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

10
11 STATE OF OREGON,

12 Plaintiff,

13 -VS-

14 ROBERT SMITH,

15 Defendant

CASE No. 20-10-XXXX

MOTION IN LIMINE TO EXCLUDE "EXPERT"
OPINION ON CHILD SEXUAL ABUSE AND
SEXUAL OFFENDER ISSUES

16
17 COMES NOW the Defendant, ROBERT SMITH, by and through his undersigned
18 attorney, and hereby moves the Court for an Order instructing the District Attorney,
19 his representatives, and his witnesses to refrain absolutely from making any reference
20 whatsoever in person, by counsel or through witnesses or exhibits, to testimony or
21 any other evidence concerning the following:

- 22 (1) The "child sexual abuse" diagnosis, syndrome or profile, or behavioral
23 characteristics of child sexual abuse victims in general, including but not
24 limited to the following: how child sexual abuse victims typically respond
25

1 during interviews, medical examinations, therapy sessions, or as eye-
2 witnesses to the crime; and typical behaviors or reactions of children
3 who have been sexually abused, in other settings such as at home, at
4 school, at play;

5 (2) Opinions that the alleged victim displayed behavior or made statements
6 about the alleged sexual abuse in a way that is typical of children who
7 have been sexually abused, or otherwise demonstrated characteristics
8 consistent with those found in child sexual abuse victims;
9

10 (3) Opinions that the alleged victim was not coached into claiming the
11 abuse occurred, or was not coached into claiming that Mr. Smith was
12 the perpetrator, or did not seem suggestible based on her responses to
13 questions;

14 (4) Opinions that the alleged victim has not fantasized or fabricated the
15 allegations or misidentified the perpetrator;

16 (5) Opinions that the alleged victim, in describing the alleged abuse,
17 remained consistent in her statements; was clear and spontaneous in
18 disclosing the abuse; provided a lot of details; was developmentally
19 appropriate in expressing the alleged abuse; displayed appropriate affect
20 in relating the alleged abuse; or similar opinions offered in context as an
21 alternate means of opining that the victim is telling the truth about
22 sexual abuse.
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- 1 (6) Opinions that the alleged victim, in describing the alleged crimes, is
2 describing something which did in fact happen to her;
- 3 (7) Opinions that the alleged victim's delay in reporting the alleged sexual
4 abuse by Mr. Smith is consistent with having been sexually abused or
5 otherwise characteristic of child sex abuse victims;
- 6 (8) A medical diagnosis, "diagnostic findings" or opinion that the alleged
7 victim was sexually abused or possibly sexually abused, regardless of
8 whether the medical diagnosis, findings or opinion identifies Mr. Smith as
9 the perpetrator;
- 10
- 11 (9) The "sexual offender profile", or behavioral characteristics of sexual
12 offenders, or typical behaviors of sexual offenders, including but not
13 limited to conduct described as "grooming," and denial when confronted
14 with accusations of abuse;
- 15
- 16 (10) Opinions that Mr. Smith displayed behaviors or engaged in conduct that
17 is consistent with behavioral characteristics of sexual offenders or
18 typical behaviors of sexual offenders; and
- 19 (11) Any other direct or indirect comment on the credibility of the alleged
20 victim as a witness or hearsay declarant, other than as permitted by
21 OEC 608.
- 22

23 The defense so moves upon the grounds and for the reasons that this
24 evidence is inadmissible (1) because it is not relevant, OEC 401 & 402; (2) because it
25 is unreliable and speculative, OEC 403; (3) because it constitutes the use of specific

1 instances of conduct of a witness or hearsay declarant for the purpose of supporting
2 the credibility of the witness, OEC 608(2); (4) because it constitutes an
3 impermissible comment on the credibility of a witness; (5) because it is improper
4 character evidence, OEC 404 & 405; (5) because it is not proper opinion evidence
5 under OEC 701 & 702, (6) because it goes to matters of which the witnesses lack
6 personal knowledge, in violation of OEC 602; or, alternatively (7) that the prejudicial
7 effect of such evidence outweighs any probative value, and said evidence would tend
8 to confuse the issues and mislead the jury, and that ordinary objection in the course
9 of trial, even if sustained with corrective instructions to the jury, would not remove
10 the undue prejudicial impact of this evidence, in violation of OEC 403 and the
11 Fourteenth Amendment to the United States Constitution.
12

