IN THE \_\_\_\_\_\_ JUDICIAL DISTRICT COURT, \_\_\_\_\_\_\_\_ DEPARTMENT IN AND FOR THE [COUNTY], STATE OF UTAH

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| THE STATE OF UTAH,  Plaintiff,  -vs-  [DEFENDANT],  Defendant. | **STATE’S MEMORANDUM IN SUPPORT OF MOTION IN LIMINE AS TO QUESTIONS CONCERNING STATISTICS**  Case No.  Judge |

The State of Utah, through its counsel, [DA], Salt Lake County District Attorney, and [ADA], Deputy District Attorney, hereby submit this Memorandum in Support of its Motion in Limine to exclude questioning or argument by the Defense concerning general incidence statistics concerning those who perpetrate child abuse or about those who cause inflicted head injuries to children. During the preliminary hearing of this case, the following questions were asked of expert witness [STATE’S EXPERT] during cross-examination:

“Are you familiar with any studies or the general studies of abuse cases which showed that fathers are the most likely perpetrators of abuse?” P.H. 128-129.

“So isn’t it true that fathers are the most likely, followed by boyfriends, babysitters, and then mothers statistically?” P.H. 129.

In response, [STATE’S EXPERT] acknowledged that fathers are the most common perpetrators of child abuse, but clarified that mothers are more often perpetrators than babysitters. She also testified that “overall, it’s more common that a male is the perpetrator.” P.H. 129.

At the conclusion of the preliminary hearing, and in argument on the Defense Motion to Quash Bindover, the contention was made that evidence concerning who generally or more often commits acts of child abuse establishes that in this case it is less likely that the Defendant, the mother of the infant victim, committed the abuse, and more likely that [ANOTHER PERSON] committed the abuse. At the conclusion of the

preliminary hearing, counsel argued: “Statistically, we have the males committing more of these offenses per the doctor’s testimony.” P.H. Part 2, page 70. Because this argument and the inferences sought to be drawn from the data constitutes a misuse of statistical evidence, has no probative value and risks confusing the trier of fact concerning what evidence is significant in determining guilt or innocence at trial, the State asks this Court to limit counsel for the defense from asking such questions, eliciting such evidence from other witnesses, or arguing the inappropriate inferences from that evidence at the trial of this matter.

# STATEMENT OF THE CASE

[DEFENDANT] (“Defendant”) was bound over for trial following the preliminary hearing on [DATE] on one count of Child Abuse, a second degree felony, in violation of Utah Code Annotated §76-5-109(2)(a).

The State introduced evidence from two expert medical witnesses and the University of

Utah Police Department Detective, which resulted in a finding by [JUDGE] that the crime of Child Abuse was committed on [DATE] by Defendant.

The Defendant filed a Motion to Quash Bindover, which was fully briefed and argued before this Court on [DATE]. This Court denied that Motion and upheld the decision to bind the Defendant over for trial.

# STATEMENT OF MATERIAL FACTS

Since the facts relating to the underlying charge have been fully set out in the State’s Memorandum in Opposition to the Motion to Quash Bindover, they will not be

repeated here. From questioning of witnesses at the preliminary hearing, argument at the conclusion of that hearing, and from the pleadings and argument relating to the Defendant’s Motion to Quash Bindover, it has become clear that part of the defense strategy in this case is to elicit evidence that incidence studies regarding perpetration of child abuse show that natural fathers, or at least males, are more often the perpetrators of child physical abuse than females or natural mothers. The apparently desired inference to be drawn from that data is that *in this particular case*, it is more likely that [VICTIM’S FATHER], the victim’s father, committed the acts that resulted in the baby’s injuries, than that the Defendant as the victim’s mother, committed those acts. As will be shown, that is a misuse of statistical evidence, which has been disapproved in Utah and other jurisdictions because of the logical fallacies necessary to draw the desired inferences, and because of the tendency to confuse the jury when the underlying data has no probative value on the question of the guilt or innocence of the Defendant.

# ARGUMENT

**THE DEFENSE SHOULD BE PROHIBITED FROM ELICITING TESTIMONY CONCERNING INCIDENCE OF CHILD ABUSE AND FROM ARGUING THAT SUCH STATISTICAL DATA CAN BE USED TO INFER WHAT HAPPENED IN ANY INDIVIDUAL CASE**

Courts have routinely excluded statistical probability evidence “when the evidence invites the jury to focus upon a seemingly scientific, numerical conclusion rather than to analyze the evidence before it and decide where truth lies.” *State v. Rammel*, 721 P.2d 498, 500-501 (Utah 1986), (citing *People v. Collins*, 438 P.2d 33, 40-41 (Cal. 1968)). In *Rammel*, the prosecution was attempting to establish that there was a high statistical probability that the defendant lied in his statement to the police detective, based upon the detective’s testimony that: “no criminal suspect ever admitted ‘right off the bat’ to

committing a crime.” While the trial court found that the detective qualified to testify as an expert on a person’s capacity for telling the truth and admitted the evidence, the Utah Supreme Court ruled that the testimony did not relate to general character for truth or veracity, but instead invited the jury to draw inferences about whether the defendant was truthful on a particular occasion, based upon the detective’s past experiences with other suspects; and thus, that testimony was inadmissible. The court also held that “probabilities cannot conclusively establish that a single event did or did not occur and are particularly

