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IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR LANE COUNTY

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| STATE OF OREGON,<br>Plaintiff,<br>-VS-<br>ROBERT SMITH<br>Defendant | CASE No. 18CRXXXX<br><br>MOTION IN LIMINE TO EXCLUDE CERTAIN OPINION EVIDENCE<br>(Oral Argument Requested) |

COMES NOW the Defendant, Robert Smith, by and through his counsel, Terri Wood, and moves the Court for an Order prohibiting the State from presenting to the jury, testimony or any other evidence concerning the following:

1) Opinions that the Complainant, Mrs/ Smith, in recounting the alleged crime, remained consistent in her statements, displayed appropriate affect, or similar statements that constitute a direct or indirect means of opining that she is telling the truth about what occurred, regardless of whether those opinions are offered as the testimony of a witness at trial or through out-of-court statements, and in

particular as flagged by underline in attached Exhibit 102-Pretrial (a transcript of the recorded interview of Complainant with police);

2) Opinions that Defendant, Robert Smith, in denying that he assaulted Complainant, made inconsistent statements, displayed evasive or other affect suggestive of deceit, or similar statements that constitute a direct or indirect means of opining that he is being untruthful about what occurred, regardless of whether those opinions are offered through the testimony of a witness at trial or through out-of-court statements;

3) Opinions that Complainant's delay in reporting the alleged assault to police, failure to seek medical care, later changing her story about how she sustained a black eye, or other behaviors by her after the alleged assault are typical or characteristic of domestic violence victims or consistent with how victims of domestic violence behave; and

4) Opinions that Defendant displayed behaviors or made statements or engaged in specific acts that are typical, characteristic of, or consistent with perpetrators of domestic violence.

The defense so moves upon the grounds and for the reasons that this evidence is inadmissible (1) because it is not relevant, OEC 401 & 402; (2) because it is improper character evidence, OEC 404 & 405; (3) because it constitutes the use of specific instances of conduct of a witness or hearsay declarant for the purpose of supporting or disparaging the credibility of the witness, OEC 608(2); (4) because it constitutes an impermissible comment on the credibility of a witness,

undermining the function of the jury and infringing on Article I, sections 10 and 11 of the Oregon Constitution, and the Sixth and Fourteenth Amendments to the United States Constitution; (5) because it goes to matters of which the witnesses lack personal knowledge, in violation of OEC 602; (6) because it is not proper opinion evidence under OEC 701 & 702; or, alternatively (7) that the prejudicial effect of such evidence outweighs any probative value, and said evidence would tend to confuse the issues and mislead the jury, and that ordinary objection in the course of trial, even if sustained with corrective instructions to the jury, would not remove the unduly prejudicial impact of this evidence, in violation of OEC 403 and the Fourteenth Amendment to the United States Constitution.

This motion is made in good faith and not for the purpose of delay. It is supported by the points and authorities that follow, and such other points and authorities as may be developed at oral argument on this motion. The defense anticipates that hearing on this motion will take 30 minutes or less, unless the State intends to offer expert testimony, in which event the defense requests a pretrial OEC 104 evidentiary hearing.

The defense specifically reserves the right to request an evidentiary hearing outside the jury's presence should one be needed to resolve this motion.

DATED this 11th day of August, 2018.

s/ Terri Wood
TERRI WOOD, OSB #883325
ATTORNEY FOR DEFENDANT

POINTS AND AUTHORITIES

1. Summary of Arguments

This motion seeks to limit testimony regarding two broad categories of testimony:

First, the motion seeks to preclude the State from eliciting "expert" testimony from police officers or others about typical behaviors or characteristics of domestic violence victims or perpetrators, that are purportedly consistent with evidence of Complainant's or Defendant's behaviors, specific acts or statements.

