OUTLINE OF MEMORANDUM OF LAW
ON ADMISSIBILITY OF "CRIMINAL PROFILE" EVIDENCE

*There is all the difference in the world between evidence proving that the accused is a bad man, and evidence proving that he is **the** bad man.* --Lord Sumner (1918)

I. What is "criminal profiling".

A. Define "criminal profiling".

A generic definition of criminal profiling is "information gathered at a crime scene, including reports of an offender's behavior, used both to infer motivation for the offense and to produce a description of the type of person likely to be responsible." [David Ormerod, "The Evidential Implications of Psychological Profiling," Crim.L.R. 863 (1996)].

The profiler begins by determining what happened at the crime scene. Upon determining what events took place, he reconstructs how the crime occurred, i.e., the sequential order of the events. After reconstructing the crime, he utilizes specialized knowledge about criminal behavior to determine why the crime happened, i.e., the offender's motivations. Armed with this information and with a thorough study of victim characteristics, the profiler's specialized knowledge of criminal behavior allow him to reach opinions about certain characteristics of the offender. This "what to how to why to who" is a most simplistic description of criminal profiling. [Id.; see also, Douglas et al.: "Criminal Profiling from Crime Scene Analysis," 4 Behav. Sci. & Law 4: 401 (1986)]

1. Terminology

The work of a profiler has been called "offender profiling," "psychological profiling," "criminal personality profiling," "behavioural profiling," and "criminal investigative analysis, among other descriptive terms. [Ormerod, supra, at 865].

The Crime Classification Manual, developed by the FBI's National Center for the Analysis of Violent Crime, defines "criminal investigative analysis as an investigative process that identifies the major personality and behavioral characteristics of the offender based on the crimes he or she has committed."

One reason that criminal profiling has so many names is that persons of various disciplines--from psychiatrists to police officers--have engaged in identifying the major personality and behavioral characteristics of an unknown offender by studying the crime itself. Not surprisingly, specialists from different forensic fields have employed different methodologies to arrive at an offender profile. [See Brent Turvey, "Deductive Profiling: Comparing Applied Methodologies between Inductive and Deductive Criminal Profiling Techniques," (1997)(draft)].

2. Historical perspective

For over a century the English and American police have consulted profiles of offenders during major criminal investigations, such as the "Jack the Ripper" investigation in the 1880s. [Ormerod, supra, at 864]. Criminal profiling has been used in a large number of cases within the last 30 years. Some of the more celebrated cases are: the Boston Strangler, Charles Manson, Son of Sam, and Richard Speck. [Anthony

Pinizzotto, "Forensic Psychology: Criminal Personality Profiling," 12 J. Police Sci. & Adm. 32 (1984)]. The Behavioral Science Unit at the FBI headquarters has been profiling offenders since 1978. [Ormerod, Id.]. The FBI claims an accuracy rate in excess of 80 percent in its profiling abilities. [Pinizzotto, supra, at 37].

Criminal profiling has proven itself as a valued means by which to narrow the field of investigation in unsolved crimes. Profiling does not provide the specific identity of the offender. Rather, it can provide certain behavioral and personality characteristics of the offender. [Douglas, supra, at 402]. Once a profile is complete, it can be used in comparison to the known behavioral and personality characteristics of one or more suspects to determine the likelihood that a given individual committed the crime. [Turvey, "The Role of Criminal Profiling in the Development of Trial Strategy" (1997)]

A forensic pathologist will allow the corpse to "tell how it was murdered" by bruises, marks, and chemical analyses. The forensic profiler will let the entire crime scene, including the victim, tell "what KIND of person committed this act." [Pinizzotto, supra at 33]. For any crime where there is some indication of psychological dysfunction, a profile can be attempted. This follows from profiling being dependent on the use of behavioral and psychodynamic principles of psychology in an applied setting. Thus, certain crimes are most appropriate, particularly sexual homicides, rapes and ritualistic crimes. [Id.].

In the case of the apparently motiveless, violent crime, law enforcement may need to look to other methods in addition to conventional investigative techniques, in its efforts to identify the perpetrator. In this context, criminal profiling has been productive, particularly in those crimes where the offender has demonstrated repeated patterns at the crime scene. [Id., at 403, 421].

3. Distinguish criminal profile from psychological "syndrome" or "profile".

The mental health community christened the first psychological "syndrome" in 1980, when Post Traumatic Stress Disorder was officially recognized. Since that time, the investigative term "profile" has slowly become synonymous with the psychological term "syndrome" in the legal community. The process of criminal profiling in its origianl form, as taught by Howard Teten and Pat Mullany at the FBI beginning in 1969, was completely different in origins and methodology from the construct of the psychological syndrome. With time, however, the term "criminal profile" became wrongfully confederated with "psychological profile," because of the way some profiles are constructed. [Turvey, Deductive Profiling, supra at 2]

Not all profiling methodology is the same. There are essentially two very different types of profiling being done by criminal investigators and criminologists in the United States. The first profiling method will be termed Inductive Profiling, and is related conceptually to the construction of psychological syndromes or profiles. An Inductive Profile is one that is generalized to an individual criminal from behavioral and emotional characteristics shared by other criminals who have been studied in the past. It is hardly distinguishable from the profile of a sex offender described in *State v. Lawson,* __ Or App ___ (1994), as "[w]hether 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 circuimstances who have been studied in the past."

The second, less common, method of profiling will be termed Deductive Profiling. It has been defined as the process of interpreting forensic evidence, including photographs and reports, and a study of victimology, to accurately reconstruct offender crime scene behavior patterns, and from those specific behaviors, infer offender motivations, emotions and characteristics. [Turvey, Deductive Profiling, supra at 5].

B. The process or methodologies used by profilers.

The underlying premise is that behavior reflects personality, and that behavior patterns can evince personality traits. [Douglas, supra at 403]. A second, fundamental premise of profiling is that no one acts without motivation. [Geberth, Practical Homicide Investigation (1983)].

1. Inductive Profiling

An Inductive Criminal Profile is one that is generalized to an individual criminal from behavioral and demographic characteristics shared by other criminals who have been studied in the past. It is the product of statistical analysis and generalization, hence the descriptor Inductive. The descriptor derives from the phrase Inductive Reasoning, which means to reason from the general to the specific. [Turvey, Deductive Profiling, supra at 2].

The datasets currently used to compile and statistically generalize Inductive Criminal Profiles are collected largely from three sources: (1) Formal and informal studies of known, incarcerated criminal populations, and the interviews upon which those studies are based;(2) Practical experience, from which anecdotal data is collected or recalled by the profiler; and (3) Public data sources, including the popular media(for example, the FBI readily admits that newspaper articles are collected by its personnel and used to fill out its computerized database of violent criminal offender activity in the United States). [Id. at 3]

An example of Inductive Profiling logic would be as follows:

80% of all serial killers that attack college students in parking lots are white males age 20-35 who live with their mothers and drive Volkswagen Bugs. Our offender has attacked at least three female college students on separate occasions; our offender has attacked all three victims in parking lots. Therefore, our offender is a white male age 20-35, lives with his mother, and drives a VW Bug. [Id.]

These generalizations can accurately predict some of the non-distinguishing elements of individual criminal behavior, but not with a great deal of consistency or reliability. A major disadvantage is that, as with any generalization, an Inductive Criminal Profile is going to contain specific inaccuracies that can and have been used to implicate innocent individuals. This occurs when an Inductive Criminal Profile is used as some sort of infallible predictive measure by an unprofessional, trigger-happy profiler. Recent examples include the 1996 case of Richard Jewell in the "Olympic Park Bombing" and, also in 1996, the Colin Stagg profile debacle in Great Britain. [Id. at 3-4].

