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Ron Waldorf, Director/COO
Ocular Data Systems, LLC
199 S. Los Robles Ave, Suite 535
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Dear Mr. Waldorf:

You asked me to render an opinion regarding the admissibility of videotape evidence collected by the DAX Evidence Recorder ("DAX"). This letter summarizes my opinion and the basis for it.

The DAX Evidence Recorder

As you know, I was only vaguely familiar with the DAX before we spoke. You advised me that law enforcement officers can use the DAX to record a Driving Under the Influence (DUI) subject's eyes during testing using commonly employed infrared and video technology.

The DAX acts as a video recorder. It merely records what happens; it is not a test, method or procedure. It provides no numerical data or feedback to anyone.

The infrared light source is invisible to the naked eye, does not effect any tests the officers may employ, and is entirely safe. You submitted an application to the Food and Drug Administration (FDA) seeking approval of a nystagmograph that utilized similar technology for medical purposes in 1992. The FDA approved the application in 1994. For further information, see http://www.510kdecisions.com/applications/index.cfm?id=K925111. The DAX meets the safety specifications set for VNG medical device products.

Legal Opinion

I believe, based on my training, experience, and case review, that DAX videos are admissible in court. More specifically, I believe that

- DAX videotapes are admissible as non-scientific evidence; and
- *Frye* and *Daubert* are inapplicable to the DAX and the tapes it produces.

Again, the DAX performs no tests, it merely records the subject's eyes. Consequently, DAX recordings are not significantly different from those introduced in courtrooms around the country on a daily basis.

Please see below for my analysis and attached for my curriculum vitae.

Standards of Admissibility

Evidence is relevant if it tends to prove or disprove a material fact. *See e.g.* FED. R. EVID. 401. Generally, relevant evidence is admissible in every jurisdiction unless its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. *See e.g.* FED. R. EVID. 402 and 403. Irrelevant evidence is not admissible. *See e.g.* FED. R. EVID. 402.

As noted above, the DAX performs no tests or procedures and merely records what happens. Accordingly, I do not believe it is subject to the same kind of scrutiny as scientific or expert evidence. Nonetheless, as you requested, I am providing my analysis of the *Frye* and *Daubert* standards and their potential applicability below. Please note that the Federal government and each state are sovereigns and each jurisdiction employs its own rules of evidence and imposes its own standards of admissibility.

The *Frye* Standard

The *Frye* standard derives from *Frye v. United States*, 293 F. 1013 (D.C. Ct. App. 1923). In *Frye*, the court considered the admissibility of the systolic blood pressure deception test, an early version of today's lie detector tests. *Id.* at 1013. The systolic blood pressure deception test was predicated on the theory that "truth is spontaneous, and comes without conscious effort, while the utterance of a falsehood requires a conscious effort, which is reflected in the blood pressure." *Id.* at 1014. The court ruled that scientific evidence is admissible only if its underlying theories and procedures are generally accepted in the relevant scientific communities or if they have passed from the stage of "experimentation and uncertainty" to that of "reasonable demonstrability." *Id.* Thus, *Frye* courts essentially rely on the experts in the field to determine if evidence is reliable enough to be admissible.

Courts only apply the Frye standard to "scientific" evidence. There is no standard definition of "scientific" evidence. However, courts generally consider evidence within the common understanding of the average person as non-scientific evidence. *See e.g. Williams v. State*, 710 So.2d 24 (Fla. 3d DCA 1998).

Although most courts employed a variation of the *Frye* standard until the early 1990's, few use it

today.

The *Daubert* Standard (also known as the Relevancy Standard)

The *Daubert* standard derives from *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993). In that case, the United States Supreme Court held that expert testimony is admissible only upon a showing that:

> (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.

Hudgens v. Bell Helicopters/Textron, 328 F.3d 1329, 1338 (11th Cir. 2003); *Quiet Tech.*, 326 F.3d at 1340-41 (citing *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 562 (11th Cir. 1998).

