**BRIEF IN SUPPORT OF STATE’S MOTION TO EXCLUDE**

**TESTIMONY OF DEFENSE EXPERT REGARDING PROFILE EVIDENCE**

##### State of Washington

The defendant is charged with First Degree Statutory Rape and Indecent Liberties committed upon his then three-year-old stepdaughter, Molly. The defendant has endorsed Dr. P. as a witness in this case. The only discovery provided to date regarding Dr. P.’s anticipated testimony is a report dated June 15, 1995, which states in relevant part, “He (the defendant) does not display the psychological or physiological profile of a child molester . . . . In this examiner’s professional judgment, such abuse occurrence appears very unlikely.”

The State moves to exclude such testimony from the trial for several reasons:

1. Dr. P. does not have the expertise to render such an opinion.
2. Such opinion is not based upon generally accepted scientific principles. *State v. Black*, 745 P.2d 12 (1987).
3. Such opinion is not supported by the materials relied upon by Dr. P.
4. Such an opinion invades the province of the jury and receipt of such evidence would result in unfair prejudice to the State pursuant to Fed. R. Evid. 403.
5. Such testimony is inadmissible character evidence under Fed. R. Evid. 404(a).
6. Such testimony is inadmissible pursuant to Fed. R. Evid. 704(2).
7. Profiling evidence is inadmissible as a matter of law.
8. Admission of such evidence would be irrelevant as a matter of law.
9. Expert testimony involving profiling evidence in support of a guilt-innocence determination violates a variety of ethical standards for professionals under the American Psychological Association’s *Ethical Principles of Psychologists and Code of Conduct* (APA Code), and the Association for the Treatment of Sexual Abusers (ATSA) *Ethical Standards and Principles for the Management of Sexual Abusers.*

As to objection 1, the doctor’s qualifications, the State requests a pre-trial opportunity to *voir dire* Dr.P. for the court to determine his qualifications as an expert in this area. The State challenges Dr.P.’s expertise in this area. Trial courts are obligated to determine whether a proffered expert witness is properly qualified to render an opinion. Fed. R. Evid. 104(a). This inquiry involves not only a determination of whether the proffered expert has the requisite professional qualifications and subject matter knowledge, but also whether the methodology employed by the expert in formulating his or her opinion is reliable and whether it can properly be applied to the facts at issue in the case. *Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167, 193 L. Ed. 2d 238 (1999); *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). For the reasons set forth below, the state submits that Dr. J.P. does not satisfy these requirements.

As to objection 2, the defendant would have the burden, pre-trial, of establishing that such a profile is accepted in the relevant scientific community. *State v. Black*, 745 P.2d 12 (1987); *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Additionally, the defendant has the burden of establishing that such expert testimony is “reliable” under Fed. R. Evid. 702. *Daubert*, 509 U.S. 579; *Kumho*, 119 S. Ct. 1167.

The United States Supreme Court has clearly indicated that trial courts are obligated to act as “gatekeepers” regarding the admission of expert testimony of any sort before such testimony may be received before the jury. *Id*. The *Daubert*,509 U.S. 579, criteria are to be applied to all forms of expert testimony, whether involving hard science, soft science, or expert testimony involving “specialized knowledge,” as well as to “novel” forms of scientific evidence. *Kumho*, 119 S. Ct. 1167. The key consideration in making the determination of admissibility is whether the expert’s testimony is relevant to a material issue in the case and a principle consideration in this regard is whether the expert’s techniques, opinions and information are “reliable.” *Daubert*, 509 U.S. 579; *Kumho*, 119 S. Ct. 1167.

Scientific validity for one purpose may not mean scientific validity for another unrelated purpose. *Id*. As related to the facts of this case, just because an expert may use certain psychological techniques or instruments to assess sex offenders for purposes of treatment, or for purposes of making recommendations to courts as part of a presentence assessment, this does not mean that such techniques or instruments are valid for assisting in a fact finder’s determination of guilt or innocence. Additionally, there is nothing which requires courts to rely on the *ipse dixit* of the expert in making this determination. *Kumho*, *Id.* (quoting *General Electric Co. v.* *Joiner*, 522 U.S. 136, 146, 118 S. Ct. 512, 519, 139 L. Ed. 2d 508, 519 (1997)). In other words, just because the expert says that the information or technique is reliable or generally accepted in the relevant scientific community does not obligate courts to accept this representation. Trial courts must undertake their own assessment in this regard in properly exercising their discretion to admit or exclude expert testimony.

