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BY: *[Signature]*  
2015 DEC -9 AM 10:49  
VIRLYNN TINNELL  
SUPERIOR COURT CLERK

7 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
8 **IN AND FOR THE COUNTY OF MOHAVE**

11 **STATE OF ARIZONA,**

12 Plaintiff,

14 vs.

15 **JUSTIN JAMES RECTOR**

16 Defendant.

NO: CR 2014 - 01193

DEFENDANT'S MOTION IN LIMINE:  
TO PRECLUDE STATES FACT  
WITNESSES FROM USING THE  
PHRASE "ACCORDING TO MY  
TRAINING AND EXPERIENCE" OR  
SIMILAR PHRASES

(ASSIGNED TO THE HON. LEE JANTZEN)

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19  
20 Defendant Justin James Rector, by and through undersigned counsel, pursuant  
21 to the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States  
22 Constitution, and Article II, §§ 1,4,13, 23, 24, 32, and 33 of the Arizona Constitution,  
23 moves this Court *IN LIMINE* to preclude the states fact (non-expert) witnesses from  
24 using the phrase "according to my training and experience", or any similar phrases  
25 having the same effect, for the reasons and authority contained in the Memorandum of  
26 Point and Authorities attached hereto and incorporated herein.  
27



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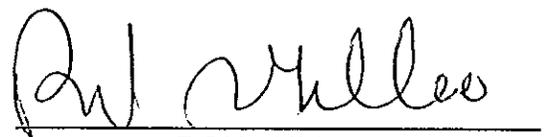
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9<sup>th</sup>

RESPECTFULLY SUBMITTED This \_\_\_\_\_ day of December, 2015.

  
GERALD T. GAVIN  
Co-Counsel for Mr. Rector

  
RON GILLO  
Co-Counsel for Mr. Rector

**MEMORANDUM OF POINTS AND AUTHORITES**

**Introduction**

As of January, 2012, after years of following the *Frye* standard, the State of Arizona adopted and follows the *Daubert* standard.

**Law and Argument**

**I. Expert Witness Defined**

"Rule 702 of the Arizona Rules of Evidence provides:

"If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." The test of whether a person is an expert is whether a jury can receive help on a particular subject from the witness. Bliss v. Treece, 134 Ariz. 516, 518-19, 658 P.2d 169, 172-73 (1983). The degree of qualification goes to the weight given the testimony, not its admissibility. State v. Mosely, 119 Ariz. 393, 400, 581 P.2d 238, 245 (1978).

State v. Davolt, 207 Ariz. 191, 84 P.3d 456 (2004).

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**II. A Police Officer Can Be An Expert Witness**

A police officer can be qualified as an expert witness based on his training and experience. State v. Davolt, *supra*, at 210, 475.

**III. An Expert Witness Cannot Testify Based Upon Unsupported and/or Subjective Beliefs**

*The Daubert Standard*

The United States Supreme Court, in General Electric Company v. Joiner, 522 U.S. 136, 118 S.Ct. 512, 139 L.Ed. 2d 508 (1997), castigated the use of expert witnesses who present specifically unsupported opinions based upon their own subjective belief and unsupported speculation. Citing Daubert, the Supreme Court stated that:

Under the rules (Federal Rules of Evidence) the trial Judge must ensure that any and all scientific testimony of evidence admitted is not only relevant, *but reliable*. Daubert v. Dow Pharmaceutical, Inc., 509 U.S. 579 at 589, 112 S.Ct. 2786, 125 L.Ed. 2d 469 (1993) (emphasis added).

The Court in Joiner went on to hold:

“Trained experts commonly extrapolate from existing data. But nothing in either Daubert or the Federal Rules of Evidence require a district court to admit opinion evidence which is connected to existing data only by *ipse dixit*.<sup>1</sup> Of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.” See Turpen v. Merrell Dow Pharmaceuticals Inc., 959 F.2d 1349, 1360 (C.A.6), *cert denied*, 506 U.S. 826, 113 S.Ct. 84, 121 L.Ed.2d 47 (1992). That is what the District Court did here.

General Electric Co. v. Joiner, 522 U.S. 136, 146.

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<sup>1</sup> It is because I said it is so

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2 The State's expert must be able to support and correlate his/her opinion scientific  
3 data, surveys, treatises, experiments, and scientific literature. 2  
4

5 The State's expert must be able to support and correlate his/her opinion with  
6 scientific data, surveys, treatises, experiments, and scientific literature. The State  
7 cannot merely rely on the unsupported conclusions of its experts, based upon their own  
8 knowledge and experience. They must be able to cite and produce authority for their  
9 opinions. The State cannot merely cite the *ipse dixit* of its own experts.  
10

11 In Joiner, the general acceptance being sought would be scientific opinion. In  
12 Joiner, an opinion by an expert about proffered scientific principles was unsupported by  
13 scholarly works or by scientific data.