13 This motion is made in good faith and not for the purpose of delay. It is
14 supported by the points and authorities that follow, and such other points and
15 authorities as may be developed at oral argument on this motion. The defense
16 specifically reserves the right to request an evidentiary hearing should one be needed
17 to resolve this motion pretrial.
18
19
20

21 MOVED this _____ day of February, 2011.

22
23 _____
TERRI WOOD, OSB #88332
24 Attorney for Defendant
25

1 foundation must be laid to be admissible; and, even if admissible, such testimony may
2 be improper if offered as being diagnostic of sexual abuse. *State v. Perry*, 347 Or 110
3 (2009); see *State v. Lupoli*, 348 Or 346 (2010).

4 The objectionable evidence is unreliable. There is no profile of a child sex
5 abuse victim that distinguishes such children from non-abused children or from
6 children with other kinds of problems. There is no profile, or set of characteristics, of
7 a sex offender that reliably indicates a person who displays one or more of the
8 characteristics is likely to be a sex offender. *State v. Hansen*, 304 Or 169, 176
9 (1987). In the absence of physical evidence of abuse, as is the case here, there is no
10 known reliable method, through physiological or psychological testing, of determining
11 whether an alleged victim is fabricating or fantasizing a sexual experience, or has in
12 fact had a particular experience. See, *State v. Southard*, 347 Or 127 (2009).

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

17 The objectionable evidence relies on specific instances of conduct by the
18 alleged victims to support the credibility of the witness, by way of an opinion that
19 such conduct is "typical" of child sexual abuse victims, in violation of OEC 608(2).
20 Additionally, the Supreme Court has held that expert testimony along these lines,
21 including a "diagnostic impression of sex abuse" in a case with a normal physical
22 exam, constituted an impermissible comment on the credibility of a sex abuse victim.
23 *State v. Keller*, 315 Or 273 (1993); *State v. Lupoli*, 348 Or 346 (2010)(holding that
24 opinions concerning the child's description of the alleged sex abuse, offered as the
25

1 foundation for a diagnosis of sex abuse, constituted improper vouching). Thus, even
2 if the State could lay a *Brown* foundation, the opinion evidence would be inadmissible.

3 Even if the evidence has relevancy and is not viewed as commenting on or
4 vouching for the alleged victims' credibility, it should be excluded under OEC 403 or
5 the Due Process Clause of the Fourteenth Amendment to the United States
6 Constitution. *See State v. Hansen, supra*. This rule requires trial courts to evaluate
7 the degree to which the trier of fact may be overly impressed or prejudiced by a
8 perhaps misplaced aura of reliability or validity of the evidence, thereby leading the
9 trier of fact to abdicate its role of critical assessment. *See, State v. Brown, supra;*
10 *State v. Southard, supra*.

12 Finally, introduction of such evidence at trial could descend into a time-
13 consuming and confusing battle of experts. *Id.* If the State is allowed to present
14 expert testimony on this issue, Due Process requires that the defense be allowed to
15 present experts holding the opposite view.
16

17 18 **2. Relevancy**

19 "Relevant evidence" means evidence having any tendency to make the
20 existence of any fact that is of consequence to the determination of the action more
21 probable or less probable than it would be without the evidence. OEC 401.
22

23 In *State v. Milbradt*, 305 Or 621 (1988), the Supreme Court said that evidence
24 of "how normal children usually react to sexual abuse," or "sex abuse syndrome,"
25 required a *Brown* foundation before it was admissible:

1 In *State v. Middleton* , this court allowed in testimony
2 concerning normal reactions to abuse but did so before we
3 decided *State v. Brown*. We have set out in great detail in
4 *Brown*, 297 Or at 409-18, the necessary foundation that
5 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*.