As to objection 3, the State indicates that this issue may be best determined by an offer of proof made outside the presence of the jury and subject to cross-examination by the State, wherein Dr.P. is required by the court to set forth the basis for his opinions, the techniques utilized in assessing the defendant, and any supporting scientific literature which relates to the opinions he is offering. It is unclear from the report of Dr.P. what is meant by a psychological or physiological profile. The State anticipates that the psychological profile referenced relies on some psychological testing instruments such as the MMPI or Sex Offender Inventory, which are frequently utilized by treatment providers and evaluators of sex offenders. The State also anticipates that the physiological profile referenced relies on a plethysmograph evaluation or use of the Abel-screen.

In further support of its request for a pre-trial hearing and offer of proof from the defense, the State would indicate that if the techniques and instruments identified above were in fact utilized by Dr. P., that such techniques and instruments would not be reliable for purposes of assisting in the determination of this defendant’s guilt, and are not generally accepted within the relevant scientific or professional community for this purpose. In support of this argument the State respectfully refers the court to the following professional articles which thoroughly articulate this position and are attached in support of this motion. *See* James M. Peters & William D. Murphy, *Profiling Child Sexual Abusers: Legal Considerations*, 19 Crim. Just. & Behav. 38 (1992); William D. Murphy & Timothy A. Smith, *Sex Offenders Against Children: Empirical and Clinical Issues*, *in Amer. Prof. Soc’y on Abuse Children Handbook on Child Maltreatment* (J. Briere et al. eds., 1996); William L. Marshall & Gary Hull, *The Value of the MMPI in Deciding Forensic Issues in Accused Sex Offenders*, 7 Sexual Abuse - J. Res. & Treatment 205 (1995). *See also* Judith V. Becker & Vernon L. Quinsey, *Assessing Suspected Child Molesters*, 17 Child Abuse & Neglect 169 (1993) (noting that the MMPI and the plethysmograph do not have predictive value for determining whether an offender engaged in the alleged conduct even though such procedures may have utility for assessing offenders in other contexts); Bill Murphy & Howard Barbaree, *Assessments of Sex Offenders by Measure of Erectile Response:* *Psychometric Properties and Decision Making*, (Monograph Order No. 86M0506500501D), Rockville, MD: National Institute of Health; John E.B. Myers, *Evidence in Child Abuse and Neglect Cases* (3d ed. 1997) (noting that there is no scientific data to support position that we can profile sex offenders); William D. Murphy, Terri J. Rau & Patricia J. Worley, *The Perils and Pitfalls of Profiling Child Sex Abusers*, Amer. Prof. Soc’y on Abuse Children Advisor, Spring 1994, at 3.

# The State also refers the court to the holding in People v. Wernick, 674 N.E.2d 322 (N.Y. 1996), which discusses the need for establishing the scientific reliability of the underlying technique upon which the expert’s opinion is based; otherwise the opinion should be excluded. Accord Ramirez v. State, 651 So. 2d 1164 (Fla. 1995); State v. Cressey, 628 A.2d 696 (N.H. 1993). As the court noted in In re Gina D., 645 A.2d 61, 64 (N.H. 1994), an expert “opinion that is impenetrable on cross-examination due to the unverifiable methodology of the expert witness in arriving at the conclusion is not helpful to the court in its search for the truth. If the court, as the trier of fact, cannot determine and assess the bases for the expert’s opinion, it also cannot accord the proper weight, if any, to the testimony.” Id. See also Jane Goodman-Delahunty, Forensic Psychological Expertise in the Wake of Daubert, 21 Law & Hum. Behav. 121 (1997) (“A clear lesson to be learned from the early post-Daubert cases is that experts have to be much more prepared to disclose the scientific underpinnings of their opinions than they were in the past.”).

