IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. JOHNATHAN RICHARD BLACK, Defendant-Appellant, Petitioner on Review.	Washington County Circuit Court Case No. C140510CR CA A158879 S065729

BRIEF OF *AMICI CURIAE* OREGON INNOCENCE PROJECT AND FORENSIC JUSTICE PROJECT IN SUPPORT OF APPELLANT BLACK

On Review from the decision of the Court of Appeals on an appeal from Judgment of the Circuit Court for Washington County

The Honorable D. Charles Bailey, Jr., Judge

Opinion Filed: December 6, 2017
Author of Opinion: Shorr, Judge
Concurring Judges: Armstrong, Presiding Judge, and Tookey, Judge

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I. STATEMENT OF *AMICI CURIAE*

Oregon Innocence Project (OIP) is program of the Oregon Justice Resource Center. OIP is dedicated to securing the release of wrongfully convicted inmates. OIP works to exonerate the innocent, train law students, and promote legal reforms related to wrongful convictions.

Forensic Justice Project (FJP) is an organization dedicated to promoting and protecting sound science in the courtroom. FJP intervenes in cases involving forensic and scientific issues in criminal cases to prevent wrongful convictions before they happen.

Amici have not investigated the merits of Mr. Black's assertions and take no position on his innocence or guilt. *Amici* appear in this matter to urge the court to enhance the truth-seeking functions of the criminal justice system by permitting expert testimony based on sound science that has been accepted in other cases. *Amici* advocate for decisions based on scientific evidence, whenever possible. To that end, such evidence must be made available to the decision-maker—the trier of fact in this case.

II. SUMMARY OF ARGUMENT

The trial court correctly ruled that an expert can testify to the general science related to perception and memory and the factors that may distort these processes. The trial court erred when it ruled that expert testimony applying that general

science to the particular facts of the case constitutes impermissible vouching. The ruling of the trial court runs contrary to Oregon law.

The Oregon Supreme Court, in *State v. Lawson*, encouraged the use of memory experts in the context of eyewitness identification evidence, where the witness's memory may have been contaminated to produce a false memory of the perpetrator's identity. The *Lawson* court explored 30 years of scientific research that proves the human memory is vulnerable to suggestion in a variety of ways, many of which are contrary to the average juror's understanding.

Appellant Black offered expert testimony to educate the jury about possible false reports caused by memory error. The trial court failed to understand the science at issue and the extent to which that science contradicts commonly held perceptions of the average juror. The trial court also failed to understand the scope of the expert's proposed testimony, which follows the Oregon Supreme Court's rulings on the scope of permissible testimony that bears on witness credibility, but does not supplant the jury's determination of credibility.

Amici proposes a rule under which expert testimony on memory science is admissible, provided that it is helpful to the trier of fact and the expert does not offer the ultimate conclusion as to whether the witness is telling the truth, or saying

the same thing in different words (that is, making a statement that "is tantamount to, the equivalent of, and the same as stating that the person is truthful").[1]

III. ARGUMENT

A psychologist in sex abuse cases offers testimony about the way in which a witness, including a child witness, is interviewed that may have an impact on the witness's memory. The expert's testimony is better characterized as relating to memory science, and, in particular, the way in which suggestion or influence affects memory, which may result in a false report.

A. False reports may be caused by intentional deception or unintentional memory errors.

False reports are claims made by a witness that are not factually accurate. The inaccuracy can be due to conscious lies on the part of the witness or to the unconscious assimilation of suggestions and influence by those who have access to the witness.

False reports can arise in several different forms, including:

1. False memories. A false memory is "an untrue memory that the witness or complainant nonetheless believes to be true."[2] Other courts finding expert testimony on false memories admissible have explained that "a false memory can

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[1] *See State v. Beauvais*, 357 Or 524, 543, 354 P3d 680 (2015).

[2] *DeLong v. State*, No. 2-04-410-CR, 2-04-411-CR, 2006 WL 3334061, at *15 (Tex App, Nov 16, 2006).

be very detailed, and a person who has a false memory can be very confident and even emotional about the false memory."[3]

2. False beliefs. A witness may have a false belief about past events, but no memory of those events. She merely believes that the event occurred.

3. Deceptive lies. A deceptive lie is an intentional untruth.

4. Compliant lies. A witness may tell a compliant lie when she knows that the information is false, but she is not trying to deceive. She, instead, feels pressured into an inaccurate report. Pressure from an interviewer may be intentional or unintentional. The result, however, is the same—a false report.

Amici focus this brief on false reports without deception—like false memories, false beliefs, and compliant lies—where expert testimony is most helpful.

An expert on memory science, such as a psychologist, cannot say whether a particular person is lying or that a particular memory is false.[4] The expert can say only whether the circumstances indicate suggestion or influence of the sort that can

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[3] *Id.*

[4] *Id.*

lead to a false report.[5] It is true that the circumstances do not always lead to a false report and those circumstances do not need to exist for there to be a false report.[6]

Expert testimony on false reports potentially falls into three categories: (1) general testimony on the phenomenon of false reports ("Category 1"); (2) whether and to what degree the factors that can create false reports exist in a particular case ("Category 2"); and (3) the ultimate conclusion as to whether the complaining witness suffered from a false memory or made a false report ("Category 3").