* * * *

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

9 *Brown* defined "[t]he term 'scientific' as we use it in this opinion [as] evidence
10 that draws its convincing force from some principle of science, mathematics and the
11 like. Typically, but not necessarily, scientific evidence is presented by an expert
12 witness who can explain data or tests results" 297 Or at 407. *O'Key* extends
13 the definition of scientific evidence to "proffered expert scientific testimony that a
14 court finds possesses significantly increased potential to influence the trier of fact as
15 'scientific assertions'." 321 Or at 293. In other words, the court must look to
16 whether jurors are likely to perceive the evidence as being "scientific," regardless of
17 whether scientists would categorize the evidence as such.

18
19 More recently, in *State v. Marrington, supra*, the Supreme Court held that
20 testimony by a psychologist that delayed reporting is a typical characteristic of
21 sexually abused children was inadmissible in the absence of a *Brown* foundation:

22
23 [T]his court has made it clear that expert testimony
24 concerning matters within the sphere of the behavioral
25 sciences possesses the increased potential to influence the
trier of fact as scientific assertions, just as expert testimony
dealing with the "hard" sciences does. . . . An expert like
Shouse, who has a background in behavioral sciences and

1 who claims that her knowledge is based on studies,
2 research, and the literature in the field, announces to the
3 factfinder that the basis of her testimony is "scientific," *i.e.*,
4 is grounded on conclusions that have been reached through
5 application of a scientific method to collected data. Because
6 that is how the factfinder would understand it, a court has a
7 duty to ensure that such information possesses the
8 necessary indices of scientific validity. As the proponent of
9 Shouse's testimony regarding delayed reporting as a
10 predominant feature of child sexual abuse, the state had the
11 obligation to show that that asserted rule of behavior was
12 scientifically valid under the standards established in *Brown*
13 and *O'Key*. The trial court erred in not requiring the state to
14 make that showing. 355 Or at ____.

9 In *State v. Perry, supra*, the Court reaffirmed such testimony is expert opinion subject
10 to a *Brown/O'Key* foundation. *Perry* specifically noted that even if the foundation is
11 met, such evidence may be objectionable if offered as being diagnostic of sexual
12 abuse, rather than to rebut a defense claim of fabrication. 347 Or at 117-118.

14 The Court of Appeals has provided additional guidance on what constitutes
15 evidence subject to a *Brown* foundation. In *State v. Lawson*, 127 Or App 392
16 (1994), a case where the defense sought to introduce expert testimony that the
17 defendant did not match a "sex offender profile," the court explained:

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

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

1 The state has not argued that the testimony to which
2 defendant objected was admissible on any other ground than
3 to explain the student's initial denial. The only other possible
4 ground would be as evidence that defendant had sexual
5 relations with the student. But the relevance of the
6 testimony for this purpose is practically nil. Detective Robson
7 testified to what might be described as a "profile" of a
8 nonviolent child abuser who is unrelated to the child: physical
9 and psychological "testing" of the child, giving gifts, showing
10 affection, praising, making the child feel comfortable in the
11 abuser's presence, etc. That child abusers use these
12 techniques has no bearing on whether a person who does
13 these things is a child abuser. For example, it is probably
14 accurate to say that the vast majority of persons who abuse
15 children sexually are male. This says little, if anything,
16 however, about whether a particular male defendant has
17 sexually abused a child. See [State v. Petrich, 101 Wash.2d
18 566, 683 P.2d 173, 180 \(1984\)](#) (potential for prejudice
19 outweighed probative value of expert testimony that 85-
20 90% of child molesters know their victims, where defendant
21 was alleged victim's grandfather); see also [McCord, Expert
22 Psychological Testimony about Child Complainants in Sexual
23 Abuse Prosecutions, 77 J Crim L & Criminology 1, 17 n 105
24 \(1986\)](#) (citing cases).