This objectionable evidence is not relevant, i.e., not reasonably reliable, under the "relevancy" test set forth in *State v. Brown,* 297 Or. 404 (1984) and *State v. O'Key*, 321 Or. 285 (1995). *See, e.g., State v. Hansen*, 304 Or 169, 176 (1987)(There is no profile, or set of characteristics, of a sex offender that reliably indicates a person who displays one or more of the characteristics is likely to be a sex offender); *State v. Marrington,* 335 Or. 555 (2003)(expert's testimony about delayed reporting as characteristic of child abuse victims); *State v. Lawson*, 127 Or.App. 392, *rev. den.* 320 Or. 110 (1994)(testimony that defendant in assault case did not meet the profile of a child abuser requires showing of reliability); *see also Kumho Tire Company, LTD v. Carmichael*, 119 SCt 1167 (1999)(federal court's "gatekeeping" function, requiring inquiry into the relevance and reliability of an expert witness's principle or technique, applies not only to "scientific" testimony,

but to all expert testimony); *State v. Henley,* 363 Or 284 (2018)(holding forensic interviewer's testimony about grooming behavior in child sex case was "scientific evidence," rejecting State's claim that it was non-scientific evidence based on expert's "training and experience"); *State v. Sanchez-Cruz*, 177 Or App 332, 337 n.4 (2001)("It is by no means clear, however, that courts are not to exercise a gatekeeping role with respect to *all* expert testimony.")(emphasis original).

This objectionable evidence is also not logically relevant, *see, State v. Ogden*, 168 Or.App. 249 (2000)(expert testimony regarding domestic violence cycle of abuse for explaining why victim stayed in relationship with defendant is inadmissible without expert finding that victim suffered from battered woman syndrome); and improper character evidence under OEC 404, 405. See discussion of those rules in Defendant's Memorandum of Law in Support of Motion To Admit Evidence regarding Complainant's pertinent character traits and behaviors.

The defense also objects to the qualifications of police officers as experts on the topic of typical behaviors or characteristics of domestic violence victims or perpetrators, and further asserts such testimony is improper opinion evidence under OEC 702 because it will not assist the jury to determine a fact at issue. Alternatively, any minimal relevance, or assistance to the jury, is outweighed by prejudice. It should be excluded under OEC 403 or the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *See State v. Hansen*, *supra.* OEC 403 requires trial courts to evaluate the degree to which the trier of fact may be overly impressed or prejudiced by a perhaps misplaced aura of reliability or

validity of the evidence, thereby leading the trier of fact to abdicate its role of critical assessment. *See, State v. Brown, supra.*

This motion also seeks to preclude the State from using law enforcement officers or other witnesses as "human polygraphs" to directly or indirectly bolster the credibility of the Complainant, or to disparage Mr. Smith's credibility. This case is a classic "swearing match" where only two persons have first-hand knowledge of what did or did not occur: the Complainant, and Defendant. Such testimony or out-of-court statements are objectionable under the vouching rule, see *State v. Chandler,* 360 Or. 323 (2016), as well as the aforesaid provisions of the Evidence Code.

The burden is on the State to prove to the Court by a preponderance that the contested matters are admissible. OEC 104.

2. Relevancy

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. OEC 401. To be admissible, the evidence must also be reasonably reliable, *see, State v. Brown*, 297 Or 404 (1984); *State v. Lawson,* 352 Or 724 (2012)(eye-witness testimony).

Testimony regarding the known traits of specific classes of victims and perpetrators—often called "profile" or "syndrome" evidence—has historically been treated as "scientific opinion" evidence requiring a Brown foundation. In *State v. Milbradt*, 305 Or 621 (1988), the Supreme Court said that evidence of "how normal

children usually react to sexual abuse," or "sex abuse syndrome," required a *Brown* foundation before it was admissible:

> We suggest that in future cases involving "syndrome" testimony full foundations be established, if indeed it can be shown that the so-called "typical" reactions can be demonstrated to be either typical or reliable. 305 Or at 631.

See also, e.g., *Ogden, supra,* 168 Or.App. at 257(evidence offered to explain behaviors or reactions of “people in general” in domestic violence relationships is syndrome evidence); *State v. Trager,* 158 Or.App. 399, 403, *rev. den.* 329 Or. 358 (1999)(“[E]vidence of typical reactions is syndrome evidence that draws its convincing force from some scientific principle or empirical data.”); *Henley, supra* (“grooming behaviors” is expert opinion evidence requiring Brown foundation).