Amici agree that Category 3 is not at issue in this case and should generally be excluded in the absence of corroborating evidence, based on the current state of scientific research. *Amici* propose a rule under which Categories 1 and 2 should be admissible under established Oregon law. The testimony is admissible so long as the expert does not offer the ultimate conclusion as to whether the witness is telling the truth, or saying the same thing in different words (that is, making a statement that "is tantamount to, the equivalent of, and the same as stating that the person is truthful").[7]

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[5] *Id.*

[6] *See* DANIEL REISBERG, THE SCIENCE OF PERCEPTION AND MEMORY: A PRAGMATIC GUIDE FOR THE JUSTICE SYSTEM 97 (2014).

[7] *See Beauvais*, 357 Or at 543.

B. Oregon law precludes an expert from offering the ultimate conclusion on truthfulness; it does not preclude a case-specific analysis.

Under Oregon law, "[e]xpert testimony that provides jurors with useful information in making their own credibility assessment ordinarily is admissible, as long as it is not either a direct comment on the credibility of a witness or tantamount to a direct comment on the credibility of a witness."[8]

The decisions of this court make clear that the standard is meant to exclude only Category 3 (the ultimate conclusion as to whether the complaining witness suffered from a false memory or made a false report).[9] The expert cannot explicitly state that a witness is telling the truth.[10] The expert, further, cannot creatively circumvent that standard by saying the same thing in different words.[11] For example, the expert cannot testify that a witness is not deceptive or is not

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[8] *Id.* at 545.

[9] *See id.* at 543 (discussing *State v. Keller*, 315 Or 273, 285, 844 P2d 195 (1993), *State v. Milbradt*, 305 Or 621, 629-30, 756 P2d 620 (1988), and *State v. Middleton*, 294 Or 427, 433, 657 P2d 1215 (1983)).

[10] *Id.*

[11] *Id.*

untruthful.[12] Using the double negative is simply "tantamount to, the equivalent of, and the same as stating that the person is truthful."[13]

The lower court, in this case, misinterpreted the "tantamount to" standard to also require exclusion of Category 2. Under the lower court's ruling, an expert can testify to the general phenomenon of false reports, but cannot apply the science to the facts of the case. That ruling goes too far. Historically, in *State v. Middleton*, this court ruled that an expert cannot testify that a witness is telling the truth.[14] Some experts attempted to circumvent that rule by saying the same thing in different words.[15] The court, in *State v. Milbradt*, created the "tantamount to" standard to prevent the artful attempt.[16] The standard was not meant to swallow the

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[12] *See id.*

[13] *Id.*

[14] *See Middleton*, 294 Or at 438 ("We expressly hold that in Oregon a witness, expert or otherwise, may not give an opinion on whether he believes a witness is telling the truth. We reject testimony from a witness about the credibility of another witness, although we recognize some jurisdictions accept it.").

[15] *See Milbradt*, 305 Or at 629-30 ("In the case at bar there was a direct disregard of the specific prohibitive statement set forth in *Middleton*, 294 Or at 438: 'We expressly hold that in Oregon a witness, expert or otherwise, may not give an opinion on whether he believes a witness is telling the truth.' An opinion that a person is not deceptive, could not lie without being tripped up, and would not betray a friend (to wit: the defendant) is tantamount to the same thing."); *Keller*, 315 Or at 285 ("Dr. Bays testified on direct examination during the state's case-in-chief that '[t]here was no evidence of leading or coaching or fantasizing' during the child's interview at C.A.R.E.S. and that, in that interview, the child was 'obviously telling you about what happened to her body.' Each of those statements amounts to testimony that the child was credible. * * * Once again, we repeat that a witness may not testify about the credibility of another witness.").

[16] *Id.*

expert's analysis of the case-specific facts.[17] That analysis is what makes the opinion relevant under OEC 401. The standard articulated by the lower courts opens the door to offer expert testimony on memory science in every case without regard to relevance.

C. Expert testimony is admissible to educate the jury about the general phenomenon of suggestibility in human memory and the circumstances in the particular case that are consistent with those that may lead to false reports.

To be admissible under Oregon law, OEC 702, expert testimony must be "helpful to the trier of fact." Oregon courts hold that testimony is helpful to the trier of fact if it concerns a phenomenon outside the experience of the average juror.[18]

1. The creation of false reports is a phenomenon outside the experience of the average juror.

(a) The Science

The study of false reporting is based on a psychological understanding of the way in which memory works. Researchers describe the act of remembering as "more akin to putting puzzle pieces together than retrieving a video recording."[19]

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[17] *See, e.g.*, *Middleton*, 294 Or at 438 (approving not only ***general*** testimony about the phenomenon and dynamics of recantation but also testimony as to whether the ***particular complainant's*** conduct was consistent with that general phenomenon).

[18] *State v. Remme*, 173 Or App 546, 562, 23 P3d 374 (2001).

