STATE OF MARYLAND	*	**IN THE**
	*	
v.	*	**DISTRICT COURT**
	*	
[redacted]		*
Defendant	*	**FOR**
	*	
CASE Nos.: [redacted]	*	**BALTIMORE CITY**
	*	
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MOTION *IN LIMINE* TO PRECLUDE "EXPERT" TESTIMONY

The Defense moves that the State's proposed "expert" testimony of Officer Moxey (#34201/1646) of the Maryland Transportation Authority Police be excluded in this matter as required by *Rochkind v. Stevenson*, 471 Md. 1 (2020) and Maryland Rule 5-702. In support of this motion, the Defense asserts:

INTRODUCTION

The above-captioned matter was set to begin trial before a jury on August 3rd, 2022. The Court continued the case due to request of the State for further preparation time, against Defense objection and the Court set the next trial date in excess of speedy trial parameters, which was demanded in Defense's omnibus motion.

The State seized the opportunity to perfect their case and employed a purported "expert" in drug recognition evaluation to opine on the ultimate issue of whether or not Defendant was under the influence and or so far impaired by drugs or alcohol that Defendant was unable to safely operate a motor vehicle. Notice of the intended expert testimony was provided by the State to the Defense on August 9th, 2022.

It is the State, as the proponent of the proffered evidence, who bears the burden of proving its expert's conclusions or opinions are reliable and, therefore, admissible. *See generally Rochkind*; and *see also Bomas v. State*, 412 Md. 392, 417 (2010).

THE *DAUBERT* AND *ROCHKIND* STANDARD GENERALLY

All expert testimony in Maryland must now be analyzed using the standard established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) for reliable evidence. *See Rochkind* at 11 ("We implement a single standard by which courts evaluate all expert testimony: *Daubert*"). Now, under the new standard, "the parties and the trial court are *forced to reckon with the factors that really do determine whether the evidence is reliable, relevant and 'fits' the case at issue*." *Id.* at 14 (emphasis in original).

By focusing "on the tests used to develop the evidence, the error rates involved, what the learned publications in the field have said *when evaluating it critically*, and then, finally, whether it has come to be generally accepted," courts must grapple with the "difficult task" of exposing "evidentiary weaknesses that otherwise would be overlooked" if all that is needed to admit the evidence is testimony that the methods or procedures have become generally accepted. *Id.* at 14 (emphasis added).

The State in this case intends to introduce unqualified expert testimony by a police officer regularly and continuously employed by them that, based on Officer Moxey's "opinion, as a Drug Recognition Expert, that [redacted] was under the influence of a Narcotic Analgesic and Depressant and was unable to operate a vehicle." August 9th, 2022 PC Statement and RMS Report by the State's Attorney (hereinafter referred to as "expert report" or "report").

The Defense asserts that there is no overarching discipline to which the Court, or anyone else for that matter, could look to for a better understanding of the opinion evidence the State is attempting to elicit at trial. This purported evidence, if it is to be called even that, is wholly

without merit, scientific support, or any fundamental analysis – the very basic underpinnings required by *Daubert* and *Rochkind.*

The proposed expert report lacks any sort of analysis and falls well short of the requirements of Maryland Rule 5-702. The report ultimately states that the purported expert, Officer Moxey, is a *Drug Recognition Expert* (henceforth "DRE")and that in his "opinion, as the drug recognition expert, that [redacted] was under the influence of a narcotic analgesic and depressant". There is no mention of how the evidence in this case supports such a conclusion, how he reached that conclusion in this case, or how he reaches such conclusions more generally.

Critically, the Court and the trier of fact "must be able to evaluate the reasoning underlying [the expert's] opinion." *Ross v. Housing Auth. Of Baltimore City*, 430 Md. 648, 663 (2013). Conclusory statements of opinion are *not sufficient*. And if, as here, "the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function *requires more than simply 'taking the expert's word for it.'*" Advisory Committee Note to Fed. R. Evid. 702 (emphasis added); *see also Blackwell v. Wyeth*, 408 Md. 575, 606 (2009) (the Court cannot simply rely "solely on an expert's word that his conclusion is appropriate to the underlying data and methods.").