inappropriate when used to establish facts ‘not susceptible to quantitative analysis,’ such as whether a particular individual is telling the truth at any given time.” *Id.* at 501. As the Court pointed out: “there was no showing that the anecdotal data from which the detective drew his conclusions had any statistical validity” and therefore, his “opinions lacked sufficient foundation to be admitted.” *Id.* p. 501. The Court also found that if for no other

reason, the detective’s testimony should have been excluded because its potential for prejudice substantially outweighed its probative value under Rule 403 of the Utah Rules of Evidence. When this type of evidence is offered the burden shifts, and the proponent must show that the evidence’s probativeness outweighs its prejudicial effect. In this case, the defense seeks to question experts about incidence statistics concerning which general categories of people generally commit acts of child abuse. However, those incidence studies are merely anecdotal, usually involve fairly small sample sizes extrapolated to a larger population, and do not include the type of “statistical validity” referred to by the *Rammel* Court. Even if that foundation could be laid, assuming the correctness of the data that across all populations males are more commonly perpetrators of child abuse, that is not probative of who committed the acts of abuse of a child in a single case. If that data showed, for purpose of the argument, that 65% of all child abuse is committed by males, or by “natural fathers”, that does not make it *more likely in this particular case* that [VICTIM’S FATHER] rather than the Defendant caused the injuries to B.H. That would represent a misuse of statistics and a logical fallacy.

*State v. Iorg*, 801 P.2d 938, 941 (Ut. App. 1990) is another Utah case where anecdotal, statistical evidence that in the detective’s experience about fifty percent of child sex abuse victims did not report right after the abuse occurred was inappropriately admitted under the rationale of *Rammel*. The import of the detective’s testimony was that delay in reporting by a victim is not a reason to disbelieve her report of abuse. “The Utah Supreme Court has continued to condemn anecdotal ‘statistical’ evidence concerning matters not susceptible to quantitative analysis such as witness veracity, as one of the categories

leading to undue prejudice,” 801 P.2d, 941. The Utah Court of Appeals reversed the

defendant’s conviction and remanded for a new trial, finding that because the case hinged on credibility of the victim, admission of this evidence was prejudicial.

Similar to the detectives’ testimony from *Rammel* and *Iorg*, the statistical incidence of child abuse in general, showing that fathers or males are more often the perpetrators of child abuse than mothers or females, has nothing to do with the factual issues that are relevant to guilt or innocence in this case. They simply explain what is more common, not what actually happened. Further, the inference sought to be raised by the Defendant would be a misapplication of statistics, since what is generally more likely does not make what happened in any particular case more or less likely.

The case of *State v. Jaco*, 156 S.W.2d 775 (Mo. 2005), *cert. den. sub nom Jaco v. Missouri*, 126 S.Ct. 350, 546 U.S. 819 (2005) applies these legal principles to a case very close to the facts of our case. In *Jaco* the defendant, the mother of the victim, was convicted of abuse of a child for causing the death of her thirteen-month-old baby. The defendant’s boyfriend testified he saw her lift up her child and shake him so violently that “his head rocked back about five or six times.” The boyfriend then saw the defendant take the child to his bedroom, and heard “three pounds” against the bedroom wall. About an hour and a half later, the boyfriend heard the child coughing, so he got up to check on him. He discovered the child was not breathing. *Id.* at 778. The child sustained serious brain injuries, and was declared legally dead two days later. At trial, the victim’s mother sought to question the prosecution experts concerning the facts that: (1) children living in households with one or more male adults not related to them are at higher risk for maltreatment; (2) children in that situation are 8 times more likely to die of abuse than children living with a parent or both parents; (3) most perpetrators of shaking or blunt head

trauma to children are unrelated males; and, (4) a risk factor for abuse is where the child is living with a stepfather or mother’s boyfriend. The trial court refused to allow the proffered questions to be asked and the Missouri Supreme Court, sitting *en banc*, agreed. The *Jaco* court stated that this use of “profile” evidence was inappropriate because the attempted use was to obtain expert testimony about the guilt or innocence of the defendant. While Jaco claimed that she was not arguing such evidence was sought to allow her to argue that the boyfriend committed the abuse, the Supreme Court found that was exactly the purpose for which the evidence was proffered: “The clear inference is that an unrelated male who lived with the child, such as [boyfriend], was statistically more likely to have been responsible for the child’s injuries than a related female, such as Jaco.” Because this was an inappropriate use of statistical probability evidence, and would constitute expert opinion concerning the guilt or innocence of the defendant, the Supreme Court held it was inadmissible. *Id.* 780. The United States Supreme Court denied certiorari on the case.

