IN THE DISTRICT COURT OF TULSA COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA, Plaintiff, vs. Defendant.	)	Case No.

DEFENDANT'S DAUBERT MOTION TO EXCLUDE EXPERT TESTIMONY OF REGARDING THE EFFECTS OF CHEMICAL SUBSTANCES ON THE HUMAN CENTRAL NERVOUS SYSTEM

, counsel for the above-named defendant, submits this motion in limine to exclude the testimony of the State's purported expert for the reasons stated below:

Procedural Status of Case

1. This defendant is charged in a multi-count amended information with three (3) counts of first degree manslaughter, allegedly causing the death of three individuals as a result of an automobile accident during which the State alleges the defendant's central nervous system was impaired by the presence of marijuana. The defendant is charged with misdemeanor counts as well, but this Motion goes solely to the three (3) felony manslaughter counts.

2. The defendant is free on bond under certain pretrial conditions of release.

3. A jury trial is scheduled in this matter to commence on

4. Counsel was directed to file this Motion no later than March 21, 2011. A Daubert motion hearing is scheduled for Friday, April 8, 2011, at 9 a.m.

Introduction and Summary of Argument

5. Allowing to testify as an expert witness regarding the effects of marijuana on the central nervous system violates the law with respect to the admissibility of expert testimony in many regards. It violates the holdings in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); Kumho Tire Co. v. Carmichael, 526 U.S. 137, 119 S.Ct. 1167, 131 F.3d 1433 (1999); Taylor v. State, 1995 OK CR 10, 889 P.2d 319; and, the spirit if not the letter of Melendez-Diaz v. Massachusetts, 557 U.S. ____, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009), inasmuch as is (1) not a competent witness to testify to any effects any substance would have on the human central nervous system; (2) would allow inadmissible hearsay testimony in violation of the confrontation clause of the federal and state constitutions; and, (3) would deny this defendant due process of law.

6. The State seeks to introduce opinion testimony of to establish that certain metabolites of marijuana had an effect on defendant's ability to operate a motor vehicle at the time of the accident alleged in the bill of information (PH Tr. 197-99, copy attached as "Exhibit A"). , however, lacks the requisite qualifications to render such opinions – he has only a bachelor's degree in biology and chemistry, and toxicology training from the . has no formal medical education of any kind. The effect of chemical substances, especially on a particular individual, is quintessentially the type of diagnostic opinion only a medical doctor, or other medical professional with commensurate medical training, can render. A toxicologist, such as , can testify that toxicological examinations—that either he performed or one acting under his

direction performed—revealed certain substances were present. But he cannot testify as to the effect of those substances on the human central nervous system generally or as to the defendant's central nervous system specifically. opinions should consequently be excluded on the ground he fails to meet 12 O.S. § 2702's qualification prerequisite to render opinions on the effects of Delta-9-THC on the human central nervous system or the human body generally. As is not a qualified expert, his attempts to recite general statements from medical and toxicological texts and articles are not permitted by 12 O.S. § 2703, and are, instead, forbidden by the hearsay rule.

7. opinions regarding the effect of chemical substances on the human body should also be excluded for another, independent reason. opinions are wholly based upon his review of medical literature. He has made absolutely no attempt to demonstrate for this Court how that literature reliably applies to the facts of this case. merely recites the general principles articulated in the literature he consulted regarding the effects of Delta-9-THC on a human being. Daubert's reliability standard requires more in order to admit expert testimony regarding such a medically sophisticated subject matter as the effect of a chemical compound on the human body. As has failed to demonstrate the literature upon which he relies is reliable or that it has been reliably applied to the facts of this case, Daubert and its progeny mandate exclusion of his opinions regarding the effects of Delta-9-THC on the human body.