[19] Hal Arkowitz and Scott O. Lilienfeld, *Why Science Tells Us Not to Rely on Eyewitness Accounts*, SCIENTIFIC AMERICAN, Jan. 8, 2009, http://www.scientificamerican.com/article/do-the-eyes-have-it/ (last visited August

The human memory is reconstructive.[20] That is, rather than storing an exact replica of an event, perceptions are combined with elements of existing knowledge and experience to form a reconstructive memory.[21]

That reconstruction can occur in any of the following three stages, which are conventionally used to describe the sequence of remembering.[22] In the first stage (acquisition), the person perceives the event or information.[23] In the second stage (retention), the person attempts to remember the event or information.[24] And finally, in the third stage (retrieval), the person tries to recall the event or stored information.[25] At each of the three stages, multiple factors can impact and/or alter a person's memory.[26] As a result, information passing through the memory process can be distorted, leading to false memories or false beliefs.

6, 2018).

[20] FREDERIC C. BARTLETT, REMEMBERING: A STUDY IN EXPERIMENTAL AND SOCIAL PSYCHOLOGY 213 (1932).

[21] *Id.*

[22] ELIZABETH F. LOFTUS ET AL., EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL § 2-2, 12–13 (4th ed 2007).

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

One factor that can lead to distortion is source confusion—when a person misattributes the source of a memory. According to Dr. Elizabeth Loftus, a leading psychologist in the area of false memories, "[p]eople integrate new materials into their memory, modifying what they believe they personally experienced. When people combine information gathered at the time of an actual experience with new information acquired later, they form a smooth and seamless memory and thereafter have great difficulty telling which facts came from which time."[27]

For example, in one study, researchers arranged for a magician to visit a pre-school and pull a rabbit out of a hat.[28] There was no rabbit, however, and the trick seemingly failed.[29] After the show, the children's teacher and an unfamiliar adult engaged in a scripted conversation in the children's presence where they repeated a rumor that the rabbit got loose in the school.[30] One week later, the children were asked open-ended questions and almost one-third falsely reported having seen the fictitious rabbit.[31] Another group of children who had not heard the adults in

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[27] Elizabeth F. Loftus, *Memory Faults and Fixes*, ISSUES IN SCIENCE AND TECHNOLOGY 43 (2002).

[28] *See* Reisberg, *supra* n 6, at 262.

[29] *Id.*

[30] *Id.*

[31] *Id.*

conversation were allowed to "overhear" their peers reporting the missing rabbit.[32] The second group of children were asked open-ended questions and 55% reported having seen the fictional bunny.[33] The children had heard about an event and mistakenly came to believe that they had seen the event after confusing the source of their knowledge.

In another experiment, researchers gave college students a list of events that were said to have been reported by their parents.[34] The students were asked to recall details about the events.[35] Although some of the events were, in fact, reported by the participant's parents, others were made up by experimenters, unbeknownst to the participant.[36] In the initial interview, none of the participants recalled the made-up event, although they recalled more than 80% of the true events.[37] Repeated attempts at recall, however, changed the pattern.[38] By the third interview, 25% of participants had created a false memory of the entirely fictitious

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[32] *Id.*

[33] *Id.*

[34] *Id.* at 71.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

event.[39] Many were able to supply details of the event, although it never happened.[40]

There are a number of factors that can lead to source confusion and, more generally, a false report. An expert on memory science considers these factors when assessing the degree of risk for a false report in an individual case. For example, in the context of cases involving child testimony, an expert on false reporting may consider:

Directive Questioning: According to scientists, "[o]ne powerful way to produce a false report is through leading or suggestive questions."[41] The questions may, but need not, be overtly suggestive.[42] "What matters is not the intention of the questioner (e.g., whether the questioner means to lead the child or not)."[43] Rather, what matters "is the perception of the child (i.e., whether the child perceives the presentation of the question, or the question itself, to imply that a particular answer is desired or expected)."[44]

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[39] *Id.*

[40] *Id.*

[41] *Id.* at 260.

[42] *Id.*

[43] *Id.*

[44] *Id.*

Feedback: Feedback from parents, teachers, and others may signal to a child whether his or her behavior or statements were met with approval.[45] Feedback can take many forms, including a verbal and explicit statement ("Yes, that's right."), a nonverbal cue (a nod of the head), an elaboration of the child's utterances (implying endorsement), a restatement in the adult's own words (implying a rejection), or even an emotional signal (a hug).[46] Studies show that "[c]hildren are sensitive to all of this informational feedback and often shift their accounts in a fashion guided by this feedback."[47]

Repeated Questions: "Repeated questions can gradually make a topic more and more familiar," which can lead to source confusion "because the person can become confused about the source of the familiarity."[48] The person will mistakenly come to believe that the ideas in the questions are familiar because of an event related to those ideas, when, in fact, the familiarity has come from a different source—being asked about the ideas over and over.[49]

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[45] *Id.* at 261.

[46] *Id.*

[47] *Id.*

[48] *Id.* at 262.

[49] *Id.*

Stereotype Induction: The induction of negative stereotypes that tell the listener that a person is bad or does bad things can create false reports.[50] The creation of the false report need not be explicit and "often involves someone merely planting a 'seed.'"[51] Moreover, the seed can sometimes be seemingly insignificant ("You know, grandpa sometimes does bad things.").[52]

(b) Juror Misperceptions

This court first recognized the impact of source confusion on the judicial system in *State v. Lawson*.[53] There, the court judicially noticed the studies on source confusion and recognized the need for precautionary measures in cases involving eyewitness identification evidence.[54]

Significant for this court's review is the *Lawson* court's recognition of the frequency with which laypeople hold beliefs contrary to the weight of scientific

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[50] *Id.* at 264.