*Brown* defined "[t]he term 'scientific' as we use it in this opinion [as] evidence that draws its convincing force from some principle of science, mathematics and the like." 297 Or at 407. *State v. O'Key* extended the definition of scientific evidence to "proffered expert scientific testimony that a court finds possesses significantly increased potential to influence the trier of fact as 'scientific assertions'." 321 Or 285, 293 (1995). In other words, the court must look to whether jurors are likely to perceive the evidence as being "scientific," regardless of whether scientists would categorize the evidence as such, or regardless of whether the expert is a scientist or a police officer.

More recently, in *State v. Marrington, supra*, the Supreme Court held that testimony by a psychologist that delayed reporting is a typical characteristic of

sexually abused children was inadmissible in the absence of a *Brown* foundation, explaining:

> [T]his court has made it clear that expert testimony concerning matters within the sphere of the behavioral sciences possesses the increased potential to influence the trier of fact as scientific assertions, just as expert testimony dealing with the "hard" sciences does. 355 Or at 564.

Most recently, in *Henley*, 363 Or. at 302-03, the Supreme Court noted:

> This court has frequently stated that, for the purposes of OEC 702, "scientific" evidence need not necessarily be based on the "hard" sciences in which experiments to control a host of variables can be designed and run to test hypotheses. Rather, the court has held that expert testimony in the realm of the "soft" sciences—that is, social and behavioral sciences, which rely on observation and interpretation of human behavior rather than on controlled experiments or mathematical models—also possess "the increased potential to influence the trier of fact as scientific assertion" and, therefore, must be subjected to the crucible of scientific validation.

Allowing police officers to provide profile evidence based on their training and experience, without requiring a *Brown-O'Key* foundation, usurps the Court's gatekeeping function because their "training and experience" includes what they have read or been instructed concerning the behavioral science and social science literature on domestic violence victims and perpetrators, coupled with their field observations in investigating domestic violence crimes, and perhaps anecdotal discussions with other officers. *See*, *State v. Dunning,* 245 Or.App. 582, 590-91 (2011)(police officer not qualified as expert on traumatic event memory recall based on training and experience including reading a lot of scientific literature on the topic,

anecdotal experience, personal experience, and interviews of people who had experienced traumatic events); *cf., State v. Althof,* 273 Or App 342, 345 n.2 (2015)(officer qualified to testify as to reasons for delayed reporting by sex abuse victims, based on training and experience, where neither party contended his testimony was "scientific evidence," or that *Brown-O'Key* applied).

Thus, the evidence at issue here pertaining to characteristic behaviors of victims or perpetrators of domestic violence, requires the State to meet the *Brown-O'Key* foundation as a predicate to its admissibility. Alternatively, to qualify as an expert on these topics, a police officer must have training and experience beyond reading literature, attending seminars, anecdotal experience, or personal experience in investigating domestic violence cases. *Dunning, supra.* The defense moves the Court to make that determination pretrial, before the prosecution comments on such evidence during voir dire or opening statement.

*Brown* also requires the court to analyze the probative value of the evidence, which requires that the evidence be "reasonably reliable," and to weigh the probative value and the helpfulness of the evidence to the jury under OEC 702, against the prejudicial effect of the evidence. The factors the court is to consider in making this analysis are set forth at 297 Or at 417-418, and at 321 Or at 306. These factors were summarized by the court in *Sanchez-Cruz, supra*:

> In *Brown,* the court set out a list of seven factors that courts are to consider in assessing the reliability of scientific evidence. Those factors are:
> '(1) The technique's general acceptance in the field;
> (2) The expert's qualifications and stature;
> (3) The use which has been made of the technique;

(4) The potential rate of error;
(5) The existence of specialized literature;
(6) The novelty of the invention; and
(7) The extent to which the technique relies on the subjective interpretation of the expert.'
*Brown,* 297 Or. at 417, 687 P.2d 751.

