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IN THE CIRCUIT COURT,
SEVENTH JUDICIAL CIRCUIT,
IN AND FOR FLAGLER COUNTY, FLORIDA

CASE NO: 21-00472-CFFA

STATE OF FLORIDA

VS.

MONSERRATE TERON,
DEFENDANT.
_____/

STATE'S OBJECTION TO EXPERT TESIMONY UNDER F.S. 90.702(DAUBERT) AND REQUEST FOR PRE-TRIAL DETERMINATION OF ADMISSIBILITY; ALTERNATELY STATED, MOTION TO STRIKE EXPERT AND/OR EXCLUDE TESTIMONY

COMES NOW, R.J. Larizza, State Attorney for the Seventh Judicial Circuit, by and through the undersigned Assistant State Attorney, and files this Objection to Expert Testimony pursuant to F.C.P.R. 3.190, F.S. 90.405, F.S. 90.702 (Daubert), and F.S. 90.704; and moves this Honorable Court for Pre-trial Determination of Admissibility of Expert Testimony; alternately stated, State's Motion to Strike Expert and/or Motion in Limine to Exclude Expert Testimony; and states as follows:

I. Summary of Argument:

The Defendant has listed Dr. Barry Crown, Ph.D., a psychologist, as an expert witness. A deposition of Dr. Crown was conducted on May 17, 2023. A copy of the deposition will be furnished to the Court for its consideration of this motion.

The State anticipates that at trial, the Defendant will attempt to offer testimony by Dr. Brown on the following matters:

1. The defendant is not a pedophile.
2. It is unlikely that a person who is a pedophile could go years without reoffending.
3. It is unlikely that a person who is grooming a child for sexual activity would be a person who sees that child sporadically. It is more likely that a person who is grooming a child for sexual activity is someone who is very involved in that child's life.
4. It is possible that a person can form a false memory of abuse after reading a news article outlining abuse to another.
5. Some children who are being abused sexually and want the abuse to end, will disclose the abuse, but blame someone else for the abuse in order to protect the actual offender.
6. Would say that children do tell lies.

Dr. Crown's testimony is inadmissible and he should not be permitted to testify because 1) the opinions are about subject matters in which Dr. Crown is not qualified as an expert to opine; 2) the opinions are not based on sufficient facts or data and are contrary to the evidence in this case; 3) the opinions are not probative on any material issue; 4) the opinions are "pure opinions" grounded only in speculation and conjecture and not in scientific principle, or even experience, training, or education; 5) the testimony would not assist the jury, would mislead and confuse the jury, and is more prejudicial than probative.

The State hereby objects to the opinion testimony of Dr. Crown based on the grounds set forth in this motion, and in any additional argument presented at a pre-trial hearing on this matter, for this Honorable Court to determine admissibility.

II. **Summary of Dr. Crown's Testimony, Opinions, and Conclusions**

Dr. Crown's practice is focused on forensic psychology and diagnostic neuropsychology. He testified at deposition that the bulk of his practice is diagnostic neuropsychology in a hospital setting with stroke patients. When asked, Dr. Crown, testified that he has not had a therapeutic practice for over twenty years. While Dr. Crown did indicate that he had treated both sex offenders and victims of sex offenses, he has not done so since he stopped his therapeutic

practice. Dr. Crown also did not testify to the frequency with which he treated either category when he was treating patients in a therapeutic setting. With respect to his forensic practice, Dr. Crown testifies primarily for the defense, with his state testimony limited to issues of competency.

Dr. Crown's understanding for the purpose of his testimony was to offer an opinion on whether the defendant is a pedophile, whether children can say untruths, and to render opinions to hypothetical questions posed to him by the defense. Dr. Crown, who has never met the defendant, is expected opine that the defendant does not fit the definition of a pedophile under the DSM V-TR. He is also expected to testify that children can and sometimes do tell untruths.

