Terri Wood, OSB #88332
Law Office of Terri Wood, P.C.
730 Van Buren Street
Eugene, Oregon 97402
541-484-4171
FAX: 541-485-5923
EMAIL: contact@terriwoodlawoffice.com

Attorney for

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

STATE OF OREGON, Plaintiff, -VS- , Defendant	CASE No. 13CXXXX MOTION IN LIMINE TO EXCLUDE OPINION ON SEXUAL ABUSE AND SEXUAL OFFENDER ISSUES (Oral Argument Requested)

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

(1) The "sexual abuse" or "alleged sexual assault" diagnosis, impression syndrome or profile, or behavioral characteristics of sexual assault victims in general, including but not limited to the following: how sexual

abuse victims typically respond during interviews, medical examinations, therapy sessions, or as eye-witnesses to the crime; and typical behaviors or reactions of minors who have been sexually abused;

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

(3) Opinions that the alleged victim, in describing the alleged abuse, remained consistent in her statements; displayed appropriate affect in relating the alleged abuse; or similar opinions offered in context as an alternate means of opining that the victim is telling the truth about what occurred.

(4) A medical diagnosis, "diagnostic findings" or opinion that the alleged victim was sexually abused or possibly sexually abused, regardless of whether the medical diagnosis, findings or opinion identifies Mr. Defendant as the perpetrator;

(5) The "sexual offender profile", or behavioral characteristics of sexual offenders, or typical behaviors of sexual offenders, including but not limited to conduct described as "grooming," and denial when confronted with accusations of abuse;

(6) Opinions that Mr. Defendant displayed behaviors or engaged in conduct that is consistent with behavioral characteristics of sexual offenders or typical behaviors of sexual offenders; and

(7) Any other direct or indirect comment on the credibility of the alleged victim as a witness or hearsay declarant, other than as permitted by OEC 608.

The defense so moves upon the grounds and for the reasons that this evidence is inadmissible (1) because it is not relevant, OEC 401 & 402; (2) because it is unreliable and speculative, OEC 403; (3) because it constitutes the use of specific instances of conduct of a witness or hearsay declarant for the purpose of supporting the credibility of the witness, OEC 608(2); (4) because it constitutes an impermissible comment on the credibility of a witness, undermining the function of the jury and infringing on Article I, sections 10 and 11 of the Oregon Constitution, and the Sixth and Fourteenth Amendments to the United States Constitution; (5) because it is improper character evidence, OEC 404 & 405; (6) because it is not proper opinion evidence under OEC 701 & 702, (7) because it goes to matters of which the witnesses lack personal knowledge, in violation of OEC 602; or, alternatively (8) that the prejudicial effect of such evidence outweighs any probative value, and said evidence would tend to confuse the issues and mislead the jury, and that ordinary objection in the course of trial, even if sustained with corrective instructions to the jury, would not remove the unduly prejudicial impact of this evidence, in

violation of OEC 403 and the Fourteenth Amendment to the United States Constitution.

This motion is made in good faith and not for the purpose of delay. It is supported by the points and authorities that follow, and such other points and authorities as may be developed at oral argument on this motion.

The defense specifically reserves the right to request an evidentiary hearing should one be needed to resolve this motion pretrial.

DATED: December 16, 2013.

TERRI WOOD, OSB #88332
ATTORNEY FOR DEFENDANT

POINTS AND AUTHORITIES

1. Summary of Arguments

This motion seeks to preclude the State from using expert witnesses as "human polygraphs" to directly or indirectly bolster the credibility of the alleged victim, JS. Apart from law enforcement officers, the State has not disclosed any potential expert witnesses thus far, but the Defense anticipates that could change, particularly if the Defense decides to call expert witnesses at trial. This motion also applies to lay witnesses, such as Ms. Victim's family and friends, although a separate motion in limine filed herewith more specifically addresses those issues. *State v. Vargas-Samado*, 223 Or App 15, 18-20 (2008)(in sex abuse trial, mother's

testimony that she “never doubted [child] for a second” was direct comment on whether the victim was truthful, and not harmless error); *State v. Ferguson*, 247 Or App 747 (2011)(father’s testimony in rape case that he would not have called police if he thought his daughter willingly had sex was impermissible vouching resulting in reversal).