2. Deductive Profiling

Deductive Criminal Profiling employs a different methodology. A Deductive Criminal Profile is one that is deduced from the careful forensic examination and behavioral reconstruction of the involved crime scene(s). After the offender's behaviors have been reconstructed, the crime scene characteristics are analyzed, and the victim characteristics are analyzed. From those combined characteristics, a profile with the characteristics of the individual who could have committed that specific offense(s), with that specific victim(s) under the conditions present at that specific crime scene(s) is deductively inferred. [Id. at 5]

Deductive Profiling is a forensically and behaviorally contained process. Offender emotions during the offense, individual patterns of offense behavior, and offender personality characteristics are deduced from that particular offender's crime scene behavior and victimology only.

An example of Deductive Profiling logic would be as follows:

The body of a female victim is found nude in a remote forest location with 4 shallow, careful incisions on the chest, cutting across the nipples. The victim's genital areas have all been removed with a sharp instrument. Petechiae are evident in the eyes, neck and face above pattern compression on the neck. No blood is found at the crime scene. No clothes are found at the crime scene. The victim bears ligature furrows around her wrists with abraded contusions but no ligature is present. Fresh tire impressions are found in the mud approximately 20 yards from where the body is located. Therefore the offender in this particular offense bound the victim to restrain her while she was still alive indicated by the abrasions around the wrists associated with struggling. Our offender removed the ligature before disposing of the body, indicated by the fact that we didn't find it at the scene. The victim was likely asphyxiated with a material ligature about the neck, indicated by the pattern compression and the petechiae. The location where the body was found is a disposal site and not the actual location of the offense indicated by the fact that no blood was present at this location. The offender has a vehicle consistent with the tire impressions and is mobile.

All of these details together indicate a competent, intelligent offender whom is able to sustain employment, and is very likely a sexual sadist. This is deductively suggested by the vehicle, the use of a secondary scene to dispose of the body to avoid transfer evidence, the removal of the victim's genitals, and the deliberate cutting to the victim's nipples intended to cause pain but not seriously injure. [Id. at 5-6].

The data used to derive a Deductive Criminal Profile for a particular criminal includes the following:

(1) Crime Scene Characteristics: Crime scene characteristics are determined from all forensic reports, all forensic analysis, and all forensic documentation which provides the nature of the interaction between the victim(s), the offender, and the location(s) of the offense during the occasion of a specific offense. In cases involving a related series of offenses, such as in serial rape, or serial homicide, crime scene characteristics are determined individually and analyzed as they evolve, or fail to evolve, over time. An offender's crime scene characteristics, in a single offense or over multiple offenses, can lend themselves to inferences about offender motive, modus operandi, and the determination of crime scene signature.

(2) Victimology: Victimology is the thorough study and analysis of victim characteristics. The characteristics of an individual offender's victim population of choice, in a single offense or over time, can lend themselves to deductive inferences about offender motive, modus operandi, and the determination of crime scene signature. In Deductive Profiling, almost as much time is spent profiling each victim as the offender responsible for the crime(s).

The Deductive Criminal Profiling method also examines behaviors of individual offenders as they occur over time. Change and growth are allowed for, analyzed, and recompiled back into the criminal profile. As something like offender MO behavior or motivations change or evolve over the course of multiple offenses in an offender's career, it is noticed and it used to better understand the offender.

C. The “specialized knowledge” involved.

1. Recognition of the specialized knowledge of law enforcement

To competently engage in Deductive Profiling, one must have specialized education and training in the forensic sciences, crime scene reconstruction, and wound pattern analysis. Additionally, training must include criminal psychology, and practical experience in investigating violent serial criminals. One need not be qualified as an "expert" in any of these fields; rather, the profiler must have specialized knowledge in these areas and be able to apply a multi-disciplinary approach to the analysis of any given crime. [Turvey, Deductive Profiling, supra]. Thus, a well-trained homicide detective may possess the specialized knowledge to be a criminal profiler, whereas a forensic psychologist who lacks knowledge of the police sciences set forth above, would not.

2. Recognition of behavioral evidence as a component of crime scene investigation.

Behavior evidence is defined as any act or omission of act indicative of a general or specific pattern of behavior, or indicative of a general or specific intent. Just like physical evidence, behavior evidence should be recognized, documented, collected, identified, compared, individualized, and reconstructed. Behavior evidence is a form of pattern evidence . Failure to recognize and document offender behaviors is a failure to collect pattern evidence, and failure to collect any evidence is negligent. [See Burgess, A. G. & Burgess A. W. & Douglas, J. & Ressler, R.,Crime Classification Manual, Lexington Books, 1992; Turvey, "Behavior Evidence: Understanding Motives and Developing Suspects in Unsolved Serial Rapes Through Behavioral Profiling Techniques" (1996)].

Profiling is one tool among many, like blood-splatter interpretation or wound pattern analysis, that can be successfully applied by a trained investigator. It's a form of pattern analysis and should be perceived no differently by those who require it or those who use it for investigating serial rape. Blood splatter analysis can tell investigators the order, number and direction of blows that a sadistic or anger-retaliatory rapist gives his victims from cast-off patterns on his basement ceiling. Wound pattern analysis can tell investigators whether or not the slashes on a rape victims arm where self-inflicted. As part of a serial rape investigation, behavioral profiling assists in sorting

out complex offender behaviors and expressions so that the fantasy motive and modus operandi can be reconstructed. [Turvey, "Behavioral Evidence," supra]

The most common objective sources of behavior evidence are going to be, but are not by any means limited to: victim statements (i.e. written and audio-taped); crime scene documentation (i.e. maps, blueprints, sketches, photos and video); physical evidence and subsequent documentation (i.e. photos and actual evidence); victim injuries and subsequent documentation (i.e. photos and video); and victimology (i.e. occupation/activity/history/ age/ physical traits). [Id.].

3. Distinguish the study of criminal behavioral evidence by profilers from the study of human behavior by psychologists. (deducing personality traits from behavior patterns vs deducing underlying mental processes from behavior patterns? Psychologists attempt to determine the mental processes causing the outward behavior, whereas profilers look at specific behavior patterns as evidence of somewhat less specific personality traits?)

D. The types of opinions or conclusions made by profilers.

Deductive Criminal Profiling can be used to reach opinions regarding Modus Operandi behavior, as well as offender signature behavior, which assists in the linkage of seemingly unrelated crimes. According to Geberth, *supra*, the Modus Operandi, or MO behavior, or method of operation, is a dynamic, learned behavior, changing over time, as the offender becomes more experienced. It involves only those actions that are necessary to commit the offense.

Signature behavior, or the signature aspect of criminal behavior, as Geberth defines it, is comprised of those behaviors not required to commit the offense. Signature is comprised of significant personality identifiers that distinguish the nature of the offender's crime scene methodology.

Another use of Deductive Criminal Profiling is to facilitate conclusions regarding an individual offender's motivations in even the most bizarre or seemingly senseless offenses. As Geberth insightfully reminds us in his foundational work Practical Homicide Investigation, 3rd. Ed., "No one acts without motivation." Deductive Criminal Profiling techniques explore offender actions through the physical evidence, through the victimology, and through the crime scene as the primary behavioral and motivational documentation, and illuminate that particular offender's motivation.

While Deductive Profiling can rarely if ever be used to opine that a specific individual is responsible for a certain crime or series of crimes, its high probative value in terms of establishing M.O., signature and motive can support a conclusion that a known suspect is consistent or inconsistent with the offender profile. [Turvey, "Deductive Profiling," supra at 6-8].

