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

10
11 STATE OF OREGON,
12 Plaintiff,

13 -VS-

14 AA.,
15 Defendant.

CASE No. 13C4XXXX

MOTION IN LIMINE, ALTERNATIVE
MOTION FOR RELIEF AND
REQUEST FOR JUDICIAL NOTICE
(Evidentiary Hearing Requested)

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18 COMES NOW the Defendant, AA, by and through his undersigned attorney, and
19 hereby moves the Court for an Order instructing the District Attorney, his
20 representatives, and his witnesses to refrain absolutely from making any reference
21 whatsoever, through counsel's statements before the jury, or through witness
22 testimony, exhibits, or any other evidence, concerning the following alleged matters:
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1 1. Statements by the child complainant, JS, the alleged eyewitness, that
2 Defendant , is the person who committed the acts of sexual conduct against her;
3 and/or alternatively,

4 2. Statements by JS describing the alleged acts of sexual conduct committed
5 against her by Defendant.

6 The Defense moves to exclude these statements, further detailed to some
7 extent in police reports and handwritten notes provided in discovery, attached hereto
8 as exhibits to be filed under seal and incorporated by reference, for lack of personal
9 knowledge, OEC 602; as improper lay opinion, OEC 701; and therefore irrelevant, OEC
10 401, or if relevant, unduly prejudicial, OEC 403. *See State v. Lawson*, 352 Or 724
11 (2012).
12

13 As a less-favored alternative, should the Court find these matters admissible,
14 the Defendant moves the Court to fashion intermediate remedies, including but not
15 limited to admitting expert testimony on the fallibility of child memory and recognized
16 sources of memory contamination, including exposure to suggestive or biased adult
17 interviewers, and giving special jury instructions on the factors that may contaminate
18 eyewitness testimony.
19

20 The defense also requests the Court, pursuant to OEC 201, to take judicial
21 notice of the studies on the reliability of eyewitness testimony that were noticed by
22 the Oregon Supreme Court in *State v. Lawson*, 352 Or 724 (2012), for purposes of
23 deciding this motion in limine and determining, if necessary, whether to give special
24 jury instructions on evaluating eyewitness testimony. A copy of *Lawson* is attached as
25

1 an exhibit to this motion, and incorporated by reference herein. The defense
2 specifically reserves the right to submit additional summaries of scientific studies
3 regarding the reliability of child eyewitnesses for purposes of judicial notice by way of
4 supplemental filings and through expert testimony at hearing on this motion.

5 This motion is well-founded in law, and not made for the purpose of delay. It is
6 supported by the authorities below and by such other grounds and authorities as may
7 be offered in reply to the State's response to this motion, or at hearing on this
8 motion.
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10 DATED: December 16, 2013.

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12 _____
13 TERRI WOOD, OSB #88332
14 ATTORNEY FOR DEFENDANT

15 **POINTS AND AUTHORITIES**

16 **I. Factual Basis.**

17 The following information is taken from the police reports submitted as exhibits
18 under seal to this motion. By summarizing this hearsay as the "factual basis," the
19 Defense is not acknowledging the information is reliable, complete or accurate. Rather,
20 these are simply the alleged facts from the reports and all that is currently known as
21 to these matters by the Defense. The Defense will be seeking additional discovery, and
22 has requested an evidentiary hearing on this motion, so that an adequate factual basis
23 exists for the Court to make an informed ruling.
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1 A summary of the alleged facts from the police records are as follows:

2 XXXXXXXXXXXXXXXXXXXXX

3 **II. *State v. Lawson: New Standards for Admissibility of All Memory-***
4 ***Based Evidence, Not Just Eyewitness Identification Evidence.***

5 Because of the alterations to memory that suggestiveness can cause,
6 it is incumbent on courts and law enforcement personnel to treat
7 eyewitness memory just as carefully as they would other forms of
8 trace evidence, like DNA, bloodstains, or fingerprints, the evidentiary
9 value of which can be impaired or destroyed by contamination. Like
10 those forms of evidence, *once contaminated, a witness's original*
11 *memory is very difficult to retrieve; it is, however, only the original*
12 *memory that has any forensic or evidentiary value.*

13 *State v. Lawson*, 352 Or 724, 748 (2012)(emphasis supplied).