[51] *Id.*

[52] *Id.*

[53] 352 Or 724, 739-40, 291 P3d 673 (2012) ("Based on our extensive review of the current scientific research and literature, we conclude that the scientific knowledge and empirical research concerning eyewitness perception and memory has progressed sufficiently to warrant taking judicial notice of the data contained in those various sources as legislative facts that we may consult for assistance in determining the effectiveness of our existing test for the admission of eyewitness identification evidence.").

[54] *Id.*

evidence on memory and perception.[55] In *Lawson*, the court held that "[b]ecause many of the [factors that influence memory] are either unknown to the average juror or contrary to common assumptions, expert testimony is one method by which the parties can educate the trier of fact concerning [those factors] that can affect the reliability of eyewitness identification."[56]

Some of the same factors that are implicated in eyewitness identification cases overlap with the factors implicated in child testimony cases because they all address the same issue—source confusion. Whether in eyewitness identification cases or in child testimony cases, those factors are just as unknown to the average juror or contrary to common assumptions. The Oregon Department of Justice, in fact, relies on the scientific research about source confusion to train its investigators and interviewers in child abuse cases, rather than simply allowing them to rely on common assumptions.[57] The common assumptions of jurors are no less problematic.

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[55] *Id*. at 761.

[56] *Id.*

[57] Oregon Interviewing Guidelines (4th ed, 2018) at 32-34 (summarizing some of the concerns about memory error), https://www.doj.state.or.us/wp-content/uploads/2018/03/OIG-2018-final-1.pdf (last visited August 6, 2018). *See also id.* at iii ("Regional forensic interviewers developed the guidelines after a thorough research and literature review, taking their collective experience into consideration as well. . . . Interviewers must be knowledgeable of practice guidelines, research, child development, and use of interview tools, and they

For example, jurors tend to "over believe" a witness who says she is "certain" about her memory.[58] Jurors look for verbal and visual cues, like tone and demeanor, to assess the witness's certainty. Studies, however, confirm that certainty does not equal accuracy, as the *Lawson* court recognized.[59] Witness confidence or certainty is highly susceptible to suggestive procedures and confirming feedback.[60] Positive feedback, for instance, will reinforce the idea that the witness "got it right," inflating confidence.[61] Likewise, evidence suggests that people become more confident when they tell and then re-tell what happened.[62] Confidence can be inflated without any corresponding effect on accuracy. Yet, jurors mistakenly believe a confident witness is an accurate witness.[63]

As another example, jurors look for signs that a witness is "telling the truth" and believe they can trust an honest witness. A witness suffering from a false

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should be prepared to support their decisions in individual cases.").

[58] REISBERG, *supra* n 6, at 237 (citing studies); *Lawson*, 352 Or at 777.

[59] REISBERG, *supra* n 6, at 76; *Lawson*, 352 Or at 778.

[60] REISBERG, *supra* n 6, at 76.

[61] *Id.*

[62] *Id.* at 78.

[63] *See Lawson*, 352 Or at 778 ("Jurors, however, tend to be unaware of the generally weak relationship between confidence and accuracy, and are also unaware of how susceptible witness certainty is to manipulation by suggestive procedures or confirming feedback.") (citations omitted).

memory or a false belief, however, is not lying.[64] She truly believes that what she sees in her mind is accurate and, as a result, cross-examination is ineffective to test the reliability of her recollection.[65] The *Lawson* court recognized the same problem in the context of eyewitness identifications, where the witness has produced a false memory of the perpetrator's identity.[66] Jurors will, nonetheless, believe the witness is telling the truth because the witness does not exhibit the tell-tale signs of deception, like hesitation, inconsistencies, and avoiding eye contact. The witness is truthful, but mistaken, and scientists confirm that there is no way to tell whether a

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[64] *See Jenkins v. Comm.*, 308 SW3d 704, 711 (Ky 2010) ("So what happens is inappropriate biased interviews suggest events to children that they imagine. The more the children are asked about these imaginary events, the more the child visualizes the imaginary events. The more the child imagines these imaginary events, the more familiar the events become. As events become more familiar, the child becomes genuinely and sincerely convinced that he is reporting accurate recall when in fact all he is doing is describing imaginary events that have been suggested to him via repeated leading suggestive questions.").

[65] *State v. Sargent*, 738 A2d 351, 353 (NH 1999) ("Furthermore, if a child witness sincerely believes that the suggested sexual abuse actually occurred, cross-examination of that child may not effectively test the reliability of the child's recollection."); *Barlow v. State*, 507 SE2d 416, 418 (Ga 1998) ("However, 'cross-examination of a child witness could be ineffectual if the child sincerely takes his or her recollections to be grounded in fact and does not remember the improper interview procedures which may have suggested them.").