II. Admissibility of criminal profile testimony.

A. In general: drug courier profile evidence cases.

As part of its war against drugs, the DEA developed what came to be known as "drug courier profiles," defined as "a formula of personal and behavioral traits," many of

which "describe a very large category of presumably innocent travelers." *U.S. v. Sokolow*, 109 SCt 1581, 1588-89 (1989)(MARSHALL, J., dissenting).

The drug courier profile is thus analogous to Inductive Profiling, in that the profile is derived from studying the behaviors of known drug couriers, and reducing those behaviors to a checklist which is used to identify suspects.

Sokolow concerned a DEA agent's reliance on the drug courier profile, and other circumstances, to give rise to reasonable suspicion to justify a stop. The Ninth Circuit took a dim view of the validity of the profile, and in turn invalidated the stop. The Supreme Court reversed, holding that the factors contained in the profile could properly be considered as part of the "totality of the circumstances" giving rise to reasonable suspicion. The Court reasoned: "long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as fact-finders are permitted to the the same--and so are law enforcement officers." 109 SCt at 1585-86.

1. Profile plus other circumstances = reasonable suspicion.

In *Sokolow*, the defendant's behavior matched certain factors contained in the DEA profile. "Any one of these factors is not by itself proof of any illegal conduct and is quite consistent with innocent travel. But we think taken together they amount to reasonable suspicion." 109 SCt at 1586.

Reasonable suspicion requires "something more than an 'inchoate and unparticularized suspicion or hunch'." 109 SCt at 1585. Rather, it requires that an individual with specialized training and experience in law enforcement have "specific and articulable facts" to reasonably suspect the defendant is involved in criminal activity. Id. at 1588.

2. The analogy of reasonable suspicion to reasonable doubt.

Reasonable doubt is defined under Oregon law as "doubt based on common sense and reason," UCrJI No. 1006, arising from the facts established by the evidence rather than prejudice or sympathy or other subjective factors. Reasonable doubt is analogous to the concept of reasonable suspicion, which is suspicion based on applying common sense to objective facts.

It is submitted that if "inductive profile" evidence coupled with other circumstances can constitutionally give rise to reasonable suspicion, then "deductive profile" evidence coupled with other facts can most certainly give rise to reasonable doubt.

Criminal profiling is a widely accepted investigative tool. When the defense seeks to show a person other than the accused committed the charged offense, it is common to ask the jury to “re-investigate” the crime, to look for evidence which was overlooked by the police and to consider additional evidence which the police could have, but did not, obtain. Thus, the opinions of a profiler should be evidence which the jury can consider; and, when those opinions are corroborated by other facts, such as the co-defendant’s opportunity to commit the crimes, his confession or admissions, and his post-crime conduct indicative of guilt, reasonable doubt may be established.

B. Case law on the admissibility of criminal profile testimony.

1. Oregon (State v. Dunn, Lane Co. Circuit Court).

The defense has found no appellate cases concerning the admissibility of criminal profile testimony. There is local precedent in the case of State v. John Erva Dunn, Case No. 10-97-02208, Lane County Circuit Court. There the State sought to offer testimony at trial by an FBI-trained profiler, Sgt. Gebo, in a robbery prosecution where identity was an issue. Based on a review of partial transcripts, it appears that Sgt. Gebo would have testified that a robbery the defendant committed 15 years before involved acts of "excessive" violence done to terrorize the victims, and that similar behavior--excessive violence to terrorize--was involved in the instant offense.

The defense moved in limine to exclude this evidence, arguing (1) that it did not meet the foundation requirements for novel "scientific" evidence; (2) that it was essentially character evidence used to prove a propensity by the defendant to commit robbery; and (3) that prejudice outweighed probative value.

Judge Foote granted the motion and excluded the evidence. However, Judge Foote specifically found that criminal profile testimony was "specialized knowledge" under OEC 702, and not "scientific" evidence requring findings consistent with *State v. Brown*. This is consistent with the holding of the Washington Supreme Court in *State v. Russell*, 882 P2d 747 (Wash. 1994)(discussed further below).

Judge Foot excluded the testimony because he found it to be "of scant relevance to this case," such that it would not assist the jury, and further found that some of Gebo's testimony involved matters about which he was not shown to be qualified to give expert opinion.

Sgt. Gebo had degrees in Police Science and Administration, and Public Administration; he had 16 years experience as a homicide unit detective in Seattle; and he was trained as a "criminal investigative analyst" by the FBI in 1986 and used that training in his professional work.

From the available information, it appears that Gebo was relying on Inductive Profiling methods. The FBI has trained law enforcement officers in that method since John Douglas took over the Behavioral Sciences Unit in 1984. [Turvey, "Deductive Profiling," supra].

The State has taken an interlocutory appeal in the Dunn case, on a variety of matters including Judge Foote's exclusion of the criminal profiling testimony. No decision is expected soon.

2. Other jurisdictions.

The defense has found reported cases in several other jurisdictions where testimony from criminal profilers was offered at trial.

Cases where testimony offered by prosecution to establish "signature" crimes as circumstantial evidence of identity of the perpetrator was admitted:

State v. Code, 627 So.2d 1373 (La. 1993)(murder case in which expert Douglas testified that all of the murders, some of which were uncharged, notwithstanding many factual dissimilarities, were signature crimes; pathologist also allowed to give expert testimony on modus operandi/signature crimes to establish identity of defendant as perp) [West Criminal Law 369.15, 372(1)]

At 1376: county coroner testified the crime was the work of one person and was clearly a signature crime; he informed police the crime was the work of a serial killer who would kill again. He "noted four signature elements: the perpetrator's total control over the victim; the perpetrator's use of a knife to both stab and cut; the binding of the victim with an electrical cord; and the unique ligature used by the perpetrator.""

Coroner also testified about "element of overkill," i.e., many more injuries than would have been necessary to kill, and "theorized that this showed an emotional relationship between the victim and the murderer." At 1379-80.

At 1381: Court discusses the evidence code rule for prior bad act evidence, which is the same as federal rule and Oregon rule, and notes pba's to establish modus operandi as evidence of identity, and further notes the crimes "must be so peculiarly distinctive that one must logically say they are the work of the same person," which is essentially the same as Oregon rule.

At 1382: Douglas, then an FBI special agent, testified as an expert in the field of criminal investigative analysis. He explained the difference between the modus operandi and the ritual aspects of a crime. "Modus operandi is learned behavior which can change as a criminal learns, modifies and adapts his behavior to fit a particular situation. Ritual aspects of a crime do not change and are linked to the criminal's internal need to do certain things.

"Douglas acknowledged that these crimes had modus operandi dissimilarities in point of entry, weapons used, and time sequence between killings. However, the crimes had several identical ritual aspects, the most important being the distinctive handcuff ligature. . . . Another ritual aspect of the murders Douglas recognized was the killer's need for manipulation, domination and control over his victims. Placing the victims in different rooms was consistent with this ritual." Id.

At 1383: "Douglas also noted the aspect of overkill present in each crime scene, i.e., the victims were not just stabbed, they were almost decapitated. Another ritual aspect was the predominant use of a knife." Additionally, "Each law enforcement officer that visited the three crime scenes was convinced that murders were the work of the same person.

The Court concluded that "The expert testimony established that these were signature crimes. The ritual aspects of the Chaney homicides, the Ford homicide and William Code homicides were so distinctive as to lead to the conclusion they were the work of the same person. The issue of identity was genuinely at issue in this case. The other crimes' probative aspect on the identity issue outweighed their prejudice to the defendant."