15 Thus, the evidence at issue herein requires the State to meet the *Brown-O'Key*
16 foundation as a predicate to its admissibility. The defense moves the Court to make
17 that determination pretrial, before the prosecution comments on that evidence during
18 voir dire or opening statement. *Brown* requires the court to analyze the probative
19 value of the evidence, which requires that the evidence be "reasonably reliable," and
20 to weigh the probative value and the helpfulness of the evidence to the jury under
21 OEC 702, against the prejudicial effect of the evidence. The factors the court is to
22 consider in making this analysis are set forth at 297 Or at 417-418, and at 321 Or at
23 306. These factors were summarized by the court in *Sanchez-Cruz, supra*:
24
25

1 In *Brown*, the court set out a list of seven factors that
2 courts are to consider in assessing the reliability of scientific
evidence. Those factors are:

- 3 '(1) The technique's general acceptance in the field;
4 (2) The expert's qualifications and stature;
5 (3) The use which has been made of the technique;
6 (4) The potential rate of error;
7 (5) The existence of specialized literature;
8 (6) The novelty of the invention; and
9 (7) The extent to which the technique relies on the
subjective interpretation of the expert.'

10 *Brown*, 297 Or. at 417, 687 P.2d 751. The court explained
11 that '[t]he existence or nonexistence of these factors may
12 all enter into the court's final decision on admissibility of the
13 novel scientific evidence, but need not necessarily do so.
14 What is important is not lockstep affirmative findings as to
15 each factor, but analysis of each factor by the court in
16 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.

17 3. Credibility

18
19 Oregon courts have repeatedly held that a trial witness cannot give an opinion
20 on the credibility of another trial witness. *State v. Keller*, 315 Or 273, 284-85
21 (1993)(pediatrician's opinion); *State v. Odoms*, 313 Or 76, 82 (1992); *State v.*
22 *Milbradt*, 305 Or 621, 629-30 (1988)(psychotherapist opinion); *State v. Middleton*,
23 294 Or 427, 438 (1983). *Middleton* held that "a witness, expert or otherwise, may
24
25

1 not give an opinion on whether he believes a witness is telling the truth." 294 Or at
2 438. *Keller* adds:

3 [T]his rule applies whether the witness is testifying about
4 the credibility of the other witness in relation to the latter's
5 testimony at trial or is testifying about the credibility of the
6 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).

7 Furthermore, the rule broadly applies to direct and indirect comments on witness
8 credibility. *Milbradt*, 305 Or at 630 (opinions that a person is not deceptive, could
9 not lie without being tripped up, was very trusting and vulnerable and so would not
10 betray a friend—the defendant—were comments on witness credibility).

11 The objectionable testimony in *Milbradt* came from a psychologist who
12 interviewed the alleged victims in a sex abuse case, who were adults but severely
13 mentally retarded. He testified for the State that he found no evidence of deception
14 and that what they reported about the sex abuse represented their experience. 305
15 Or at 625. The Supreme Court quoted at length from the trial testimony, and it is
16 instructive to scrutinize what the Court found to be reversible error:
17

18 Q. (By Prosecutor) Doctor, you have indicated that part of
19 your training as a psychologist is to be a trained observer, is
20 that correct?

21 A. That is correct.

22 Q. Have you in your training and education as a
23 psychologist found there to be certain indicators of
deception?

24 A. Certainly
25

1 Q. Were you able to arrive at opinions or observations in
2 that regard with respect to [one of the victims]?

3 A. Yes, I was.

4 Q. And what was that based on?

5 A. Based on her demeanor, on how she answered questions,
6 the content of her answers. I could go into her spontaneity,
7 among other things. She was spontaneous with freshness in
8 answering the questions.

9 * * * *

10 Q. To what extent did you see evidence, or indicators of
11 deception?

12 A. I did not. She seemed to take every question and answer
13 it as she was, answer spontaneously on the moment with no
14 indication of hesitation, or figuring out what the best answer
15 might be. You know, she would just blurt things out, which
16 is unpremeditated response. So, kind of a very fresh and
17 spontaneous approach to me.

