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Attorney for

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

STATE OF OREGON,

Plaintiff,

-VS-

JOHN DOE,

Defendant

CASE No.

MOTION TO COMPEL PRODUCTION OF
DATA UNDERLYING EXPERT OPINION

Defendant, by and through his undersigned attorney, moves the Court for an Order commanding the State to disclose to the defense the following:

1. EDUCATION AND TRAINING MATERIALS:

Any and all texts, treatises, tapes, videotapes, memorandum or other writings or law enforcement training materials which will be relied upon by any of the State's witnesses either to establish their expertise in the area of child sex abuse investigation, or their compliance with ORS 418.747, or to serve as the facts or data underlying their opinions concerning the conduct of the investigation in this case, or concerning the behavior, demeanor or statements of the alleged victim and sexually abused children in general, or concerning the behavior, demeanor or statements of the defendant, or concerning the behavior, demeanor or statements of "sexually deviant" adults in general.

2. EXPERIENCE:

The police reports, the witness' own reports, charging documents, and outcomes of all child sex abuse cases investigated by any of the State's witnesses which will be relied upon by them either to establish their expertise in the area of child sex abuse investigation or to serve as the facts or data underlying their opinions concerning the conduct of the investigation in this case, or concerning the behavior, demeanor or statements of the alleged victim and sexually abused children in general, or concerning the behavior, demeanor or statements of the defendant, or concerning the behavior, demeanor or statements of "sexually deviant" adults in general.

3. UNDERLYING FACTS AND DATA:

The statements and observations of all persons, whether or not the statements currently exist in recorded form, and all tangible items which constitute the underlying facts and data for the opinions and inferences of any State's witness whose testimony would fall within the scope of expert testimony pursuant to OEC 702.

Defendant expressly reserves the right to challenge both the qualifications of any witness offered as an expert by the State, and the admissibility of any expert testimony or opinions by said witnesses.

This motion is made in good faith and not for the purpose of delay. It is based on the points and authorities which follow, incorporated herein by reference, and upon such other grounds and authorities as may be developed at hearing on this matter.

MOVED this 22nd day of November, 1999.

TERRI WOOD OSB 88332
Attorney for Defendant

POINTS AND AUTHORITIES

By this motion the defense seeks pretrial disclosure of the qualifications of certain witnesses and the underlying facts and data for expert opinion which the

defense anticipates the State will seek to offer at trial. Given the nature of this case, and the reports discovered by the State, it is reasonably foreseeable that the State will seek to introduce opinion testimony by some of the investigating officers, social workers, counselors and Dr.Chervenak, M.D., concerning the alleged victim(s), the defendant, and the behaviors of abused children and child abusers. See, e.g., *State v. Munro*, 68 Or App 63 (1984)(social worker); *State v. Milbradt*, 305 Or 621 (1988)(CSD worker); Search & Seizure Manual for Prosecutors, p. 111 ("The special expertise of trained investigators has been relied upon by Oregon Courts to help evaluate otherwise ambiguous conduct.")(citations omitted).

Furthermore, law enforcement officers traditionally--and in this case--rely upon their training and experience in evaluating probable cause and in making other decisions regarding the conduct of the investigation. See, e.g., *United States v. Cortez*, 449 US 411 (1981). In addition, the defense anticipates the conduct of the investigation will be an issue at trial. Such "technical" or "specialized knowledge," not universally held by the general public, offered to assist the trier of fact to understand the evidence or to determine a fact in issue, falls within the scope of the rules governing expert testimony. OEC 702-705.

The Legislative Commentary to Rule 702 (Testimony by experts) makes clear that testimony in the form of opinion or otherwise by trained law enforcement investigators within the scope of their official duties will often constitute "testimony by experts":

The rule is broadly phrased. The fields of knowledge which may be drawn upon are not limited merely to the 'scientific' and 'technical' but extend to all 'specialized' knowledge. Similarly the expert is viewed, not in a narrow sense, but as a person qualified by 'knowledge, skill, experience, training or education.' Thus within the scope of the rule are not only experts in the strictest sense of the word, e.g., physicians, physicists and architects, but also the large group sometimes called

'skilled' witnesses, such as bankers or landowners
testifying to land values.