Objection four is that the proffered expert opinion of Dr. P. invades the province of the jury. It is improper for an expert to base an opinion about an ultimate issue of fact solely on the expert’s determination of a witness’ veracity. As the Court of Appeals noted in *State v. Fitzgerald*, 694 P.2d 1117 (Wash. Ct. App. 1985):

The physical evidence does not show whether sexual abuse of the children occurred. Dr. G.’s opinion is based solely on her evaluation of the children’s version of the events. “An expert may not go so far as to usurp the exclusive function of the jury to weigh the evidence and determine credibility.” 54 K. Tegland, *Wash. Prac. Evid*. § 292, at 39 n.4 (2d ed. 1982); *United States v. Samara*, 643 F.2d 701, 705 (10th Cir.), *cert. denied*, 454 U.S. 829 (1981).

The Hawaii Supreme Court has likewise noted, “Scientific and expert testimony with their aura of special reliability and trustworthiness . . . courts the danger that the triers of fact will abdicate (their) role of critical assessment and surrender . . . their own common sense in weighing testimony.” *State v. Batangan*, 799 P.2d 48 (Haw. 1990).  *See also* *People v. Beckley*, 456 N.W.2d 391 (Mich. 1990) (“To a jury recognizing the awesome dilemma of whom to believe, an expert will often represent the only seemingly objective source, offering it a much sought-after hook on which to hang its hat”); *State v. Cressey*,628 A.2d 696 (N.H. 1993); *Stephens v. State*, 774 P.2d 60, 66-67 (Wyo. 1989); *State v. Friedrich*, 398 N.W.2d 763 (Wis. 1987). This risk is especially acute when the expert testimony influences credibility determinations between witnesses.  *Stephens* 774 P.2d at 66; *State v. Michaels*, 642 A.2d 1372 (N.J. 1993); *State v. Pittman*, 496 N.W.2d 74 (Wis. 1993) (“an expert’s conclusion as to witness credibility does not assist the jury to evaluate credibility; it usurps their role as ‘lie detector’ in the courtroom”). Here such testimony would effectively be offered to buttress the defendant’s denials that he did not engage in the sexual acts alleged, or his claims that he does not have any sexual interest in children that would motivate him to engage in such acts. Indirectly, such testimony would also amount to an opinion that the alleged victim is falsely alleging abuse, or mistaken in her interpretation of the acts of the defendant.

Rule 704(b) of the Federal Rules of Evidence additionally prohibits expert testimony about “whether a defendant did or did not have the mental state or condition constituting an element of the crime charged or a defense thereto.” The State is required to prove that the defendant had sexual contact with the alleged child with the intent to become sexually aroused or sexually gratified by such contact. The profile offered here by Dr.P. is intended to establish that the defendant does not have a mental condition (e.g. pedophilia) that would lead him to engage in sexual conduct with a child for purposes of achieving sexual arousal or sexual gratification. The proffered expert testimony runs afoul of this evidentiary prohibition and should, therefore, be excluded. Just as the State could not offer evidence that the defendant is a pedophile to show that the defendant acted in conformity with this character trait and committed a sexual assault on a child, the defendant cannot offer expert testimony indicating the defendant is not a pedophile and therefore did not, or is less likely to have committed such an offense. *See*, *e.g.*, *State v. Tucker*, 798 P.2d 1349 (Ariz. Ct. App. 1990) (error to introduce expert testimony on behavioral characteristics of child molesters); *State v. Braham*, 841 P.2d 785 (Wash. Ct. App. 1992) (State not permitted to present evidence of grooming and seduction techniques to prove defendant’s probable commission of sexual assaults).

The seventh and eighth objections, respectively, are that evidence of profiling sexual abusers is, as a matter of law, inadmissible and irrelevant in a criminal trial. Profile testimony has been repeatedly rejected by the courts of this state and by virtually every appellate court which has considered the issue. Many courts which have addressed the issue have found the evidence of “profiling” does not meet the test of general acceptance in the relevant scientific community articulated in *Frye*, 293 F. 1013 (Adopted in Washington. S*ee Black*, 745 P.2d 12). Others have found such evidence invades the province of the jury, is speculative and is confusing to the jury. As the United States Supreme Court has noted, relevance is a function of reliability. *Daubert*,509 U.S. 579; *Kumho*, 119 S. Ct. 1167.