Finally, as in *Ogden, supra,* in the absence of expert opinion evidence that Complainant suffers from Battered Woman's Syndrome, evidence of how domestic violence victims typically behave or react lacks logical relevance and has insufficient probative value.

**3. Expert Opinions By Police Based On "Training and Experience"**

Whether the police officers are qualified to give expert testimony based on their training and experience requires close examination. As recently noted in *State v. Daniels*, 234 Or. App. 533, 541-42 (2010), "The phrase 'training and experience,' in other words, is not a magical incantation with the power to imbue speculation, stereotype, or pseudoscience with an impenetrable armor of veracity." Although *Daniels* involved evaluation of a search warrant affidavit based in part on the officer's training and experience, its discussion of this topic remains noteworthy:

> In many cases, what the officer states that he has learned from training and experience reflects common sense—for example, that hunters keep their rifles at their homes, *State v. Clapper,* 216 Or.App. 413, 422, 423–24, 173 P.3d 1235 (2007), or that people who possess stolen property hide it in their homes or vehicles, *State v. Henderson,* 341 Or. 219, 225, 142 P.3d 58 (2006). However, as the information becomes more esoteric, specialized, counter-intuitive, or scientific, increasingly persuasive explanation is necessary. The extent to which an officer must explain the basis of his or her "training and experience" knowledge, in other words, varies from case to case across a broad spectrum. At one extreme is knowledge

> such as the fact that a person who stole property is likely to keep it at his or her home—knowledge that, in fact, need not be justified by *any* reference to training and experience. At the other end of the spectrum is knowledge such as, for example, the fact that anhydrous ammonia is a precursor chemical used in the manufacture of methamphetamine and that a brass fitting that has been in contact with that substance will turn blue. *See State v. Heckathorne,* 347 Or. 474, 478, 223 P.3d 1034 (2009). Knowledge at that end of the spectrum, in order to count in the magistrate's probable cause calculus, requires more of a foundation than the bare assertion of training and experience.

In *State v. Dunning, supra,* the Court held that the officer's training and experience failed to meet the level of expertise required for admissibility of his testimony on memory recall of traumatic events.

> In the state's offer of proof and during his testimony, Kozowski presented the following facts as the basis of his expertise to testify on memory after traumatic events:
> • As the department firearms instructor, he taught students what they could expect to experience psychologically after a use of force situation.
> • He read "a number of things" by Lieutenant Colonel Dave Grossman, an Army psychologist and "noted expert in the field."
> • He read "quite a bit of literature from an organization called the Force Science Institute" focusing on what police officers might experience after a deadly force encounter.
> • He read other unspecified "publications on memory."
> • He was aware of Oregon and Wallowa County policies that called for letting at least 48 hours pass before interviewing a police officer who had been involved in a deadly force encounter.
> • On one occasion two years before trial, he "had an opportunity to talk to an officer shortly after he was involved in a deadly-force incident just to * * * verify some of the things I had researched earlier * * *."
> • He relied on other unspecified "multiple sources" and "independent interviews of people."
> • He recalled his "own personal experience" as a Marine in Desert Storm, where he obtained "personal knowledge of those things."
> 245 Or App at 590.

The Court found "several of these facts to be irrelevant, particularly his personal recollections and informal conversations, which are not detailed or extensive enough to constitute relevant experience on memory loss." The Court also found important that the officer was not qualified to teach on the subject, had "no formal training in the subject about which he was to testify as an expert, had written no books or articles, and had passed no qualifying exam." *Id.*

The Court concluded:

> In the final analysis, his expertise derived from reading some material by one author and one institute and from familiarity with one or two public documents. That is not the stuff of expertise; if it were, any literate person with access to a library or an Internet connection could become an expert in anything over one long weekend. Our standards are higher. *Id.* at 91.