State v. Russell, 882 P2d 747 (Wash. 1994)(three sexual homicides joined in one trial; criminal profiling testimony admitted to establish that all three homicides were committed by same perpetrator, and to explain "posing" of bodies; not

required to meet "scientific evidence" foundation)[West Crim Law 369.15, 469.1, 477.1. 474.5, 488, 470(2)].

At 776: Defense objected to testimony by Douglas "regarding the rarity of posed murder victims" and subsequent opinion that the same person committed all three murders. The trial court found that expert testimony referring to VICAP statistics on posed homicides did not involve novel scientific evidence and was, therefore not subject to Frye-type foundation. "Testimony which does not involve new methods of proof or new scientific principles from which conclusions are drawn need not be subjected to the Frye test."

Court notes that Douglas is a recognized authority in crime scene analysis with extensive experience in serial crime investigation, i.e., witness qualified as an expert; and that the testimony concerning the rarity of posing would be helpful to the jury:

"The jury does not have the specialized knowledge of how common the problem is or how often there is sexual penetration, open display of bodies, or the posing of the body after death. So I think it is within the scope of an opinion of somebody's experience to indicate whether these are common or not common or unique. I would find that the relevance of the testimony, as it goes to the identity of the perpetrator, and the inference to be drawn, is that the same person committed all three homicides." Id.

Appellate court notes that VICAP programs are "nothing more than sophisticated record-keeping systems," such that no novel scientific evidence foundation is required.

At 777: Court notes that the expert relied more on case materials and personal expertise than on the VICAP data base in forming his opinion, and expressed his opinion in non-quantifiable terms.

At 778: Expert was allowed to state opinion that these were signature crimes, notwithstanding dissimilarities.

<u>Case excluding criminal profile testimony offered by prosecution to establish motive</u>:

State v. Lowe, 599 NE2d 783 (Ohio App. 3 Dist. 1991)(defense filed pretrial motion to suppress testimony by state's purported expert witness; state appealed; appeals court held that evidence of reliability was insufficient to demonstrate relevancy of testimony of purported expert or to qualify purported expert as expert witness)[Douglas/criminal profiling; West Crim Law 476.6, 478(1)]

At 784: State gave notice of intent to offer FBI/BSU officers to "testify concerning crime scene characteristics for the purposes of assisting in the identification of the Defendant as the perpetrator." Defense filed motion to suppress any testimony regarding "establishment of a psychological or personality profile of the perpetrator of the crimes charged, based upon crime scene analysis."

Goal of the testimony was to "to determine [Douglas's] opinion regarding the perpetrator's motivation for the murder." Douglas testified that "criminal-investigative analysis is a process through which the crime scene is examined to determine the

perpetrator's motivation for the crime." He used it on over 5,000 cases. His education background consisted of a bachelor's degree in physical education, a master's degree in educational psychology with an emphasis on counseling, and a doctorate in education.

He testified that in his opinion, the motivation for the homicide was sexual, based on binding of the victim's hands and feet with ligatures brought to the scene by the perpetrator; that bringing the ligatures to the scene indicated preplanning; and that preplanning is one of several characteristics of a sexually motivated homicide.

He acknowledged that when concluding an offender's motivation is sexual, he must make psychological inferences to draw those conclusions and is therefore engaging in a form of psychology.

At 785: He conceded that none of his testimony could be stated to a reasonable scientific certainty.

The trial court found that Douglas' opinion "is an investigative tool like a polygraph; it might be used to investigate, but it does not have the reliability to be evidence." Appellate court agreed that there was evidence in the record to support the trial court's finding that the opinion testimony of Douglas is not reliable evidence:

"As a whole, the record reflects that Douglas' opinion for the most part is based on the behavioral science of clinical psychology, an area in which he has no formal education, training or license. In short, the purported scientific analytical processes to which Douglas testified are based on intuitiveness honed by his considerable experience in the field of homicide investigation." Id.

III. The evidentiary analysis for determining admissibility of criminal profile testimony by the defense.

A. The “Some Other Guy Did It” (S.O.G.D.I.) Defense

An implied element that must be proven beyond a reasonable doubt by the prosecution under every criminal statute is that the defendant--not someone else--committed the offense. Accordingly, American courts have long recognized the self-evident proposition that a criminal defendant should be able to defend by showing that someone else was the perpetrator.

The majority approach for determining the admissibility of evidence suggesting that someone other than the defendant committed the offense has been a question of relevancy; once the probative value of the evidence is ascertained, it is balanced against any prejudice to the opposing party's interests.

1. OEC 401 “Relevant Evidence” Test

The Oregon Evidence Code defines "relevant evidence" to mean "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.

The Legislative Commentary tells us that relevancy "is a matter of analysis and reasoning," such that "[t]he variety of relevancy problems is coextensive with the ingenuity of counsel in using circumstantial evidence as a means of proof."

"Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case. . . . Whether the relationship exists depeneds upon principles evolved by experience or science, applied logically to the situtation at hand." Id.

The proper inquiry is "Does the item of evidence even slightly increase or decrease the probability of the existence of any material fact in issue? If the item of evidence affects the balance of probabilities to any degree, it is logically relevant." *State v. Gailey*, 301 Or 563, 567 (1986).

The "fact that is of consequence" may be an ultimate fact, intermediate or evidentiary fact. It need not be a fact in dispute. In Oregon, if a fact "will advance the search for truth" or "throws some light on the issue," it is relevant. Commentary to OEC 402.

Logically, evidence of the past behavior by the defendant or co-defendant which is similar to the crime scene behavior of the perpetrator(s) is relevant; in contrast, the past behavior of other persons who have committed crimes similar to the charged offenses is not logically relevant to proving whether the defendant or co-defendant committed these crimes.

2. Oregon uses the relevancy test

There are only a few Oregon appellate cases that deal with the issue of admissibility of alternative perpetrator evidence. However, it is clear that Oregon courts approach this issue as a question of relevancy. Alternative perpetrator evidence is admitted or denied on the same grounds as any other evidence proffered by a party: a court faced with such evidence must first determine whether it is relevant under OEC 402, and then balance the probative value against any prejudicial tendency under OEC 403.

The first Oregon case dealing with alternative perpetrator evidence is *State v. Woodfield*, 62 Or.App. 69 (1983). The defendant in that case appealed from his convictions for murder and sodomy. He contended that the court erred in denying his motion to call Moore as a witness. Moore had subsequently been convicted of other murders in Salem. The purpose of calling him was to have two paramedics who were first on the scene of the incident at issue testify that they had seen a man who bore a "resemblance" to Moore a few blocks away shortly after the homicide. The defendant sought to introduce this evidence because the central issue at trial was the identity of the attacker, and the surviving victim had given inconsistent descriptions of her assailant. *Id.* at 71.

> The appellate court affirmed the trial court's decision to exclude the testimony:
>
> The fact that there was a man acting suspiciously on the street near the crime who resembled someone who had been convicted of other crimes had only marginal relevance. <u>Defendant does not contend that Moore was ever a suspect or that he should have been.</u> Whatever relevance that might have been

was certainly outweighed by the possibility of confusion created by parading Moore in front of the jury with so little to connect him with the crimes with which the defendant was charged.

Id. at 71-72. (emphasis supplied)

The court in *State v. Holterman*, 69 Or.App. 509 (1984), also treated the admission of alternative perpetrator evidence as an issue of relevancy. In that case, the defendant appealed his conviction for aggravated murder. The jury found that he had shot two women in the course of robbing them at an illegal gambling establishment. *Id.* at 511-12. The defendant, among other issues, contended that the trial court erred in excluding evidence that another person committed the crimes.