Factual Background

8. is employed as a toxicology supervisor at the

He holds a Bachelor's of Science Degree from the

, and his major was biology/chemistry

. He holds no other degrees or formal medical certifications, and he has

not received any medical training from a medical school or similar institution

9. The State intends to offer opinion testimony from to the effect that:

> *Delta-9-THC, the psychoactive compound found in marijuana will cause an impairment of time and space perception, you know, how fast they are traveling, how slow they are traveling, how far away things are. It will affect the sedation, disorientation, confusion, problem solving skills, poor balance, just information such as that. The main thing is it's cognitive or their thinking skills, how quickly they can think and react to problems.*

and:

> *[C]oncentrations of 1.0 to 1.5 [nanograms per milliliter of Delta-9-THC] will affect a person's cognitive ability or psychomotor ability to perform psychomotor tasks. It's going to cause poor judgment, slowed reaction, confusion, sedation. So at 1.0 to 1.5 when they are seeing those type of reactions, a higher concentration is only going to have a more significant impact.*

10. In forming the above-referenced opinions, consulted the following :

A. Drug Effects on Psychomotor Performance by Randall C. Baselet;

B. An article titled High-Potency Marijuana Impairs Executive Function and Inhibitory Motor Control, published on May 6, 2003, in Drug and Alcohol Dependence; and,

C. Marijuana and Cannaboids, edited by Mahmoud A. ElSohly, Ph.D., published by the Humana Press.

11. In neither his preliminary hearing testimony nor in any other disclosure made in this case has offered any testimony as to the effect of Delta-9-THC (or any other substance for that matter) on the defendant's body or central nervous system.

12. analysis concedes that physical examination of a person is needed in order to actually determine the effect of a given level of marijuana on a particular person (PH Tr. 215, l. 19). did not perform any physical examination of the defendant on the date of the accident (or at any other time), nor has he disclosed reliance upon the physical examination of the defendant by any person on the day of the accident.

Argument and Authorities

I. Governing Standard

13. To offer expert opinions, a witness must be "qualified as an expert by knowledge, skill, experience, training, or education" (12 O.S. § 2702). Such opinions "must be grounded in an accepted body of learning or experience in the expert's field, and the expert must explain how the conclusion is so grounded." United States v. Pacheco, 08-20895-CR, 2009 WL 383257, at *12 (S.D. Fla. Feb. 14, 2009); see also Pierce v. Gilchrist, CIV-05-1519-C, 2007 WL 128993, at *1 (W.D. Okla. Jan. 16, 2007).[1]

14. The Court must do more than just determine whether the witness is an expert within some general area. Rather, the Court must focus on whether the expert has been shown to have specific expertise in the area at issue that qualifies him as an expert with respect to the specific opinions he intends to offer. See Kumho Tire Co. v. Carmichael, 526 U.S. 137,

[1] In Oklahoma, federal-court decisions carry particular persuasive value when they construe federal evidence rules with language substantially similar to that in the Oklahoma Evidence Code. Mayes v. State, 1994 OK CR 44, ¶ 74, 887 P.2d 1288, 1309 ("When our Legislature adopted the rule virtually identical to the Federal Rules, it also adopted the reasoning behind the rules."); Freeman v. State, 1988 OK CR 192, ¶ 4, 767 P.2d 1354, 1355-56 (interpreting 12 O.S. § 2404, in accordance with federal authorities interpreting Fed. R. Evid. 404); Robinson v. State, 1987 OK CR 195, ¶ 3, 743 P.2d 1088, 1090 ("We turn to the federal rules, upon which Oklahoma's rules are based, under the assumption that in adopting the Federal rules in an effort to promote uniformity, our legislature also adopted the philosophy and interpretations of those rules as litigated in the federal courts."). Here, 12 O.S. § 2702, is substantively identical to Fed. R. Evid. 702.

