[CAPTION]

MOTION IN LIMINE CONCERNING OPINIONS NOT PERMITTED UNDER THE INDIANA RULES OF EVIDENCE 701, 702 AND 403

The Defendant, by counsel, respectfully moves this Court as follows:

1. The Defendant has deposed the State's witness, [insert witness name].
2. This witness asserts that he is an expert in [insert disputed area of expertise], and alleges that this is an area of expertise.
3. Counsel for the Defendant, upon information and belief, has cause to believe that the prosecution intends to attempt to qualify this witness as an "expert witness" in the field of [insert disputed area of expertise] in order to extract opinion evidence from him.
4. Because the reliability of reasoning and methodology of [insert area of expertise] has not been determined under Indiana law, this Court cannot take judicial notice of its reliability. West v. State, 805 N.E.2d 909 (Ind.Ct.App. 2004).
5. It is the State's burden, as the proponent of the evidence, to show that the evidence is based on reliable scientific principles. Steward v. State, 652 N.E.2d 490 (Ind. 1995).
6. Indiana Rule of Evidence 702 provides:

    (a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

    (b) Expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable.

7. The Supreme Court's analysis in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and its progeny should aid Indiana Courts in applying Indiana Rule of Evidence 702. Norfolk Southern Ry v. Estate of

Wagers, 833 N.E.2d 93, 102 (Ind.Ct.App. 2005); Turner v. State, 953 N.E.2d 1039 (Ind. 2011) (the Daubert, factors to determine the reliability of scientific evidence are helpful, but not controlling in Indiana). The State will be unable to prove that the methodology and techniques used in [insert disputed area of expertise] are based on reliable scientific principles because:

(a) The methodology has not gained general acceptance in the scientific community;

(b) The methodology has not been subjected to peer review and publication;

(c) The principles, methodology and reliability upon which [insert area of expertise] is based have not been subjected to empirical testing; and

(d) There are no existing standards in the area of [insert area of expertise].

8. This Court has been designated as the "gate keeper" whose duty is to prevent the fact finder from being prejudicially impacted by the onslaught of junk science.

9. An opinion in the [insert disputed area of expertise] is not necessary for a full and fair determination of the facts in this case. In fact, the unreliability of the opinion renders the opinion unhelpful to a clear understanding of the witness's testimony or the determination of a fact in issue. Thus, the opinion testimony is also inadmissible under Indiana Rule of Evidence 701.

10. Even if the reasoning and methodology used in [insert area of expertise] were based on reliable scientific principles, the reasoning and methodology cannot be reliably applied in the instant case. Norfolk Southern Ry v. Estate of Wagers, 833 N.E.2d 93, 103 (Ind.Ct.App. 2005) ("when faced with a proffer of expert scientific testimony, the court must make a preliminary assessment of whether the reasoning or methodology

underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue.)

11. Moreover, due to the nature of [insert disputed area of expertise], any opinion, even if based on reliable principles, would lack the probative value needed to substantially outweigh the danger of unfair prejudice, confusion of the issues, or misleading of the jury. Because expert evidence can be both powerful and quite misleading, the judge in weighing possible prejudice against probative force under Rule 403 exercises more control over experts than over lay witnesses. Harrison v. State, 644 N.E.2d 1243, 1252 (Ind. 1995), *cert. den'd*., 117 S.Ct. 307 (1996) (superseded in part, on other grounds, by statue as stated in Belvedere v. State, 875 N.E.2d 352 (Ind.Ct.App. 2007). Thus, the opinion is also inadmissible under Indiana Rule of Evidence 403. Steward v. State, 652 N.E.2d 490 (Ind. 1995).
12. A pre-trial hearing at which the State can attempt to prove the scientific reliability of [insert disputed area of expertise] and the Defendant can offer proof otherwise is in the interest of judicial economy and fairness.

WHEREFORE, the Defendant, by counsel, respectfully requests this Court to order a hearing on the Motion in Limine, grant this Motion in Limine, order the State of Indiana, through its prosecutors and witnesses, not to mention, refer to, interrogate concerning, or attempt to convey to the jury in any manner, either directly or indirectly, an purported "expert opinion" concerning [insert disputed area of expertise] without first obtaining permission of the Court outside the presence and hearing of the jury; and further instruct the State of Indiana and its witnesses not to make any reference to the fact that this Motion has been filed and granted to

warn and caution each and every one of its witnesses to strictly adhere to these same instructions, and for all other relief just and proper in the premises.

(Signature)

NOTE:

Be aware that a defendant may waive a Rule 702(b)/Daubert issue as to a State's expert's opinion by putting on his own experts in the same field to combat the State's case. See, e.g., Camm v. State, 908 N.E.2d 215 (Ind. 2009).