In *Althof, supra,* the Court of Appeals upheld a trial court's ruling that a police detective was qualified based on his training and experience to provide expert testimony about different reasons why victims of either sexual or domestic abuse might delay reporting. The Court reasoned the testimony was "narrow in scope," and described "various, concrete reasons" for delayed reporting, 273 Or App at 344-346. The only objection raised by the defense was the officer's qualifications to be an expert, *id.,* at 344. The defense made no claim that the subject of his testimony—delayed reporting—was subject to a *Brown/O'Key* foundation, *id.,* at 345 n.2. Furthermore, the defense did not contend the officer's testimony was little more than various, common sense reasons for delayed reporting, and therefore not needed to assist the jury in understanding the evidence; or that any marginal

relevance was outweighed by probative value. In the case at bar, the defense has raised all of these objections.

**4. Credibility Comments By Expert Witnesses**

Oregon courts have repeatedly held that a trial witness cannot give an opinion on the credibility of another trial witness. Even if an expert's testimony satisfies the *Brown-O'Key* foundation, it may be excluded as a direct or indirect comment on credibility. *State v. Keller,* 315 Or 273, 284-85 (1993)(pediatrician's opinion); *State v. Odoms,* 313 Or 76, 82 (1992)(detective's opinion; abrogated on other grounds, *Chandler, supra*); *State v. Milbradt,* 305 Or 621, 629-30 (1988)(psychotherapist opinion); *State v. Middleton,* 294 Or 427, 438 (1983). *Middleton* held that "a witness, expert or otherwise, may not give an opinion on whether he believes a witness is telling the truth." 294 Or at 438. *Keller* adds:

> [T]his rule applies whether the witness is testifying about the credibility of the other witness in relation to the latter's testimony at trial or is testifying about the credibility of the other witness in relation to statements made by the latter on some other occasion or for some reason unrelated to the current litigation. 315 Or at 285 (citation omitted).

Furthermore, the rule broadly applies to direct and indirect comments on witness credibility. *Milbradt,* 305 Or at 630 (opinions that a person is not deceptive, could not lie without being tripped up, was very trusting and vulnerable and so would not betray a friend—the defendant—were comments on witness credibility). The trial judge in *Milbradt* gave a long cautionary instruction to the jury, making, among other points, that "the answer given by the witness related to the capacity of either one of these victims of manufacturing a story. . . . You people are the one who have to

make the determination of whether or not either one of these victims have fabricated a story with respect to defendant," 305 Or at 627. The Supreme Court held that the testimony should have been disallowed altogether. 305 Or at 629 & n.3.

"It is legally impermissible under Oregon law for a witness to comment on the credibility of another witness, and, in enforcing that principle, trial courts are obligated, *sua sponte*, to exclude and, if necessary, strike testimony that comments on a witness's credibility." *B.A. v. Webb*, 253 Or App 1, 12 (2012).

The Court of Appeals has repeatedly cautioned that in abuse cases that boil down to a credibility contest between the defendant and alleged victim, "'evidence commenting on the credibility of either was likely to be harmful,'" *State v. Pergande,* 270 Or App 280, 285-86 (2015)(citing *State v. Lowell*, 249 Or App 364 (2012)); *State v. Higgins*, 258 Or App 177, 182 (2013).

In *Keller,* the Supreme Court found objectionable as a comment on credibility, testimony by pediatrician Dr. Jan Bays of her diagnostic impression that the child was sexually abused, that there was no evidence of leading or coaching or fantasizing during the child's interview, and that the child had given a clear history of sexual touching which had happened to her own body. 315 Or at 278-79, 285. Defense counsel objected to the testimony both on grounds of it being a comment on credibility and because of lack of foundation under *Brown*, as required by *Milbradt.* 315 Or at 279-82. The Supreme Court did not reach the *Brown* issue. Thus, it is

clear that even if contested testimony meets the *Brown* test, it could be inadmissible if it constitutes a direct or indirect comment on credibility.

In *State v. Lupoli*, 348 Or 346 (2010)(*en banc*), the Court held that health care professionals' testimony explaining how the children's statements and demeanor were diagnostic of sexual abuse constituted improper vouching on the credibility of the child victims. Among the statements at issue were the following, 348 Or at 353-356:

> "Her disclosures * * * were very clear and spontaneous. They were appropriate for the age that she was. They didn't sound rehearsed, they sounded like things she just said."
>
> "She was consistent. She had said the same type of thing before to her parents, I guess."
>
> "[T]he manner in which [SM] told her story was pretty compelling. She just had a real clear change in her demeanor."
>
> "[J]ust the way she told her story was very compelling, and that just makes it-it just was-it had an effect."
>
> "I did not find her, you know, very suggestible. She answered 'no' to a lot of questions. She kind of corrected herself at one point. She didn't appear that suggestible to me."