156 (1999) (explaining that the issue was not whether qualified tire experts exist, but "whether this particular expert had sufficient specialized knowledge to assist the jurors in deciding the particular issues in the case") (internal quotation marks omitted); Dodge v. Cotter Corp., 328 F.3d 1212, 1227 (10th Cir. 2003) (explaining that "a district judge asked to admit scientific evidence must determine whether the evidence is genuinely scientific, as distinct from being unscientific speculation offered by a genuine scientist") (internal quotation marks omitted); Clark v. Takata Corp., 192 F.3d 750, 759 n.5 (7th Cir. 1999) (observing that even a "supremely qualified expert cannot waltz into the courtroom and render opinions" unless the opinions are relevant and reliable).

15. In making this inquiry, this Court must identify the relevant area of expertise at issue for the opinion and then consider what the expectations are in that area of expertise. For example, in many areas of expertise, there are certain expectations of analytical rigor. See In re Methyl Tertiary Butyl Ether (MTBE) Products Liab. Litig., 593 F.Supp.2d 549, 556 (S.D.N.Y. 2008) (concluding that medical testimony as to the effect on human beings of certain chemicals found in the water supply were of the kind "subject to the expectations of falsifiability, peer review, and publication").

16. This Court should also consider whether the area of expertise is a single unitary field, or one in which there are subspecialties. As Judge Posner has observed:

> *A scientist, however well credentialed he may be, is not permitted to be the mouthpiece of a scientist in a different specialty. That would not be responsible science. A theoretical economist, however able, would not be allowed to testify to the findings of an econometric study conducted by another economist if he lacked expertise in econometrics and the study raised questions that only an econometrician could answer.*

Dura Automotive Sys. of Indiana, Inc. v. CTS Corp., 285 F.3d 609, 614 (7th Cir. 2002).

17. Under 12 O.S. § 2702, expert testimony is admissible only where the subject matter on which the expert claims expertise and proposes to testify "will assist the trier of fact to understand the evidence or to determine a fact in issue." If the expert is qualified and the testimony would be helpful to the trier of fact, such an expert may still only give expert opinion testimony "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." Id.

18. Applying 12 O.S. § 2702, a district court is obligated to act as a gatekeeper to the admission of expert testimony by ensuring that it "both rests on a reliable foundation and is relevant to the task at hand." Daubert, 509 U.S. at 597. The objective of the gatekeeping "requirement is to ensure the reliability and relevancy of expert testimony" by making "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." Kumho Tire Co., 526 U.S. at 152.

19. When proposed expert testimony is challenged under Daubert, 12 O.S. § 2104, requires the Court to determine whether the expert testimony is admissible under 12 O.S. § 2702. See Daubert, 509 U.S. at 592, n.10; see also Christian v. Gray, 2003 OK 10, ¶ 23, 65 P.3d 591, 603:

> *When a party challenges the admissibility of expert testimony by stating the specific ground of the objection, the proponent of the evidence must make known the substance of the proposed testimony that pertains to the objection.*

Rule 104(a) places the burden of proof upon the proponent of the testimony to establish the admissibility of the proffered expert testimony by a preponderance of the evidence. Id.; see also Ralston v. Smith & Nephew Richards, Inc., 275 F.3d 965, 970, n.4 (10th Cir. 2001). When faced

with a party's objection, the district court must adequately demonstrate by specific findings on the record that it has performed its duty as gatekeeper. Goebel v. Denver & Rio Grande Western Railroad Co., 215 F.3d 1083, 1088 (10th Cir. 2000), after remand 346 F.3d 987, 992-1000; see also Lewis v. State, 1998 OK CR 24, ¶ 21, 970 P.2d 1158, 1167 ("[W]e direct trial courts, upon request of either party, to hold an in camera hearing to determine whether an expert's reliance on particular information is reasonable."). Daubert's reliability and helpfulness strictures apply to all expert testimony, including testimony regarding scientific, technical, and other specialized matters. Kumho Tire, 526 U.S. at 147; see also Hanson v. State, 2003 OK CR 12, n.36, 72 P.3d 40, 52 n.36.