[66] *Lawson*, 352 Or at 758.

memory is false, absent corroborating evidence.[67] In child sex abuse cases, corroborating evidence often does not exist.[68]

As yet another example of the way in which common perceptions are contrary to scientific evidence, jurors tend to believe that suggestion must be overt or intentional to create a memory error. Intentional suggestion is not the only way to produce a false report. Research proves there are many paths toward a false report, including the use of leading questions, neutral but repeated questions, or neutral questions preceded by a stereotype induction.[69] False reports can arise out of conversations with an adult who has suspicions about some prior event, or even with no direct questioning of the child at all.[70] The pre-school children who recalled seeing the "missing" bunny above simply overheard conversations from their peers. Contrary to what most laypeople understand, false reports can be created in many ways and do not require a specific "recipe."[71]

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[67] REISBERG, *supra* n 6 at 81-82, 87, 287; *DeLong*, 2006 WL 3334061, at *15.

[68] Deborah A. Connolly, *et al*, *Judging the Credibility of Historic Child Sexual Abuse Complainants*, 15 PSYCHOL PUB POL'Y & L 102, 116 (2009) (citing Bottoms, B.L., *et al*, *A Review of Factors Affecting Jurors' Decisions in Child Sexual Abuse Cases*, in Toglia, M.P., *et al*, THE HANDBOOK OF EYEWITNESS PSYCHOLOGY, VOL I: MEMORY FOR EVENTS 509-543 (2007)).

[69] REISBERG, *supra* n 6 at 267.

[70] *Id.*

[71] *Id.*

Laypeople are often unaware of how little it takes to produce a false report, how far a false report can go, and how firmly entrenched a memory error will become.[72] In one study, children interacted with a man called "Mr. Science" who demonstrated four science activities.[73] Three months later, the children's parents were given storybooks about the visit with Mr. Science, with instructions to read the story aloud to the child three times.[74] The book included descriptions of the actual demonstrations, as well as demonstrations the child had not experienced.[75] The book also described two events involving body touch that had not occurred at all: first, an event in which Mr. Science put something "yucky" in the child's mouth and, second, an event where Mr. Science pushed so hard on the child's bare stomach (to apply a reward sticker) that it hurt.[76] The children were then interviewed about the Mr. Science visit.[77] In an immediate interview, roughly 30-40% of children of all age groups in the study (ages 3 to 8) reported they had

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[72] *Id.* at 258.

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

experienced the fictitious events, including the unpleasant touching experience.[78] In follow-up interviews with more careful questioning, the false reports increased for 3-year-olds to 53% and 4-year-olds to 58%.[79] The number decreased for 7- and 8-year-olds, but still 15% reported the suggested events, despite warnings they were possibly untrue.[80] No one deliberately tried to manipulate the children, but the frequency of false reports was high and included reports of painful skin-to-skin contact.[81] A percentage of those reports remained in place even when the memories were challenged.[82]

It is true that jurors generally know that our memories can "play tricks" on us. Most jurors, however, do not know how powerful or how frequent those tricks can be. Moreover, most jurors mistakenly think that the tricks will manifest themselves in a way that is obvious to an unbiased observer. An expert on false reporting can educate jurors about the ways in which memory operates contrary to our expectations. The expert—like the jurors—cannot tell whether the memory is, indeed, accurate or false, absent objective corroborating evidence. The focus,

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[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

instead, is on determining the risk of a memory error. The expert should educate the jury about the factors that make suggestion easier and may lead to false reports. It is then up to the jury to translate the risk of error into its decision about whether error has, indeed, occurred in that case. Absent psychological training to understand perception, memory, and factors that influence these processes, jurors are ill-equipped to understand that there exists a risk of memory error. Even jurors who understand that the risk exists need to then know how to assess the degree of risk. In many cases, the science suggests that jurors underestimate the degree of risk. An expert on false reporting and the factors that can lead to a false report is helpful when the jury is relying on a memory-based report to make its decision. Expert testimony on false reports should be admissible when a memory error or other false report is at issue.[83]

2. Case-specific testimony is helpful to the trier of fact under OEC 702.

An expert on false reporting testifies only to the risk of error. Scientists agree that the risk of memory error is always present, although the level of risk

[83] *Delong*, 2006 WL 3334061, at *15 (admitting expert testimony on false memories); *Jenkins*, 308 SW3d at 710 (admitting expert testimony on improper interviewing of children and false memories, and collecting cases); *Barlow*, 507 SE2d at 417 ("We conclude that [expert testimony on improper interviewing of children and false memories] involves an area of expertise beyond the ken of the average layman[.]"); *Sargent*, 738 A2d at 354 ("[W]e agree with those jurisdictions that find that the proper protocols and techniques used to interview child victim witnesses is a matter not within the knowledge and understanding of the average juror.").

varies according to the facts of the case. There are numerous factors that can influence memory—some of which are external to the witness and some of which are internal; some of which occur during the acquisition stage of the memory construction process, and some of which occur during the retention or retrieval stages.[84] There is no way to exclude every possible influence to keep the memory of an event "pure" and without risk of influence.

Although the risk of memory error is always present, that risk does not always rise to a level of concern.[85] The court must allow expert testimony to educate jurors on how to assess the level of risk in each case. It is the case-specific testimony that informs the jury about the level of risk.

General testimony about false reporting (Category 1 above) is helpful, but of limited use because it gives an incomplete picture.[86] Without the case-specific

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[84] *See* National Academy of Sciences, *Identifying the Culprit: Assessing Eyewitness Identification* 40-46 (2014), available at: http://www.nap.edu/catalog/18891/identifying-the-culprit-assessing-eyewitness-identification (last visited August 6, 2018); ELIZABETH F. LOFTUS ET AL., EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL § 2-2, 12–13 (4th ed 2007).