18 * * * *

19 A. Again, I find her condition of her mental defect as
20 directly related to rendering her unsophisticated to either
21 plan a systematic or motivated deception, or carry it
22 through. She was so spontaneous if she, this is my opinion,
23 if she lied, that she would trip herself up five minutes later,
24 you know. 305 Or at 626-27.

25 The trial judge in *Milbradt* gave a long cautionary instruction to the jury,
making, among other points, that "the answer given by the witness related to the
capacity of either one of these victims of manufacturing a story. . . . You people are
the one who have to make the determination of whether or not either one of these
victims have fabricated a story with respect to defendant," 305 Or at 627. The
Supreme Court held that the testimony should have been disallowed altogether.

1 Unless the function of the jury is to find the truth, its role is
2 devoid of substance. Often the jury can meet this
3 obligation only by determining the credibility of witnesses.
4 The jury system with all its imperfections, has served
5 society well. It has not been demonstrated that the art of
6 psychiatry has yet developed into a science so exact as to
7 warrant such a basis intrusion into the jury process. 305 Or
8 at 629 n.3 (citation omitted).

9 In *Keller*, the Supreme Court found objectionable as a comment on credibility,
10 testimony by pediatrician Dr. Jan Bays of her diagnostic impression that the child was
11 sexually abused, that there was no evidence of leading or coaching or fantasizing
12 during the child's interview, and that the child had given a clear history of sexual
13 touching which had happened to her own body. 315 Or at 278-79, 285. Dr. Bays
14 also testified about the types of behavioral evidence on which she normally relied to
15 determine whether a child had been coached: A "rote" style of recitation by a child, a
16 child's ability to supply "peripheral" details of the alleged incident, a child's tendency
17 to correct the interviewer about the facts, and various emotional responses by a
18 child, concluding that in this case the victim's interview showed she was
19 "remembering what happened." Each of those statements amounts to testimony
20 that the child was credible. *Id.*

21 Defense counsel in *Keller* objected to the testimony both on grounds of it
22 being a comment on credibility and because of lack of foundation under *Brown*, as
23 required by *Milbradt*. 315 Or at 279-82. The Supreme Court did not reach the *Brown*
24 issue. Thus, it is clear that even if the contested testimony met the *Brown* test, it
25 would be inadmissible. *Cf., State v. Sanchez-Cruz, supra*, 177 Or App at 334 n.2
(finding State had met *Brown* foundation for admission of doctor's diagnosis of "child

1 sex abuse” but noting defendant had not argued on appeal the doctor’s diagnosis
2 constituted an impermissible comment on the credibility of the victim); *see, Snowden*
3 *v. Singletary*, 135 F3d 732 (11th Cir. 1998), *cert den.*, 119 S.Ct. 405
4 (1998)(constitutional error for state judge to allow expert to testify that 99.5% of
5 children tell the truth about sexual abuse; improper for witness to testify about
6 credibility of other witnesses).

7
8 In *State v. Lupoli*, 348 Or 346 (2010)(*en banc*), the Court held that health
9 care professionals’ testimony explaining how the children’s statements and demeanor
10 were diagnostic of sexual abuse constituted improper vouching on the credibility of
11 the child victims. Among the statements at issue were the following, 348 OR at 353-
12 356:

13 “Her disclosures * * * were very clear and spontaneous. They
14 were appropriate for the age that she was. They didn't sound
15 rehearsed, they sounded like things she just said.”

16 “She was consistent. She had said the same type of thing
17 before to her parents, I guess.”

18 “[T]he manner in which [SM] told her story was pretty
19 compelling. She just had a real clear change in her demeanor.”

20 “[J]ust the way she told her story was very compelling, and
21 that just makes it-it just was-it had an effect.”

22 She saw multiple instances of “idiosyncratic detail” in SM's
23 statements, described as “spontaneous detail that you wouldn't
24 otherwise get, * * * things that if you were making up a story,
25 you might not put that kind of detail in it.”