II. is Not Qualified to Render Medical Opinions as to the Effect of Chemical Substances on the Human Body.

20. The qualification of a witness as an expert, separate and apart from the witness' opinion, is a determination that is a discreet, independent and important requirement in considering the admissibility of an expert's testimony. See United States v. Frazier, 387 F.3d 1244 (11th Cir. 2004). This analysis, as well as that pertaining to the reliability of an expert's opinion, is especially sensitive in a criminal case where the effect of chemical substances is an element of, or a necessary predicate to, an element of the charged offense. See United States v. Vitek Supply Corp., 144 F.3d 476, 486 (7th Cir. 1998) (in a prosecution requiring proof of food contamination with certain substances, noting that "we have no doubt that an expert's qualifications bear upon the scientific validity of his testimony."); see also Whiting v. Boston Edison Co., 891 F. Supp. 12, 24 (D. Mass. 1995) (excluding proffered medical expert's opinion based on lack of knowledge and experience in analyzing causation of injury by radiation).

21. Indeed, the Seventh Circuit Court of Appeals has held that a toxicologist is not qualified to offer an expert opinion regarding a chemical's ability to cause alleged damages

where the toxicologist is not a licensed medical doctor and lacks experience in the study of exposures to the subject chemical. See Wintz v. Northrop Corp., 110 F.3d 508, 514 (7th Cir. 1997) (excluding expert's opinion based upon lack of qualification where the proffered toxicologist was not a physician and, despite acquiring generalized knowledge of the chemical at issue [bromide], the expert did not have experience in analyzing causation of injury by way of exposure to the chemical); see also Newton v. Roche Laboratories, Inc., 243 F. Supp. 2d 672, 677 (W.D. Tex. 2002) (concluding that a putative expert did "not possess the qualifications to render a[n] . . . opinion [as to the effects of Accutane on the human body] in this case, [because] [a]lthough he holds himself out as a 'doctor' and a pharmacologist, he has never earned an M.D., a Ph.D., or any degree in pharmacology."); Plourde v. Gladstone, 190 F. Supp. 2d 708, 719 (D. Vt. 2002) aff'd, 69 Fed. App'x 485 (2d Cir. 2003) (excluding testimony of a Ph.D. in toxicology as to the effect of herbicides on the human body because "Dr. Simon is not a medical doctor. He professes no experience or training in diagnosing and treating patients." (emphasis added)); Conde v. Velsicol Chem. Corp., 804 F. Supp. 972, 1026 (S.D. Ohio 1992) aff'd, 24 F.3d 809 (6th Cir. 1994) (excluding a toxicologist's opinions as to the effect of chlordane (a chemical substance) on the human liver, because the court found that the witness "is not a medical doctor, and he is unable to make a differential diagnosis.").

22. Here, too, lacks the requisite qualifications to opine as to the effect of Delta-9-THC, either on the human body generally or on the defendant specifically. Wallace is not a medical doctor. He has never attended nor received any training from a medical school. He did not testify, nor has the State disclosed, that he has any experience in diagnosing or observing the effects of Delta-9-THC on actual persons. Indeed, he never examined the defendant, nor did he attempt to rely upon any physician or other qualified medical professional who did examine the defendant at or near the time of the accident. Without adequate medical training, 12 O.S. § 2702, does not permit Wallace to testify as to the medical effects of a

chemical substance, such as Delta-9-THC. His testimony expressing such opinions should accordingly be excluded.

III. 12 O.S. § 2703 Does Not Permit to Inject Otherwise Inadmissible Hearsay into These Proceedings

23. As demonstrated above, lacks the requisite qualifications to opine upon the medical effects of Delta-9-THC (or other chemical compounds) on the human body. Consequently, neither he nor the State may not rely upon 12 O.S. § 2703, to admit the findings of other persons—in the books and articles relied upon by —at trial in this case. As is not a qualified expert, his recitation of those other authors (none of whom will be present at trial or subject to cross-examination) would run afoul of the hearsay rule.