All Washington State cases reject of expert testimony on profiles. In *State v. Steward*, 660 P.2d 278 (Wash. Ct. App. 1983), the State introduced expert testimony “that serious injuries to children were often inflicted by either live-in or baby-sitting boyfriends.” The court reversed a second degree murder conviction, holding that the testimony was highly prejudicial and had no scientific basis. In *State v. Petrich*, 683 P.2d 173 (Wash. 1984), the Washington Supreme Court found error in the admission of evidence that in “85-90% of sexual abuse cases, the child is molested by someone they already know.” The court noted that such expert testimony should be excluded as it invited the jury to base its decision on the defendant’s membership within a group of people.

Similarly, in *State v. Maule*, 667 P.2d 96 (Wash. Ct. App. 1983), the court found reversible error when the State introduced expert testimony “that the majority of child sexual abuse cases involve ‘a male parent figure, and those cases that would involve a father figure, biological parents are in the majority.’” This case involved the prosecution of a defendant who was the father figure of one of the alleged victims and the father of the other. The court ruled:

Such evidence invites a jury to conclude that because the defendant has been identified by an expert with experience in child abuse cases as a member of a group having a higher incidence of child sexual abuse, it is more likely the defendant committed the crime. Admission of this testimony was reversible error.

*Id* at 99*. See also State v. Rimmasch*, 775 P.2d 388 (Utah 1989) where the Utah Supreme Court rejected profile evidence, calling it “inherently unreliable.” In that case, the State introduced evidence that the characteristics of a victim of ongoing child abuse was consistent with the profile of abuse victims. The court held there was an insufficient demonstration of the existence of such a profile, and reversed the defendant’s conviction.

Profiling evidence is substantially the same as inclusion of the defendant in a group of individuals, as done in *Steward*, *Petrich* and *Maule*. The argument suggested by the defense expert is that if the defendant does not share characteristics common to other child abusers he is, therefore, less likely to have engaged in the alleged assault, or is less motivated to do so. This argument presupposes (1) that there are characteristics common to child abusers that are identifiable through psychological or physiological assessment, and (2) that such characteristics make the defendant more or less likely to engage in acts of child abuse.

The presumptions of the defense expert are faulty for several reasons. There are individuals who are sexually attracted or have an exclusive erotic preference for pre-adolescent (pedophiles) or adolescent children (hebephiles). However, not all pedophiles or hebephiles molest children. Many individuals who are sexually attracted to children nevertheless resist their attraction and do not commit criminal offenses. Alternatively, the majority of individuals who actually commit acts of sexual abuse are not exclusively sexually attracted to children as sexual partners. Therefore, having a sexual interest in children does not mean that an individual is more or less likely to commit an act of sexual abuse. *See* Murphy, Rau & Worley, *supra* (“[O]ffenders against children are a very diverse group, showing a range of psychological dysfunction from none to severe and a variety of sexual arousal patterns from normal to quite deviant.”).

Research on sexual offenders consistently reveals that they are a highly diverse and heterogeneous group in terms of their characteristics as individuals and in their offense behaviors and that there is no psychological profile of a child molester. (*See supra*, authorities cited above regarding objection 3). Some sex offenders offend only against boys or girls while others offend against both. Some have a specific age preference while others offend against children of different ages and developmental levels. Some adult rapists also commit offenses against children and incest offenders also offend outside their family. Offenders also vary widely in terms of their other paraphilias and sexual preferences. Even within the community of professionals who investigate, manage, evaluate and treat sex offenders, there is wide variation in sex offender typologies. *See* *The Sex Offender: Corrections, Treatment, and Legal Practice* (Barbara K. Schwartz & Henry R. Cellini eds., 2d ed. 1999) (discussing differences in sex offender typologies). Not only is there no way to exclusively categorize sex offenders, there is also no way to determine whether any individual, regardless of his sexual preference(s) is more or less likely to commit a specific act against a specific child.

It is paramount to recognize that there is no scientific ability to determine whether someone committed a specific sexual act, nor is there acceptance of any type of “profile” of a child sexual abuser.

Numerous methods of psychological assessment are used to evaluate sex offenders. It is important to emphasize, however, that there is *no* psychological test or combination of tests that can determine whether a person has engaged or will engage in deviant sexual activity. Psychological tests and instruments are useful aids to diagnosis and treatment, but they cannot be used to determine whether an act occurred.

