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Attorney for

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

STATE OF OREGON,

Plaintiff,

-VS-

Mr. X,

Defendant

CASE No. 20-14-XXXXX

MOTION IN LIMINE TO EXCLUDE OPINIONS ON INTERNET PREDATORS AND SEXUAL OFFENDER ISSUES
(Oral Argument Requested)

COMES NOW the Defendant, by and through his counsel, Terri Wood, and moves the Court for an Order instructing the District Attorney, his representatives, and his witnesses to refrain absolutely from making any reference whatsoever in person, by counsel or through witnesses or exhibits, to testimony or any other evidence concerning the following:

1) The behavioral characteristics or common practices or techniques used by "Internet predators," or persons, however denominated, who engage in online communications to solicit sexual activities with minors;

2) How to conduct successful "sting operations" to catch "Internet predators" or persons intent on patronizing prostitutes, and not ensnare innocent people; or why such operations are undertaken;

3) A "sexual offender profile", or behavioral characteristics of sexual offenders, or typical behaviors of sexual offenders, including but not limited to conduct described as "grooming," and denial when confronted with accusations of sex crimes or attempted sex crimes;

4) Opinions that Mr. X displayed behaviors, used words or phrases, or engaged in conduct that are consistent with behavioral characteristics or common conduct or practices of sexual offenders or "Internet predators" or persons who have hired prostitutes; and

5) Any other direct or indirect comment on the credibility of assertions Mr. X made during interrogation regarding his disbelief that the prostitute he was communicating with was a minor, and his lack of sexual purpose.

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 unreliable and speculative, OEC 403; (3) 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; (4) because it is improper character evidence, OEC 404 & 405; (5) because it is not proper opinion evidence under OEC 701 & 702, (6) because it goes to matters of which the

witnesses lack personal knowledge, in violation of OEC 602; 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 specifically reserves the right to request an evidentiary hearing should one be needed to resolve this motion pretrial.

DATED this 18th day of November, 2014.

TERRI WOOD, OSB #883325
ATTORNEY FOR DEFENDANT

POINTS AND AUTHORITIES

1. Summary of Arguments

This motion seeks to preclude the State from eliciting "expert" testimony from police officers about typical behaviors, practices, or conduct by persons who commit the types of crimes charged against Mr. X, or how sting operations are designed and

needed to catch such individuals, as circumstantial evidence of guilt inferred from the "typical conduct" or "common practices" of known perpetrators.

The objectionable evidence is not relevant under the "relevancy" test set forth in *State v. Brown,* 297 Or 404 (1984) and *State v. O'Key*, 321 OR 285 (1995); *see, State v. Marrington,* 335 Or 555 (2003) and *State v. Lawson*, 127 Or App 392 (1994); *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. 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).

The objectionable evidence is unreliable. 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. Hansen*, 304 Or 169, 176 (1987).

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

Even if the evidence has relevancy and is not viewed as commenting on the credibility of Mr. X's denial of criminal purpose, 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.* This rule 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; State v. Southard, supra*.

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 generally, State v. Brown*, 297 Or 404 (1984).

Testimony regarding the known traits of sex offenders or sex crime victims—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:

> In *State v. Middleton* , this court allowed in testimony concerning normal reactions to abuse but did so before we decided *State v. Brown*. We have set out in great detail in *Brown*, 297 Or at 409-18, the necessary foundation that must be laid for the introduction of scientific evidence. Without repeating what we said there, we direct the attention of anyone who is offering a form of scientific evidence to the procedures for admission set forth in *Brown.*
>
> * * * *
>
> 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.

Likewise, in *State v. Lawson,* 127 Or App 392 (1994), a case where the defense sought to introduce expert testimony that the defendant did not match a "sex offender profile," the court explained:

> Whether it is labeled a "syndrome" or a "profile," the type of evidence . . . involves comparing an individual's behavior with the behavior of others in similar circumstances who have been studied in the past. This comparison evidence purports to draw its convincing force from scientific principles. 127 Or App at 395 (emphasis supplied).

Lawson held the evidence inadmissible for lack of foundation to establish it was reliable as “scientific evidence”.

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. Typically, but not necessarily, scientific evidence is presented by an expert witness who can explain data or tests results . . . ." 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.

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” is based on what they

have read or been instructed about the scientific literature on sex offenders or sex crime victims, coupled with their field observations in investigating sex 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).

Thus, the evidence at issue here pertaining to characteristic behaviors of sex offenders, including Internet predators and persons patronizing prostitutes, requires the State to meet the *Brown-O'Key* foundation as a predicate to its admissibility. The defense moves the Court to make that determination pretrial, before the prosecution comments on that evidence during voir dire or opening statement. *Brown* 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. The court explained that '[t]he existence or nonexistence of these factors may all enter into the court's final decision on admissibility of the novel scientific evidence, but need not necessarily do so. What is important is not lockstep affirmative findings as to each factor, but analysis of each factor by the court in reaching its decision on the probative value of the evidence under OEC 401 and OEC 702.' *Id.* at 417-18, 687 P.2d 751 (footnotes omitted.) As the court further explained in *O'Key,* 'scientific' evidence, to be admissible, must be supported by a showing that the evidence is based upon scientifically valid principles, *i.e.,* 'sound scientific reasoning or methodology.' 321 Or. at 302, 899 P.2d 663. In conducting this inquiry, we focus on the methodology followed, not on the conclusions reached. 177 Or App at 341-42.

