SUPREME COURT OF NEW JERSEY
DOCKET NO. A-50-16 (078718)

STATE OF NEW JERSEY, Plaintiff-Respondent, v. **J.L.G. a/k/a J.L.J.,** Defendant-Petitioner.	CRIMINAL ACTION **ON APPEAL FROM THE SUPERIOR COURT, APPELLATE DIVISION, AFTER REMAND FOR A SPECIAL MASTER HEARING BEFORE THE SUPERIOR COURT, LAW DIVISION** Sat Below: Peter F. Bariso, Jr., A.J.S.C.

BRIEF OF AMICUS CURIAE, THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY

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PRELIMINARY STATEMENT

> *The method of science is tried and true. It is not perfect; it's just the best we have. And to abandon it, with its skeptical protocols, is the pathway to a dark age.*
>
> - Carl Sagan[1]

Child Sex Abuse Accommodation Syndrome ("CSAAS") is not scientific, and therefore it is not scientifically reliable under N.J.R.E. 702. As a result, any reliance on CSAAS evidence, as expert testimony or otherwise, violates basic principles of due process and fundamental fairness. Moreover, no individual part of CSAAS - namely "accommodation" as a stand-alone theory – passes muster, and changing the name of CSAAS evidence will not cure its constitutional defects.

Purported scientific evidence assumes an authority of truth and accuracy, regardless of its deservingness of same; it can be either the great tool for, or the great deceiver of, the finder of fact. For that reason, our courts serve the important role of gatekeeper in only admitting scientific evidence that is reliable, generally accepted within the relevant scientific community, and which will materially contribute to the ascertainment of truth. Failure to exclude unreliable scientific evidence violates due process, unduly prejudices a defendant, and renders his trial fundamentally unfair. A defendant must be able to counter the evidence against her, and ill-defined hypotheses are neither

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[1] Nabil Abu el Ata & Maurice J. Perks, Solving the Dynamic Complexity Dilemma: Predictive and Prescriptive Business Management 103 (2014) (quoting Carl Sagan).

rebuttable nor appropriate to present as scientific fact. Accordingly, the proponent of alleged scientific evidence bears the burden of clearly establishing its reliability before it can be presented to a jury.

None of this is to say that CSAAS experts are not intelligent, learned, or impressive as individuals; they are. But the legal question of whether CSAAS is scientifically reliable is not a close call. Despite the State's burden as proponent of this evidence, its experts failed to align as to CSAAS's very definition. Given the ambiguity as to what CSAAS even is, the theory underlying CSAAS cannot possibly have achieved general acceptance within the relevant scientific community. Whatever CSAAS might be, the State has failed to show that it is empirically demonstrable through reliable and consistent scientific results. Therefore, Judge Bariso's well-reasoned decision, rejecting CSAAS as not scientifically reliable, was the only possible constitutional result.

There has been the suggestion, directly in the testimony and implied by the State's opening argument below, that the best solution would be for the Court to establish some compromise as to the continued reliance on CSAAS, either by changing its name or cherry picking certain parts of the untenable theory. However, that is not what our courts are asked to do when deciding whether evidence is admissible: either scientific evidence passes the reliability test or it does not. It is not for the courts to posit different scientific theories or draw scientific conclusions not

before it. In any event, the State has also failed to show that any part of the CSAAS theory is independently scientifically reliable. Therefore, Judge Bariso properly rejected attempts to save any flawed part of the unscientific and undefined whole of CSAAS.