Myers et al., *Expert Testimony in Child Sexual Abuse Litigation*, 63 Neb. L. Rev. 133 (1989). Myers et al. concluded that there are several reasons to reject testimony of a “profile” of a child molester. Key among these reasons is that “the clinical and scientific literature does not support the existence of a profile of a ‘typical’ child sexual abuser.” *Id*. at 143.

A review of the appellate decisions around the country support the contention that evidence of a child molester “profile” should be rejected. Again, as Myers et al. reported:

The relevant scientific literature does not support the conclusion that there is a reliable profile of a “typical” sex offender. Despite this fact, however, some mental health professionals are willing to testify that a profile exists. Faced with such testimony, a number of courts have determined that sex offender profiles are a form of novel scientific evidence. Courts adopting this approach correctly conclude profile evidence has not found general acceptance in the relevant scientific community.

*Id.* at 144.

A specific review of these cases shows clearly that such evidence is appropriately rejected.*See*, *e.g*.,*Kavanagh v. Berge,*73 F.3d 733 (7th Cir. 1996); *Hulbert v. State*, 529 N.W.2d 632 (Iowa Ct. App. 1995); *State v. Michaels*, 642 A.2d 1372 (N.J. 1993) (holding testimony scientifically unreliable); *United States v. Powers*, 59 F.3d 1460 (4th Cir. 1995) (profile based on defendant’s performance on penile plethysmograph not scientifically reliable); *State v. Kallin*, 877 P.2d 138 (Utah 1994).

An earlier New York court decision in *People v. Berrios*, 568 N.Y.S.2d 512 (N.Y. Sup. Ct. 1991), reviewed the cases nationwide which had considered the admissibility of “profile” evidence. There the defendant, charged with first degree rape and first degree sexual abuse, sought to introduce testimony of a “purported expert (a Ph.D.) in sexual abuse” that the defendant did not fit the “accepted child abuser profile.” The court rejected the testimony holding:

This court finds that profile testimony has the sole purpose of advancing “expert” opinion concerning the ultimate question of guilt or lack thereof, effectively usurping the jury’s role, and providing no information helpful to the jury’s understanding of the evidence properly before it. Accordingly, such profile testimony is inadmissible, *per se*, and thus no need exists for any scrutiny of its reliability in principle, the reliability of a particular profile, or the qualification of the purported expert witness.

*Id*. at 515.

The court noted its conclusion was consistent with the applicable case law across the country. “Research by this court has disclosed seventeen states and the District of Columbia, as well as federal appellate courts, which have ruled on this question. The only possible exception to universal preclusion among the jurisdictions which have considered the matter is California, which this court will address *infra*.” *Id.*  at 513. (The California case, *People v. Stoll*, 783 P.2d 698 (Cal. 1989) permitted such testimony pursuant to a specific statutory provision, not adopted in Washington.)

In *State v. Friedrich*, 398 N.W.2d 763 (Wis. 1987), the defendant was convicted of sexual assault in connection with crimes against his wife’s 14-year-old niece. Defense counsel presented an offer of proof from a clinical psychologist who had interviewed the defendant and given him psychological tests. The psychologist testified that he had compared the defendant’s psychological profile to the psychological profile of known incestuous sex offenders and found them diametrically opposed. The defense argued that this finding tended to corroborate the defendant’s testimony that he did not commit the alleged acts and also tended to negate the complaining witness’s testimony that he did commit those acts.

The trial court refused to allow the jury to hear the psychologist testify, concluding that admitting this evidence would result in a usurpation of the jury function of assessing witness credibility in that it “had the potential to cause the jury to substitute the expert’s opinion for its own.” *Id.* at 768. The Supreme Court of Wisconsin held that the trial judge reasonably determined that the jury could draw its own conclusions on the question of the credibility of the defendant without the help of the expert.

In *State v. Miller*, 709 P.2d 350 (Utah 1985), testimony about a “typical psychological profile” of individuals who sexually molest children was offered by the accused. The “expert” would have described “the typical psychological profile of individuals who sexually abuse children.” The Court excluded the testimony on grounds that it was speculative and confusing to the jury. The Utah Supreme Court observed that the trial court was concerned “that the jury would shift its attention in deciding the case from whether or not the appellant had committed the crime to whether or not the prosecution had proven that the appellant fit within the typical psychological profile of a child abuser.” *Id*. at 352. The trial court correctly excluded the evidence, the court held, to prevent a confusion of the issues for the jury.