The objectionable evidence is not relevant under the "relevancy" test set forth in *State v. Brown,* 297 Or 404 (1984) and *State v. O'Key*, 321 OR 285 (1995); *see, State v. Marrington,* 335 Or 555 (2003) and *State v. Lawson*, 127 Or App 392 (1994); *see also Kumho Tire Company, LTD v. Carmichael*, 119 SCt 1167 (1999)(federal court's "gatekeeping" function, requiring inquiry into the relevance and reliability of an expert witness's principle or technique, applies not only to "scientific" testimony, but to all expert testimony); *State v. Sanchez-Cruz*, 177 Or App 332, 337 n.4 (2001)(“It is by no means clear, however, that courts are not to exercise a gatekeeping role with respect to *all* expert testimony.”)(emphasis original).

The Supreme Court has made clear that expert testimony concerning characteristics of sexually abused children is “scientific evidence” for which a proper foundation must be laid to be admissible; and, even if admissible, such testimony may be improper if offered as being diagnostic of sexual abuse. *State v. Perry*, 347 Or 110 (2009); *see State v. Lupoli,* 348 Or 346 (2010).

The objectionable evidence is unreliable. There is no profile of a sex abuse victim that distinguishes such persons from non-abused persons or from persons with other kinds of problems. There is no profile, or set of characteristics, of a sex

offender that reliably indicates a person who displays one or more of the characteristics is likely to be a sex offender. *State v. Hansen*, 304 Or 169, 176 (1987). In the absence of physical evidence of sexual assault, as is the case here, there is no known reliable method, through physiological or psychological testing, of determining whether an alleged victim is fabricating or fantasizing a sexual experience, or has in fact had a particular experience. *See, State v. Southard*, 347 Or 127 (2009).

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

The objectionable evidence relies on specific instances of conduct by the alleged victim to support the credibility of the witness, by way of an opinion that such conduct is "typical" of sexual abuse victims, in violation of OEC 608(2). Additionally, the Supreme Court has held that expert testimony along these lines, including a "diagnostic impression of sex abuse" in a case with a normal physical exam, constituted an impermissible comment on the credibility of a sex abuse victim. *State v. Keller,* 315 Or 273 (1993); *State v. Lupoli*, 348 Or 346 (2010)(holding that opinions concerning the child's description of the alleged sex abuse, offered as the foundation for a diagnosis of sex abuse, constituted improper vouching). Thus, even if the State could lay a *Brown* foundation, the opinion evidence would be inadmissible.

Even if the evidence has relevancy and is not viewed as commenting on or vouching for the alleged victims' credibility, it should be excluded under OEC 403 or the Due Process Clause of the Fourteenth Amendment to the United States

Constitution. *See State v. Hansen*, *supra.* This rule requires trial courts to evaluate the degree to which the trier of fact may be overly impressed or prejudiced by a perhaps misplaced aura of reliability or validity of the evidence, thereby leading the trier of fact to abdicate its role of critical assessment. *See, State v. Brown, supra; State v. Southard, supra*.

2. Relevancy

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

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

> In *State v. Middleton* , this court allowed in testimony concerning normal reactions to abuse but did so before we decided *State v. Brown*. We have set out in great detail in *Brown*, 297 Or at 409-18, the necessary foundation that must be laid for the introduction of scientific evidence. Without repeating what we said there, we direct the attention of anyone who is offering a form of scientific evidence to the procedures for admission set forth in *Brown.*
>
> * * * *
>
> We suggest that in future cases involving "syndrome" testimony full foundations be established, if indeed it can be shown that the so-called "typical" reactions can be demonstrated to be either typical or reliable. 305 Or at 631.

Brown defined "[t]he term 'scientific' as we use it in this opinion [as] evidence that draws its convincing force from some principle of science, mathematics and the like. Typically, but not necessarily, scientific evidence is presented by an expert

witness who can explain data or tests results . . . ." 297 Or at 407. *O'Key* extends the definition of scientific evidence to "proffered expert scientific testimony that a court finds possesses significantly increased potential to influence the trier of fact as 'scientific assertions'." 321 Or at 293. In other words, the court must look to whether jurors are likely to perceive the evidence as being "scientific," regardless of whether scientists would categorize the evidence as such.

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

> [T]his court has made it clear that expert testimony concerning matters within the sphere of the behavioral 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 who claims that her knowledge is based on studies, research, and the literature in the field, announces to the factfinder that the basis of her testimony is "scientific," *i.e.,* is grounded on conclusions that have been reached through application of a scientific method to collected data. Because that is how the factfinder would understand it, a court has a duty to ensure that such information possesses the necessary indices of scientific validity. As the proponent of Shouse's testimony regarding delayed reporting as a predominant feature of child sexual abuse, the state had the obligation to show that that asserted rule of behavior was scientifically valid under the standards established in *Brown* and *O'Key*. The trial court erred in not requiring the state to make that showing. 355 Or at 564.