> *Rule 703 permits "experts" to rely upon hearsay. The kind of guarantee of trustworthiness is that it be "of the kind normally employed by experts in the field." The expert is assumed, if he meets the test of Rule 702, to have the skill to properly evaluate the hearsay, giving it probative force appropriate to the circumstances.*

In re "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1223, 1245 (E.D.N.Y.1985) (emphasis added), aff'd 818 F.2d 187 (2d Cir.1987). As the Plourde court explained:

> *Thus a physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety, including statements by patients and relatives, reports and opinions from nurses, technicians and other doctors, hospital records . . . . The physician makes life-and-death decisions in reliance upon them. His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes.*

Plourde, 190 F. Supp. 2d at 720 (emphasis in original); see also Kannankeril v. Terminix Int'l, Inc., 128 F.3d 802, 807 (3d Cir.1997):

> *A physician may reach a reliable differential diagnosis without performing a physical examination, particularly if there are other examination results available; it is perfectly acceptable, in arriving at a diagnosis, for a*

physician to rely on examinations and tests performed by other medical practitioners. (emphasis added)

24. As the court in Plourde noted in prohibiting a toxicologist's attempted reliance on the published opinions of physicians as to the effect certain substances on humans as an impermissible end-run around the hearsay rule not allowed by Rule 703:

> *In this case, Dr. Simon is not a physician, but a toxicologist. He offers no proof that diagnoses and opinions offered by medical doctors . . . as to causation are regularly relied upon by trained toxicologists who lack medical . . . training. More importantly, Dr. Simon offers no textual support for the proposition that toxicologists are qualified to evaluate the medical judgments and opinions made by doctors . . . .*

Plourde, 190 F. Supp. 2d at 720 (emphasis added).

25. "If those [qualified experts upon which another witness relies] are not made available at trial, [the witness's] opinion really amounts to nothing more than inadmissible 'hearsay in disguise' under Rule 703." Id.; see also United States v. Mejia, 545 F.3d 179, 197 (2d Cir. 2008) (Even a qualified expert "may not, however, simply transmit that hearsay to the jury. . . . Instead, the expert must form his own opinions by 'applying his extensive experience and a reliable methodology' to the inadmissible materials. Otherwise, the expert is simply 'repeating hearsay evidence without applying any expertise whatsoever,' a practice that allows the Government 'to circumvent the rules prohibiting hearsay.'" (internal citations omitted)); United States v. Tomasian, 784 F.2d 782, 786 (7th Cir.1986) ("Rule 703 does not sanction the simple transmission of hearsay; it only permits an expert opinion based on hearsay."); United States v. Burt, 76 F.3d 1064, 1068-69 (9th Cir. 1996); United States v. Johnson, 54 F.3d 1150, 1157 (4th Cir. 1995); State v. Towne, 453 A.2d 1133, 1135 (Vt. 1982) (a testifying physician may not act as a mere "conduit" for another physician's opinion); Dupona v. Benny, 291 A.2d 404, 408 (Vt. 1972) ("By his own admission [the proffered expert] was not an expert in the field of brain injury . . . . [and] he merely stated the conclusions of the doctors to whom he had sent

the patient. Such testimony was not as to any conclusion of his own, for admittedly his training gave him no basis for coming to such conclusions."); 29 Charles Alan Wright & Victor James Gold, Federal Practice & Procedure, § 6273, at 312 (1997) ("Rule 703 does not authorize admitting hearsay on the pretense that it is the basis for expert opinion when, in fact, the expert adds nothing to the out-of-court statements other than transmitting them to the jury.").

26. In this case, as made clear by preliminary hearing testimony, he seeks to do exactly what the above authorities forbid. He merely seeks to recite standards from textbooks and articles that he has reviewed. He has not offered any independent opinions as to the effect of Delta-9-THC on the defendant, despite conceding that a physical examination and analysis is necessary to determine the effect of a particular quantity of Delta-9-THC on a particular person at a given point in time. Indeed, could not offer such opinions, because he did not examine the defendant nor has he relied upon any person who did examine the defendant in formulating his "opinions." Especially under these circumstances, the Oklahoma Evidence Code does not permit to merely recite hearsay statements from the publications of others under the guises of "opinion testimony." Such an effort is unequivocally prohibited by the hearsay rule.