In *United States v. St. Pierre*, 812 F.2d 417 (8th Cir. 1987), appellant sought to have an expert examine him to determine whether he fit the profile of a sexual offender. The motion was denied, and he appealed. The court pointed out that the appellant had “cited no decision or scientific treatise that recognizes the acceptability of such testimony. One of the standards for admissibility is that it must have gained the acceptance of the particular field of scientific community to which it belongs.” *Id.*  at 420. The court held that “a review of the cases in other jurisdictions does not persuade us that it is generally accepted in the medical or legal communities that psychiatrists possess such knowledge or capabilities.” *Id.*  (quoting *State v. Cavallo*, 443 A.2d 1020, 1027 (N.J. 1982)).

In *State v. Fitzgerald*, 382 N.W.2d 892 (Minn. Ct. App. 1986), a psychologist proffered testimony about “typical traits of pedophiles” in an effort to show that the defendant did not fit the profile. The trial court rejected the testimony for several reasons, including a concern that it would confuse the jury. The court found no error.

In *Williams v. State*, 649 S.W.2d 693 (Tex. Ct. App. 1983), the defense proposed to call a psychologist to testify that the defendant did not possess character disorders “virtually always found in child molesters” and, for that reason, the statistical improbability of him having committed the crimes was very high. *Id*. at 694. The basis of his testimony was an MMPI test and a mental status exam. The trial court refused to permit the testimony. The court ruled that the evidence was inadmissible, stating that opinion testimony of one witness as to the state of mind of another is inadmissible because one person cannot possibly know another’s state of mind. Such testimony is necessarily conjectural.

In *Hall v. State*, 692 S.W.2d 769 (Ark. Ct. App. 1985), the Arkansas court held that expert testimony was distracting and prejudicial because it included a description of a “typical” psychological profile of a child molester. The court reversed a lower court ruling which allowed the testimony.

*Hall* was cited approvingly by the Supreme Court of Kansas in *State v. Clements*, 770 P.2d 447 (Kan. 1989), which found reversible error in the admission of trial testimony about the psychology of sexual offenders. Also citing *State v. Maule*, 667 P.2d 96 (Wash. Ct. App. 1983), the Kansas court noted “evidence which only describes the characteristics of the typical offender has no relevance to whether the defendant committed the crime in question . . . .” *Clements*, 770 P.2d at 454.

In *State v. Hansen*, 743 P.2d 157 (Or. 1987), the State introduced evidence of character traits of a child molester through a police detective. The court found this reversible error noting:

Detective Robson testified to what might be described as a “profile” of a nonviolent child abuser who is unrelated to the child…. 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 abuser children sexually are male. This says little, if anything, however, about whether a particular male defendant has sexually abused a child.

*Id.* at 161.

In a New Jersey court case, *State v. Cavallo*, 443 A.2d 1020 (N.J. 1982), involving a rape charge, the court found that the trial judge properly excluded expert character testimony by a psychiatrist who would testify that defendant did not possess the psychological traits of a rapist. In so holding, the court found that:

Defendants have not met their burden of showing that the scientific community generally accepts the existence of identifiable character traits common to rapists. They also have not demonstrated that psychiatrists possess any special ability to discern whether an individual is likely to be a rapist. Until the scientific reliability of this type of evidence is established, it is not admissible.

*Id.* at 1031.

In *United States v. Powers*, 59 F.3d 1460 (4th Cir. 1995), the court upheld the trial court’s decision to exclude the defense expert’s testimony that defendant’s performance on the penile plethysmograph indicated he did not exhibit characteristics of a “fixated pedophile”, and did not demonstrate the psychological profile of a “fixated pedophile.” The expert also wanted to testify that 40% of incest offenders were “fixated pedophiles.” The Court ruled that the defendant failed to establish the scientific reliability of the plethysmograph as a diagnostic device, under *Daubert*, 509 U.S. 579, standards, in light of evidence the government produced before the trial court establishing that the scientific literature did not support use of the plethysmograph as a diagnostic tool, it had no accepted standards in the scientific community, and there were substantial false negatives for offenders in denial. The profiling evidence was likewise held not to be relevant because the defendant provided no link demonstrating that non-fixated pedophiles were less likely to commit incest abuse.