In *Daubert*, the Court enunciated a non-exhaustive list of five factors to consider in determining the reliability of scientific evidence: (1) whether the methods can be tested; (2) whether the methods have been peer reviewed; (3) whether there are known error rates; (4) whether there are established standards for applying the method; and (5) whether the methods are generally accepted. *Daubert*, 509 U.S. at 593-594. Since then, courts have considered additional factors including whether the expert accounted for alternative explanations or extrapolated an accepted premise inappropriately, and applied the standard to *non-scientific expert testimony. See e.g. Kumho Tire Co., Ltd. V. Carmichael*, 526 U.S. 137, 154-155 (1999) and *General Electric Co. v. Joiner*, 522 U.S. 136, 144-146 (1997). Accordingly, Judges employing the *Daubert* standard, act as "gatekeepers" and may even exclude evidence that the scientific community accepts.

All Federal courts and most states employ the *Daubert* standard or a similar test.

Videotapes

Videotapes are admitted into evidence each and every day in courtrooms all over the country. Although the DAX is new, the introduction of videotaped evidence (including field sobriety tests) is not. In many jurisdictions, officers record all of the field sobriety tests using standard videotaping equipment. In some of the jurisdictions, prosecutors have introduced up close videotapes of individuals with and without nystagmus as demonstrative evidence. *See State v. Desautels,* 2014 WL 1395052 (Ct. Sup. Ct. March 13, 2014)(Unpublished Opinion); *Travis v. State*, 314 Ga. App. 280 (Ga. Ct. App. 2012); *Hartsock v. State,* 322 S.W.3d 775 (Tex. Ct. App. 2010); *Guerrero v. State,* No. 01–11–01013–CR, 2013 WL 3354653 (Tex. Ct. App. July 2, 2013) (not designated for publication).

In at least one jurisdiction, officers use the HawkEye[1] to record their subjects' Horizontal Gaze Nystagmus (HGN) tests. *See e.g. Petty v. State*, 438 S.W.3d 784 (Tx. Ct. App. 1st). In *Petty*, it appears that the prosecution introduced a tape memorializing the defendant's HGN test results without objection.

It should be noted that some jurisdictions (most notably South Carolina) require officers to videotape the standardized field sobriety tests. Once DAX recordings become commonplace, I can foresee defense attorneys moving to suppress HGN test results when the device is *not* used and moving to suppress the recordings when it is (assuming the recordings support the officers' opinions).

Caveats

My opinion is subject to three important limitations. First, as noted above, my knowledge of the DAX is limited. Second, there is always a risk that a judge may exclude evidence, including DAX videotapes, in DUI cases for the following reasons:

- Misdemeanor DUI cases typically are handled by inexperienced prosecutors who often are so overwhelmed by the case loads that they are unable to give each case the time it deserves;
- There are attorneys who specialize in DUI defense all over the country. Many of these attorneys aggressively challenge even the most commonly accepted evidence, like the field sobriety tests and breath testing;
- *Frye* and *Daubert* hearings are rare. Accordingly, many practitioners, including judges, are unfamiliar with the law. Thus, they are prone to mistakes; and
- The law is constantly evolving.

Third, DAX tapes may be excluded as irrelevant if the officer examining the subject's eyes fails to administer the tests properly. Of course, this last limitation is unrelated to the DAX technology itself and is beyond Ocular Data System LLC's control.

Conclusion

Experienced defense attorneys routinely and aggressively challenge the admissibility of virtually every type of evidence in DUI cases. At times, they have convinced judges to suppress even the most commonly accepted evidence. Nonetheless, I believe that DAX recordings should easily withstand legal challenges, especially if Ocular Data Systems prepares for them in advance by educating prosecutors and providing legal support when necessary.

I recommend piloting the device in a jurisdiction with experienced prosecutors who recognize the important contribution the DAX can make to their cases. If you like, I can contact

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[1] As you know, the HawkEye is the predecessor of the DAX.

prosecutors in Palm Beach and Miami-Dade Counties and gauge their interest.

If you have any questions, comments, or concerns, please do not hesitate to contact me.

Thank you.

Stephen K. Talpins, Esquire