In February of 2009, the National Academy of Sciences ("NAS"), the premier science institute in the United States, issued a report titled *Strengthening Forensic Science in the United States: A Path Forward*. The report was based on a congressionally mandated study of this country's forensic sciences. In general, the report found our nation's forensic labs in need of major overhauling. The report can be read on line at the NAS web page or purchased. The report also addresses the reliability, or lack thereof, of many forensic sciences, including, but not limited to, blood stain pattern analysis, fingerprint comparison, tool mark comparison, fiber analysis. The report can be extremely helpful in framing and supporting Rule 702(b) challenges.

CASE LAW **CASEBANK O.7; O.12**

GENERAL RULES

Daubert v. Merrell Dow Pharmaceuticals Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) (Frye standard for admissibility of scientific evidence, that evidence has gained general acceptance in relevant scientific community, was superseded by adoption of Federal Rules of Evidence, permitting admission of expert testimony pertaining to "scientific, technical, or other specialized knowledge" that "will assist the trier of fact to understand the evidence or to determine a fact in issue.")

McGrew v. State, 682 N.E.2d 1289 (Ind. 1991) (when analyzing IRE 702(b), U.S. S.Ct. decision in Daubert, 113 S.Ct. 2786 (1993) is helpful, but not controlling).

Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (Daubert's "gate keeping" obligation, which requires an inquiry into both relevance and reliability, applies not only to scientific testimony, but to all expert testimony. See also Carter v. State, 766 N.E.2d 377 (Ind. 2002). (Kumho Tire is not binding on Indiana state practice. Daubert and Kumho Tire are helpful, but not controlling, for analyzing IRE.)

Steward v. State, 652 N.E.2d 490 (Ind. 1995) (concerns in Daubert coincide with express requirement of IRE 702(b) that the trial court be satisfied of reliability of scientific principles involved; reliability may be established either by judicial notice or by proponent of scientific testimony providing sufficient foundation to convince the trial court that relevant scientific principles are reliable; exclusion of such evidence is authorized by IRE 403 if the evidence is substantially more prejudicial than probative.)

Carter v. State, 706 N.E.2d 552 (Ind. 1999) (Frye test or Rules of Evidence concerning the reliability of scientific evidence do not apply in probation revocation hearings; scientific evidence is admissible if the evidence is relevant and bears some substantial indicia of reliability).

Burnett v. State, 815 N.E.2d 201 (Ind.Ct.App. 2004) (challenging the reliability of the area of expertise is a different challenge, and must be separately made, than a challenge to the qualifications of an expert).

Billups v. Commonwealth, 274 Va. 805, 652 S.E.2d 99 (2007) (Virginia Supreme Court held that the same standard that governs the admission of expert testimony on scientific evidence at trial also governs the admissibility of such testimony at sentencing).

SPECIFIC SCIENTIFIC AREAS OF TESTIMONY

U.S. v. Scheffer, 523 U.S. 303, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998) (an evidentiary rule that prohibits admission of all evidence related to polygraph examinations does not violate 6th Amendment right to present a defense).

Miller v. State, 770 N.E.2d 763 (Ind. 2002) (in murder prosecution, where Defendant's statement played prominent role in State's case, trial court erroneously excluded testimony of psychologist called by defense as expert in field of police interrogations and false confessions; general substance of expert's testimony would have assisted jury regarding psychology of relevant aspects of police interrogation, especially interrogation of mentally retarded persons, topics outside of the jury's common knowledge and experience; reversible error).

Smith v. State, 751 N.E.2d 280 (Ind.Ct.App. 2001) (because field sobriety tests are not based on complex scientific principles, the State need not meet the requirements of Indiana Rule 702, but rather just establish the officer's training and experience in order to admit results of test).

U.S. v. Jordon, 924 F.Supp. 443 (W.D.N.Y. 1996) (testimony of expert in field of memory and perception, regarding reliability and accuracy of eyewitness identification, should be admitted in robbery case that hinges on bank teller's identification of perpetrator).

Farris v. State, 818 N.E.2d 63 (Ind.Ct.App. 2004) (trial court properly excluded eyewitness identification expert's testimony regarding truthfulness of witness's testimony under IRE 704(b)).

Buzzard v. State, 669 N.E.2d 996 (Ind.Ct.App. 1999) (admission of expert opinion testimony regarding profiles exhibited by pedophiles constituted abuse of discretion).

Carnahan v. State, 681 N.E.2d 1164 (Ind.Ct.App. 1997) (court did not abuse discretion in admitting expert testimony regarding Battered Women's Syndrome, particularly involving cycle of violence and reasons battered women do not leave their husbands, to explain why complaining witness (CW) recanted her earlier allegation of abuse).

Schaefer v. State, 750 N.E.2d 787 (Ind.Ct.App. 2001) (for medical opinions and diagnoses to be admitted into evidence, they must meet requirements for expert opinions set forth in Indiana Evidence Rule 702).