The defense acknowledges that *State v. Stafford*, 157 Or App 445 (1998)(*en banc*), *rev. den.* 329 Or 358 (1999), held that testimony concerning "grooming" behavior by child sex offenders, by a clinical psychologist who specialized in treating sex offenders, was not "scientific" evidence" requiring a *Brown* foundation. The defense submits that *Stafford's* holding is no longer good law, in light of *State v. Marrington,* 335 Or 555 (2003) which held that a psychologist's expert testimony concerning delayed reporting by child sexual abuse victims was scientific evidence. The experts' opinions in both cases were based upon their clinical experience, as well as their professional education and training in their respective fields. See also, *State v. Borck*, 230 Or App 619, 635 n.10 (2009)(noting that the foundational requirements for "grooming" evidence are hotly contested and an open issue, with the Court of Appeals divided on the issue).

3. 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. Hansen*, *supra*, the Supreme Court reversed a conviction where a police detective was permitted to testify regarding techniques used by sex offenders to "groom" child victims, observing:

> The state has not argued that the testimony to which defendant objected was admissible on any other ground than to explain the student's initial denial. The only other possible ground would be as evidence that defendant had sexual relations with the student. But the relevance of the testimony for this purpose is practically nil. Detective Robson testified to what might be described as a "profile" of a nonviolent child abuser who is unrelated to the child: physical and psychological "testing" of the child, giving gifts, showing affection, praising, making the child feel comfortable in the abuser's presence, etc. That child abusers use these techniques has no bearing on whether a person who does these things is a child abuser. For example, it is probably accurate to say that the vast majority of persons who abuse children sexually are male. This says little, if anything, however, about whether a particular male defendant has sexually abused a child. See *State v. Petrich*, 101 Wash.2d 566, 683 P.2d 173, 180 (1984) (potential for prejudice outweighed probative value of expert testimony that 85-90% of child molesters know their victims, where defendant was alleged victim's grandfather); see also McCord, Expert Psychological Testimony about Child Complainants in Sexual Abuse Prosecutions, 77 J Crim L & Criminology 1, 17 n 105 (1986) (citing cases).

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 "psychological" 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 law enforcement professionals that Mr. X acted in ways consistent with known offenders 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). 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.

In *McCarthy, supra*, the Court held that expert testimony about grooming behaviors that the child victim had related to be excludable under OEC 403, without reaching the issue of whether such testimony constituted scientific expert opinion evidence versus non-scientific expert opinion evidence.

4. Credibility

Oregon courts have repeatedly held that a trial witness cannot give an opinion on the credibility of another trial witness. *State v. Keller,* 315 Or 273, 284-85 (1993)(pediatrician's opinion); *State v. Odoms,* 313 Or 76, 82 (1992); *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. In *State v. McCarthy,* 251 Or App 231 (2012), the Court of Appeals reversed a rape conviction, finding that expert testimony concerning grooming amounted to impermissible vouching; and that expert testimony that applied general principles related to the phenomenon of delayed reporting in child sex abuse cases to the facts at trial was unduly prejudicial. The Court found improper vouching for the

child's credibility by testimony that linked grooming behaviors in general to what the child said had occurred in that case. *Id.*, at 235-36.

Improper vouching includes testimony expressing an indirect opinion that the defendant's statements to police were not credible. 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 *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. 249 Or App at 366. Most recently in *State v. Watts*, 259 Or App 560 (2013), the court held it to be reversible error when an officer was allowed to testify, based on his training and experience in interrogation, that defendant's responses to questions were "an indicator to me that there's a deceptive answer." The court rejected the State's claim that the admitted error was harmless because the case turned on the credibility of the defendant versus the credibility of a co-defendant.

Thus, if officers are allowed to testify about common practices or conduct of sex offenders that are consistent with conduct by Mr. X, such testimony would be an indirect comment on the credibility of his denial of criminal purpose. *McCarthy, supra; see also, Keller, Odoms, Middleton, supra.*

5. Expert Opinions By Police Based On "Training and Experience"

Whether the police officers are qualified to give expert testimony on many of the objectionable topics remains to be determined. 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 *542 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.

Even if the officers have adequate training and experience in how to conduct sting operations designed to catch Internet predators or persons seeking prostitutes to explain to the jury why they took the steps that they did leading up to Mr.X' arrest, such evidence falls within the *res gestae* doctrine. The Oregon Evidence code abolished that doctrine, so that would not be a basis for its admission. *See,* Laird C. Kirkpatrick, *Oregon Evidence,* §803.01[4], p.779 (6th ed. 2013).

RESPECTFULLY SUBMITTED this 18th day of November, 2014.

TERRI WOOD, OSB #883325
ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that I have made service of the foregoing NOTICE OF DEFENSES, by causing a true, full and exact copy thereof to be hand-delivered on November 18, 2014, to the Lane County District Attorney Office, 125 E. 8th Ave., Eugene, Oregon, 97401, attorney for plaintiff.

TERRI WOOD, OSB #883325