[85] *See* Reisberg, *supra* n 6, at 97 ("[T]he fact remains that our perception and memory are accurate more often than not. * * * [R]esearchers have offered a number of estimates of the overall accuracy level of memory for forensically relevant information.") (citing Simon, D., *In Doubt: Psychology of the Criminal Justice System* (2012)).

[86] *See id.* ("[R]esearchers have offered a number of estimates of the overall level of memory for forensically relevant information. These overall assessments, however, are of limited use. Instead, we need (and can provide) a more finely tuned estimate of memory accuracy by considering the details of a particular event and a particular witness.").

testimony (Category 2), the jury has no way of estimating memory accuracy in a particular case. The case-specific testimony gives the jury the information it needs to determine the level of risk that there exists a memory error (that is, whether the risk is high or low). That risk is based on the facts of the case and requires expert testimony to understand how the different factors that affect memory interact with one another. The expert must weigh the factors to which the witness was exposed against the degree in memory shift proposed.[87] Scientists agree that when certain factors combine, they increase the risk of memory error in different ways.[88] The expert must be able to balance the factors present in a particular case, and the interaction between those factors, against the proposed memory shift. Without that case-specific testimony, the jury cannot accurately estimate the level of concern about memory error that may exist in that case. It is also the case-specific

[87] *Id.* at 269 ("[L]arger memory errors, involving more complex events or more consequential events, are more difficult to produce than smaller memory errors. For this reason, large-scale errors—including memories of being touched in some troubling way—will be observed only if the child is exposed to multiple influences or to relatively strong influences.").

[88] *Id.* ("[W]e can easily show that various influences on a child have a cumulative effect, so that false memories are more frequent and can involve larger errors if multiple suggestive elements are in play. In one study, preschool children were exposed to repeated suggestions *and* instructions to imagine how the suggested events might have unfolded *and* selective reinforcement of responses that indicated acceptance of the suggestions. These steps continued across a series of interviews. In this set-up, a stunning 95% of the children assented to the false events (e.g., claiming they had witnessed a theft in their daycare center) by the third interview.") (citing Bruck,M., Hembrooke, H., & Ceci, S.J., *Children's Reports of Pleasant and Unpleasant Events* in D. Read & S. Lindsay (Eds.), *Recollections of Trauma: Scientific Research and Clinical Practice* 199-219 (1997)).

testimony that prevents the jury from over-valuing the general information about memory science to think that every misstep in an interview causes a memory error.

Although jurors may be able to identify overt suggestion in a fact pattern (such as leading questions or blatant pressure to lie), jurors may not be able to identify more subtle factors that result in suggestion (such as questions that include words that may have more than one meaning (e.g., the word "sex" may have a different meaning for a child) or questions that ask the witness to engage in guided imagery (e.g., image how the act might have felt)). Jurors also may not be able to identify the level of shift that is possible when those subtle factors combine. The question may not be whether it is suggestive, but, rather, how suggestive is it.

For this reason, "[a]lthough there are decisions to the contrary in some jurisdictions, most courts that have considered the issue hold that expert testimony regarding the methods for interviewing young children or evaluating the interview techniques used in a particular case is properly admissible."[89]

The case-specific testimony informs the jurors about how evidence was collected and analyzed, no different than in a case involving DNA or other evidence. The *Lawson* court recognized that memory evidence should be treated the same as other forensic evidence: "Because of the alterations to memory that

[89] *State v. Speers*, 98 P3d 560, 566 (Arizona Ct App 2004).

suggestiveness can cause, it is incumbent on courts and law enforcement personnel to treat eyewitness memory just as carefully as they would other forms of trace evidence, like DNA, bloodstains, or fingerprints, the evidentiary value of which can be impaired or destroyed by contamination. Like those forms of evidence, once contaminated, a witness's original memory is very difficult to retrieve; it is, however, only the original memory that has any forensic or evidentiary value."[90]

3. Case-specific testimony related to false reports is not a comment on credibility.

Psychological evidence to assist the jury in assessing the witness's ability to perceive, remember, and relate is admissible and does not constitute improper "vouching" under Oregon law so long as the expert does not answer the "ultimate" question of whether the witness is credible.[91] Oregon courts, instead, make the principled distinction between (1) ***inadmissible*** expert testimony that supplants the jury's assessment of credibility by making a direct comment on truthfulness and (2) ***admissible*** expert testimony that assists the jury's assessment of credibility by providing useful, nonconclusive information from which inferences as to credibility may be drawn.[92]

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[90] *Lawson*, 352 Or at 748.

[91] *Remme*, 173 Or App at 562.

