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8 Attorney for

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

10  
11 STATE OF OREGON,

12 Plaintiff,

13 -VS-,

14  
15 Defendant

CASE No. 13C4

MOTION *IN LIMINE* TO PROHIBIT  
REFERRING TO THE CHILD  
COMPLAINANT AS THE "VICTIM"  
(Oral Argument Requested)

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17  
18 COMES NOW the Defendant, XX, by and through his undersigned attorney, and  
19 hereby moves the Court for an Order prohibiting the State, its representatives, and  
20 witnesses from making any reference whatsoever through testimony, other evidence,  
21 or arguments of counsel other than in closing argument, concerning the following:

22 That JS, the alleged victim in the Indictment, is the "victim" in this case.

23  
24 This motion is made in good faith and not for the purpose of delay. It is  
25 supported by the authorities below and by such other grounds and authorities as may

1 be offered in reply to the State’s response to this motion, or at hearing on this  
2 motion.

3 DATED this 16th day of December, 2013.

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TERRI WOOD OSB 88332  
7 Attorney for Defendant

8 **POINTS AND AUTHORITIES**

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10 1. Mr. is charged by Indictment with Measure 11 sex crimes, committed  
11 against JS, a minor. He has plead not guilty to these allegations. There are no third-  
12 party witnesses to the alleged crimes, and no forensic evidence to corroborate either  
13 that these crimes actually occurred, or if they did, that Mr. is the person who  
14 committed the crimes.

15 2. In *State v. Teixeira*, 259 Or App 184 (2013), the Court of Appeals discussed  
16 various definitions of “victim” that are found in the Oregon Criminal Code in deciding  
17 the issue of the definition of “victim” for purposes of an upward departure under the  
18 sentencing guidelines based on “multiple victims” enhancement. While not on point to  
19 the issue raised by this motion in limine, the case is instructive because as to each  
20 legal definition of “victim” reviewed by the Court, the core concept was that “victim”  
21 is the person who suffered the harm caused by the crime. For example, “[o]rdinarily,  
22 when the term ‘victim’ is used in a statute that defines a criminal offense, it is used in  
23 the precise sense of a person who suffers harm that is an element of the offense.”  
24 259 Or App at 188 (citation omitted). The State contended that the definition for  
25

1 guidelines enhancement purposes was the omnibus definition of “victim” in ORS  
2 131.007:

3 “As used in \* \* \* ORS chapters 136, 137 and 144, except as otherwise  
4 specifically provided or unless the context requires otherwise, ‘victim’  
5 *means the person or persons who have suffered financial, social,*  
6 *psychological or physical harm as a result of a crime \* \* \*.*” (Emphasis  
added).

7 The Court of Appeals found the State’s reliance on the definition from the  
8 “Crime Victims’ Bill of Rights” misplaced because it is a broad definition intended “to  
9 maximize the participatory rights of those affected by criminal conduct in related”  
10 criminal proceedings. *Id.*, at 190. Ultimately, the Court defined “victim” for purposes  
11 of the multiple victim enhancement as “a person who is directly, immediately, and  
12 exclusively injured by the commission of the crime.” *Id.*, at 198.

13  
14 The term “victim” is not a term of art for a quasi-party in the criminal action,  
15 as are the terms Plaintiff and Defendant. As a legal term it does not exist in the  
16 abstract, but only in its statutory context. *Teixeira, supra*. The core concept for  
17 “victim” as a legal term is the person injured by the commission of the crime. There is  
18 no “victim” in the sense of a trial until the jury reaches a verdict of guilt. It is  
19 improper for the State to refer to the complainant or accuser as “the victim” except  
20 in its closing argument, that being what it asks the jury to conclude from the  
21 evidence. The Criminal Code sets forth a presumption of innocence for the Defendant:  
22 “A defendant in a criminal action is presumed to be innocent until the contrary is  
23 proved.” ORS 136.415. That presumption is impermissibly weakened by the State and  
24 its witnesses referring to the complainant as the victim during the course of trial.  
25

1 3. *Teixeira* also discussed the ordinary meaning of “victim”:

2 The ordinary meaning of “victim” is “someone put to death, tortured, or  
3 mulcted by another: a person subjected to oppression, deprivation, or  
4 suffering \* \* \* someone tricked, duped, or subjected to hardship:  
5 someone badly used or taken advantage of[.]” *Webster’s Third New Int’l  
6 Dictionary* 2550 (unabridged ed 2002) (boldface in original). In that  
7 sense, a “victim” is someone who is subjected to harm “by another,” and  
8 not someone who is harmed by other causes.

9 259 Or App at193.

10 4. Referring to JS as the “victim” logically imputes fault to Mr., and indirectly  
11 invites the jury to convict him on an emotional basis, based on the ordinary meaning  
12 of that term. Mr. is 37, and JS is now 7, which increases the likelihood of juror  
13 sympathy for her. However, JS is only a “victim” of the alleged crimes if he subjected  
14 her to sexual contact. Unless and until he is convicted, she is only the “alleged  
15 victim,” or more succinctly, the complainant.

16 5. Under these circumstances, allowing the State to refer to JS as the “victim”  
17 in questioning witnesses and addressing the jury, implicates Mr. right to a fair trial  
18 under Article I, section 11 of the Oregon Constitution and the Fifth and Sixth  
19 Amendments to the United States Constitution. Witnesses referring to JS as the  
20 “victim” is improper lay opinion on a mixed question of law and fact, not a matter  
21 subject to the first-hand observation of any witness nor helpful to the trier of fact, in  
22 violation of OEC 701 & 403. Furthermore, referring to JS as “the victim,” constitutes  
23 improper vouching for the credibility of JS, in that calling her “the victim” during  
24 testimony has no relevance apart from inferring the truthfulness of the accusations.  
25

1 If the State asserts a need to refer to JS by some descriptive term other than  
2 her name during the course of this trial, it should be restricted to using “the alleged  
3 victim,” or “the complainant.”

4  
5 RESPECTFULLY SUBMITTED this 16th day of December, 2013.  
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TERRI WOOD OSB 88332  
Attorney for Defendant