In *State v. Transfiguracion*, the Supreme Court of Hawaii rejected certiorari, but the Chief Justice joined by four other justices wrote an unpublished opinion as to why they would have granted certiorari. In the underlying case, which involved allegations of sexual abuse of a child, an expert witness had extensively testified about typical characteristics of child abusers, including an opinion that 85% of child abuse victims are abused by someone they had a preexisting relationship with. In the dissenting opinion, Justice Recktenwald notes that most other jurisdictions and legal commentators have rejected the use of statistics as inherently prejudicial in criminal trials. “[I]t has been noted that commentators are virtually unanimous in their condemnation of the use of probability evidence on crucial points in criminal proceedings, because jurors are likely to be unable to appropriately

analyze statistical evidence, such evidence would overwhelm the jury, and such evidence is incompatible with traditional notions of reasonable doubt. 2013 WL 1285112 \*5-6 (Hawaii 2013) (citing *State v. Petrich*, 683 P.2d 173, 180 (Wash.1984)) (rejecting

testimony that in “eighty-five to ninety percent of our cases, the child is molested by someone they already know). As the opinion continues: “testimony that a certain characteristic is commonly possessed by a certain type of criminal may suggest to the jury that an individual with that characteristic is guilty. However, such testimony *actually has no probative value for that purpose*, because it says nothing about how many innocent individuals also possess that characteristic.” *Id.* 6, emphasis in original. As applied to this case, the inference sought is the opposite, because most child abuse is committed by males or fathers, the defense wishes to argue that those general statistics, derived from incidence studies, are probative evidence that on the facts of this case, [VICTIM’S FATHER] is more likely the person who abused B.H.

If the positions were reversed and the epidemiological studies relating to child abuse established that mothers and females more often commit acts of child abuse, and if the State attempted to introduce such evidence to support an argument that the Defendant likely abused B.H., there is no doubt the defense would be vehemently objecting, and with good grounds. The logical fallacies and statistical mistakes are the same in either situation. Many cases around the country hold that it is inappropriate for the prosecution to introduce evidence as to a “profile” of a common offender, then try to show the charged defendant shares aspects of that profile, or to show what is a “typical” case, followed by evidence the charged case is “typical” to support an argument the defendant committed the crime.

A good example is *Hall v. State*, 692 S.W.2d 769, 773 (Ark.App.1985), where the prosecution elicited expert evidence as to what the features of a ‘usual’ case of child sexual abuse would involve, followed by expert opinion concerning how many of those usual details were made out by the evidence against the defendant. The Court of Appeals of Arkansas held that such evidence, which included evidence that “in 75 percent to 80 percent of such cases the perpetrator is known to the children involved” was inadmissible, since it was not introduced to rebut common misconceptions about child sex abuse but to support the inappropriate inference the defendant was guilty of the crime. To the same effect is the holding in *Stephens v. State*, 774 P.2d 60, 64 (Wyo.1989), where the State elicited expert testimony not only about things such as that 80% to 85% of child sexual abuse is committed by a relative of the victim, but also the expert’s opinions concerning the fact that sexual abuse had happened and even who committed the abuse of the child. The Wyoming Supreme Court stated: “We hold that permitting a witness, lay or expert, to articulate an opinion as to the guilt of the accused constitutes plain error and demands reversal,” *Id.* 67. If statistical evidence can’t be used in that way, it should also not be used to establish the likely innocence of an accused person, when such a conclusion is not supported by the data.

# CONCLUSION

The court should not allow the type of questions the defense asked [STATE’S EXPERT] during the preliminary hearing about epidemiological studies and percentages regarding who “the most likely perpetrators of abuse” are. Nor should the defense be allowed to elicit such testimony from their own experts or others who might have that awareness of epidemiologic studies of child abuse. Analogous to the facts in *Jaco*,

Defendant is the mother of the child she allegedly abused, and the inference she is seeking the trier of fact to make, that because child abuse in general is more often committed by natural fathers or males, it’s more likely in this case her husband [VICTIM’S FATHER] caused B.H.’s injuries than that she did, would be an inappropriate, confusing and a logically fallacious use of statistical science. As in *Jaco*, the inappropriate attempt to encourage the trier of fact to draw inferences regarding how statistical likelihood applies in this case would have no scientific probative value and would almost certainly cause confusion of the real issue of guilt or innocence, based solely on the facts of this case. Thus, the State’s Motion in Limine is also based upon the argument under Rule 403 of the Utah Rules of Evidence that such evidence should be excluded because its probative value if far outweighed by the risk of prejudice from confusion of the trier of fact with the lure of a numerical probability concerning who abused B.H.

The fact that Defendant is a mother, charged with Child Abuse, does not make her any more or less likely to have committed the crime simply because there are general statistics that show that fathers or males as a category commit more acts of abuse in general. The State respectfully requests this Court grant the State’s Motion in Limine to exclude the defense’s questions relating to statistics and incidence of child abuse. The defense should not be allowed to introduce such evidence through any witness, because the evidence has no probative value to establish that it is less likely the Defendant committed the charged crime. And, the use of such evidence at trial risks confusing the trier of fact by encouraging the jury to suspend their responsibility to carefully consider and weigh all the facts introduced at the trial, instead deciding they can decide questions of guilt or innocence based purely on statistical probabilities.

RESPECTFULLY SUBMITTED this 28th day of April, 2014.

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Deputy District Attorney