNDAMENTAL CONSTITUTIONAL RIGHTS TO PRESENT HIS THEORY OF THE CASE

31. In the interests of avoiding redundance and the unnecessary duplication of arguments and other related matters, Abernathy does hereby incorporate by reference herein, all arguments, authorities cited, transcript references, facts, assertions and all other related matters contained in ISSUE ONE above.

32. Abernathy would submit that he enjoys a fundamental right to present a full and complete defense to the charges against as contained in the Indictment. And further, the right to present his theory of the defense is absolute. *See* Due Process Clause, Sixth and Fourteenth Amendments to the United States Constitution and corresponding portions of the Mississippi Constitution; *see also Giles v. State*, 501 So.2d 406 (1987) (Court stated that the state has a legitimate interest in telling a rational and coherent story of what happened in the case); *Manuel v. State*, 667 So.2d 590 (Miss. 1995) (responsibility of trial judge to properly instruct the trial jury on the defendant's theory of the case when supported by the evidence no matter how meager or unlikely).

33. In Issue One Abernathy presented argument and authorities in support of the violation of his fundamental constitutional rights due to an erroneous denial of his right to present expert testimony, pursuant to the holding in *Daubert* and it's progeny. Basically, Abernathy's argument centers around the trial court's failure to allow expert

testimony touching on relevance facts in evidence justifying the use of Dr. Katz's expertise.

34. Abernathy's theory of the defense was first, that he did not commit the acts of which he stood accused, and second, the stated fact that the victim was suffering from a migraine headache and possibly enceinte at the time was material and crucial to the matter of the victim's accurate recollection of the events, among other things, that transpired that evening. Dr. Katz would have testified and expounded on what particular condition or symptoms that migraine headaches could cause. (T.III. 300-304) *See Chinn v. State*, 958 So.2d 1223, 1225 (Miss. 2007) (every accused has a fundamental right to have her theory of the case presented to the jury, even if the evidence is minimal); *O'Bryant v. State*, 530 So.2d 129, 133 (Miss. 1988) (it is an absolute right of an accused to have every lawful defense he asserts, even though based on meager evidence and highly unlikely, to be submitted as a factual issue to be determined by the jury under proper instructions of the court); *Phillipson v. State*, 943 So.2d 670, 671-672 (Miss. 2006) (we greatly values the right of a defendant to present his theory of the case); *Taylor v. Illinois*, 484 U.S. 400, 108 S.Ct. 646 (1988) (a defendant has a constitutional right to present a complete defense); *United States v. Scheffer*, 523 U.S. 303, 331 118 S.Ct. 1261, 1275 (1998) (constitution provides a defendant a meaningful right to present a complete defense).

35. Testimony was presented that Lori was diagnosed as suffering from migraine headaches, was taking prescription Darvocet for her condition and most importantly, was suffering from a migraine headache at the very time she has alleged that the sexual assault was to have taken place. The State offered no evidence to contest the qualifications of an OB-GYN medical doctor to diagnose a condition of migraine

headaches and contrary to the position of the State on the matter of Dr. Katz, his testimony would have greatly aided the trial jury in understanding the condition of migraine headaches. Such knowledge is of a degree not fully comprehendible or readily understood by the average person and expert opinion testimony was relevant and mandated to an understanding of the relevant facts of the case.

36. Abernathy was unfairly denied his fundamental right to present a full and complete defense to the charges against him, and was denied the opportunity to present his theory of the defense to the trial jury. As a result of plain error, Abernathy's conviction and sentence should be reversed and vacated, respectively. A new trial should be granted.

ISSUE THREE

THE EVIDENCE ELICITED AT THE TRIAL WAS WHOLLY INSUFFICIENT AS A MATTER OF LAW TO SUPPORT THE VERDICT OF THE JURY AND ABERNATHY'S CONVICTION AND SENTENCE SHOULD BE REVERSED AND VACATED, RESPECTIVELY

37. The instant case is one of the victim's version of the facts versus Abernathy's. There was no confession, no scientific evidence by way of a rape kit, no bruising or scratches on the victim. Simply stated, there was a total lack of any credible evidence or testimony in corroboration of the victim's story of the events that had transpired on the evening of September 6, 2005. The evidence presented at the trial was wholly insufficient as a matter of law to support the verdict of the trial jury.

38. This Court has issued its standard of review in cases dealing with the sufficiency of the evidence.

> The concern is whether the evidence in the record is sufficient to a finding adverse to Abernathy on each element of the offense of sexual battery. With respect to each element of the offense charged, the court must consider all of the evidence – not just the evidence which supports the case for the prosecution – in the light most favorable to the verdict. The credible evidence which is consistent with the guilt must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. Matters regarding the weight and credibility to be accorded the evidence are to be resolved by the jury. The Court may reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty.

McRee v. State, 732 So.2d 246, 248 (Miss. 1999) (*quoting Wetz v. State*, 503 So.2d 803 (Miss. 1987)).

39. Abernathy would submit that the only evidence supporting his conviction is the victim saying that he did the acts. Surely a conviction based on such questionable assertions can not stand. *See Holland v. State*, 656 S0.2d 1192, 1196 (Miss. 1995); *Hamm v. State*, 735 So.2d 1025 (Miss. 1999).

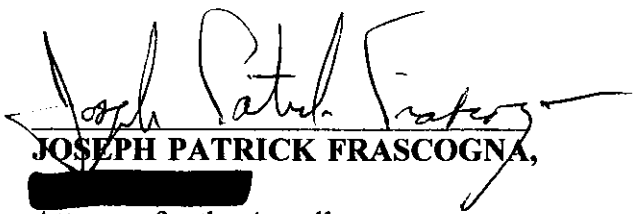
40. Based the evidence presented at trial and more significantly, the lack of credible evidence in the record, Abernathy would move the Court to reverse and render this matter.

CONCLUSION

Based on the arguments presented and the legal authorities support in this brief, Abernathy would respectfully submit that the denial of his fundamental constitutional rights, warrant the reversal of his conviction and the vacation of the sentence imposed. In the alternative, Abernathy would state that the evidence presented at rial and of record is wholly insufficient as a matter of law and the matter should be reversed and rendered.

Respectfully submitted,

DAVID ABERNATHY,
Appellant

BY: 
JOSEPH PATRICK FRASCOGNA,
[redacted]
Attorney for the Appellant
FRASCOGNA & FRASCOGNA, PLLC
234 East Capitol Street, Suite 100
Jackson, MS 39201
TEL: (601) 985-3542
FAX: (601) 985-3548

CERTIFICATE OF SERVICE

I, the undesigned attorney of record for the appellant David Abernathy, do hereby certify that I have on this day mailed postage fully pre-paid, a true and correct copy of the foregoing **BRIEF OF APPELLANT** to the following:

Honorable Samac S. Richardson
Circuit Court Judge
P.O. Box 1885
Brandon, MS 39043

Honorable Michael Guest
Rankin County District Attorney
P.O. Box 68
Brandon, MS 39043

Honorable Jim Hood
Attorney General
P.O. Box 220
Jackson, MS 39205-0220

Mr. David Abernathy
MDOC #136113
Winston County Correctional Facility
P.O. Drawer 928
Louisville, MS 39339

This the 24th day of February, 2009.

Joseph Patrick Frascogna, [redacted]
Certifying Attorney