Essentially, defendant's theory was that the victims had known a lot about organized illegal gambling in Oregon and that they had associated with an undercover cop. Because of this, defendant wanted to show that the robbery was actually a cover up for a "hit." The defendant wanted to show: that the victim had spoken to an undercover cop; that she had expressed fears that she may be murdered; and that there were rumors circulating that there was a contract out on her. *Id.* at 515.

The trial court excluded the evidence because it found it to be too speculative and created too great a risk of confusing the jury. *Id.* The appellate court in affirming the sentence found that the trial court did not abuse its discretion in excluding the evidence. "In determining relevance, we consider whether the evidence is probative of a fact that the defendant is entitled to prove and then balance the probative value against its prejudicial tendency." *Id.* "Rumors, circumstances and [the victim's] fears are not probative of much at all. Defendant's testimony only marginally tended to show another person may have had the motive to commit the crimes." *Id.* at 516.

The court commented that exclusion of exculpatory evidence may potentially violate a defendant's due process rights to present a defense. However, the court found that "a defendant does not have a right to present irrelevant evidence...[i]n the exercise of this right, the accused, as is required by the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Id.* (citing *Chambers v. Mississippi*, 93 S.Ct. at 1049).

3 .Categories of "Relevant Evidence" that S.O.G.D.I.

Law Professor David McCord has analysed case law from across the nation, and determined that defendants attempt to raise reasonable doubt regarding an "alternative perpetrator" by offering evidence in the following categories:

a. Opportunity

b. Motive

c. Propensity, i.e., demonstrating a repeatedly occuring motive, modus operandi, or "signature" crime

d. Resemblance to Defendant, i.e., "mistaken identity"

e. Confession, admissions or physical evidence linked to the crime

f. Post-crime behavior indicative of guilt.

McCord, "'But Perry Mason Made It Look So Easy!': The Admissibility of Evidence Offered By A Criminal Defendant To Suggest That Someone Else Is Guilty,"63 Tenn L.R. 917 (1996)(article does not deal with cases where the "alternative perpetrator" was claimed to be a co-defendant, apparently because there is no doubt in such cases that the co-defendant is a viable suspect, the government itself having established that point to the level of probable cause).

It is submitted that defendants could likewise seek to raise reasonable doubt through the expert opinions of a criminal profiler using the Deductive Profiling methodology.

Under a relevancy test, the issue would be: Does the fact that an expert witness is of the opinion that a specific person other than the accused is more likely to be the perpetrator make it more or less likely that the accused committed the crime? Subject to arguments related to the qualifications of the expert and to the reliability of his opinion, the answer should be yes. [Ormerod, supra at 876].

B. Common Method of Proof in S.O.G.D.I. Defense: “Prior Bad Act” Evidence

Regardless of whether the defense case focuses on an identified individual as the "alternative perpetrator," or simply on there being another potential suspect not yet identified by the police, the use of prior bad acts evidence is a common method of proof in this line of defense.

The prosecution also frequently offers prior bad act evidence to support its claim that the defendant is the true perpetrator of the charged offenses.

1. OEC 404(3): use of prior bad acts to prove motive, modus operandi, identity, plan, preparation, etc.

OEC 404 concerns the admissibility of "character evidence." The rule contains the general prohibition that "[e]vidence of a person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion." Character may be proved by opinion of a witness who knows the person whose character is at issue, by reputation, or by specific instances of conduct, in certain limited situtations. OEC 405.

The specific instances of conduct generally encountered in criminal cases are other crimes, wrongs or acts, collectively referred to as "prior bad acts." OEC 404(3). Thus, prior bad acts are not, in and of themselves, "character evidence," but rather, one method of proving character. Rule 404(3) recognizes that prior bad acts are admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident," or any other fact of consequence, for that matter, except one:

Rule 404(3) generally prohibits the use of prior bad acts evidence to prove criminal propensity in order to show the person committed the charged offense. For example, the defendant in a theft prosecution has eight prior convictions for theft.

Those prior incidents of theft cannot be used to simply prove the defendant is a thief, and therefore more likely committed the theft for which he is being tried.

The fact that prior bad acts may tend to prove criminal propensity to commit the charged crime will not result in exclusion of the evidence, so long as it is "independently relevant for a noncharacter purpose," which is a question of logical relevancy. *State v. Hampton,* 317 Or 251, 254 (1993). "The possibility that an inconsistent or contradictory inference may reasonably be drawn from the offered item of evidence does not destroy that item's relevancy so long as the inference desired by the proponent is also a reasonable one." Id. at 255.

a. Available for use by defendant against "some other guy."

It is clear that the defense may offer prior bad acts evidence under 404(3) as it pertains to an alternative perpetrator or any other witness. See, e.g, *State v. Gardner*, 67 OrApp 404 (1984)(right to cross-exam witness concerning uncharged crimes, if relevant to some issue such as relationship to defendant or other witnesses, motives, bias); McCord, supra at 978 n269 (collecting cases).

b. Case law on Motive

Although the motive for committing a crime generally need not be established by the prosecution to prove guilt, it is a relevant circumstantial fact, because it makes more probable the fact that defendant committed the crime than if such a motive were not established. *Hampton, supra* at 258. Though proof of motive is not ordinarily essential, nevertheless proof showing presence of motive or its absence is always admissible. *State v. Miller*, 137 Or 218 (1931). For purposes of relevancy of evidence, motive is significant in that it bears on the actor's state of mind and can also be used to establish identity. *State v. White*, 71 Or App 299 (1984).

State v. Rose, 311 Or 274 (1991)(aggravated murder prosecution based on intentional killing during the course of robbery; proof of motive to establish state of mind)

At 282: "Evidence of a defendant's intent is rarely, if ever, proven by direct evidence. Intent is an operation of the mind, and it is seldom susceptible of direct proof. This subjective fact is usually established by a consideration of objective facts, and from these objective facts an ultimate conclusion is drawn. A defendant does not telegraph his or her intent for the world to see, and there is no stopwatch keeping track of when a defendant's intent to commit a specific act is formed." [Cf., conclusions drawn by criminal profiling, and methods used--consideration of objective facts from crime scene--to conclude subjective fact of offender's state of mind].

At 283: "Although the state is not required to prove a defendant's motive for a charged crime, it may do so. The issue here, however, is not why defendant did what he did, i.e., his motive, but whether he committed the proscribed acts with the requisite intent. Nonetheless, evidence of a defendant's motive may be relevant, as circumstantial proof, to the issue of intent."

At 283 n.7: "Motive is the cause or reason that moves the will and induces action. . . . If evidence of motive is offered at trial, then motive is but a

circumstance to be considered with other evidence surrounding the commission of the crime and to be given only such weight as the trier of fact deems proper."

c. Case law on M.O.

The Louisiana Supreme Court found that the admissibility of evidence of an alternative perpetrator's propensity to commit similar crimes was essentially an issue of relevancy. *State v. Washington,* 386 So.2d 1368 (La. Sup. Ct. 1980). Defendant was found guilty of four counts of attempted aggravated rape. These counts were all tried in a single proceeding. All these incidents were similar in nature, consisting of a man luring a young girl into his car, driving her to an abandoned area, raping her and finally dropping her off a few blocks from her home. The state attempted to establish the guilt of the defendant partially on the basis of the similarity of these various incidents, and thereby a modus operandi on the part of the defendant. *Id.* at 1369-70.

At trial, defense counsel wished to examine police witnesses about the possibility of other, similar crimes having been committed since defendant was incarcerated. The trial court refused to allow this line of questioning on the basis that it was not relevant and would serve to confuse the jury. *Id.* at 1373.