U.S. v. Hines, 55 F.Supp.2d 62 (D.Mass. 1999) ((1) handwriting analysis testimony which points out similarities and differences between defendant's exemplar and note are admissible but analyst's conclusions are not, because ability to draw these conclusions has not been subjected to empirical testing; (2) eye-witness ID expert testimony is admissible because it will give jurors additional information with which it can make more informed decision, and because expert is not testifying to prediction or conclusion regarding accuracy of eyewitness ID in this case).

Vega v. State, 656 N.E.2d 497 (Ind.Ct.App. 1995) (the trial court did not err in refusing to allow expert to testify, where it determined that testimony would not have been of assistance to jury in understanding evidence or in making its final determination; the expert was psychology professor specializing in study of human memory, and would have testified on various factors affecting person's memory).

McGrew v. State, 682 N.E.2d 1289 (Ind. 1991) (microscopic hair comparison was admissible because it is more a matter of observations of persons with specialized knowledge than a matter of scientific principles governed by Ind.Evidence Rule 702(b)).

Henson v. State, 535 N.E.2d 1189 (Ind. 1989) (a defendant may offer expert testimony on rape trauma syndrome to show that rape did not occur; exclusion of expert opinion of psychologist offered by Defendant that complainant's behavior after incident was inconsistent with that of victim of traumatic rape impinged upon the substantial rights of Defendant to present a defense.)

Hyppolite v. State, 774 N.E.2d 584 (Ind.Ct.App. 2002) (in the twenty years since Cornett, advances could have been made in field of voice analysis, but the Defendant, as proponent of evidence, failed to demonstrate that scientific principles upon which his voice expert's testimony rested was reliable).

Davidson v. State, 580 N.E.2d 238 (Ind. 1991) (it is not necessary to hold pre-trial hearing on whether DNA testing lab used accepted scientific techniques; once expert is qualified, evaluation of evidence goes to weight, not admissibility).

Steward v. State, 652 N.E.2d 490 (Ind. 1995) (child sexual abuse syndrome evidence is presently not scientifically reliable enough to permit expert to offer directly "an unreserved conclusion that child in question has been abused" or indirectly "to imply the occurrence of abuse").

West v. State, 805 N.E.2d 909 (Ind.Ct.App. 2004) (State failed to establish reliability of Draeger test under IRE 701 and 702; Court considered (1) whether the Draeger test had been tested; (2) whether the theory or technique has been subjected to peer review and publication, (3) the known or potential rate of error, (4) the existence and maintenance of standards controlling the technique's operation, and (5) whether the technique is generally accepted within the relevant scientific community; nonetheless, error was harmless.) But see Burkett v. State, 691 N.E.2d 1241 (Ind. 1998) (holding field test to detect marijuana was reliable under Ind.R.Evid. 702(b)).

U.S v. Hall, 974 F.Supp. 1198 (C.D. Ill. 1997) (proposed testimony by social psychologist about coercive interrogation tactics likely to produce false confessions meets Fed. R. Ev. 702's standard for admission of expert testimony).

Turner v. State, 953 N.E.2d 1039 (Ind. 2011) (an opinion of a tool mark examiner that a tool mark on the unfired cartridge matched tool marks found on four of the discharged cartridge casings found at the scene and the marks were made by the same tool of unknown origin was admissible, despite the fact it failed some Daubert factors; the lack of formal testing and the inability to pinpoint other research, all inform the fact finder's judgment on weighing this evidence).

Otte v. State, 967 N.E.2d 540 (Ind.Ct.App. 2012) (trial court did not abuse its discretion in allowing domestic violence expert to testify about propensity of domestic abuse victims to recant; testimony need not have been based upon demonstrably reliable scientific principles because status as an expert witness was due to her specialized knowledge about domestic violence victims).

Barnhart v. State, 15 N.E.3d 138 (Ind.Ct.App. 2014) (in child molesting prosecution, trial court did not abuse its discretion by excluding evidence that complaining witness (C.W.) submitted to a drug screen and that the results were negative although C.W. testified Defendant had given her marijuana several times. But the urine sample was taken eight days after Defendant allegedly provided marijuana and the witness used to support the introduction of the evidence was a probation officer who merely took custody of the sample. This failed to provide the proper scientific basis under Evid. Rule 702(b)).

Doolin v. State, 970 N.E.2d 785 (Ind.Ct.App. 2012)(trial court abused its discretion in admitting results of in-court "field test" conducted by arresting officer of the plant substance that had been seized from the car where Defendant was a passenger. This courtroom field test was the only test performed on the substance, and State failed to present sufficient foundation for the reliability of the field test as required by Indiana Rule of Evidence 702(b). However, the error was harmless because there was substantial other evidence that the plant material in question was marijuana).