Regarding hypothetical questions expected to be asked by the defense, Dr. Crown was asked whether a person can unconsciously create a false memory of abuse after reading a news article about abuse. Dr. Crown's opinion was that this can happen. When asked whether this opinion was based on any scientific research, Dr. Crown indicated that it was not, but rather was his opinion based on his experience. Dr. Crown was also asked whether some children who are being abused sexually will disclose the abuse, but will identify someone other than the abuser as committing the acts in order to protect the abuser. Dr. Crown indicated that this does happen. When asked whether this is based on any scientific research, again Dr. Crown indicated that it was not, but rather was his opinion based on his experience. Dr. Crown was asked if it is likely that someone who suffers from pedophilia would go years without reoffending. Dr. Crown indicated that it was his opinion that this is unlikely. Again, Dr. Crown testified that this opinion was not based on scientific research, but rather was his opinion based on his experience. Dr. Crown was asked whether it was more likely for someone who is grooming a child for sexual activity to be a person that is very involved in the child's life versus someone who sees the child

sporadically. Dr. Crown testified that it was less likely for someone to groom a child who only sees that child sporadically. Again, Dr. Crown testified that his opinion was not based on scientific research, but rather was his opinion based on his experience.

III. **Memorandum of Law and Argument**

As this Court is aware, F.S. 90.405 limits character evidence to reputation evidence or specific instances of conduct. Opinion evidence of character is not permissible. It is the State's position that testimony by Dr. Crown that the defendant does not meet the definition of a pedophile under the DSM V-TR is improper character evidence pursuant to F.S. 90.405.

Courts have been faced with this exact question- whether a defense expert could testify that a defendant was not a pedophile in a child sex offense case. In those cases, the Courts have ruled that the testimony was not admissible because it was impermissible character evidence. *See* Wyatt v. State, 578 So.2d 811, 813 (3rd DCA 1991) (Court ruled that the defense could not call an expert to testify that the defendant did not fit the profile of a pedophile because it was improper character evidence in the form of opinion evidence.); Worrell v. State, 281 So.3d 1275, 1277 (1st DCA 2019) (Court ruled that potential expert testimony of physician who would have testified pursuant to a psychosexual evaluation that the defendant did not have a propensity to molest children was inadmissible character evidence.) It is the State's position that Dr. Crown's opinion that the defendant is not a pedophile is inadmissible character evidence and should not be permitted.

Regarding the remainder of Dr. Crown's opinion testimony, one has to look to the analysis is F.S. 90.702 (Daubert Standard) which governs the admissibility of expert testimony. It provides:

> **Testimony by experts**: If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify

about it in the form of an opinion or otherwise, if:
(1) The testimony is based upon sufficient facts or data;
(2) The testimony is the product of reliable principles and methods; and
(3) The witness has applied the principles and methods reliably to the facts of the case.

The inquiry compels the trial court to perform the critical "gatekeeping" function concerning the admissibility of expert evidence and requires the trial court to conduct an exacting analysis of the foundations underlying the expert opinions. *See* Daubert v Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579, 589 (1993), McCorvey v. Baxter Healthcare Corp., 298 F.3d 1253, 1257 (11th Circ. 2002). The Daubert inquiry places a duty on the trial judge "to ensure that any and all scientific testimony or evidence is not only relevant, but reliable." *See* Daubert, at 593-94. The trial court should also be considering whether the probative value of the testimony is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. *See* Id. at 595.

In determining the admissibility of expert testimony, the trial court must engage in a rigorous three- part inquiry, considering whether:

> (1)The expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in Daubert; and (3)the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.
>
> While there is inevitably some overlap among the basic requirements- qualification, reliability, and helpfulness- they remain distinct concepts…

See U.S. v Frazier, 387 F.3d 1244, 1260 (11th Cir. 2004)(citing cases). The burden of establishing qualification, reliability, and helpfulness rests on the proponent of the expert opinion. *See* Id. The Defendant has not met his burden.