A prerequisite to admissibility of expert opinion testimony is a qualified expert. OEC 702. The expert's qualifications must first satisfy the discretion of the trial judge. OEC 104(1). The party offering the expert testimony must lay a foundation as to the expert's qualifications. Under OEC 104(1), by using questions in aid of an objection, opposing counsel may contest the qualifications of an expert witness before the opinion of the witness is expressed. The pretrial disclosure of the State's potential expert witness's training and experience will allow the defense to prepare a more effective challenge to the witness's qualifications and will allow the trial to proceed more efficiently.

Furthermore, the Linn County Multidisciplinary Child Abuse Protection Team Protocol, page 2, requires that "all investigators conducting child abuse investigations shall be trained in accordance with ORS 418.747." That statute mandates that investigators be trained in "risk assessment, dynamics of child abuse, child sexual abuse and rape of children, legally sound and age appropriate interview and investigatory techniques." ORS 418.747(3). Accordingly, the defense is entitled to cross-examine those witnesses who investigated the allegations herein regarding their training. Without pretrial discovery of the materials sought by this motion, the defense would be unduly restricted in its ability to cross-examine and impeach the State's witnesses, in violation of Article I, Section 11 of the Oregon Constitution and the Sixth and Fourteenth Amendments to the United States Constitution.

The underlying facts or data which support these witnesses' expert testimony should also be discovered pretrial. OEC 705, "Disclosure of Facts or Data Underlying Expert Opinion," provides:

An expert may testify in terms of opinion or inference and give reasons therefore without prior disclosure of the underlying facts or data, *unless the court requires otherwise. The expert may in any event be required to*

disclose the underlying facts or data on cross-examination.
(emphasis supplied).

The Legislative Commentary to this Rule notes that the Legislature rejected a version which required prior disclosure in all cases. However, the Commentary goes on to note:

Requiring the underlying facts to be disclosed every time an expert offers opinion raises a number of problems. It invites disputes over whether all the facts have been disclosed. In certain cases it requires expert to divulge facts relied upon that are not themselves admissible evidence. . . . Finally, it mandates the use of hypothetical questions, a procedure that consumes time, encourages partisan bias, and affords an opportunity for summation in the middle of a case. The hypothetical question has been abused by counsel on numerous occasions.

. . . . Without [prior disclosure] opposing counsel may not know when the proponent of an expert witness has failed to establish the basis for testimony, or when the testimony rests on an impermissible bias. . . . The rule indicates that in appropriate situations the trial court can require advance disclosure of the underlying facts. . . . In short, prior disclosure should not be mandatory in all cases, nor should it be eliminated.

Pretrial disclosure of the underlying facts and data for expert testimony will serve the following purposes:

(1) Afford the accused his constitutional rights to explore and test the basis for the expert opinion through cross-examination without the risk of ignorantly eliciting inadmissible evidence from the witness in response;

(2) Afford the accused his constitutional right to a fair trial by providing the defense with information needed for pretrial litigation to prohibit evidence that the alleged victim fits the profile of a sexually abused child or similar "syndrome" testimony, unless and until the State has established the foundation required by such cases as *State v. Milbradt*, 305 Or 621, 631 (1988);

(3) Afford the accused the opportunity to investigate the underlying facts and data so as to be able to offer evidence at trial to contradict or otherwise impeach the basis for the expert's opinion, avoiding the need for a continuance in the midst of trial to conduct an investigation;

(4) Afford the accused a meaningful opportunity to obtain and consult with an expert in the same field, so as determine whether to call an expert witness of its own and comply with the reciprocal discovery rules.

The need for pretrial disclosure of these matters is amplified by the nature of this case. The State's only witness to the alleged crimes is a now 11-year-old child. There is no physical evidence. The child has made numerous inconsistent statements about the facts of the alleged crimes. Thus, the child's credibility is the central issue. It is fair to anticipate the State will attempt to bolster the child's credibility by calling a number of "expert" witnesses to repeat the child's statements and describe and interpret the child's demeanor to the jury, thereby infusing those statements with the "aura" of the witness' expertise as a child abuse expert. To require the defense to wait until trial to begin obtaining the information necessary to prepare for effective cross-examination of these witnesses is tantamount to the denial of a fair trial, in violation of the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 11 of the Oregon Constitution.