The fact that New Jersey only permits the introduction of "blind" or "cold" CSAAS testimony - without applying CSAAS to the facts - does nothing to remedy the constitutional concerns surrounding the admission of its unreliable scientific conclusions. For these reasons, Judge Bariso's opinion should be upheld and CSAAS evidence should be deemed inadmissible under N.J.R.E. 702.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

For purposes of this brief, *Amicus Curiae* ACLU-NJ adopts the Statement of Facts and Procedural History set forth by Judge Bariso in his September 1, 2017 Opinion, adding only the following. On September 25, 2017, ACLU-NJ filed a Motion for Leave to Appear and Argue as *Amicus Curiae* simultaneously with this brief, pursuant to Rule 1:13-9.[2]

STANDARD OF REVIEW

The role of our courts as gatekeeper to allegedly scientific evidence is of paramount importance. "With respect to the court's

[2] ACLU-NJ participates as of right in the filing of this brief, see Rule 1:13-9(d), and further respectfully moves the Court for an order permitting ACLU-NJ to also participate in oral argument pursuant to this Court's September 12, 2017 Order.

gatekeeping role in the admission of expert testimony in civil cases, New Jersey continues to follow the 'general acceptance' rule of Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), rather than the more expansive rule of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)," except in certain tort actions. Pressler & Verniero, Current N.J. Court Rules, comment 4.8(b) on R. 2:10-2 (2018). "In a criminal case, the judge's exercise of discretion must be based on a supportable finding of 'general acceptance' where novel expert testimony is offered." Id. (citing State v. Torres, 183 N.J. 554, 568 (2005)). "Moreover, in criminal cases, when the matter involves a novel scientific proposition, an appellate court should employ a *de novo* standard of review of the trial court's decision." Id. (citing State v. Harvey, 151 N.J. 117, 167 (1997); In re Commitment of R.S., 339 N.J. Super. 507, 531 (App. Div. 2001), aff'd, 173 N.J. 134 (2002) (extending the same rule to cases of civil commitment)).

However, appellate courts "defer to a special master's credibility findings regarding the testimony of expert witnesses." State v. Henderson, 208 N.J. 208, 247 (2011) (citing State v. Chun, 194 N.J. 54, 96 (2008)); see also, State v. Locurto, 157 N.J. 463, 471 (1999). Moreover, our courts "evaluate a special master's factual findings 'in the same manner as we would the findings and conclusions of a judge sitting as a finder of fact,'" and "'therefore accept the fact findings to the extent that they are

supported by substantial credible evidence in the record[.]" Henderson, 208 N.J. at 247 (quoting Chun, 194 N.J. at 93).

Accordingly, while review of Judge Bariso's legal conclusion that CSAAS is not scientifically reliable under N.J.R.E. 702 is *de novo*, he is afforded deference with regard to his credibility determinations of the experts and his findings of fact.

ARGUMENT

This court charged Judge Bariso with determining whether CSAAS evidence meets the scientific reliability standards of N.J.R.E. 702. State v. J.L.G. a/k/a J.L.J., Nos. C-653, 078718 (Mar. 16, 2017) (slip op. at 2-3).[3] After a four-day evidentiary hearing, in light of the expert testimony, and after review of the relevant literature, expert reports, and record, Judge Bariso delivered his thoughtful opinion, finding as fact that "there is no general acceptance of CSAAS among the relevant scientific community," and then holding, as a matter of law, "CSAAS testimony inadmissible under N.J.R.E. 702." State v. J.L.G., No. 12-11-1994

[3] This Court's grant of certification also considers whether the trial court erred in admitting CSAAS evidence because it was irrelevant or unduly prejudicial. Id. at 2. However, the summary remand was only with regard to whether "CSAAS evidence meets the reliability standards of N.J.R.E. 702, in light of recent scientific evidence." Id. at 2-3. In any event, the question of scientific reliability is largely determinative of whether the evidence is relevant, and an "unduly prejudicial" analysis is premature unless the evidence is otherwise admissible. As is addressed herein, in addition to failing to satisfy N.J.R.E. 702, CSAAS evidence is also unduly prejudicial. See, infra, Part V.

(Law Div. Sept. 1, 2017) (slip op. at 2). Judge Bariso's decision should be upheld.

