

IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA

STATE OF ALABAMA,	§	
Plaintiff,	§	
v.	§	CASE NO.:
,	§	
Defendant.	§	

**DEFENDANT’S BRIEF IN SUPPORT OF OBJECTION
TO STATE’S INTENT TO OFFER PROOF BY CERTIFICATE OF ANALYSIS**

1. Confrontation Clause Violations: As applied in this case, Alabama Code §12-21-300 (1975) is unconstitutional because it effectively denies the Defendant her right to cross-examine the toxicologist who prepared the Certificate of Analysis, thereby violating the 6th Amendment to the U.S. Constitution; and, Grantham v. State, 580 So.2nd 53 (Ala. Crim. App. 1991).

The Constitutions of Alabama and the United States establish the right of the accused to be confronted with witnesses against him. (Confrontation Clause of Article 1, Section 6 Alabama Constitution 1901 and the 6th Amendment to the U. S. Constitution). The Confrontation Clause reflects a preference for face-to-face confrontation at trial. A primary right secured thereby is the right of cross-examination.

2. Crucial And Devastating: In Grantham, 580 So.2d at 56, the Court stated: “The government is not required to produce a seemingly available witness when the ‘utility of trial confrontation [is] remote.’ Roberts, 448 U.S. at 65 n. 7, 100, S.Ct. at 2538 n. 7. Furthermore, ‘[t]estimony that is neither “crucial” to the prosecution nor “devastating” to the defendant might not be subject to the necessity requirement.’ Perez,

658 F.2d at 661 (citing Dutton v. Evans, 400 U.S. 74 at 87, 89, 91 S.Ct. 210 at 219, 220, 27 L.Ed.2d 213 (1970)). (emphasis added).

In order to convict the Defendant of the instant charges, the government must prove that the material seized was, in fact, a controlled substance. Therefore, the Certificate of Analysis is “crucial” to the prosecution and “devastating to defense in that it alone establishes an essential element of the offense. Grantham, supra, citing United States v. McClintock, 748 F.2d at 1292, and, United States v. Oates, 560 F.2d 45 at 63 (2d Cir. 1977) (report prepared by government’s chemist, “the crucial nature of which is beyond cavil, concluded that the powder examined was heroin”).

Most recently, the United States Supreme Court has returned the confrontation clause of the Sixth Amendment to its original intent. In Crawford v. Washington, _____ U.S. _____, 124 S.Ct. 1354, 158 L.Ed. 2d 177 (2004), the Supreme Court stated categorically that testimonial evidence cannot be admitted against a defendant where he has not had the opportunity to previously cross-examine the witness. The Court stated that, “Where testimonial evidence is at issue...the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.”

In the instant case, the State has not alleged that the toxicologist was unavailable. The Defendant has had no prior opportunity to cross examine the toxicologist. The State has simply notified the Defendant that it intends to offer the Certificate of Analysis, to which the Defendant has made a confrontation clause objection.

3. Trustworthiness: The government has made no showing that the Certificate of Analysis is particularly trustworthy. Since the analysis necessary involves a scientific or expert opinion, the witness should be required to disclose the underlying

facts or data on cross-examination pursuant to Rule 705, Alabama Rules of Evidence. Since the Department of Forensic Sciences performs most, if not all, of its work for the government, it is reasonable to inquire as to their objectivity through a thorough and sifting cross-examination.

The Certificate of Analysis merely contains the date, time, and name of the person who delivered the substance to the toxicologist, the name of the person receiving delivery, and is sworn to by the person making the analysis. The Defendant would elicit much more than this on a thorough and sifting cross-examination.

The Certificate of Analysis is devoid of any indication as to what analysis, if any, that was performed on the substances in questions. Therefore, there is no way to discern whether or not the analysis is questions in reliable; or, whether or not it involves a scientific technique rather than a scientific theory; or, whether there is a known or potential rate of error; Daubert v. Merrell Dow Pharmaceuticals, Inc., 507 U.S. 509, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Nothing in the Certificate of Analysis indicates: (a) toxicologist's personal qualifications and experience; (b) whether the tests performed, which were not "mere routine recordations of facts" were correctly performed; (c) whether the procedures and analyses used are recognized in the profession as being reliable, and if so, how reliable; and, (d) whether any machines used were in good working order. If the toxicologist were required to testify, the Defendant would cross-examine him as to these matters.

After Crawford, trustworthiness is to be established by one means: cross-examination. The confrontation clause "commands...that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." "By replacing

categorical constitutional guarantees with open-ended balancing tests, we do violence to their design.” There are no more acceptable balancing tests to determine the trustworthiness and reliability of evidence. The only test now available to the court is the test of cross-examination.

4. No Hearsay Exception: Although the Certificate of Analysis is clearly hearsay, it would usually be admissible under Alabama Code § 12-21-300; essentially an exception to the hearsay rule that is similar to the business record exception. However, evidence that would normally be admissible under an exception to the hearsay rule may still be inadmissible because it violates the Confrontation Clause. Grantham, 580 So.2d at 55.

In Smith v. State, No. CR-02-1218 (Ala. Crim. App. Apr. 30, 2004), Alabama visited this issue in light of Crawford. In Smith, the State was allowed to introduce an autopsy report in the absence of the medical examiner who performed the autopsy. Smith objected that the admission of the autopsy report without opportunity to cross-examine the medical examiner violated his right to confront the witnesses against him. The Court of Criminal Appeals held that the cause of death was an essential element of the crime that had to be established in Smith. Therefore, the Defendant was entitled to confront the medical examiner who conducted the autopsy. However, because the jury apparently did not rely on the autopsy, the Court held that its admission was harmless error.