DRUG RECOGNITION EVALUATION IS NEITHER A SCIENTIFIC FIELD OF STUDY NOR AN AREA OF EXPERTISE RECOGNIZED AS RELIABLE AND IS THEREFORE INADMISSIBLE IN LIGHT OF THE *DAUBERT* AND *ROCHKIND* ***FACTORS***

The Maryland Court of Appeals in *Rochkind* set out a non-exhaustive list of factors they found relevant in interpreting Maryland Rule 5-702. *Rochkind* at 16-17. The first factor, **testability**, refers to whether the "theory or technique" "can be (**and has been**) tested." *Daubert* at 593 (emphasis added). Second, the **peer review** factor, asks whether a methodology or hypothesis has been published to the scientific community for the purpose of detecting substantive flaws. *Id.* at 594. The third and fourth factors are the known **error rate** and the existence of **standards** controlling the technique's operation. *Id.* The fifth factor is the **general acceptance** of the field in the scientific community. There is no specifically required rate of acceptance, but "a technique that has attracted only minimal support in the scientific community 'may properly be viewed with skepticism.'" *Id.; see also United States v. Adams*, 444 F.Supp.3d, 1248, 1258 (emphasis added and internal citations omitted). Five additional factors were adopted in *Rochkind* which grew out of *Daubert* and its progeny in the federal courts. They are: "(6) 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 opinions expressly for purposes of testifying;" "(7) whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion;" "(8) whether the expert has adequately accounted for obvious explanations;" "(9) whether the expert is being as careful as he would be in his regular professional work outside his paid litigation consulting; and" "(10)

whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give."

1. Testability

There are no objective benchmarks by which to test this particular area of expertise, theory, or technique. There is no underlying data upon which the expert relies and which could be independently examined, verified, or tested. This particular expert's field of purported expertise is effectively in the law and in his observations of people with no scientific training or education, and applies observational conclusions taught by lay persons and fellow active and retired police officers, not scientists or doctors. This factor weighs heavily in favor of exclusion.

2. Error Rate

If a method has been tested, the Court must then consider its error rate. More importantly, error rate must be considered in its proper context. For example, in cases involving alleged firearms and shootings, toolmark examiners and their expert testimony are "very often the critical factor in determining guilt or innocence – an endeavor that must tolerate only a very small rate of error. Even an error rate of five percent, which would be low in many contexts, would be unacceptably high where it drives a guilty verdict because it would mean that one in twenty convictions could be wrong." *Adams*, 444 F.Supp.3d at 1264.

Here, there is no known error rate because there is no way to test this particular DRE's efficacy or technique. As such, it is impossible for the Court to determine objectively how damning the proposed opinion evidence could be. This factor weighs heavily in favor of exclusion of the proffered expert testimony.

3. Peer Review

Peer review, for the purposes of the *Daubert* analysis, is not review of the work by a peer (such as a verification or technical review). Although, presumably, there was no such technical review in this case since there was no testing or analysis to review. Rather, the "question of whether a methodology has been subjected to peer review is a question of whether a methodology or hypothesis has been published to the scientific community for the purpose of detecting substantive flaws. If a methodology has been published but not for this purpose, this factor is not satisfied in favor of admissibility." *Adams* at 1265 (internal citations omitted); *see also Daubert* at 593 ("submission to the scrutiny of the scientific community is a component of 'good science,' in part because it increases the likelihood that substantive flaws in methodology will be detected).

Counsel was unable to find a single scientific journal or publication suggesting the existence of peer review in the context of DRE efficacy, and in fact found the most comprehensive such article to be a study published by the National Institutes of Health that found that a study that purported to find "the theory depends on the false idea that validation study DRE Opinions generally correct. *They were not*. The LEDA accuracies highlighted by the validation studies overstate how often DRE officers predicted drug categories correctly. Compton's 94% accuracy counts mistaken – wrong – drug category predictions as correct so long as toxicology found literally *any* proscribed drug other than alcohol. If an officer predicted a CNS stimulant but toxicology found a CNS depressant, that wrong prediction would contribute a correct score to Compton's 94% accuracy. Here the DRE validation studies' misclassification bias theory asks us to believe that because the DRE officer found what he thought were signs of a stimulant that was not present, the driver must have been impaired by a depressant whose

physical signs were not found. More likely wrong predictions were just that, wrong predictions, and Compton's highlighted 94% accuracy was subject to misclassification bias." The methodological quality of three foundational law enforcement drug influence evaluation validation studies, 2013; 12: 16. Published online 2013 Nov 4. Doi: 10.1186/1477-5751-12-16 https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3828623/.

4. Standards and Quality Control

Because there exists no data upon which to rely and no scientific theory or technique applied by practitioners in this field, there quite obviously exist no standards or quality controls. All observations are subjective, no BWC recording of the evaluation was presented in discovery and presumably does not exist unless the State is willfully withholding the evaluation footage because it is exculpatory. This factor weighs heavily in favor of exclusion.