In recognition of the scientific problems inherent to CSAAS and the potential for prejudice, this Court had already placed three significant limitations on the use of CSAAS evidence. First, "CSAAS cannot be used as probative testimony of the existence of sexual abuse in a particular case." State v. W.B., 205 N.J. 588, 611 (2011) (citing State v. Michaels, 264 N.J. Super. 579, 598-99 (App. Div. 1993), aff'd, 136 N.J. 299 (1994)). Second, because CSAAS is not probative as to whether abuse occurred, a CSAAS expert may "not attempt to 'connect the dots' between the particular child's behavior and the syndrome, or opine whether the particular child was abused." Id. at 588 (quoting State v. R.B., 183 N.J. 308, 328 (2005)). Third, CSAAS testimony is only admissible for the limited purpose of "explain[ing] why many sexually abused children delay reporting their abuse, and why many children recant allegations of abuse and deny that anything occurred." State v. J.Q., 130 N.J. 554, 579 (1993) (quoting John E. B. Myers et al., "Expert Testimony in Child Sexual Abuse Litigation," 68 NEB. L. REV. 1, 67-68 (1989)). However, because CSAAS fails to satisfy N.J.R.E. 702, merely limiting its use - rather than excluding it in its entirety — still amounts to a violation of due process.

Moreover, CSAAS and CSAAS-derived theories posit a causal relationship between child sexual abuse ("CSA") and recantation or delayed disclosure (or, the "disclosure behaviors"), which is not supported by the scientific record and is otherwise unduly

prejudicial. Here, the prejudicial effect of unreliable CSAAS evidence is plain.

I. ADMISSIBILITY OF EVIDENCE IS A QUESTION OF DUE PROCESS.

Improper admission of evidence violates due process; because finders of fact afford particular weight to purportedly scientific evidence, due process concerns are only heightened in such context. In Haley v. Ohio, Justice Douglas wrote, "Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law." 332 U.S. 596, 601 (1948) (holding that the Fourteenth Amendment prohibits the use of coerced confessions as evidence); see also, In re Gault, 387 U.S. 1, 12, 29 (1967) (same, regarding child defendants). "The [admissibility] standard, after all, is that of fairness as required by the Due Process Clause of the Fourteenth Amendment." Manson v. Brathwaite, 432 U.S. 98, 113 (1977); see also, United States v. Lovasco, 431 U.S. 783, 790 (1977) (same); Rochin v. California, 342 U.S. 165, 170-172 (1952) (same). Just as admission of unreliable evidence violates the fundamental rights to due process and a fair trial, so too does the improper exclusion of evidence. See, Crane v. Kentucky, 476 U.S. 683, 690 (1986) ("In the absence of any valid state justification, exclusion of . . . exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.'").

"'[R]eliability [is] the linchpin in determining admissibility' of evidence under a standard of fairness that is

required by the Due Process Clause of the Fourteenth Amendment." Michaels, 136 N.J. at 316 (quoting Manson, 432 U.S. at 114). This is true of admissibility in general, not just with regard to scientific evidence. See, e.g., State in Interest of J.H., 244 N.J. Super. 207, 214 (App. Div. 1990) (reliability is the linchpin of admissibility regarding both scientific lab results and hearsay evidence).

Evidentiary hearings under N.J.R.E. 104 allow judges to determine the conditions precedent to admissibility. N.J.R.E. 702 defines the conditions precedent to admissibility of scientific evidence as: (1) general acceptance within the relevant scientific community; and (2) scientific reliability (i.e., the "Frye" standard). State v. Harvey, 151 N.J. 117, 169-70 (1997) (citing Frye, 293 F. at 1014); see also Romano v. Kimmelman, 96 N.J. 66, 80 (1984); State v. Johnson, 42 N.J. 146, 170-71 (1964). Taken together, the rules of evidence serve to protect constitutional guarantees of due process, a reliable verdict, and a fair trial. See Michaels, 136 N.J. at 316.