“There was a lot of little details that were involved in the way
the story was told. * * * I mean it was really quite
descriptive.”

1 “We look to make sure that the child's statements are
2 developmentally appropriate. It would be very worrisome or
3 concerning * * * if I had a child who at five was using
4 terminology or expressing things with phrases that would not
5 be expected to come from a five-year-old. * * * [SO] seemed
6 developmentally appropriate to me[.]”

7 “In general, [peripheral details are] one of the things that's
8 important in the sense that the child can give as much detail
9 about the entire reported or alleged incident as possible. * * *
10 [SO] was very clear-cut in telling us [details].”

11 “For a five-year-old child, she actually seemed to be very
12 appropriate. She did not seem to be overly anxious, overly
13 timid, overly afraid.”

14 “It was the fact that she had options or opportunities to
15 perhaps change her history or say that she had been touched
16 in other places, and she remained fairly consistent—not fairly,
17 she remained consistent in where she was touched.”

18 She relied on the absence of “risk factors,” *i.e.*, ways in which
19 a child would gain “inappropriate sexual knowledge,” such as
20 exposure to adult pornography.

21 “I did not find her, you know, very suggestible. She answered
22 ‘no’ to a lot of questions. She kind of corrected herself at one
23 point. She didn't appear that suggestible to me.”

24 The defendant there did not renew his objections to the diagnosis of sex abuse on
25 appeal, so the Court was faced with determining the admissibility of testimony
describing indicia of truthfulness from child witnesses. 348 Or at 357. The Court
found that in the context of the trial—where the testimony was offered as the basis
of the expert’s diagnosis—and taken as a whole, the testimony was impermissible
vouching. *Id.*, at 361-362.

1 The Supreme Court cautioned that “discrete portions” of the objectionable
2 testimony “might be admissible in many circumstances, and perhaps even in this
3 case.” 348 Or at 362. Notwithstanding that dicta, Mr. Smith contends that jurors are
4 perfectly capable of determining on their own, by listening to the child and by
5 watching the videotaped interview, whether the child appears spontaneous in her
6 disclosures, provides a lot of detail, appeared suggestible or rehearsed, remained
7 consistent in her account of abuse, etc. Those are matters for argument by counsel,
8 not for expert opinions. *See, State v. Southard*, 347 Or 127, 140 (2009)(“while the
9 staff at the KIDS Center are experienced professionals, the criteria that the staff used
10 to decide whether to credit the boy's testimony are essentially the same criteria that
11 we expect juries to use every day in courts across this state to decide whether
12 witnesses are credible.”).

14 The risk is too great that such testimony from experts will cause jurors to
15 “defer to the expert's implicit conclusion that the victim's reports of abuse are
16 credible.” *Southard*, at 141. That risk is created when professional are allowed to
17 testify to a litany of factors used in “assess child abuse,” which is simply another way
18 of saying assess the truthfulness of the child’s disclosure.

20 **4. Prejudice**

21 Oregon Rule of Evidence 403 provides that:

22
23 "Although relevant, evidence may be excluded if its probative
24 value is substantially outweighed by the danger of unfair
25 prejudice, confusion of the issues, or misleading the jury, or by
considerations of undue delay or needless presentation of
cumulative evidence."

1 In *State v. Brown, supra*, the Court found that "under proper conditions
2 polygraph evidence may possess some probative value and may, in some case, be
3 helpful to the trier of fact." 297 Or at 438. The Court then turned to the OEC 403
4 analysis, upon which ground it held the evidence to be inadmissible. The *Brown* court
5 itself drew an analogy between polygraph evidence and the "psychological" type
6 evidence at issue here, and so proves more instructive than the majority of 403
7 cases which deal with other crimes or bad acts:
8

9 The nature of the polygraph examination is closer to a
10 psychiatric evaluation than to objective scientific analysis such
11 as fingerprints and ballistics. The polygraph technique is heavily
12 dependent on the subjective evaluation of the expert both in the
13 administration of the test and in reaching the result. 297 Or at
14 438.