[92] *Remme*, 173 Or App at 562. According to the *Remme* court, the "common principle underlying [the Oregon Supreme Court's rulings in] *Middleton*, *Milbradt*, and *Keller* is that expert testimony must assist, not supplant, the jury's assessment

As discussed above, decisions of this court that find impermissible vouching are limited to cases involving explicit statements that a witness is telling the truth, or statements that say the same thing using different words—for example, the double negative, "the witness is not untruthful." Although the expert cannot offer an opinion on the "ultimate" question of whether the witness is truthful (Category 3 above), he or she can testify to the "penultimate" question of whether the witness's account comports with the more general phenomenon or dynamics bearing on credibility (Categories 1 and 2 above).[93] The expert can "connect the dots" up until the last one.[94] So long as the testimony concerns a phenomenon outside the experience of the average juror and at least the last dot is left unconnected, the expert's opinion on the "penultimate" question is admissible.[95]

With respect to false reports based on unintentional memory errors (i.e., false memories or false beliefs), the question of truthfulness is not at issue. The victim believes her memory to be true. An expert on false memories cannot say whether a particular memory is true or false.[96] Experts agree there is currently no way to draw

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of credibility." *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *DeLong*, 2006 WL 3334061, at *15.

the ultimate conclusion.[97] The experts can say only that the circumstances in the case are consistent with those that can lead to false memories (Categories 1 and 2 above).[98]

The Supreme Court of Kentucky, admitting the testimony of an expert on false memories, correctly observed the distinction between credibility and reliability.[99] The court explained that "[c]redibility refers to whether a witness is being truthful or untruthful."[100] Expert testimony on memory science does not "run afoul of this rule" because the expert opinion "assumes the witness is testifying truthfully—but may be mistaken in his or her belief."[101] Thus, "[s]imilar to expert testimony involving eyewitness identification, expert testimony that a witness was subjected to suggestive interview techniques pertains to the reliability or accuracy

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[97] *Id.*

[98] *See id.* ("Dr. Loftus testified that she could not say whether a particular person is lying or that a particular memory is a false memory—in other words, that she could not comment directly on the truthfulness of a complainant's allegations—but she could say whether the circumstances indicated suggestion of the sort that can lead to a false memory.").

[99] *Jenkins*, 308 SW3d at 711.

[100] *Id*.

[101] *Id. See also Washington v. Schriver*, 255 F3d 45, 59 (2nd Cir 2001); *Speers*, 98 P3d at 566.

of the witness's belief or recollection, not to the truthfulness or untruthfulness of the witness."[102]

The Oregon Supreme Court recognized this limitation in the science in *Lawson*: "We recognize that the scientific research is 'probabilistic'—meaning that it cannot demonstrate that any specific witness is right or wrong, reliable or unreliable, in his or her identification."[103] The expert's testimony is only an explanation of why the victim could be testifying truthfully, but still have it wrong. The expert can identify the risks involved in a case, but it is up to the jury to decide whether and how the risk was actually realized. Testimony about memory errors is not a comment on credibility at all because memory errors are not about truthfulness or lying.

D. The Court of Appeals' ruling creates a conflict in Oregon law and will impact cases beyond those related to child sex abuse.

The decision of this court will impact cases beyond those involving child sex abuse. Experts often testify in cases involving memory error related to eyewitness identifications, false confessions, and sex abuse of adults. As discussed above, it is the case-specific application that gives the testimony meaning. That analysis requires more than the rote identification of facts that may lead to suggestion or

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[102] *Id.*

[103] 352 Or at 741.

influence. The science is probabilistic and requires an analysis of how the memory operates in ways that run contrary to our expectations and beliefs.

The decision of this court will affect litigants' ability to effectively educate jurors about memory science in criminal and civil cases where witness testimony may be affected by memory error.

E. False reports, including from false memories, have led to wrongful convictions around the country that were later overturned.

Over 257 people around the country have proved they were wrongfully convicted of sexually abusing a child and won release from prison, according to the National Registry of Exonerations.[104] Some of those defendants were convicted on the basis of what was later thought to be a false memory or a compliant lie. In 1987, Teobaldo Guce was wrongfully convicted of sexually abusing his 5-year-old daughter after a physician, Dr. Sabbagh, conducted a routine examination and concluded that the girl had been raped and sodomized.[105] The girl repeatedly

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[104] National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (last visited August 6, 2018). Over 660 people have been wrongfully convicted due to eyewitness misidentification and 281 have been wrongfully convicted due to false confessions. *Id.* Expert testimony on memory science is also relevant to these other cases where false reports are at issue.

[105] Teobaldo Guce, National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4301 (last visited August 6, 2018).

denied having been abused when questioned by the doctor and social workers. A private doctor examined the girl just five days after Sabbagh's examination and found no signs of rape or sodomy. The girl and her 7-year-old sister were, nonetheless, repeatedly interviewed by social workers until they finally implicated their father, Guce. The 5-year-old said Guce had raped her in her bed, and the 7-year-old said she saw the rape. Guce was convicted and sentenced. Four years later, the girls recanted to their minister and their new foster parents. Additional experts also examined the girls and determined neither had been raped or sodomized. The federal district court in New York ordered a hearing to address the possibility that the girl's initial accusations were the result of lengthy interrogations and suggestive questioning by Dr. Sabbagh and the social workers, and the prosecution ultimately agreed that the recantations were credible. Guce's habeas petition was granted, and he was released.