The proponent of expert testimony or other scientific evidence bears the burden to "clearly establish" its admissibility. Harvey, 151 N.J. at 170; see also State v. Cavallo, 88 N.J. 508, 516-17 (1982) (same). To establish the general acceptance and scientific reliability of a theory, one must show that it has "'sufficient scientific basis to produce uniform and reasonably reliable results [which] will contribute materially to the ascertainment of the truth.'" Romano, 96 N.J. at 80 (quoting

State v. Hurd, 86 N.J. 525, 536 (1981)). "Proving general acceptance 'entails the strict application of the scientific method, which requires the extraordinarily high level of proof based on prolonged, controlled, consistent, and validated experience.'" Harvey, 151 N.J. at 171 (quoting Rubanick v. Witco Chem. Corp., 125 N.J. 421, 436 (1991)). General acceptance occurs only after the theory "passes from the experimental to the demonstrable stage." Ibid. However, "[g]eneral acceptance . . . does not require complete agreement over the accuracy of the test or the exclusion of the possibility of error," "that the . . . methodology. . . [is] infallible," or "that acceptance within the scientific community [is] unanimous," because "[e]very scientific theory has its detractors." Id. at 171 (citing Biunno, Current N.J. Rules of Evidence, Comment 4 to N.J.R.E. 702 (1997); Johnson, 42 N.J. at 171; State v. Tate, 102 N.J. 64, 83 (1986); and Windmere, Inc. v. International Ins. Co., 105 N.J. 373, 379 (1987)).

While the Frye standard applies to "novel" scientific methods, the distinction between novel and non-novel science is the same as the distinction between science that is "experimental" and that which is "demonstrable." Frye, 293 F. at 1014. Therefore, a theory does not have to be new or even recently developed in order to be "novel" under Frye. Indeed, the application of Frye to older, extant scientific theories is necessary to avoid the continued admission of long-relied upon but ultimately unproven analyses, which may amount to inadmissible "junk science" under

N.J.R.E. 702. See United States v. Lewis, 220 F. Supp. 2d 548, 554 (S.D. W. Va. 2002).

Further, when scientific evidence takes the form of expert testimony, it must also: (1) "concern a subject matter that is beyond the ken of the average juror"; (2) "the field testified to must be at a state of the art such that an expert's testimony could be sufficiently reliable"; and (3) "the witness must have sufficient expertise to offer the intended testimony." State v. Kelly, 97 N.J. 178, 208 (1984); see also State v. Cary, 49 N.J. 343, 352 (1976) (same); Hurd, 86 N.J. at 536 (same); Agha v. Feiner, 198 N.J. 50, 62 (2009) (same). This is because "expert testimony seeks to assist the trier of fact. An expert opinion that is not reliable is of no assistance to anyone." Kelly, 97 N.J. at 209.

Accordingly, due process demands the exclusion of any purportedly scientific evidence that does not pass the scientific reliability threshold, and the exclusion of any expert testimony not based on reliable science or not within an expert's area of expertise.

II. CSAAS IS NOT SCIENTIFIC.

CSAAS expert testimony in New Jersey relies on a theory first set forth by Dr. Roland Summit in 1983. That theory is not scientific, let alone scientifically reliable. In fact, Dr. Summit published a subsequent article, roughly ten years later, explicitly stating that his CSAAS theory was never intended to be scientific.

The State bore the burden of establishing the scientific reliability of CSAAS, but it has failed to do so. The State has not shown that CSAAS has been scientifically tested at all, let alone that such testing has yielded consistent and replicable results. Indeed, the State has not established what CSAAS is, and therefore could not have possibly shown that the amorphous concept has achieved "general acceptance" within the relevant scientific community. Moreover, the State and its experts have admitted that – at minimum – CSAAS amounts to a misleading misnomer. Accordingly, Judge Bariso was constrained to find that CSAAS evidence is inadmissible under N.J.R.E. 702.