A. Who May be Qualified to Testify as an Expert

1. Experts are Qualified to Testify Only About Matters Included in Their Specific Discipline

Note that the first requirement of qualification is separate and distinct from the second requirement of reliability. *See* Frazier, at 1261. "[O]ne may be considered an expert but still offer unreliable testimony." *See* Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd., 326 F. 3d 1333, 1342 (11th Cir. 2003). Although an expert may be qualified in various ways, he or she may not testify outside of his or her area of expertise. Frazier at 1260. "[I]t is not enough that the witness be qualified to propound opinions on a general subject; rather he must be qualified as an expert on the discrete subject on which he is asked to opine." *See* Goodyear Tire & Rubber Co. v. Ross, 660 So.2d 1109, 1111 (Fla. 4th DCA 1995). "A trial court has broad discretion in determining the range of subjects on which an expert witness can testify, and, absent a clear showing of error, the court's ruling on such matters will be upheld." *See* Finney v. State, 660 So.2d 674, 682 (Fla.1995). The party seeking to elicit the witness's expert opinion must demonstrate by a preponderance of the evidence that the expert has specialized knowledge, skill, experience or training that can assist the trier of fact in the matter. *See* Fla. Stat. § 90.702 and Padillas v. Stork-Gamco, Inc., 186 F.3d 412, 418 (3d Cir. 1999). It is reversible error to certify a witness as an expert when the subject matter is outside of their expertise. *See* Jordan v. State, 694 So. 2d 708, 717 (Fla. 1997). Dr. Crown, though presumably qualified in some fields, is not qualified to give the proffered opinion in this case.

While it is true that training and experience without formal education and professional certification may sometimes qualify a witness as an expert in certain fields, this does not mean that anyone who learns something about a subject, or whom has some experience in that field, can or should be certified as an expert in a court of law. The law recognizes that different subjects of expert testimony, due to their nature and/or complexity, require varying degrees of expertise. *See* Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999). Particularly when there are existing standards governing a scientific discipline, self-proclaimed "experts" who lack the necessary credentials are not qualified to testify as experts in that discipline. *See* Wolf v. Ramsey, 253 F. Supp. 2d 1323 (N.D. Ga. 2003) (a handwriting expert not qualified to testify because she lacked the necessary credentials for that field where she had not taken a certification exam, completed a relevant accredited course, been an apprentice in the field, and was not board-certified).

In lieu of formal education and training, an expert may be qualified through study and practical experience, so long as the specialized knowledge in the subject is sufficiently developed. *See* Chavez v. State, 12 So. 3d 199, 206 (2009) (proper to exclude lawyer from testifying about differences between the Cuban and American criminal justice systems where his knowledge was gained by reading legal materials and visiting Cuba). Likewise, "[s]imply reading large amounts of scientific literature, all of which falls outside a person's area of educational expertise, cannot serve to create an expert out of a non-expert." *See* Jordan, at 717 (witness with degrees in psychology and counseling not qualified to testify about offender profiling where knowledge came from reading large amounts of scientific literature).

While Dr. Crown has the credentials to be a psychologist, he is rendering opinions regarding matters for which he is lacking in experience. Dr. Crown has not participated in a therapeutic practice in over twenty years. While Dr. Crown may have treated sex offenders and/or sex victims at one time in his career, that experience is remote in time and no longer relevant to today's standards. Thus, while Dr. Crown may be able to testify about some matters in the area of psychology and neuropsychology, the matters the defense intends to call him for are matters for which he is lacking in expertise.

B. The Daubert Inquiry: Relevance & Reliability

A qualified expert may only testify about an issue that is both within his or her sphere of expertise, and also based on the reliable application of that expertise to the specific facts and data of the instant case. Expert opinion testimony is relevant "if the knowledge underlying it has a valid . . . connection to the pertinent inquiry" and is reliable "if the knowledge underlying it has a reliable basis in the knowledge and experience of [the relevant] discipline." *See* U.S. v. Sandoval-Mendoza, 472 F.3d 645, 654 (9th Cir. 2006). As gatekeeper, the trial court must exclude expert testimony when the court "conclude[s] that there is simply too great an analytical gap between the data and the opinion proffered." *See* Gen. Elec., at 146. A logical and systematic path from data to opinion is essential. *See* In re Denture Cream Products Liability Litigation, 795 F.Supp.2d 1345, 1362 (S.D. Fla. 2011) (proffered testimony not reliable when proposed expert relies on studies which conclude that certain factors "may" cause a result, and then testifies that those factors conclusively do cause the result). Opinions derived from such flawed reasoning do not demonstrate "the degree of intellectual rigor characterized by practitioners in the field." Id. at 1354.