14 The Oregon Supreme Court, *en banc*, recently issued a landmark decision on
15 the legal standards for determining admissibility of eyewitness testimony in *Lawson*,
16 *supra*. Although the facts of *Lawson* dealt with the discrete evidentiary class of
17 eyewitness identification testimony, its holding governs determination of admissibility
18 of all memory-based evidence when put to challenge.

19 Why? First because *Lawson* relied on Oregon Evidence Code provisions to
20 determine admissibility, and specifically rejected the former test that had been
21 adopted specifically for eyewitness identification testimony. *Lawson* reasserts the
22 fundamental principle that the admissibility of all testimony is anchored in the rules of
23 evidence where: (1) reliability is the linchpin that determines admissibility; (2) the
24 proponent bears the initial burden of establishing admissibility; and (3) the opponent
25 may challenge otherwise admissible evidence that is unfairly prejudicial or misleading.
Lawson at 747, 751 (“Although none of the OEC’s provisions pertain specifically to
eyewitness identification evidence . . . those rules nevertheless articulate minimum

1 standards of reliability intended to apply broadly to many types of evidence.”). The
2 Court warned that “Trial court[s] tasked with considering a question of evidentiary
3 admissibility clearly cannot begin by assuming admissibility,” *id.*, at 747.

4 Second, *Lawson* logically extends to all memory-based evidence because many
5 of the scientific studies the Court relied on to reject the old methodology for
6 admitting identification testimony concern the failings of eyewitness testimony about
7 events, rather than recognition of individuals:

8
9 Based on our extensive review of the current scientific research and
10 literature, we conclude that the scientific knowledge and empirical
11 research concerning eyewitness perception and memory has
12 progressed sufficiently to warrant taking judicial notice of the data
13 contained in those various sources as legislative facts that we may
consult for assistance in determining the effectiveness of our
existing test for the admission of eyewitness identification
evidence. *Lawson*, 352 Or at 740.

14 The Court summarized the research as it related to suggestive questioning and
15 other sources of post-event memory contamination, concluding:

16 The way in which eyewitnesses are questioned or converse about an
17 event can alter their memory of the event. The use of suggestive
18 wording and leading questions tend to result in answers that more
19 closely fit the expectation embedded in the question. Witness
20 memory can become contaminated by external information or
assumptions embedded in questions or otherwise communicated to
the witness. *Id.*, at 724.

21 The same field of research that the Supreme Court relied on in *Lawson* helped
22 inform the Oregon Interviewing Guidelines that the Marion County Child Abuse
23 Protocols recognize as the model to be followed in cases such as this. See, e.g.,
24 Oregon Interviewing Guidelines (2012), page 40 (“Children are socialized to please
25

1 adults and avoid challenging or correcting them.”); page 9 (“Even supportive adults
2 can intentionally or unintentionally coach or nonverbally cue a child, thereby
3 contaminating the interview”).

4 Third, the memory-based evidence challenged in the case at bar is of greater
5 importance than a typical claim of misidentification in a case, such as robbery or
6 murder, where there is independent proof that the crime actually occurred. *See also,*
7 *e.g., State v. Sewell*, 257 Or App 462, 467 (2013)(recognizing trial court’s finding
8 that the alleged victim’s credibility in sex abuse case was the determinative factor in
9 the outcome of the case, when defense challenged her memory that the abuse
10 occurred after she turned 18, rather than earlier).

12 Fourth, like misidentifications, there is reliable research showing a significant
13 number of false convictions for child sexual abuse based on contaminated child
14 eyewitness testimony. According to the National Registry of Exonerations, maintained
15 by the University of Michigan law school, nearly 12% of all exonerations were for child
16 sexual abuse convictions, and the majority of those false accusations followed
17 suggestive interviews or pressure from relatives, police officers or therapists. These
18 statistics do not include the number of false convictions which are thought to be
19 much higher. Exonerations in the United States, 1989-2012, Report by the National
20 Registry of Exonerations, pages 17-20, 40-52, available at
21 <https://www.law.umich.edu/special/exoneration/Pages/learnmore.aspx>, (last
22 accessed 12/14/2013). Mistaken eyewitness identifications of the perpetrator
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1 occurred in 26% of child sex abuse exoneration cases, and the majority of those
2 involved confabulated crimes. *Id.*, at 52.