5. General Acceptance

It is extremely doubtful that any competent scientist in a traditional, scientific discipline would consider the opinions of a DRE on questions of both law and fact to be reliable or generally accepted as somehow scientifically reliable, given the complete lack of any scientific analysis or data upon which any analysis could ever be conducted. The previously cited NIH publication found: "accuracies were subject to forensic spectrum bias"; "The accuracies reported by Compton and Adler were subject to selection bias"; "More likely drivers were not impaired by drugs present at extremely low levels and Compton's reported accuracy was inflated by misclassification bias"; Compton and Adler administered the reference test (toxicology) only to people who failed the index test (LEDA). The sensitivities and specificities discovered by these studies are subject to verification bias…"; "In all three studies, SFST serves as both index test and reference test for impairment. The accuracies reported by these studies are subject to

incorporation bias"; Current US law enforcement DIE methods do not reproduce the LEDA methods investigated in Bigelow, Compton, and Adler. The accuracies reported in these studies do not reflect the accuracy of current DIEs"; "Compton and Adler do not describe their reference tests in reproducible detail"Compton's report that DRE Opinions "identified one or more drugs correctly in 87% of the suspects" [Compton, page 16], and Adler's "DRE decisions were supported by laboratory analysis for 404(83.5%) of the 484 specimens" [Adler, page 33], both relied on this methodology. Neither number correctly quantifies the probability relevant to the US law enforcement use of DIEs, the probability that an individual LEDA DRE Opinion is correct"; "Neither Bigelow, Compton, nor Adler reported the externally valid statistics needed to calculate diagnostic accuracy of the LEDA-like testing they investigated or of the DIEs now used by US law enforcement";

"CONCLUSION

Bigelow, Compton, and Adlerm the three validation studies commonly cited in American criminal prosecutions to quantify the accuracy of current US law enforcement DIE practice, did no reference testing of driving performance or physical or mental impairment, investigated tests different from those currently employed by US law enforcement, used methodologies that biased accuracies, and reported DIE statistics that are not externally valid. The LEDA accuracies reported by these studies do not quantify the accuracy of the DIE process now used by US law enforcement. *These validation studies do not validate current DIE practice*." *Id. (Emphasis added)*. This factor weighs overwhelmingly in favor of exclusion.

6. Whether Officer Moxey is proposing to testify about matters growing naturally and directly out of research he has conducted independent of the litigation, or whether he has developed his opinion expressly for purposes of testifying.

The discovery provided, the proposed expert report provided, and the *curriculum vitae* of Officer Moxey *which was not provided* as required to qualify an expert, are completely devoid of any data or any indication that any research has been conducted by Officer Moxey beyond that which he has claims to have training in. As a police officer internally designated as a DRE, it is woefully apparent that his sole purpose with respect to Drug Recognition Evaluation is to aid in the conviction of alleged offenders. As such, his opinion was developed solely and expressly for purposes of testifying. This factor weighs heavily in favor of exclusion.

7. Whether Officer Moxey has unjustifiably extrapolated from an accepted premise to an unfounded conclusion.

Because Officer Moxey's expert report (if it was in fact prepared by him) provided by the State lacks any specifics as to why he maintains the opinion he apparently maintains, it is unclear whether he has unjustifiably extrapolated from an accepted premise to an unfounded conclusion. Currently it would appear that this factor weighs in favor of neither exclusion nor inclusion due to the lack of any specificity in Officer Moxey's report.

8. Whether Officer Moxey has adequately accounted for obvious alternative explanations.

It does not appear that Officer Moxey has accounted for obvious alternative explanations, such as whether the Defendant had underlying health issues that may have contributed to his temporary loss of consciousness. Based on the report, it appears Officer Moxey is basing his opinion on the weight of the training he received, merely 40 hours as opposed to 4-7 years a medical doctor or PhD would receive, alone and is not considering factors such as severity or

existence of the Defendant's possible medical condition like diabetes, for which the officer's report expresses that [redacted] was prescribed a drug for treatment thereof. Within Officer Moxey's own report, he notes Defendant [redacted] is prescribed Lamotrigine and Alogliptin, one of these drugs is prescribed to treate diabetes and a natural alternative conclusion to Officer Moxey's report is that Defendant [redacted] may have suffered complications from his diabetes, such an alternative explanation is not mentioned once in Officer Moxey's report. This factor weighs in favor of exclusion.

9. Whether Officer Moxey is being as careful as he would be in his regular professional work outside of his paid litigation consulting.

Officer Moxey is a police officer ultimately employed by the same agency calling him to testify at trial on their behalf. He works for the Maryland Transportation Authority police in the MDTA Operations Detachment, which is a law enforcement agency under the State's employ. There is no way to determine whether he is being as careful as he would be in his regular professional work outside of his paid litigation consulting, because testifying on the State's behalf is part of his regular, full-time employment. As such, it would appear this factor weighs slightly in favor of exclusion.