A. CSAAS Lacks Any Generally Accepted Definition Or Cogent Meaning.

In order to prove that a scientific theory has attained general acceptance within the relevant scientific community, one must establish, at the very minimum, that the community has a shared understanding of what the theory is or represents. Here, the experts lacked even that common definitional baseline. Therefore, CSAAS cannot possibly be generally accepted by the relevant scientific community. See Harvey, 151 N.J. at 169-70.

Dr. D'Urso was not consistent even within his own attempts at defining CSAAS. Compare 12T162:17-18[4] (describing CSAAS as the

[4] 12T refers to the transcript of July 17, 2017.
13T refers to the transcript of July 18, 2017.
14T refers to the transcript of July 20, 2017.
15T refers to the transcript of July 21, 2017.

"typical characteristics" of the "disclosure process"); with 12T155:12-15 (as "a construct"); and 12T158:10-13 (as a "sequence," or "non-overlapping factors . . . and one must proceed the other - when the truth is many of them are operating simultaneously"); and 12T225:15-22 (as a "model," and the "secrecy" category not as a "clinical term" but "a period of time that exists"); and id. ("[d]elayed disclosure" as a "phenomena or characteristic of abuse" that "happens for reasons and those are . . . helplessness and accommodation"); and 12T225:1-11 (as a "combination" of symptoms, syndrome, and disease, that "fit under different constructs in different ways"); and id. (as "emotional responses" or "behaviors that may be impacted by the abuse experience that lead up to this thing we call helplessness which impairs disclosure"); and 12T226:2-9 (as "intrapersonal dynamics that impair a child from telling, trauma symptoms, depression, sadness, fear, shame, guilt - those would be under helplessness" and "[u]nder accommodation would be factors one could use for coping strategies or - helping you tolerate or existing with . . . the abuse that's occurring"); and 12T73:3-7 (something "designed . . . [to] educate triers of fact and audiences"); 12T72:23 (as a "heuristic").[5]

[5] Indeed, Dr. D'Urso's characterization of CSAAS as a "heuristic" is telling, given that a heuristic is a mental shortcut based on stereotypes, generalizations, or snap judgments, which are inherently unreliable and often the product of fallacies or errors in judgment. See *Representativeness Heuristic*, iResearch.net: Psychology Research and Reference, https://psychology.Iresearchnet.com/social-psychology/decision-making/representativeness-

Alternatively, Dr. Lyon described CSAAS, which he calls "CSAA," quite differently. 13T76:7-13 (as "characteristics" which are not "more common in abused children" than in non-abused children); id. (as a phenomenon that "merely appear[s] among enough [victims] . . . to be an understandable or reasonable reaction to abuse"); Ex. S-4 at 2-3, Dr. Lyon's Report ("Accommodation testimony" is a tool to "inform[] the jury that a characteristic is more common among abused children than the jury might assume" and that the alleged disclosure behaviors are "not necessarily inconsistent with sexual abuse"). The fact that Dr. Lyon "deliberately refrained from using the term 'syndrome'" in his expert report on CSAAS, rejecting the nomenclature our courts assign to such evidence, will be discussed herein in Part II, C. See Ex. S-4 at 3 (rejecting the term "syndrome" because the term "invites analogies to battered child syndrome, in which a child's symptoms, taken together, suggest that otherwise innocent injures are abusive," which is not the case with CSAAS).

Dr. Brainerd illustrated just how unclear a concept CSAAS is. See 14T101:16-25 ("I can't tell what [CSAAS] is really."). Other

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heuristic/ (last visited Sept. 14, 2017) ("Heuristics are cognitive shortcuts or rules of thumb that are used when one must make a decision but lacks either ample time or the accurate information necessary to make the decision."); See also *availability heuristic*, Psychology Dictionary, https://psychology dictionary.org/availability-heuristic/ (last visited Sept. 20, 2017) (an availability heuristic is "a common quick strategy for making judgments about the likelihood of occurrence," and the "[u]se of this strategy may lead to errors of judgment") (emphasis added).

preeminent members of the relevant scientific community have also noted the lack of clarity regarding what CSAAS might actually mean. See O'Donohue & Benuto, "Problems with Child Sexual Abuse Accommodation Syndrome," 9:1 SCI. REV. OF MENTAL HEALTH PRACTICE 20-28, 22 (2012) ("It is unclear what kind of thing [CSAAS] is.").