IV. has Failed to Adequately Link His "Opinions" to the Facts of This Case

27. opinions regarding the effects of Delta-9-THC should also be excluded because he has utterly failed to even attempt to reliably apply the statements in treatises in articles upon which he attempts to rely to the facts of this case. Rather, simply recites general statements from treatises and articles with respect to the effects of Delta-9-THC. That is not permissible expert opinion testimony in any sense.

28. As a prerequisite to admissibility of expert testimony, 12 O.S. § 2702 requires "[t]he witness [must have] applied the principles and methods reliably to the facts of the case." Thus, even if a witness is qualified to serve as an expert, the witness thus cannot simply set forth a set of conclusions.

29. In short, an expert's say-so is not enough. "The trial court's gatekeeping function requires more than simply taking the defendant's word for it." United States v. Frazier, 387 F.3d 1244, 1261 (11th Cir. 2004); see also Daubert v. Merrell Dow Pharmaceuticals, Inc. (on remand), 43 F.3d 1311, 1316 (9th Cir. 1995) (observing that the gatekeeping role requires a district court to make a reliability inquiry, and that "the expert's bald assurance of validity is not enough"). "[N]othing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert." Kumho Tire Co. v. Carmichael, 526 U.S. 137, 157 (1999) (internal quotation marks omitted); see also Daubert, 43 F.3d at 1319 ("We've been presented with only the expert's qualifications, their conclusions and their assurances of reliability. Under Daubert, that's not enough."); Twyman v. GHK Corp., 2004 OK CIV APP 53, ¶ 37, 93 P.3d 51, 59 ("An expert's opinion . . . must be more than ipse dixit.").

30. Daubert itself involved a situation in which the purported experts sought to do exactly what seeks to do in this case. There, the putative experts sought to rely upon previous studies regarding Benedictin (a prescription medication) and extrapolate generalized data from those studies to conclusion that birth defects in particular persons were caused by their mothers' Benedictin use. Daubert (on remand), 43 F.3d at 1314; see also Daubert, 509 U.S. at 584. Applying the United States Supreme Court's new analysis (which is the analytical method for determining the admissibility of expert testimony in Oklahoma), the Ninth Circuit, in rejecting one of the expert's attempted reliance upon other studies, found that the testimony was inadmissible because the expert "offer[ed] no tested or testable theory to

explain how, from this limited information [other studies], he was able to eliminate all other potential causes of birth defects, nor does he explain how he alone can state as a fact that Bendectin caused plaintiffs' injuries." Daubert, 43 F.3d at 1319; see also Hendrix v. Evenflo Co., Inc., 255 F.R.D. 568, 608 (N.D. Fla. 2009) ("Experts may not, however, simply repeat or adopt the findings of other experts without investigating them."); Brumley v. Pfizer, Inc., 200 F.R.D. 596, 602 (S.D. Tex. 2001) ("Plaintiffs cannot use the Phillips study to support a conclusion that the study itself does not make."); In re Polypropylene Carpet Antitrust Litig., 93 F.Supp.2d 1348 (N.D.Ga.2000) (finding blind reliance by expert on other expert opinions demonstrates flawed methodology under Daubert); TK-7 Corp. v. Estate of Barbouti, 993 F.2d 722, 732-33 (10th Cir.1993) (excluding expert opinion relying on another expert's report because witness failed to demonstrate a basis for concluding report was reliable)).