In *State v. Perry, supra*, the Court reaffirmed such testimony is expert opinion subject to a *Brown/O'Key* foundation. *Perry* specifically noted that even if the foundation is

met, such evidence may be objectionable if offered as being diagnostic of sexual abuse, rather than to rebut a defense claim of fabrication. 347 Or at 117-118.

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

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

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

> The state has not argued that the testimony to which defendant objected was admissible on any other ground than to explain the student's initial denial. The only other possible ground would be as evidence that defendant had sexual relations with the student. But the relevance of the testimony for this purpose is practically nil. Detective Robson testified to what might be described as a "profile" of a nonviolent child abuser who is unrelated to the child: physical and psychological "testing" of the child, giving gifts, showing affection, praising, making the child feel comfortable in the abuser's presence, etc. That child abusers use these techniques has no bearing on whether a person who does these things is a child abuser. For example, it is probably accurate to say that the vast majority of persons who abuse children sexually are male. This says little, if anything, however, about whether a particular male defendant has sexually abused a child. See *State v. Petrich*, 101 Wash.2d 566, 683 P.2d 173, 180 (1984) (potential for prejudice outweighed probative value of expert testimony that 85-

> 90% of child molesters know their victims, where defendant was alleged victim's grandfather); see also McCord, Expert Psychological Testimony about Child Complainants in Sexual Abuse Prosecutions, 77 J Crim L & Criminology 1, 17 n 105 (1986) (citing cases).

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

> In *Brown,* the court set out a list of seven factors that courts are to consider in assessing the reliability of scientific evidence. Those factors are:
> '(1) The technique's general acceptance in the field;
> (2) The expert's qualifications and stature;
> (3) The use which has been made of the technique;
> (4) The potential rate of error;
> (5) The existence of specialized literature;
> (6) The novelty of the invention; and
> (7) The extent to which the technique relies on the subjective interpretation of the expert.'
> *Brown,* 297 Or. at 417, 687 P.2d 751. The court explained that '[t]he existence or nonexistence of these factors may all enter into the court's final decision on admissibility of the novel scientific evidence, but need not necessarily do so. What is important is not lockstep affirmative findings as to each factor, but analysis of each factor by the court in reaching its decision on the probative value of the evidence under OEC 401 and OEC 702.' *Id.* at 417-18, 687 P.2d 751 (footnotes omitted.) As the court further explained in

> *O'Key,* 'scientific' evidence, to be admissible, must be supported by a showing that the evidence is based upon scientifically valid principles, *i.e.,* 'sound scientific reasoning or methodology.' 321 Or. at 302, 899 P.2d 663. In conducting this inquiry, we focus on the methodology followed, not on the conclusions reached. 177 Or App at 341-42.

3. Credibility

Oregon courts have repeatedly held that a trial witness cannot give an opinion on the credibility of another trial witness. *State v. Keller,* 315 Or 273, 284-85 (1993)(pediatrician's opinion); *State v. Odoms,* 313 Or 76, 82 (1992); *State v. Milbradt,* 305 Or 621, 629-30 (1988)(psychotherapist opinion); *State v. Middleton,* 294 Or 427, 438 (1983). *Middleton* held that "a witness, expert or otherwise, may not give an opinion on whether he believes a witness is telling the truth." 294 Or at 438. *Keller* adds:

> [T]his rule applies whether the witness is testifying about the credibility of the other witness in relation to the latter's testimony at trial or is testifying about the credibility of the other witness in relation to statements made by the latter on some other occasion or for some reason unrelated to the current litigation. 315 Or at 285 (citation omitted).

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

The objectionable testimony in *Milbradt* came from a psychologist who interviewed the alleged victims in a sex abuse case, who were adults but severely

mentally retarded. He testified for the State that he found no evidence of deception and that what they reported about the sex abuse represented their experience. 305 Or at 625. The Supreme Court quoted at length from the trial testimony, and it is instructive to scrutinize what the Court found to be reversible error:

> Q. (By Prosecutor) Doctor, you have indicated that part of your training as a psychologist is to be a trained observer, is that correct?
>
> A. That is correct.
>
> Q. Have you in your training and education as a psychologist found there to be certain indicators of deception?
>
> A. Certainly . . . .
>
> Q. Were you able to arrive at opinions or observations in that regard with respect to [one of the victims]?
>
> A. Yes, I was.
>
> Q. And what was that based on?
>
> A. Based on her demeanor, on how she answered questions, the content of her answers. I could go into her spontaneity, among other things. She was spontaneous with freshness in answering the questions.
>
> * * * *
>
> Q. To what extent did you see evidence, or indicators of deception?
>
> A. I did not. She seemed to take every question and answer it as she was, answer spontaneously on the moment with no indication of hesitation, or figuring out what the best answer might be. You know, she would just blurt things out, which is unpremeditated response. So, kind of a very fresh and spontaneous approach to me.
>
> * * * *

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

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.