14 This motion *in limine* is to prohibit proffered opinion that does not meet the  
15 standard of Joiner. The same standard of admissibility of expert opinion should apply.  
16 While the prosecution may try to distinguish Joiner as applying only scientific evidence,  
17 the defendant maintains that the Supreme Court would apply Joiner to expert opinion  
18 from the State where there is no supporting scientific documentation. Otherwise, the  
19 government would be in a position to dictate approved science.

20 It would be an abuse of discretion for the court to accept, not reject, the *ipse dixit*  
21 of a government witness. There would be a double standard for the presentation of  
22 evidence in court. The Court should apply the evidentiary standards refined in Joiner.  
23

24 If there is not showing of genral acceptance in the relevant community regarding  
25 a proffered principle, technique, or process, then the opinion must be precluded. Any  
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2 Whether scientific method is generally accepted in the scientific community  
must be shown by more than just a bare assertion by one expert witness that  
the technique is reliable. State v. Ahlfinger, 749 P.2d 190, (Wash. App. 1988)

1 expert opinion must be supported by the presentation in court of published treatises,  
2 articles, books, opinions, tests and data. Unsupported and speculative opinion based  
3 upon mere belief and experience must be excluded. See United States v. Slot  
4 Machines, 658 F.2d 697, 700-01, (9<sup>th</sup> Cir. 1981); American Bearing Co. v. Litten  
5 Industries, 540 F.Supp. 1163, 1171-75, (E.D. Pa. 1982), *cert denied*, 469 U.S. 854, 105  
6 S.Ct. 178, 83 L.Ed.2d 112 (1984); Reazin v. Blue Cross & Blue Shield of Kansas, 633  
7 F.Supp. 1360 (D Kan. 1987); Evers v. General Motors Corp., 3 Fed R. Serv.3d 959,  
8 962 (11<sup>th</sup> Cir. 1985).

9 The use of undocumented opinions from the State's expert, i.e. *ipse dixit*, is  
10 improper, prejudicial, and contrary to the spirit of Joiner.

11 There is little room for cross-examination with an expert who says something is  
12 true because he or she says its true. Allowing such evidence to be presented by the  
13 State in a criminal prosecution would be a denial of due process of law as guaranteed  
14 by the Fourteenth Amendment of the United States Constitution and Article II, §§ 4 and  
15 24 of the Arizona Constitution.  
16

### 17 Expert Witnesses Must be Disclosed

18 17 A.R.S. Rules of Criminal Procedure Rule 15.1(b)(4) requires the disclosure of "the  
19 names and addresses of experts who have personally examined a defendant or any  
20 evidence in the particular case, together with the results of physical examinations ad of  
21 scientific tests, experiments or comparisons that have been completed." For cases in  
22 the Superior Court, this disclosure shall be made not later than 30 days after  
23 Arraignment, Rule 15.1(c)(1). There is a continuing duty to disclose experts. Rule  
24 15.6(b) and (c). In fairness to the State, the defense does not include potential State  
25 mental health testimony and experts, as the defense is still gathering medical and social  
26 evidence for its own undetermined expert. As far as other experts, the defense assumes  
27

1 no further expert witnesses or information is in possession of the State not already  
2 disclosed.

3  
4 **It Is Error To Permit A Party To Elicit Expert Opinions From a Witness at Trial If**  
5 **The Party Has Only Identified The Witness As A Factual Witness, Not An Expert**  
6 **Witness.**

7 It is error to permit a party to elicit expert opinions from a witness at trial if the  
8 party has only identified the witness as a factual witness, not an expert witness. Kolt v  
9 City of Phoenix, 158 Ariz. 415, 763 P.2d 235 (1988).

10 *Therefore*, Justin Rector prays that this Court grant his motion *in limine* and order the  
11 State, at the appropriate time, to instruct its fact witnesses not to use the phrase or  
12 expression "based upon my training and experience", or any similar phrase having the  
13 same effect.

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1 ORIGINAL of the foregoing filed  
2 this 9<sup>th</sup> day of December, 2015 with:

3 Clerk of Court  
4 401 E Spring Street  
5 Kingman Arizona 86401

6  
7 COPY of the forgoing  
8 Delivered this 9<sup>th</sup> day  
9 Of December, 2015, to:

10 Honorable Lee Jantzen  
11 Judge of the Superior Court  
12 Mohave County Courthouse  
13 2<sup>nd</sup> floor  
14 Kingman Arizona 86401

15 Greg McPhillips  
16 Assigned Deputy County Attorney  
17 PO Box 7000  
18 Kingman Arizona 86401

19 Ron Gilleo  
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25 Client Justin James Rector  
26 Mohave County Jail

27 File

28 BY: 

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