The Supreme Court cautioned that "discrete portions" of the objectionable testimony "might be admissible in many circumstances, and perhaps even in this case." 348 Or at 362. Notwithstanding that dicta, Mr. Smith contends that jurors are perfectly capable of determining on their own, by observing Mrs. Smith's testimony and other evidence, whether she appeared suggestible or rehearsed, remained consistent in her account of the assault, etc. Those are matters for

argument by counsel, not for lay or expert opinions. *See, State v. Southard*, 347 Or 127, 140 (2009)("while the staff at the KIDS Center are experienced professionals, the criteria that the staff used to decide whether to credit the boy's testimony are essentially the same criteria that we expect juries to use every day in courts across this state to decide whether witnesses are credible.").

The Courts have reversed cases based on police officers' testimony as experts (based on their training and experience, i.e., non-scientific expert opinion) when it amounted to a comment on credibility. In *State v. McQuisten,* 97 Or App 517, 519-520 (1989), defendant's conviction was reversed because the jury heard a recorded interrogation and received the transcript where the officer had stated such things as "it is pretty hard for [a sexual assault victim] to fabricate those feelings," and that the complainant had shown "very true emotions and signs" of sexual abuse.

In *Simpson v. Coursey*, 224 Or App 145, 148 (2008), the court found vouching occurred when an officer described the demeanor of the child complainant during his interview. He testified that the child complainant—as with most young females he had interviewed—found it hard to talk about things that have happened to their private areas, but was honest and straightforward. The court held defense counsel was ineffective for not moving for a mistrial or to strike and request a curative instruction for the jury to completely disregard the officer's testimony and to make its own assessment of credibility. See, 224 Or App at 153.

In *Lowell, supra,* the court found plain and reversible error where a police officer testified that he didn't think the defendant was being very honest during questioning, and used certain phrases that are an indication of somebody being less than truthful. More recently in *State v. Watts,* 259 Or App 560 (2013), the Court of Appeals reversed a drug conviction because of testimony by the arresting officer that defendant's demeanor during interrogation was an indication of a deceptive answer, based on his training and experience.

**5. Credibility Comments By Lay Witnesses**

In *State v. Higgins*, 258 Or App 177 (2013), the court held a mother's statement that after hearing her daughter's complaint of sex abuse, she waited for many hours and had her repeat it so she would know for sure her daughter wasn't lying, was reversible error. In *State v. Vargas-Samado*, 223 Or App 15 (2008), the court found reversible error when the complainant's mother responded "I never doubted her for a second" to the prosecutor's question of whether her daughter's "demeanor" gave her "some indication that [she] should doubt her." In *State v. Ferguson*, 247 Or App 747 (2012), the appellate court reversed where the complainant's father testified he would not have called the police if he thought his daughter had consensual sex with the defendant. The court explained this was indirect vouching because it "suggested to the jury that they should believe her because her father, with whom she was 'very close,' believed her."

### 6. The Vouching Rule Applies To Out-Of-Court Statements

In *Chandler,* the Supreme Court held that an out-of-court statement about the credibility of a witness or non-witness complainant was subject to the categorical prohibition against vouching evidence if the statement was offered for the truth of the credibility opinion that it expressed. The Supreme Court also recognized that even such statements offered for other relevant, non-opinion purposes could be subject to exclusion under OEC 401, 403, "or other evidentiary rules," 363 Or. at 334 & 338-39, but the defendant there failed to preserve that argument. *Chandler* involved the familiar scenario where police interrogating the defendant challenged him with professions of belief that the victim was being truthful. The Court noted the "vouching rule" was not codified in the Evidence Code, and defined it to include both comments that bolster and comments that undermine a witness's credibility. 363 Or. at 331 n.3.