The Louisiana supreme court reversed on the basis that this questioning should have been allowed. "If, as defense counsel contends, there were other highly similar offenses after the defendant's arrest, then this fact would weaken the state's case against the defendant. The obvious purpose of the defendant's query was to show that the alleged rapes were committed by a person or persons other than the defendant. We can only conclude that such evidence is relevant where the state, through joinder, has attempted to establish the defendant's identity through evidence of several offenses." *Id.*

In Massachusetts, the defendant was convicted of armed robbery for his involvement in a convenience store hold up in which two suspects used a shotgun in a paper bag and a square barreled pistol. *Commonwealth v. Keizer*, 385 N.E.2d 1001, 1002 (Mass. 1979). The state's primary witness made a positive photo identification of the defendant as the man with the shotgun. Defendant sought to introduce evidence of a robbery committed by similar methods while he was in custody so as to implicate someone other than himself as the perpetrator. The evidence would hold that two other men were arrested in possession of a paper bag containing two sticks that resembled a shotgun and a cigarette lighter in the shape of a square barreled pistol. The trial judge excluded the evidence as not closely related to the facts of the case against the defendant. *Id.* at 1003.

The appellate court reversed and held that "it is well established that a defendant should have the right to show that crimes of a similar nature have been committed by some other person when the acts of such other person are so closely connected in point of time and method of operation as to cast doubt upon the identification of the defendant as the person who committed the crime." *Id.*

When deciding whether to admit evidence of this nature, Massachusetts uses a balancing test: "where the defendant offers such [alternative perpetrator] evidence, it is also the rule that where the proffered evidence is of substantial probative value, and will not tend to prejudice or confuse, all doubt should

be resolved in favor of admissibility." The court found that the evidence had high probative value because the two crimes were of such similar nature, the same vicinity, similar weapons identified, and defendant was incarcerated during the second crime. The balancing test weighed on the side of probative value, and the evidence was deemed admissible. *Id*. at 1004.

The Supreme Court of New Jersey also uses a balancing test when examining the admissibility of alternative perpetrator evidence. In *State v. Garfole*, 388 A.2d 587 (1978), an armed assailant accosted a boy and sexually molested a girl. The defendant was identified as the offender by the girl, but was not positively identified by the boy. At trial, defendant attempted to develop facts concerning four criminal episodes that occurred prior to the incident at issue. Defendant's purpose was to establish by the similarity of the conduct of the assailant in each prior incident that one person was responsible for all of them and that defendant was not that person because he had an alibi for all but two of the prior criminal episodes. *Id.* at 588-89.

The trial judge rejected the defendant's offer based on irrelevancy to the charges on which the defendant was being tried. The Supreme Court found error and held that it is "well established that a defendant may use similar other-crimes evidence defensively if in reason it tends, alone or with other evidence, to negate his guilt of the crime charged against him." *Id.* at 591. It noted that a balancing test was warranted because "the question here is not relevance as such, but the degree of relevance balanced against the counter considerations...of undue consumption of time, confusion of the issues and the misleading of the jury."[1] *Id.* at 590. The Court on this basis remanded to the trial court to employ such a balancing test to the evidence defendant sought to admit. *Id.* at 593.

d. Case law on Identity/"signature crimes"

State v. Johnson, 313 Or 189 (1992)(aggravated murder case reversed because court determined admission of uncharged murder was error because lacking "very high degree of similarity" with charged murder)[NOTE: this is the case behind the Measure 40 provisions which eliminate pba restrictions]

At 195-196: Discusses *State v. Pinnell* as having "defined the process for determining the admissibility of other crimes evidence to prove identity based on modus operandi."

n.8: Explains that modus operandi pba evidence is not barred by the propensity rule because it does not necessitate a conclusion that the individual "acted in conformity" with his character to commit a particular type of crime. [TW: Our

[1] It is worth noting that the New Jersey Supreme Court went on to hold that when offering other-crimes evidence, defendants enjoy a lower standard of degree of similarity of offenses than the prosecution. This is due to the fact that, when offered by the prosecution, other-crimes evidence has the distinct capacity of prejudicing the accused. Therefore, a fairly rigid standard of similarity is required of the state. However, when the defendant offers other-crime evidence, "prejudice to the defendant is no longer a factor, and simple relevance to guilt or innocence should suffice as the standard of admissibility, since ordinarily, and subject to rules of competency, an accused is entitled to advance in his defense any evidence which may rationally tend to refute his guilt or buttress his innocence of the charge made." *Garfole*, 388 A.2d at 591.

argument would be that Susbauer's pba's of thefts, UUMV,. etc., are not offered to prove his character for being a thief and to thereby reason that he acted in conformity with that character to commit any of the charged property crimes; rather, the pba's are offered to establish a behavior pattern of "putting one over" on people through deception and manipulation, which is relevant to his relationship with Hale and with the investigating officers]

At 196: Cites *Pinnell* as establishing the foundation for admissibility of this type of evidence: "The prosecution must establish by a preponderance of the evidence that (1) there is a very high degree of similarity between the charged and uncharged crimes; and (2) the methodology is attributable to only one criminal, that is, the methodology is distinctive so as to earmark the acts as the handiwork of the accused. . . . Whether the two requirements, similarity and distinctiveness or unusual characteristics have been established is a preliminary fact question for the trial court under OEC 104(1)."

e. Case law on plan, preparation

The Pennsylvania Superior Court has held that alternative perpetrator evidence is "unquestionably relevant." *Commonwealth v. Rini*, 427 A.2d 1385, 1388 (Pa. Super. 1981). In *Rini*, two high school girls were walking to school one morning when they observed a man exposing his genitals. They reported the occurrence to school officials, who then called police. Latter that day, police picked up a suspect and the girls identified him as the perpetrator. Defendant was then charged with indecent exposure. *Id.* at 1386-87.

At trial, defendant wanted to present testimony of a classmate of the girls who, a week before the incident at issue, saw a man at the same location expose himself to her. Defendant was charged with this earlier exposure as well after this first girl identified him in a photo line up. However, at a preliminary hearing, she became certain that, upon seeing defendant in person, that he was definitely not the perpetrator. The trial judge excluded this evidence. *Id.* at 1388.

The superior court vacated the sentence, holding that it is "unquestionably relevant for a defendant to show that the crime of which he is accused was committed by someone else." *Id.* It went on to state that "evidence is admissible when it tends to prove a common scheme, plan or design embracing the commission of two or more crimes so related to each other that proof of one tends to prove the others or to establish the identity of the person charged with the commission of the crime on trial...." *Id.* (citation omitted). The Court then applied a balancing test weighing the probative value of the proffered evidence against the danger of prejudice:

> The Commonwealth is permitted in such cases to introduce evidence that the defendant committed crimes other than the one charged, because their highly detailed similarity makes their probative value in showing that the defendant committed the crime charged so great as to outweigh even the substantial danger of prejudice to the defendant. When the defense offers evidence that someone other than the defendant committed a crime with a detailed similarity to the one charged, the probative value is equally strong in showing that the defendant did not commit the crime charged, and the argument for admissibility is even stronger, because there is no prejudice to weigh against this equally strong probative value.

Id.

In *United States v. Aboumoussallem*, 726 F.2d 906 (2d Cir. 1984), the defendant, Yagih, was convicted of importing and distributing heroin. The facts are that an undercover police officer purchased heroin from Yagih's cousin, Nazih, in New York. Nazih told the cop that the source of heroin was Lebanon, and that various family members regularly transported drugs to the United States. Hoping to these other dealers, the police ordered more heroin. Nazih claimed that Yagih would be carrying the heroin from Lebanon on a airplane, that he would be wearing a blue t-shirt, carrying a black attaché case, and would deliver his load to anyone carrying a photo of Nazih. Yagih arrived as described, and the police made the exchange. They then had conversation and the undercover cop asked Yagih about his trip. Yagih spoke no English and the cop spoke no Arabic, so Nazih acted as interpreter. Nazih translated several incriminating statements from Yagih. *Id*. at 908-9.