3 Fifth, a young child’s memory of abuse and identification of the perpetrator of
4 that abuse is as resistant to the ordinary tests of the adversary system—cross-
5 examination and the common sense of jurors—as tainted eyewitness identifications.
6 Most people believe that a young child lacks the knowledge or ability to make up a
7 detailed story of sexual abuse, and would not falsely accuse a close family member.
8 However, there is strong science demonstrating that suggestive questioning of a child
9 early on can contaminate the child’s memories and result in an ongoing false belief.
10 See research summarized in Oregon Interviewing Guidelines, “Memory And
11 Suggestibility,” pp. 141-152 (Second Edition 2004). Interviewer bias where value
12 judgments were placed on the child’s report, e.g., “He shouldn’t have done that,” or
13 “People who touch kids should be put in jail” may lead to false accusations. *Id.*, pp.
14 37-38. The genuine but false belief is unlikely to be undone by cross-examination, as
15 noted by *Lawson*. Studies show that even trained forensic, mental health and child
16 development professionals cannot reliably discriminate between children whose
17 reports are accurate from those whose reports are inaccurate as a result of
18 contamination. 2004 Guidelines, *supra*, p. 40. Jurors cannot be presumed to do
19 better.
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23 **III. The *Lawson* Hearing Framework That Applies To All Challenged 24 Memory-Based Testimony.**

25 In *Lawson*, the Court rejected the long-standing *Classen* methodology for
deciding pretrial motions to suppress eyewitness identification, finding it “inadequate

1 to ensure that unreliable evidence will be excluded.” 352 Or at 746-748. The Court
2 then turned to the Oregon Evidence Code sections 602 (personal knowledge
3 requirement), 701 (lay opinion testimony), and 401-403 (relevancy, and exclusion of
4 relevant evidence for undue prejudice), to craft a new framework. *Id.*, at 749-758.
5

6 A. OEC 401, Relevance

7 Evidence is relevant if it has “any tendency to make the existence of any fact
8 that is of consequence to the determination of the action more probable or less
9 probable than it would be without the evidence.” Eyewitness identification evidence
10 will almost always meet that basic standard. *Lawson* at 752. The same is likely of all
11 eyewitness testimony concerning facts about an alleged crime observed by the
12 witness.
13

14 B. OEC 602, Witness’ Personal Knowledge

15 “[A] witness may not testify to a matter unless evidence is introduced
16 sufficient to support a finding that the witness has personal knowledge of the
17 matter.” OEC 602. The Court explained that OEC 602 was pertinent because:
18

19 Although perhaps somewhat counter-intuitive, inquiring into the extent
20 of an eyewitness's personal knowledge—when raised as an issue in a
21 case—promotes the reliability of eyewitness evidence just as with any
22 other type of evidence. Indeed, many of the reliability concerns
23 surrounding eyewitness identification evidence stems from the basic
24 premise that eyewitness testimony can be led or prompted by
25 suggestive identification procedures, suggestive questioning, and/or
memory contamination from other sources.

Lawson at 753.

24 The State has the burden of proof by a preponderance of the evidence, and
25 “must offer evidence showing both that the witness had an adequate opportunity to

1 observe or otherwise personally perceive the facts to which the witness will testify,
2 and did, in fact, observe or perceive them, thereby gaining personal knowledge of the
3 facts.” Id.

4 In a case such as Defendant’s, where there are no independent eyewitnesses
5 and no forensic evidence to corroborate that the alleged crimes occurred, there are
6 at least two additional possibilities beyond the one favored by the State (that he did
7 what JS allegedly said he did). One is that she has been subjected to the type of
8 sexual contact she described but has misidentified the perpetrator. The other is that
9 she has been exposed to the type of sexual conduct she describes through
10 pornography or other sources in her environment, and has incorporated that
11 knowledge into a conscious or unconscious confabulation. Memory contamination
12 would account for either of those two possibilities, and either of those would render
13 the possibility favored by the State unreliable.
14

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16 C. OEC 701, Rational Basis for Witness Perception When Offered as Lay Opinion

17 A challenge to eyewitness testimony based on OEC 701 incorporates the
18 personal knowledge requirement; i.e., it must be “rationally based on the perception
19 of the witness”. Id. Additionally the rule requires that the testimony be “helpful to a
20 clear understanding of the testimony of the witness or the determination of a fact in
21 issue.” *Lawson* at 754-755. “OEC 701 permits lay opinion testimony to be admitted
22 only when the opinion communicates more to the jury than the sum of the witness’s
23 describable perceptions.” Id. at 756.
24
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1 The Court explained that when a witness's perceptions are capable of
2 supporting an inference of identification, but there is competing evidence of an
3 impermissible basis for that inference, such as suggestive interviewing procedures, an
4 issue of fact arises. *Id.* at 755.