After the experts had testified here, all that was clear was what CSAAS is not. Indeed, at the end of Dr. D'Urso's testimony, Judge Bariso illustrated the confusion by asking Dr. D'Urso: "What is CSAAS? What does it refer to? I've been listening to your testimony, tell me what it is. I've heard what it's not, what is it?" 13T50:1-3. The experts agreed that CSAAS is not: a syndrome, diagnostic tool, or capable of predicting abuse. See, e.g., 14T61-62 (Judge Bariso noting, in a question to Dr. Brainerd, that "we know [CSAAS is] not a syndrome"). In terms of what CSAAS is, one court aptly described it as an "unreliable . . . psychodynamic formulation," which has been rightly criticized as a "'post hoc interpretive rationalization[] of behavior, not [an] explanation[] of it.'" State v. Foret, 628 So. 2d 1116, 1126 (La. 1993) (citation omitted). The evidence presented below provided no clearer definition.

B. Dr. Summit's CSAAS Theory Is Not Scientific by Summit's Own Admission, And The Experts Here Agreed It Is Not Scientific.

Whatever CSAAS might be, it is not scientific. In 1983, Dr. Roland C. Summit published an article setting forth what he claimed to be "[t]he most typical reactions of children" victims of CSA, which he "classified . . . as the child sexual abuse accommodation syndrome." Ex. S-5 at 177, R. Summit, "The Child Sexual Abuse

Accommodation Syndrome," 7 CHILD ABUSE AND NEGLECT 177-93, 177 (1983). He alleged that "[t]he syndrome include[d] five categories, two of which are preconditions to the occurrence of sexual abuse." Id. at 181.[6] He claimed that the "remaining three categories are sequential contingencies which take on increasing variability and complexity." Ibid. He defined the five categories as: (1) "Secrecy"; (2) "Helplessness"; (3) "Entrapment and accommodation"; (4) "Delayed, conflicted and unconvincing disclosure": and (5) "Retraction." Ibid. Dr. Summit's theory of CSAAS is not scientific, and it is therefore not scientific reliability under Frye and N.J.R.E. 702.

Summit never claimed that his theory was the product of "the strict application of the scientific method, which requires the extraordinarily high level of proof based on prolonged, controlled, consistent, and validated experience." Harvey, 151

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[6] Notably, Summit contracts himself in his article, initially claiming that CSAAS describes the "typical reactions" of child victims of CSA, but then writing that the first two "categories" are external (to the child) preconditions. Id. at 177. A "precondition," which is a condition that must be fulfilled before something else occurs, cannot be, and is the antithesis of, a "reaction," which is something performed or experienced in response to something else, and therefore occurring afterward. See Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/precondition; see also id. at https://www.merriam-webster.com/dictionary/reaction (last visited Sept. 18, 2017). Further, logic provides that something external to the child cannot be a reaction of the child. As far as "entrapment," Summit does not use the word at all within the so-titled section of his article, but it seems clear he also does not allege that entrapment is a "typical reaction" of victims. See Ex. S-5 at 184-86.

N.J. at 171 (quoting Rubanick, 125 N.J. at 436). Moreover, there does not appear to ever have been any scientific attempt to validate Summit's five category theory after the fact - let alone any study that succeeded. See Gersten v. Senkowski, 426 F.3d 588, 600 (2d Cir. 2005) (Quoting Dr. John C. Yuille, a forensic scientist from the University of British Columbia, as saying: "research in the field reveals that the 'symptoms' which were the alleged components of the syndrome do not occur regularly enough in those who truly have been the victims of sexual abuse to call it a syndrome," and concluding that "the child sexual abuse accommodation syndrome and its alleged five components has no validity and is not regularly accepted in the scientific community."). There is certainly no scientific literature in this record that claims to have empirically demonstrated the scientific validity of Summit's five-category theory.

