

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS

WORCESTER SUPERIOR COURT
NO. 03-0546

COMMONWEALTH

V

KELLY HOOSE

**MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO EXCLUDE
EXPERT TESTIMONY OF CHRISTINE BARRON, M.D.**

Defendant Kelly Hoose submits this memorandum of law in support of his
Motion to Exclude Expert Testimony of Christine Barron, M.D.

INTRODUCTION

The Defendant faces four indictments for possession of child pornography, in
violation of the statute that makes it a crime to:

knowingly possess...a depiction by computer of a child whom the
defendant knew or reasonably should have known to be under the age of
eighteen years of age and such child is depicted or portrayed in a pose,
posture, or setting involving lewd exhibition of the unclothed genitals,
pubic area, or buttocks, or, if such a person is female, a fully or partially
developed breast of the child; with knowledge of the nature or content
thereof..

G.L. 272, § 29C.

The Commonwealth alleges that the Defendant possessed, on the hard drive of
his computer, approximately 37 visual images that the Commonwealth contends meet
the definition of child pornography as defined by the above-referenced statute.

It is the Commonwealth's burden to prove that the individuals depicted in these 37 images were, at the time the images were created, under the age of eighteen. The Commonwealth has notified the Defendant that it intends to offer the testimony of Dr. Christine Barron, who will testify that the individuals depicted in these computer images were under the age of eighteen.

Dr. Barron is expected to testify that her opinion is based on her application of the "Tanner Scale", a technique for estimating age ranges of children and adolescents based on the appearance of secondary sex characteristics.

ANALYSIS

The Court must act as a "gatekeeper" in ruling on the admissibility of expert testimony. *Commonwealth v. Lanigan*, 419 Mass. 15, 25-26 (1994). "If the process or theory underlying a scientific expert's opinion lacks reliability, that opinion should not reach the trier of fact." *Id.* at 26. The trial Court's gatekeeping inquiry is specific to the facts of the case. "The trial court ha[s] to decide whether this specific expert ha[s] sufficient specialized knowledge to assist the jurors in deciding the particular issues in the case." *Kumho Tire Co. Ltd. V. Charmingichael*, 526 U.S. 137, 156 (1999), quoting *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

To determine reliability, a judge must assess the validity of the reasoning or methodology underlying an expert opinion. *Lanigan*, 419 Mass. at 26. The court can consider several factors that bear on whether the expert evidence offered is reliable: (1) whether the methodology can be or has been tested; (2) whether the theory or technique has been subject to peer review and publication, (3) whether, with respect to a

particular technique, there is a high known or potential rate of error and whether there are standards controlling the technique's operation, and (4) general acceptance in the relevant community. *Kunho*, 526 U.S. 149-50.

In addition, if the expert's testimony requires too great a leap of faith from the existing data to her conclusions and opinions, it should likewise be excluded. *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997). In *Joiner*, the U.S. Supreme Court stated that expert opinion evidence should be excluded if it "is connected to existing data only by the *ipse dixit* of the expert." In other words, the only basis for the reliability of the opinion is that the expert states the opinion. *Id.* Courts will also disregard expert testimony "where it amounts to no more than mere speculation or a guess from subordinate facts that do not give adequate support to the conclusion reached." *Sevigny's Case*, 337 Mass. 747, 751 (1958).

A. Dr. Barron does not qualify as an expert in the specific area in which she would offer expert testimony.

The application of the Daubert/Lanigan analysis to the specific facts of this case should result in the exclusion of Dr. Christine Barron's expert testimony. An expert should be precluded from testifying if she lacks the necessary qualifications on the subject matter in question. *Leibovich v. Antonellis*, 410 Mass. 568, 573 (1991). "The crucial issue in determining whether a witness is qualified to give an expert opinion is whether the witness has sufficient 'education, training, experience and familiarity' with the subject matter of the testimony." *McLaughlin v. Board of Selectmen of Amherst*, 422 Mass. 359, 361 (1996), quoting *Letch v. Daniels*, 401 Mass. 65, 68 (1987). The court should also consider the scope of the witnesses' knowledge, skill, experience,

research history and publications with respect to the subject matter of the testimony in determining if the witness is qualified to testify as an expert. *Vassalo v. Baxter Healthcare Corp.*, 428 Mass. 1, 12 (1998).

Dr. Barron is a pediatrician with extensive clinical experience in the area of child abuse, including sexual abuse. She has been an instructor, has published scholarly material, has engaged in research and maintains professional memberships in the field of child abuse.

However, in this case, Dr. Barron would offer her expert opinion that individuals depicted in visual images, found on a computer hard drive, are under the age of eighteen. She would base this opinion on her application of the "Tanner Scale" to what she observed in these images. The Commonwealth can point to no training, research, publication or validated experience of Dr. Barron in the application of the "Tanner Scale" to photographic images as a means of determining the age of the people depicted in the images. She has never been qualified as an expert in the application of the "Tanner Scale" to visual images.

B. The methodology used by Dr. Barron does not meet the Court's "gatekeeping" criteria for expert testimony.

The methodology in question is not the use of or validity of the "Tanner Scale" itself, but rather its application to visual images with the purpose of establishing the age of the people depicted in those images.

The Commonwealth fails to demonstrate that Dr. Barron's methodology meets the criteria of the Daubert/Lanigan analysis. The Commonwealth produces no evidence that the methodology has been tested or has been subjected to peer review. The Commonwealth does not establish whether there is any knowledge of rates of error or standards guiding the methodology, or if it is generally accepted in the relevant community. Therefore, the Commonwealth has not established the reliability of this methodology, and the Court should exercise its "gatekeeping" authority to prevent "expert" opinion, based on this methodology, from reaching a jury.

Respectfully submitted,
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By his attorney,

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