5 [A]lthough a defendant may choose to present evidence of particular
6 suggestive influences, the burden ultimately rests on the proponent of the evidence
7 (generally the state) to prove that the identification was rationally based on the
8 witness's perceptions." *Lawson* at 754.

9
10 "[T]he trial court need only ascertain whether it was more likely that the
11 witness's identification was based on his or her own perceptions than on any other
12 source." *Id.*, at 755-756. In Defendant's case, the Court must find from the State's
13 proof that it is more likely that JS's description of the sexual abuse and identification
14 of him as the perpetrator are based on her own perceptions rather than any other
15 source.

16
17 D. Once Foundation is Met, Defense May Challenge Under OEC 403

18 If the State is able to make the showing under OEC 602 and 701, such that
19 the eyewitness testimony meets the threshold reliability test for admissibility, the
20 defendant assumes the burden of proving that OEC 403 requires its exclusion. OEC
21 403 allows the court to exclude evidence "if its probative value is substantially
22 outweighed by the danger of unfair prejudice, confusion of the issues, or misleading
23 the jury, or by considerations of undue delay or needless presentation of cumulative
24 evidence."
25

1 Probative value “is essentially a measure of the persuasiveness that attaches
2 to a piece of evidence.” *Lawson* at 758. The more reasons to doubt the reliability of
3 testimony that has met the “minimum baseline of reliability” for admissibility, the
4 lower the probative value. “Probative value is not an all-or-nothing proposition.” *Id.*

5 Unfair prejudice “describes a situation in which the preferences of the trier of
6 fact are affected by reasons essentially unrelated to the persuasive power of the
7 evidence to establish a fact of consequence.” *Id.* For example, eyewitness
8 identifications where the witness was exposed to suggestive police procedures raise
9 concerns of unfair prejudice because “ ‘traditional’ methods of testing reliability—like
10 cross-examination—can be ineffective at discrediting unreliable or inaccurate
11 eyewitness identification evidence.” *Id.* Unfair prejudice may also occur with
12 emotionally-charged evidence likely to evoke societal misgivings or even outrage
13 against a defendant. *See, e.g. Sewell, supra*, 257 Or App at 469-471 (discussing
14 exclusion of complainant’s testimony in sex abuse case that defendant had refused to
15 wear a condom, which could have persuaded the jury that defendant was an
16 irresponsible adult male who deserved to be punished for his conduct with a much
17 younger female, even if she was of legal age; and acknowledging the nature of the
18 charges alone were likely to evoke juror outrage).

19 The same concerns for unfair prejudice exist with any memory-based,
20 eyewitness testimony where the witness has been exposed to factors known to
21 contaminate memory. In such cases, “trial courts have a heightened roles as an
22 evidentiary gatekeeper,” *id.*, because “*once contaminated, a witness's original*
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1 *memory is very difficult to retrieve; it is, however, only the original memory that has*
2 *any forensic or evidentiary value.” Lawson at 748 (emphasis supplied).*

3 “When the opponent of the evidence succeeds in that regard, the trial court
4 can either exclude the evidence or fashion a remedy to restore a permissible balance
5 between the probative value of the evidence and the countervailing concerns set out
6 in OEC 403.” *Id* at 756-757.

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10 E. Remedies For Evidence of Questionable Reliability, Short of Exclusion

11 *Lawson* discussed remedies short of exclusion of eyewitness testimony that
12 could be imposed by the trial court under a 403 balancing test, including excluding
13 “particularly prejudicial aspects of a witness’s testimony,” or the “witnesses’ self-
14 appraisal of their certainty”; allowing expert testimony on variables that can affect
15 the reliability of eyewitness testimony; and noting that generalized jury instructions
16 are not effective in helping jurors evaluate the reliability of such testimony, and that
17 special instructions may be appropriate. *Id* at 759-761.

18
19 The Defense submits that the issues in this case are highly analogous to the
20 issue in *Lawson*, because both cases address eyewitness testimony that is highly
21 determinant of one or more elements of the charge; and raise the same question of
22 whether that memory-based evidence has been contaminated. Moreover, the case at
23 bar includes a challenge to eyewitness identification evidence by JS of Defendant as
24 the perpetrator, which is the exact challenge addressed in *Lawson*. The State’s duty
25

1 to make a preliminary showing under OEC 401, 602 and 701 is triggered by this
2 motion to exclude or limit JS's testimony, and any other witness testimony about her
3 challenged pre-trial statements.