In evaluating the reliability of the expert opinion, the trial court must assess "whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue." Daubert, at 592-94 (listing non-exclusive factors to consider in assessing the reliability of an expert's opinion, including whether the methods have been tested, subjected to peer review/publication, have error rates, standards, and are generally accepted). The trial court may consider any other factors to ensure that the expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *See* Kumho Tire, 526 U.S. at 152. *See, e.g., Id.*, at 154 (has expert has properly accounted for alternative explanations?); Norris v. Baxter Healthcare Corp., 397 F.3d 878, 886 (10th Cir. 2005) (were conclusions were reasoned as carefully as they would have been outside of litigation?); and, Gen. Elec. Co. v. Joiner, 522 U.S. 136, 144-46 (1997) (is an accepted premise is being extrapolated to unfounded claims?).

"The trial court's gatekeeping function requires more than simply taking the expert's word for it[,]" meaning that experience alone is not a sufficient foundation to render *any* conceivable opinion reliable. *See* Frazier, at 1261 "If admissibility could be established merely by the *ipse dixit* of an admittedly qualified expert, the reliability prong would be, for all practical purposes, subsumed by the qualification prong." Id. An expert relying primarily on experience must explain "the logic and relevance" of the opinion, Baan v. Columbia County, 180 So.3d 1127, 1133 (Fla.1st DCA 2015), including "how that experience leads to the opinion, why the experience is a sufficient basis for the opinion and how that experience is reliably applied to the facts." Charles W. Ehrhardt, 1 Fla. Prac., *Florida Evidence* § 702.3 (2015 ed.) There is "nothing in either Daubert or the Federal Rules of Evidence requiring a court to "admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *See* Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997).

The trial court must ensure and trust that the expert's testimony rests "on a reliable foundation," is supported by "appropriate validation – i.e., 'good grounds[,]' is "properly grounded, well-reasoned, and not speculative[,]" *See* Frazier, at 1261 (citing Daubert, at 590, 597) (internal citations omitted); is both substantiated and objective; and is based in the methods and procedures of science rather than on "subjective belief or unsupported speculation." *See,* e.g., Holmes v. South Carolina, 547 U.S. 319, 326-27 (2006) (excluding speculative and remote evidence) and Delap v. State, 440 So.2d 1242 (Fla.1983)(excluding speculative evidence not based

on reliable scientific principles). "Pure opinion testimony," opinions based on the expert's training and experience, rather than on the skilled application of facts to a reliable methodology to come to an informed conclusion, is impermissible. *See* Booker v. Sumter County Sheriff's Office, 166 So.3d 189 (1st DCA 2015) and Marsh v. Valyou, 977 So.2d 543, 549 (Fla. 2007) (testimony based on experience that "did not rely on any study, test, procedure, or methodology that constituted new or novel scientific evidence, but instead was based on an analysis of medical records" constituted impermissible pure opinion testimony).