Yahig's defense at trial was that he was duped by his cousin Nazih. He claimed that he had no knowledge of the contents of the attaché case and was only asked to bring the case to someone carrying Nazih's photo. To support this defense, Yahig attempted to offer proof that five months prior to his arrest, Nazih had similarly duped a woman into transporting hashish from Lebanon into the United States. He offered the evidence as part of a common plan or scheme. The trial court performed the balancing test and excluded the evidence on the basis that it was irrelevant as well as being highly prejudicial and confusing to the jury. *Id*. at 911.

On appeal, the Second Circuit commented that "[o]n numerous occasions federal and state courts have admitted similar acts evidence offered for defensive purposes." *Id.* at 912. Further, it commented that "risks of prejudice are normally absent when the defendant offers similar acts evidence of a third party to prove some fact pertinent to the defense." *Id.* at 911. The court then went on to hold that the evidence of a prior plan to dupe an unwitting courier satisfied the liberal relevancy standards because it tended to make the existence of a consequential fact, Yagih's knowledge, less probable. *Id.* at 912. The court did not, however, disturb the verdict because they were reluctant to second-guess the trial court's determination that the proffered evidence would confuse the jury. *Id.*

In *United States v. Cohen*, 888 F.2d 770 (11th Cir. 1989), defendants were convicted of wire fraud, conspiracy, and tax evasion. The Cohen brothers planned to take over a carpet manufacturing business and contacted the business' president, Faw, about the matter. Faw, who entered a plea agreement to avoid prosecution in this matter, testified that the Cohens stated that they were only interested in buying the business if they could skim off the top of the profits. Faw agreed and immediately established a skimming scheme and Faw and the Cohens shared the proceeds. The Cohens disputed this version of the facts, claiming that Faw had duped them into sharing the proceeds. *Id.* at 772-73.

Defense sought to introduce evidence of Faw's prior bad act, notably, about a prior business relationship in which Faw had engaged in cash sales of products without the owner's knowledge. Essentially, defense claimed that Faw's involvement in a similar fraudulent scheme supported their version of the facts. The trial court ruled this issue was irrelevant to the issues before the court. *Id.* at 775.

The Eleventh Circuit held that, although such evidence is inadmissible for the purpose of showing character of a person, "[e]vidence that [Faw] had the opportunity and ability to concoct and conduct the fraudulent scheme without the aid or participation of the Cohens was relevant to their guilt." *Id.* at 776. It further held that "[t]he trial court's discretion does not extend to exclusion of crucial evidence." *Id.* at 777.

2. Reliance on 404(3) for the Profiler's use of prior bad acts by known suspect to establish specific behavior patterns which are indicative of the specific behavior evidence gleaned from the crime scene.

The above cases demonstrate that the courts routinely allow the use of prior bad act evidence to establish a likelihood that a person other than the defendant probably committed the crime. In these cases, this circumstantial use of prior bad act evidence was tied together for the jury through the arguments of defense counsel. It is thus difficult to see a valid objection to an expert's reliance upon such evidence to form the basis of an opinion that a person other than the defendant probably committed the crime, assuming that the expert's specialized knowledge in "tieing together" the circumstantial "prior bad acts" evidence is both reliable and helpful to the jury.

a) E.g., anal sex linked to rape; voyeurism (triolism); return to crime scene; use of hooded garment and other disguises; disguising or creating false identities on regular basis; threats to sacrifice to Satan. Argument is that these are specific behaviors, not "character traits" such as character for violence, for veracity, for being law-abiding. Also, not offered to establish "bad character," and therefore "bad person," and therefore "probably committed the crimes." This evidence is independently relevant to the behaviors displayed by the perpetrator of the charged offenses.

C. The OEC 702 foundation for Profiler's testimony

1. Specialized Knowledge.

a. Case law on use of expert testimony to establish modus operandi

State v. Woods, 6 Or App 311 (1971)(shoplifting case involving multiple defendants; expert testimony by police officer as to modus operandi of groups of shoplifters in distracting clerk while one or more of them accomplishes the theft was admissible to assist jury in determining whether defendant's seemingly harmless conduct might have been part of planned scheme).

At 314: Defendant concedes that the general rule is that expert testimony is admissible in a criminal trial when the criminal means are not likely to be understood by the jury. **100 ALR2d 1433 (1965)**; At page 315, Court cites with approval Wigmore, "But the only true criterion is : On *this subject* can a jury from *this person* receive appreciable help?" (emphasis original)

US v. Webb, 115 F3d 711 (9th Cir. 1997), held that (1)prejudicial effect of police expert's testimony regarding reasons people conceal weapons in engine

compartments of their cars did not substantially outweigh its probative value; (2) such expert testimony was not inadmissible on grounds of alleged similarity with drug courier profile evidence; (3) such expert testimony was not impermissible expert opinion on ultimate issue of whether defendant had known pistol was in engine compartment of his car; and (4) such expert testimony did not constitute scientific knowledge to which *Daubuert* standards for admission applied. [West Crim Law 338(7), 474.5] Testimony in felon in possession of firearm case, where defense was lack of knowledge of gun, expert testimony offered to establish that people typically conceal weapons in engine compartment of car for two reasons: so that they have ready access to gun, but police do not readily discover it; and so that they can disclaim knowledge of the weapon if police do discover it. 115 F3d at 713.

Majority opinion cites the *Johnson* rule (see at 720, below), and notes "In the drug cases, the testimony was necessary to inform the jury of the techniques employed by drug dealers in their illegal trade." at 714, and finds the testimony in the instant case to be analogous.

Regarding qualifications of the expert: 19 years in law enforcement, with training and experience in the way that guns are concealed in cars; talked to 50-60 jail inmates per day about how and why criminals conceal weapons (during a one-year stint of duty at jail). At 714.

At 720 (JENKINS, J., concurring in result): Recognizing two types of modus operandi evidence: "(1) evidence of an individual modus operandi, or "signature" evidence; and (2) evidence of a common modus operandi, shown by testimony as to 'the general practices of criminal,' which ostensibly 'helps the jury to understand complex criminal activities, and alerts it to the possibility that combinations of seemingly innocuous events may indicate criminal behavior.'" (citing *US v. Johnson*, 735 F2d 1200, 1202 (9th Cir. 1984)(emphasis supplied). "This court has approved of the use of expert testimony concerning a common modus operandi on a number of occasions. . . . Moreover, "In a series of cases, we have upheld admission of a law enforcement officer's expert testimony that the defendant's activities indicated that he acted in accordance with usual criminal modus operandi."

[Note, at page 721, discussion of cases in which officer's testimony admitted as lay opinion evidence, e.g., *US v. VonWillie*, 59 F3d 922, 929(9th Cir. 1995)(officer's testimony concerning the nexus between drug trafficking and weapons possession was rationally based on his perceptions during the search at Von Willie's residence and his perceptions during prior drug investigations, and helpful to the jury's determination of a fact in issue, i.e., whether Von Willie was involved in drug trafficking and whether he used a firearm in relation to a drug offense); *US v. Simas*, 937 F2d 459, 464-65 (9th Cir. 1991)(opinion of officer who testified as lay witness that the defendant's activities match 'the usual criminal modus operandi' is helpful to jury and admissible).]

Individual modus operandi: admissible under 404(b) to show identity, absence of mistake or accident, or to show knowledge or intent.