31. In sum, the State may not offer to simply regurgitate generalized statements from toxicology treatises or studies. has made no independent analysis or attempt to apply those principles to this case at all, much less reliably apply them. has made no effort—analytical or otherwise—to consider or determine the effect of Delta-9-THC's effect on the defendant's body or central nervous system, nor has he relied upon anyone who did. This failure is especially significant in light of own concession that Delta-9-THC affects different people in different ways and that a physical analysis is necessary to determine whether a particular person is impaired at a given point in time based upon Delta-9-THC ingestion. With no attempt to reliably apply general statements in literature to the facts of this case, Daubert precludes admissibility of opinions regarding the medical effects of Delta-9-THC.

32. Additionally, testimony violates the Confrontation Clause as the holdings in Crawford v. Washington and Melendez-Diaz v. Massachusetts describe.

33. In June of 2009, the United States Supreme Court issued its opinion in Melendez-Diaz v. Massachusetts, Melendez-Diaz v. Massachusetts, 557 U.S. _____, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009), the court held that the trial court's admission of sworn affidavits of state laboratory analysts stating that a particular substance was cocaine violated the Sixth Amendment's confrontation clause and reversed the appellant's conviction. Counsel submits that in addition to the above argument, allowing to testify to unsworn medical conclusions directly from textbooks not only violates all of the expert witness authority cited above, but also operates to deny this defendant the right to confront the ultimate witness against him in violation of the holding in Melendez-Diaz v. Massachusetts.

34. In sum, Justice Scalia held for the court in Melendez-Diaz v. Massachusetts, that:

> *(1) analysts' certificates of analysis were affidavits within core class of testimonial statements covered by Confrontation Clause;*
>
> *(2) analysts were not removed from coverage of Confrontation Clause on theory that they were not "accusatory" witnesses;*
>
> *(3) analysts were not removed from coverage of Confrontation Clause on theory that they were not conventional witnesses;*
>
> *(4) analysts were not removed from coverage of Confrontation Clause on theory that their testimony consisted of neutral, scientific testing;*
>
> *(5) certificates of analysis were not removed from coverage of Confrontation Clause on theory that they were akin to official and business records; and*
>
> *(6) defendant's ability to subpoena analysts did not obviate state's obligation to produce analysts for cross-examination.*

In reaching this conclusion, the court relied heavily on its holding in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177. Justice Scalia held that Crawford v.

Washington, required the state laboratory analysts to testify in open court and to be cross-examined by defense counsel. Here, while the reference to textbooks authorities may not be based on "sworn testimony", sworn testimony is the functional equivalent of bootstrapping the same evidence without benefit of confrontation. Justice Scalia turned aside the dissenters' arguments on many grounds. The court found there was no support for the proposition that witnesses who testified regarding facts other than those observed at the crime scene are exempt from confrontation. Here, although the referenced expert witnesses' opinions are not directly tied to the facts of this case, sworn testimony attempts to place them in that context for a critical element of the State's allegation in the felony manslaughter counts. Any argument that the analyst should not be subject to confrontation because their statements result from neutral scientific testing was rejected. Likewise, the court rejected any "overburdening of the prosecution" not proven by any history before the court.

Conclusion

35. This Court should exclude from evidence any opinions from regarding the effect of Delta-9-THC (or other chemical substances) on the human body generally, the human nervous system generally, or as to its effects on the defendant specifically. is not a medical doctor, nor does he have any medical training of any formal nature. Consequently, he lacks the qualifications required to give testimony as to the medical effects of chemical compounds on the defendant or generally. Further, attempts to repeat general statements from medical and toxicological treatises are forbidden by the hearsay rule. In addition, failure to apply the general statements in the literature he has consulted demonstrate his opinions do not reliably fit the facts of this case. For these reasons, this Court should enter an order excluding opinions regarding the effects of Delta-9-THC (or other chemical substances) from evidence and prohibiting the State, its witnesses, attorneys

and/or representatives from arguing, implying, testifying, soliciting evidence or exhibits, or in any way attempting to inform the jury of those opinions of .

CERTIFICATE OF SERVICE