15 OEC 403 "requires trial courts . . . to evaluate the degree to which the trier of
16 fact may be overly impressed or prejudiced by a perhaps misplaced aura of reliability
17 or validity of the evidence, thereby leading the trier of fact to abdicate its role of
18 critical assessment." 297 Or at 439.

19 Testimony from professionals that the alleged victims acted in ways consistent
20 with a sexual abuse victim may "assume a posture of mystic infallibility in the eyes of
21 a jury," *Brown, supra*, 297 Or at 440. This is particularly so when the professional,
22 who has impressive academic credentials and/or clinical experience, tells the jury he
23 or she has had contact with "hundreds" of sexual abuse victims, or specializes in sex
24 abuse cases or in interviewing sexual abuse victims.

25 The *Brown* Court also looked at the "time-consuming and confusing battle of
[the] experts," under its 403 analysis, 297 Or at 441, and concluded, "[a]lthough

1 not in any sense determinative, these concerns are relevant to the issue whether
2 evidence of questionable value is outweighed by 'consideration of undue delay' as set
3 forth in OEC 403." There is no consensus of the experts on the characteristics or
4 behaviors of sexual abuse victims or sex offenders; the battlefield lies waiting. *See,*
5 *State v. Warren*, 224 Or App 204, 213 (2008).
6

7 8 **5. Medical diagnosis or diagnostic findings of child sexual abuse.**

9 In *State v. Trager*, 158 Or App 399 (1999), the Court of Appeals held that a
10 medical diagnosis of child sex abuse by a CARES physician was not "scientific
11 evidence" subject to a *Brown* foundation. In *State v. Sanchez-Cruz*, 177 Or App 332
12 (2000), the Court of Appeals held the opposite, and found that the State had met
13 the foundational requirement by a CARES physician giving similar testimony. *State v.*
14 *Marrington, supra*, should remove any doubt that a physician's diagnosis, findings or
15 medical opinions must survive a threshold reliability determination by the trial judge.
16

17 In the case at bar, *State v. Southard, supra*, controls. *Southard* held that a
18 diagnosis of child sex abuse—even though scientifically valid—is inadmissible when
19 based on the child's report and demeanor, in the absence of physical evidence of
20 abuse, because its prejudice outweighs its probative value under Rule 402.
21

22 23 **6. Expert testimony about "grooming."**

24 In *State v. Stafford*, 157 Or App 445 (1998)(*en banc*), *rev. den.* 329 Or 358
25 (1999), the Court of Appeals held that testimony concerning "grooming" behavior by

1 child sex offenders, by a clinical psychologist who specialized in treating sex
2 offenders, was not “scientific” evidence” requiring a *Brown* foundation. The defense
3 submits that *Stafford’s* holding is no longer good law, in light of *State v. Marrington*,
4 *supra*, which held that a psychologist’s expert testimony concerning delayed
5 reporting by child sexual abuse victims was scientific evidence. The experts’ opinions
6 in both cases were based upon their clinical experience, as well as their professional
7 education and training in their respective fields. See also, *State v. Borck*, 230 Or App
8 619, 635 n.10 (2009)(noting that the foundational requirements for “grooming”
9 evidence are hotly contested and an open issue, with the Court of Appeals divided on
10 the issue).
11

12
13 RESPECTFULLY SUBMITTED this _____ day of February, 2011.

14
15 _____
16 TERRI WOOD, OSB 88332
17 ATTORNEY FOR DEFENDANT
18

19 CERTIFICATE OF SERVICE

20 I hereby certify that I have made service of the foregoing MOTION IN LIMINE, by
21 causing to be hand-delivered on February 28, 2011, a true, full and exact copy thereof
22 to the Lane County District Attorney Office, 125 E. 8th Ave., Eugene, Oregon, 97401,
23 attorney for plaintiff.
24

25 _____
TERRI WOOD, OSB #88332