10. Whether the field of expertise claimed by Officer Moxey is known to reach reliable results for the type of opinion the expert would give.

The field of expertise claimed by Officer Moxey is in Drug Recognition Expert. As stated previously, there is no scientific community of Drug Recognition Experts. In the absence of any information to the contrary, it can be safely presumed such testimony would not reach reliable results. This factor weighs heavily in favor of exclusion.

THE CONCLUSION DRAWN BY OFFICER MOXEY IS NOTHING MORE THAN *IPSE DIXIT* BECAUSE NO BASES UPON WHICH IT IS MADE HAVE BEEN PROVIDED.

The State's expert report contains the examiner's conclusion only, and does not provide any bases for that opinion. As such, it amounts to a pure *ipse dixit* that the Defendant was impaired by drugs at the time of his accident. It must therefore be excluded under MD Rule 5-702. *See United States v. Saunders*, 826 F.3d 363 (7th Cir. 2016) (Without disclosing the features relied on by the government's expert, "he ha[d] failed to disclose [the] basis" for his opinion); *State v. McPhaul*, 808 S.E.2d 294 (N.C. Ct. App. 2017) (where fingerprint examiner did not detail which features she relied on in concluding a match, the State failed to show that the expert "applied the principles and methods reliably to the facts of the case"); *see also United States v. Monteiro*, 407 F. Supp. 2d 351, 374 (D. Mass. 2006) ("Until the basis for the identification is described in such a way that the procedure performed . . . is reproducible and verifiable, it is inadmissible under Rule 702").

As the Supreme Court of the United States noted in *General Electric Company v. Joiner*, 522 U.S. 136, 137 (1997) (holding that the animal studies relied upon by expert physicians were insufficient to support conclusion that plaintiff's exposure to certain chemicals contributed to his cancer), "nothing in either *Daubert* [or the rules of evidence] requires a [trial] court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. *See also Rochkind* at 36.

In this case, there are absolutely no studies upon which the proposed expert seems to rely. None have been provided and none have seemingly been considered. Officer Moxey is apparently basing his opinion on his experience as a police officer in Maryland and a 40 hour

class he attended, possibly many years ago, that explains a detection process that has not be scientifically validated except in three older studies which the cited study by NIH aforementioned concludes are not at all validations of accuracy and are plagued by a plethora of scientific bias. In other words, it is his personal opinion that, based on his personal interactions and a 40 hour class he took given by non medical or scientific instructors, that the Defendant was impaired by drugs at the time of his accident. This type of testimony is the very definition of speculative, conclusory, and unfairly prejudicial evidence that the Courts in *Daubert* and *Rochkind* were attempting to eliminate. *See generally Daubert*, *Rochkind*, and Md. R. Evid. 5-403.

Without providing the bases for the proposed expert opinion, the State has failed to meet its burden of admissibility.[1] Officer Moxey's opinion, report and testimony are thereby inadmissible in this case.

CONCLUSION

Under MD Rule 5-702, *Daubert*, and *Rochkind*, the report and proposed expert testimony are inadmissible. Because the discipline as a whole has not been shown to be reliable and this particular expert has not provided the bases for his opinion testimony, the State has not met its burden of admissibility. *See Rochkind*, 471 Md. at 36.

[1] The Court of Special Appeals has emphasized that "simply because a witness has been tendered and qualified as an expert in a particular occupation or profession, it does not follow that the expert may render an unbridled opinion, which does not otherwise comport with Md. Rule 5-702." *Giant Food, Inc. v. Booker,* 152 Md. App. 166, 182 (2003). The Court of Appeals has specifically **"*rejected* the argument that the adequacy of the basis for the opinion of an expert *goes only to the weight* to be given to the expert's testimony, and not to its admissibility as evidence."** *Beatty v. Trailmaster Products Inc.,* 330 Md. 726, 741 (1993) (internal citations omitted and emphasis added). "If a proffered expert opinion, properly challenged, **fails the Rule 5-702 test in any respect, it does not come into evidence at all.** It does not come halfway in, with less than full efficacy. **Under Rule 5-702, *the evidence is either in or out*.**" *Terumo Med. Corp.* v. *Greenway,* 171 Md. App. 617, 624 (2006).

WHEREFORE, the Defense asks this Court to:

(a) Preclude the report and proposed testimony of Officer Moxey;

(b) Schedule a hearing on this Motion prior to the newly scheduled trial date or immediately if Defense motion for continuance is denied; and

(c) Grant any other relief this Court deems proper.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this October 6th , 2022, a copy of the foregoing motion was electronically filed and served via email to:

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