Other decisions have reached similar results regarding use of the plethysmograph to profile offenders or determine the likelihood that the defendant engaged in the alleged conduct. *See*, *e.g*., *Gentry v. State*, 443 S.E.2d 667 (Ga. Ct. App. 1994) (holding trial court erred in admitting plethysmograph evidence, noting other courts had rejected its use and its reliability is uncertain within the scientific community). *See also* *State v. Kallin*, 877 P.2d 138 (Utah 1994) (noting defense experts reliance on plethysmograph was not supported by evidence of reliability sufficient to warrant admission). *Accord State v. Spencer*, 459 S.E.2d 812 (N.C. Ct. App.), *appeal* *denied*, 462 S.E.2d 524 (N.C. 1995); *In the Interest of A.V*., 849 S.W.2d 393 (Tex. Ct. App. 1993).

Another well-known case where “profile” evidence of another sort was rejected is *United States v. MacDonald*, 688 F.2d 224, 227 (4th Cir. 1982), *cert. denied*, 459 U.S. 1103, 103 S. Ct. 726, 74 L. Ed. 2d 951 (1983). There, an Army Green Beret physician was charged with the killings of his wife and two children. The defendant was prevented from presenting the testimony of a forensic psychiatrist to the effect that the defendant had a personality that was not consistent with the heinous murders. The court reasoned that the probative value of the testimony was substantially outweighed by the danger of unfair prejudice, confusion of the issues and misleading the jury. The trial court believed that a “battle of the experts” would ensue and result in juror confusion. The appellate court found no error.

The proposed testimony of Dr. P. also runs afoul of several ethical standards for professionals in the field who evaluate and treat sex offenders. Even if this court were to deviate from the well established precedent cited above excluding profiling testimony and permit this expert to offer such evidence, professional ethical standards preclude the expert from so testifying. For example, the Association for the Treatment of Sexual Abusers (ATSA), the largest professional organization involving the assessment, treatment and management of sex offenders, has promulgated the *Ethical Standards and Principles for the Management of Sexual Abusers*. Principle 3.01 indicates, “there is no known set of personality characteristics that can differentiate the sexual abuser from the non-abuser.” Principle 3.02 additionally provides that “psychological profiles cannot be used to prove or disprove an individual’s propensity to act in a sexually deviant manner.”

The American Psychological Association (APA) has promulgated an even more comprehensive set of professional standards for psychologists under their *Ethical Principles of Psychologists and Code of Conduct* (1992)(APA Code). Specifically, the APA “Principles” and numerous ethical rules in sections 1, 2, 3 and 7 of the APA Code would significantly circumscribe any testimony in this area. *See*, *e.g*., Standard 2.01 *Evaluation, Diagnosis, and Interventions in Professional Context* providing that “[p]sychologists’ assessments, recommendations, reports, and psychological diagnostic or evaluative statements are based on information and techniques . . . sufficient to provide appropriate substantiation for their findings.” Standard 2.02 *Competence and Appropriate Use of Assessments and Interventions* additionally provides that “[p]sychologists who develop, administer, score, interpret, or use psychological assessment techniques, interviews, tests, or instruments do so in a manner and for purposes that are appropriate in light of the research on or evidence of the usefulness and proper application of the techniques, and . . . refrain from misuse of assessment techniques, interventions, results, and interpretations and take reasonable steps to prevent others from misusing the information these techniques provide.” Based upon the professional authorities cited above the techniques utilized by Dr. P. fail to satisfy these ethical standards. There are several other relevant sections of the APA Code which are not specifically referenced herein but which would likewise be implicated by the proffered testimony of this expert.

For the above stated reasons, the proffered testimony of Dr. P. is outside of generally accepted scientific principles, is misleading, speculative, confusing, invades the province of the jury, is contrary to law and professional standards of practice and should, therefore, be excluded.

Respectfully submitted,

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Deputy Prosecuting Attorney