4 **IV. Judicial Notice of the Scientific Research Regarding Memory**
5 **Contamination and Suggestive Child Interviewing.**

6 *Lawson* relied on three decades of empirical and scientific research regarding
7 the fallibility of human memory, which it found to have “progressed sufficiently to
8 warrant taking judicial notice of the data contained in those various sources as
9 legislative facts.” *Id.*, at 740. That data is set forth in the appendix to the *Lawson*
10 decision, and the Defense requests this Court to likewise take judicial notice of that
11 data for purposes of resolving the issues raised by this motion. The Defense may offer
12 additional research dealing specifically with child witnesses and child interview
13 techniques, at hearing on this motion, or by way of supplemental memoranda.
14

15
16 The research findings relied on in *Lawson* that are most pertinent to the case at
17 bar are summarized here:

- 18 • It is a common misconception that a person's memory operates like a
19 videotape, recording an exact copy of everything the person sees. Studies
20 show, however, that memory in fact works much differently. *Lawson*, at 771.
- 21 • An eyewitness's ability to perceive and remember varies with the witness's
22 physical and mental characteristics. *Id.*, at 773. Age can also significantly affect
23 the reliability of a witness's identification, memory, and perception. Studies
24

1 show that children and elderly witnesses are generally less likely to make
2 accurate identifications than adults. Id., at 774.

3 • Despite widespread reliance by judges and juries on the certainty of an
4 eyewitness's identification, studies show that, under most circumstances,
5 witness confidence or certainty is not a good indicator of identification
6 accuracy. Research also shows that retrospective self-reports on eyewitness
7 certainty are highly susceptible to suggestive procedures and confirming
8 feedback, a factor that further limits the utility of the certainty variable. Id., at
9 777.

10
11 • Witness certainty, although a poor indicator of identification accuracy in most
12 cases, nevertheless has substantial potential to influence jurors. Studies show
13 that eyewitness confidence is the single most influential factor in juror
14 determinations regarding the accuracy of an eyewitness identification. Id., at
15 778.

16
17 • It is a well-known fact that memory decays over time. An aspect of memory
18 decay that is less well known, however, is that decay rates are exponential
19 rather than linear, with the greatest proportion of memory loss occurring
20 shortly after an initial observation, then leveling off over time. Id., at 778.
21 Estimating the effect of memory decay, however, turns in large part on the
22 strength and quality of the initial memory encoded; a witness forgets, over
23 time, only what was encoded into the witness's memory to begin with.
24 Scientists generally agree that memory never improves. Id., at 779.
25

- 1 • An identification procedure is essentially a pseudo-scientific experiment
2 conducted by law enforcement officials to test their hypothesis that a
3 particular suspect is, in fact, the perpetrator that they seek. However, like any
4 experiment, the validity of the results depends largely on the careful design and
5 unbiased implementation of the underlying procedures. *Id.*, at 781.
- 6 • A “showup” is a procedure in which police officers present an eyewitness with a
7 single suspect for identification, often (but not necessarily) conducted in the
8 field shortly after a crime has taken place. Showups are widely regarded as
9 inherently suggestive—and therefore less reliable than properly administered
10 lineup identifications—because the witness is always aware of who police
11 officers have targeted as a suspect. *Id.*, at 783.
- 12 • The way in which eyewitnesses are questioned or converse about an event can
13 alter their memory of the event. Studies show that the use of suggestive
14 wording and leading questions tend to result in answers that more closely fit
15 the expectation embedded in the question. *Id.*, at 786.
- 16 • Witness memory, moreover, can become contaminated by external information
17 or assumptions embedded in questions or otherwise communicated to the
18 witness. *Id.*, at 787.
- 19 • Post-event memory contamination is generally categorized as a system variable
20 because state actors are often the entities engaged in questioning
21 eyewitnesses to crimes. That said, however, witness memory is equally
22 susceptible to contamination by nonstate actors. *Id.*, at 787.
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1 RESPECTFULLY SUBMITTED this 16th day of December, 2013.

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5 TERRI WOOD, OSB #88332
6 ATTORNEY FOR DEFENDANT
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