1. Dr. Crown's Testimony Lacks Any Reliable Foundation, and Constitutes Pure Opinion, Speculation, and Conjecture

Dr. Crown's opinions are irrelevant because they **lack any probative value** and do not make any material fact or issue more or less likely. Even assuming the court is convinced that Dr. Crown relied on some sort of methodology, the opinions are inadmissible because the Defendant cannot demonstrate that his reasoning or methodology is scientifically valid and can be applied to the facts in issue. The testimony is not based in scientific knowledge, is not based on the evidence in this case, does not logically advance any material aspect of the case, and will only serve to confuse the issues and to mislead the jury. The proffered testimony is mere conjecture, speculation, and a hunch.

i. Pure Opinions Based Solely on Experience

Dr. Crown's opinions are inadmissible because he cannot explain the logic and relevance of his opinion. *See* Baan *v*, at 1133. Since he is relying only on his experience, the law requires him to "explain how [his] experience leads to [his] opinion, why [his] experience is a sufficient basis for the opinion and how that experience is reliably applied to the facts." *Ehrhardt*, *Fla. R. Ev.* § 702.3 (2015 ed.). His opinions constitute impermissible "pure opinion" testimony because they are based only on his say-so, rather than skillfully applying facts to a reliable method in order to come to an informed confusion. In fact, the very definition of "pure opinion testimony" comes from the Florida Supreme Court case of Marsh v. Valyou, in which the Court held that an opinion based only on experience coupled with an analysis of medical records was "pure opinion testimony" and not permissible. Like in Marsh, Dr. Crown's opinions are based only on alleged "experience". The Florida Legislature made it very clear in amending Florida Statute 90.702, that their intention was to eliminate pure opinions, i.e. opinions that are not the result of the reliable application of expertise to the facts of the case. The very preamble to the Bill cites to Marsh and

its definition of pure opinion testimony. Dr. Crown's testimony in this case is exactly what the Florida Supreme Court held is not admissible and what the Florida Legislature does not want in our courtrooms.

This Court cannot trust that the testimony rests on a reliable foundation, is supported by "appropriate validation," is substantiated and objective, that it is based on science, or that there are "good grounds" for the testimony. *See* Frazier, at 1261. This Court should exclude the testimony because it is the product of unsupported speculation, subjective belief, and speculation. *See* Holmes, at 326-27; Delap, at 1242; Kemp v. State, 280 So.3d 81 (4th DCA 2019). While Courts have recognized that it is more difficult to analyze psychological expert opinions under Daubert, those opinions are still subject to the Daubert analysis. *See* Andrews v. State, 181 So.3d 526, 528-29(5th DCA 2016) (court concluded expert opinions of two psychologists was admissible after concluding that both had used an appropriate basis that is customarily used in the field to reach their opinions) Unlike the psychologists in the Andrews case, Dr. Crown did not base his opinions on any psychological research or assessments. Here, the only connection between Dr. Crown's opinion and the record in this case is his *ipse dixit.*

C. The Testimony Must Assist, Not Mislead or Confuse, the Jury, and Must be More Probative than Prejudicial

1. Assisting the Jury

The final requirement for admissibility is that the testimony must "assist the trier of fact in understanding the evidence or in determining a fact in issue." Fla. Stat. § 90.702. The 1976 Law Review Council Notes to Florida Statute section 90.702 elaborating on this issue, stating:

> If the issue involves a matter of common knowledge about which the ordinary layman would be capable of forming a correct judgment, expert testimony is not admissible. . . The opinion of an expert should be excluded where the facts testified to are of a kind that do not require any special knowledge or experience in order to form a conclusion, or are of such character that they may be presumed to be within the common experience of all men moving in ordinary walks of life.

Id. Expert testimony assists the jury when the facts to be determined are obscure, and can only be clarified by and through the opinions of skilled persons in that subject. *See* Millar v. Tropical Gables Corp., 99 So.2d 589, 590 (Fla. 3d DCA 1958). When the facts testified to are of such a nature as to not require any special knowledge or expertise in order for the judge or jury to form conclusions, then

it must be excluded. *See* Johnson v. State, 393 So.2d 1069, 1072 (Fla. 1980). "Proffered expert testimony generally will not help the trier of fact when it offers nothing more than what lawyers for the parties can argue in closing arguments." Frazier, at 1262-63 (citing 4 *Weinstein's Federal Evidence* § 702.03[2] [a]).