In 1985, John Stoll, along with Tim Palomo, Margie Grafton, and Grant Self, were wrongfully convicted of sexually abusing several boys over a period of months in the mid-1980s.[106] The allegations began when Stoll's ex-wife, following a bitter divorce, called Kern County Sheriff's Department to report that she believed her son Jed had been molested by Self, who was living in Stoll's pool

[106] John Stoll, National Registry of Exonerations, http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3667 (last visited August 6, 2018).

house at the time. The police then interviewed Jed and five of his friends using highly suggestive questioning techniques. While all five of Jed's friends initially denied any abuse, after repeated questioning at length, and after being promised they could go home if they admitted to the abuse, all five gave statements that they had been sexually abused by Stoll, Palomo, Grafton, and Self. In 2002, Stoll filed a petition for writ of habeas corpus, arguing that his conviction was based on false testimony and that the CPS workers and police used coercive and manipulative interviewing techniques that resulted in unreliable testimony. At his evidentiary hearing, four of the children recanted and one reported having no memory of the abuse. Jed maintained that he had been abused, and Stoll argued that Jed had been prejudiced by his mother. In 2004, the Ken County Superior Court vacated Stoll's conviction finding that the interviewing techniques used by the investigators while questioning the children resulted in unreliable testimony. Stoll was released after serving 20 years in prison. Then, in May 2006 after an investigation, the California Attorney General and State Board of Control announced their determination that Stoll had not committed any of the crimes of which he was convicted.

In 1990, Kevin Peterson was wrongfully convicted of sexually abusing his 9-year-old daughter and 11-year-old son.[107] Peterson was sentenced to one year in

[107] Kevin Peterson, National Registry f Exonerations, http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4099 (last visited August 6, 2018).

prison followed by three years of probation and the completion of a sex offender treatment program. After being released, Peterson was sent back to prison because he refused to admit to the abuse, and therefore failed the treatment program. Peterson was released from prison in 2007, and upon attempting to reconnect with his children, discovered that their mother and step-father had pressured the children to lie because they wanted custody of the children. Peterson's son, who was physically abused by his step-father, said he lied about the abuse after his step-father threatened to hurt him. Peterson's daughter said she had no memory of the abuse. "I guess they just kept asking and asking and asking and asking," she said in her statement. "They wouldn't take no for an answer, so finally, we just said, 'Yeah, he did.'" Peterson received a certificate of innocence in 2012.

Cases like those of Peterson, Stoll, and Guce raise serious concerns about memory-based evidence used to convict in absence of physical findings.[108]

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[108] These are just a few of the cases where false memories have resulted in wrongful convictions. Going back as far as the Salem Witch Trials in 1692, courts have been concerned about the reliability of memory-based evidence and the likelihood of wrongful convictions in absence of corroborating evidence. The most widely known cases seem to mirror the hysteria of the Salem Witch Trials, with the day care abuse cases in the 1980s and the repressed memory familial abuse cases in the 1990s. *See* Violet Amirault, National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3863 (last visited August 6, 2018); Loftus, *Memory Faults and Fixes, supra*, n 26; *State v. Smith*, 809 So2d 556, 567 (Ct App La 2002) (Downing, J., dissent) ("During the 1980's criminal prosecutions based on 'repressed memories' sent many an innocent person to jail for crimes alleged to have been committed decades before the victim 'remembered' the abuse. Sadly our court system did not learn

Although some question the legitimacy of exonerations based on victim recantation, the recantation, at a minimum, calls the original conviction into doubt. It is in the best interest of everyone—the defendant, the victim, the prosecution, and the court—to arm jurors with science to make a more informed decision the first time around.

The documented instances of wrongful conviction in child sex abuse cases suggest that jurors are not well-prepared on their own to critically assess memory-based evidence. Jurors naturally want to sympathize with the complaining witness, especially when that witness offers compelling and emotional details of sexual abuse. The average juror lacks a scientific understanding of perception and memory to fully evaluate a witness's testimony and determine the risk of memory error.

Because the witness believes that what she sees in her memory is the truth, typical trial tools, like cross-examination and closing argument, are ineffective to expose a mistaken, yet sincere, witness. Expert testimony can educate the jury in a way that defense counsel cannot. Absent case-specific analysis, the jury lacks the ability to properly assess the level of risk of a false report in a particular case.

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the lesson of the Salem Witch Trials. Numerous studies show that when children are exposed to forms of suggestion the error rates can be as high as 50%.") (citations omitted).

Oregon courts should encourage the use of experts who offer a principled, scientific basis upon which to assess the risk of a false report. The testimony is admissible so long as the expert does not offer the ultimate conclusion as to whether the witness is telling the truth, or saying the same thing in different words (that is, making a statement that "is tantamount to, the equivalent of, and the same as stating that the person is truthful").[109]

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[109] *See Beauvais*, 357 Or at 543.

IV. CONCLUSION

Amici respectfully request that the court rule that expert testimony on memory science is admissible, provided that it is helpful to the trier of fact and the expert does not offer the ultimate conclusion as to whether the witness is telling the truth, or saying the same thing in different words (that is, making a statement that "is tantamount to, the equivalent of, and the same as stating that the person is truthful").

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CERTIFICATE OF FILING

I certify that I electronically filed the foregoing BRIEF OF *AMICI CURIAE* with the State Court Administrator for the Court of Appeals of the State of Oregon by using the appellate electronic filing system on August 6, 2018.

CERTIFICATE OF SERVICE

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(3)(b).

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