Common modus operandi cases: *US v. Gomez-Osorio*, 957 F2d 636, 641-42 (9th Cir. 1992)(admitting expert testimony that defendant's use of pagers indicated he was a money launderer); *US v. Jaramillo-Suarez*, 950 F2d 1378, 1384 (9th Cir. 1991)(expert testimony that pagers used frequently in drug trafficking was relevant

evidence); *US v. Stewart*, 770 F2d 825, 831 (9th Cir. 1985)(counter surveillance driving; *US v. Rogers*, 769 F2d 1418, 1425 (9th Cir. 1985)("[l]aw enforcement officers may testify concerning the techniques and methods used by criminals.").

US v. Alonso, 48 F3d 1536, 1541 (9th Cir. 1995)(reviewing cases and concluding that "[t]hese cases show that a district court may properly allow expert testimony from a law enforcement officer that will help the jury understand how otherwise innocent conduct . . . might in fact be consistent with or even indicative of criminal conduct").

US v. Patterson, 819 F2d 1495, 1507 (9th Cir. 1987)(expert testimony on the structure of criminal enterprises allowed to help the jury understand the a complex heroin distribution scheme and assess a defendant's involvement in it)

US v. Gil, 58 F3d 1414 (9th Cir. 1995)(expert testimony that drug traffickers often employ counter-surveillance driving techniques, register cars in others' names, deliver narcotics and cash in public parking lots, and frequently use pagers and public telephones)

At 721: **"The more complex the pattern of criminal behavior at issue, the more assistance it would seem an expert could offer in explaining the significance of particular elements of the pattern."**

At 718: Describing the testimony at issue as "specialized knowledge of human behavior patterns characteristic of" particular criminal activity. The concurring opinion notes that *Webb* is not a case "in which the expert explained the criminal purpose of seemingly innocuous acts."

Webb, majority opinion, 115 F3d at 715: says not profile evidence; not offered to demonstrate that Webb as guilty because he fit the characteristics of a certain drug-courier profile. Instead, admitted to assist the jury in understanding the reasons why a person would conceal a weapon in the engine compartment of a car. Also, expert described a typical situation, and never offered any opinion abut whether Webb knew the weapon was hidden in the car. [Note, FRE 704(b) prohibits expert opinion on ultimate issue of state of mind, whereas Oregon does not have a counterpart to this rule].

Also holds at 716 that the expert testimony in this case constitutes specialized knowledge of law enforcement, not scientific knowledge, so *Daubert* standards for admission do not apply.

US v. Cordoba, 104 F3d 225, 229 (9th Cir. 1997)(possession with intent to district cocaine; expert testimony that drug traffickers would not use unknowing transporters was admissible to show defendant's knowledge that he possessed narcotics)[No analysis, just cites to other drug cases where rule was applied].

2. Assist Trier of Fact.

The objective, deductive process of criminal profiling can help jurors understand the nature and quality of physical evidence, offender fantasy behavior and/or motivation, offender state of mind during the commission of the crime, and help link or

exclude cases by illuminating offender patterns in terms of Modus Operandi (MO) and Signature behavior.

The profiler identifies signature behaviors and MO behaviors, and interprets their meaning for the purpose of linking two separate crimes together as having been potentially committed by the same offender, or for the purpose of demonstrating how two crimes may be behaviorally different, indicating two separate offenders.

The profiling process at its best maximizes the potential of any existing physical evidence in seemingly motiveless cases involving criminal behavior of violent, aberrant, sexual and/or predatory nature. It further serves to illuminate physical evidence, and offender behavior, in a way that allows jurors to understand all of the available evidence in a case so as to arrive at a fully informed determination of guilt or innocence of the accused.

3. Reliability.

The Profiler's conclusions are opinions, not facts. These opinions must have reliability. If the opinions are not reliable, there is no probative value to this evidence. If there is no probative value, i.e., doesn't tend to prove anything of consequence, the evidence is not relevant. Evidence with no probative value is not admissible.

a. Reliability based on establishing the facts which form the basis of the opinion by admissible evidence.

b. Reliability based on widespread acceptance of the methodologies by law enforcement to investigate crimes.

c. Reliability based on empirical research of the methodologies.

D. The OEC 403 Objection

1. Prejudice vs. Probative Value of S.O.G.D.I. evidence

2. Does 403 apply to the defense?

IV. The Constitutional Right to Present a Defense.

A. State evidence codes cannot be applied mechanistically to defeat the right to present a defense.

The accused has a constitutional right under the Compulsory Process Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to present reliable, crucial evidence.

The Supreme Court of the United States has held that a defendant's right to present witnesses and offer evidence is a fundamental element of due process of law.

Washington v. Texas, 87 S.Ct. 1920, 1923 (1973). In *Washington*, the defendant was convicted of murder. He had a romantic relationship with a girlfriend, but the girlfriend's mother forbade her to see defendant. The girlfriend subsequently began to date another boy. Evidently motivated by jealousy, defendant and several other boys, including one named Fuller, arrived one evening at the girlfriend's house where the new boyfriend and the family were dining. The boys began to throw bricks at the windows of the house. When the family came to the porch to investigate, defendant and Fuller approached the house armed with a shotgun. The shotgun was fired by either defendant or Fuller, and the boyfriend was fatally wounded. *Id.* at 1921.

Defendant testified on his own behalf that Fuller had taken the shotgun from him, that defendant had unsuccessfully tried to dissuade Fuller from shooting, and that defendant had run back to the car before Fuller fired the fatal shot. Defendant sought to introduce the testimony of Fuller, who would have concurred with this story. However, under Texas law, coparticipants in the same crime could not testify for one another. Thus, the testimony was excluded and defendant was convicted. *Id.* at 1922.

The United States Supreme Court held that the right of an accused to have compulsory process for obtaining witnesses in his favor was a Sixth Amendment right that was applicable to the states via the Fourteenth Amendment:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so is may decide where the truth lies. Just as an accused had the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Id. at 1923. The Texas statute was therefore held unconstitutional and defendant's conviction reversed. *Id.; see Chambers v. Mississippi,* 93 S.Ct. 1038, 1045 (1973).

1. The Profiler testimony is reliable

2. The Profiler testimony is critical to presenting the defense theory

3. The government's interests in excluding the testimony is minimal.

The defense seeks to introduce evidence that tends to show the accused's innocence. The defense is not invoking a constitutional exclusionary rule to suprress the truth. Rather, the tables are turned, and it is the prosecution that is attempting to suppress the truth.

B. Rock v. Arkansas: testimony based on "novel" scientific methods

US v. Scheffer, 44 M.J. 442, 65 USLW 2438 (1996)(defendant asserted that exclusion of favorable polygraph evidence violated his Sixth Amendment right to present a defense; the evidence would have been used to rebut the attack on his credibility as a witness; court of appeals agreed; USSCt has accepted review)

At 445: The Sixth Amendment grants an accused the right to call witnesses in his favor. An accused's right to present testimony that is relevant and material may be

denied arbitrarily. The right to present evidence, however, is not unlimited but may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. When restrictions are placed on an accused's right to present evidence, they may not be arbitrary or disproportionate to the purposes they are designed to serve.

At 446: Citing to *Rock v. Arkansas*, 483 US 44, 107 SCt 2704 (1987)(holding that a per se rule excluding the defendant's hypnotically refreshed testimony infringed his right to present a defense)

C. Admissibility of Prior Bad Acts evidence

Case law from California has upheld admission of “all relevant evidence” against defense claim that prior bad acts evidence used to prove propensity to commit crime (i.e., evidence of bad character as circumstantial evidence of committing the bad conduct constituting the charged offense).