2. Balancing Test

Because expert evidence has the strong potential to mislead and/or confuse the jury, like all other evidence sought to be introduced at trial, expert testimony may still be excluded by applying Florida Statute section 90.403's balancing test. Under 90.403, relevant evidence may be excluded where the probative value of otherwise admissible evidence is substantially outweighed by its potential to confuse or mislead the jury, is cumulative, or needlessly time consuming. Fla. Stat. § 90.403. Furthermore, where the opinion is nothing more than speculation, it invades the province of the jury. *See* Mills v. Redwing Carriers, Inc., 127 So.2d 453 (Fla. 2d DCA 1961). *See also,* Hull v. Merck & Co., Inc., 758 F.2d 1474, 1477 (11th Cir.1985) (per curiam) (finding that admission of speculative and potentially confusing testimony is at odds with the purposes of expert testimony).

It is reversible error to permit expert testimony in the form of generalized opinions about an industry when the expert is unable to (logically) apply those opinions to the facts in issue in the underlying case because such testimony does not assist the jury and has the potential to mislead and/or confuse the jury. *See* Sunbeam Television Corp. v. Mitzel, 83 So.3d 865 (Fla. 3d DCA 2012). "An opinion is unhelpful to a trier of fact if it attempts to apply a general observation about a larger group to particular individuals whose conduct is in question." *See* Rolls-Royce Corp. v. Heros, Inc., 2010 WL 184313, at *6 (N.D. Tex. Jan. 14, 2010).

In Sunbeam, an age and gender discrimination suit filed by a former employee against a television station, the trial court permitted expert testimony that the news industry has a generalized distaste for older women. The Third District Court of Appeals held that the admission of such generic evidence and generalized opinions was "wholly improper and so prejudicial as to warrant reversal and a new trial." *See* Sunbeam, at876-877. The Third District explained that the proffered testimony was inadmissible because: (1) it was not necessarily probative of a discrete discrimination claim; (2) the expert, who had a Ph.D. and was a professor of mass communications at a college, reached conclusions that she was not qualified, nor competent, to reach; and (3) the testimony served only to interject conjecture into the jury's speculation, thus diverting the jury from its task of deciding whether

age was the *but-for* cause of former employee's termination. *Id.* Thus, the testimony was not probative of any material facts at issue, and served only to create unfair prejudice. *Id.* Dr. Crown's testimony, while not probative of any material issues, is prejudicial in that it would serve only to mislead the jury.

IV. Conclusion

Dr. Crown is not qualified to testify about the matters contained in his opinions. His opinions are not supported by the record, are not based on science, experience, education, or training, and are mere speculation and conjecture. The testimony is irrelevant, unreliable, misleading and confusing. The testimony cannot satisfy the rigor of the Daubert test under Florida Statute section 90.702, and is not probative but prejudicial. It is exactly the type of expert testimony that the Florida Supreme Court and Florida Legislature intended to keep out of the courtrooms. For those reasons, Dr. Crown should be stricken as a defense witness; or, his testimony should be excluded; or, the Court should hold a Daubert pre-trial hearing.

WHEREFORE, based on the reasons, and authorities cited herein, the State of Florida requests that this Motion to Exclude Dr. Crown as a witness be GRANTED.

Respectfully Submitted,

R.J. LARIZZA
STATE ATTORNEY

By: s/MELISSA L CLARK
ASSISTANT STATE ATTORNEY
Florida Bar No.: 0499625
ESERVICEFLAGLER@SAO7.ORG

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by mail/delivery to HARLEY BROOK, MUSCA LAW PA, 923 DEL PADRO BLVBD S SUITE 201, CAPE CORAL, FL 33990 and DEREK T MAINES, MUSCA LAW P.A., 630 W ADAMS STREET SUITE 206, JACKSONVILLE, FL 32204, on May 18, 2023.

s/MELISSA L CLARK
ASSISTANT STATE ATTORNEY
Florida Bar No.: 0499625
1769 EAST MOODY BLVD BLDG 1 THIRD FLOOR
BUNNELL, FL 32110
(386) 313-4300
ESERVICEFLAGLER@SAO7.ORG