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

In *Keller,* the Supreme Court found objectionable as a comment on credibility, testimony by pediatrician Dr. Jan Bays of her diagnostic impression that the child was sexually abused, that there was no evidence of leading or coaching or fantasizing during the child's interview, and that the child had given a clear history of sexual touching which had happened to her own body. 315 Or at 278-79, 285. Dr. Bays also testified about the types of behavioral evidence on which she normally relied to determine whether a child had been coached: A "rote" style of recitation by a child, a child's ability to supply "peripheral" details of the alleged incident, a child's tendency

to correct the interviewer about the facts, and various emotional responses by a child, concluding that in this case the victim's interview showed she was "remembering what happened." Each of those statements amounts to testimony that the child was credible. *Id.*

Defense counsel in *Keller* objected to the testimony both on grounds of it being a comment on credibility and because of lack of foundation under *Brown*, as required by *Milbradt.* 315 Or at 279-82. The Supreme Court did not reach the *Brown* issue. Thus, it is clear that even if the contested testimony met the *Brown* test, it 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 sex abuse" but noting defendant had not argued on appeal the doctor's diagnosis constituted an impermissible comment on the credibility of the victim); *see, Snowden v. Singletary*, 135 F3d 732 (11th Cir. 1998), *cert den.,* 119 S.Ct. 405 (1998)(constitutional error for state judge to allow expert to testify that 99.5% of children tell the truth about sexual abuse; improper for witness to testify about credibility of other witnesses).

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

> "Her disclosures * * * were very clear and spontaneous. They were appropriate for the age that she was. They didn't sound rehearsed, they sounded like things she just said."
>
> "She was consistent. She had said the same type of thing before to her parents, I guess."
>
> "[T]he manner in which [SM] told her story was pretty compelling. She just had a real clear change in her demeanor."
>
> "[J]ust the way she told her story was very compelling, and that just makes it-it just was-it had an effect."
>
> "I did not find her, you know, very suggestible. She answered 'no' to a lot of questions. She kind of corrected herself at one point. She didn't appear that suggestible to me."

The defendant there did not renew his objections to the diagnosis of sex abuse on 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.

The Supreme Court cautioned that "discrete portions" of the objectionable testimony "might be admissible in many circumstances, and perhaps even in this case." 348 Or at 362. Notwithstanding that dicta, Mr. Defendant contends that jurors are perfectly capable of determining on their own, by observing to JS testimony and other evidence, whether she was genuinely traumatized by the alleged crime, appeared suggestible or rehearsed, remained consistent in her account of abuse, etc. Those are matters for argument by counsel, not for lay or expert opinions. *See, State*

v. Southard, 347 Or 127, 140 (2009)("while the staff at the KIDS Center are experienced professionals, the criteria that the staff used to decide whether to credit the boy's testimony are essentially the same criteria that we expect juries to use every day in courts across this state to decide whether witnesses are credible.").

The risk is too great that such testimony will cause jurors to "defer to the expert's implicit conclusion that the victim's reports of abuse are credible." *Southard,* at 141. That risk is created when professionals are allowed to testify to a litany of factors used in "assess child abuse," which is simply another way of saying assess the truthfulness of the child's disclosure.

4. Prejudice

Oregon Rule of Evidence 403 provides that:

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

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

> The nature of the polygraph examination is closer to a psychiatric evaluation than to objective scientific analysis such

> as fingerprints and ballistics. The polygraph technique is heavily dependent on the subjective evaluation of the expert both in the administration of the test and in reaching the result. 297 Or at 438.

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

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

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

5. Medical diagnosis or diagnostic findings of sexual abuse.

The law is now clear that expert diagnosis of sexual abuse, in the absence of physical evidence of abuse, constitutes impermissible vouching because it is

necessarily based on an assessment of the alleged victim's credibility. *State v. Southard, supra; State v. Lupoli, supra; State v. Kelly*, 244 Or App 105, 111 (2011)(noting evidence must be excluded even if expert does not state opinion based on alleged victim's statements and demeanor; and that admission of such evidence is plain error).

6. Expert testimony about "grooming."

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

RESPECTFULLY SUBMITTED this 16th day of December 2013.

TERRI WOOD, OSB #88332
ATTORNEY FOR DEFENDAN