The Supreme Court went on to uphold admission of the officer's statements in *Chandler* because they were offered to provide relevant context for the statements that defendant made throughout the interview—a view that defendant did not challenge—even though an objection as to the logical relevance of the statements could have been raised. 363 Or at 339 n.7. The defendant may also seek a limiting instruction under OEC 105 if the trial court admits the evidence.

In the case at bar, the vast majority of the objectionable, out-of-court vouching by police is during the recorded interview of the Complainant. See Exhibit 102-Pretrial (statements objected to by the defense are underlined). The officers'

statements are not relevant, did not prompt additional disclosures or changes to Complainant's story so as to possess a non-vouching purpose, fall within the previous discussed restrictions on "syndrome" evidence, and even if otherwise admissible would be unduly prejudicial under OEC 403.

**7. Prejudice**

Oregon Rule of Evidence 403 provides that:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence."

In *State v. Brown, supra*, the Court found that "under proper conditions polygraph evidence may possess some probative value and may, in some case, be helpful to the trier of fact." 297 Or at 438. The Court then turned to the OEC 403 analysis, upon which ground it held the evidence to be inadmissible. The *Brown* court itself drew an analogy between polygraph evidence and the behavioral characteristics type evidence at issue here, and so proves more instructive than the majority of 403 cases which deal with other crimes or bad acts:

> The nature of the polygraph examination is closer to a psychiatric evaluation than to objective scientific analysis such as fingerprints and ballistics. The polygraph technique is heavily dependent on the subjective evaluation of the expert both in the administration of the test and in reaching the result. 297 Or at 438.

Similarly, testimony from police officers that the alleged victim acted in ways consistent with victims in other domestic violence cases they have investigated, or that the defendant acted in ways consistent with males who commit domestic

violence, is “heavily dependent on the subjective evaluation of the expert” police officer. Moreover, courts have recognized that weighing of probative value versus prejudice is particularly important with the expert testimony of a law enforcement officer, which often carries an “ ‘aura of special reliability and trustworthiness.’ ” *United States v. Espinosa*, 827 F.2d 604, 613 (9th Cir. 1987)(citations omitted); *see also, Watts, supra,* 259 Or App at 564 (noting jury would likely value officer’s testimony that he had the training and experience to make a credibility determination). OEC 403 "requires trial courts . . . to evaluate the degree to which the trier of fact may be overly impressed or prejudiced by a perhaps misplaced aura of reliability or validity of the evidence, thereby leading the trier of fact to abdicate its role of critical assessment." 297 Or at 439.

OEC 403 "requires trial courts . . . to evaluate the degree to which the trier of fact may be overly impressed or prejudiced by a perhaps misplaced aura of reliability or validity of the evidence, thereby leading the trier of fact to abdicate its role of critical assessment." *Brown,* 297 Or at 439. Testimony from professionals, including police officers, that the alleged victim acted in ways consistent with an abuse victim may "assume a posture of mystic infallibility in the eyes of a jury," *Brown, supra,* 297 Or at 440. The same is true about officers’ testimony linking behavior or phrases used by a defendant to behaviors or phrases they have observed in males they have arrested in domestic violence cases. This is particularly so when the professional tells the jury he or she has had contact with numerous abuse victims and perpetrators; and has special training in investigating domestic violence cases.

As the Supreme Court observed in *Chandler*, police officers opinions indicating the victim is truthful and the defendant is engaged in evasion or deceit, even when offered to put the defendant's admissions during interrogation in context rather than as opinions on credibility, "are troubling," and had Chandler specifically requested 403 balancing "the admissibility of those statements might well have been different." 363 Or. at 339. "Indeed, [the officer's] claim of expertise in determining truthfulness posed the risk that this court identified in *Brown—i.e.,* that jurors might place undue weight on the 'aura of reliability' created by such a claim." Id.

RESPECTFULLY SUBMITTED this XXdate, 2018.

s/ Terri Wood
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ATTORNEY FOR DEFENDANT