In fact, Dr. Summit himself published a subsequent paper in which he acknowledged the same, in response to what he saw as the "abuse" of his theory in the courts. See Ex. S-6, R. Summit, "Abuse of the Child Sexual Abuse Accommodation Syndrome," 1:4 JOURNAL OF CHILD SEXUAL ABUSE 153-64, 156 (1992) ("It should be understood without apology that the CSAAS is a clinical opinion, not a scientific instrument.") (emphasis added).[7] Other scholars have

[7] It would be easy to belabor just how unscientific Summit's CSAAS theory is. One need not look much further than his assertion that a victim of CSA "may develop multiple personalities, assigning helplessness and suffering to one, badness and rage to another, sexual power to another, love and compassion to another, etc."

echoed this point. For example, Doctors O'Donohue and Benuto have concluded that "the CSAAS should be considered as an exemplar of junk science and should not be used in any way in any context particularly in legal settings, where impactful decisions are being made." O'Donohue, "Problems with Child Sexual Abuse Accommodation Syndrome," at 20.

Indeed, both State experts testified that Dr. Summit's 1983 CSAAS article is non-scientific. Dr. D'Urso went so far as to allege that applying scientific methodology to test CSAAS for validity would be impossible, because "complex data is very hard to do." 12T86-87. He sought to support this assertion by pointing

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without a scintilla of scientific evidence that such a reaction might be causally related to CSA. See Ex. S-5 at 185. Indeed, Summit did not even base his theory on his own clinical observations, as he apparently did not typically treat children, let alone child victims of CSA. See 12T134:4-9 (Dr. D'Urso testifying that he understands this to be the case); S-6 at 154 (Summit writing that his CSAAS article was based on his "broad consulting experience throughout Los Angeles County" and conversations with persons he describes as "national visionaries"); 14T66:11-20 (Dr. Brainerd noting his "understanding that . . . [Summit's] practice was actually an adult clinical practice."). Summit makes myriad other unscientific, conclusory, and sometimes absurd assertions regarding "typical reactions" to CSA, such as that a victim: "may learn to exploit the father for privileges, favors and material rewards, reinforcing her self-punishing image as 'whore' in the process" and "assumes that her mother must know of the sexual abuse and is either too uncaring or too ineffectual to intervene." Ex. S-5 at 185. An argument that there is scientific reliability to such "psychobabble" is mystifying. See, Commonwealth v. Legg, 711 A.2d 430, 443 (Pa. 1998) (calling out as "psychobabble" various threadbare and non-scientifically supported conclusions about human nature); see also, Simms v. Dep't of Health & Rehab. Servs., 641 So.2d 957, 963 (Fla. Dist. Ct. App. 1994) ("vague, 'undeniable, and impertinent'" expert psychological testimony could at "best described as psychobabble").

to the "problems with" the current published studies, including those by Dr. Lyon. Id. at 86-87. Further, Dr. D'Urso agreed with such statements as: "It is unclear what kind of thing [CSAAS is]"; "there is not a sufficient accumulation of evidence to support" the existence of CSAAS; that there is "no evidence indicat[ing] that [CSAAS] can discriminate against sexually abused children and those who have experienced other trauma"; that "[a]lthough clinical reports have indicated that many sexually abused children exhibit certain combinations of emotional and behavioral reactions, no evidence indicates that the combinations are not also present in groups of children experiencing other sorts of trauma"; and that "some evidence indicates that the combinations are present in groups of children experiencing other sorts of trauma." 13T21:1-6.

Dr. Lyon testified: "I wouldn't hesitate to agree that when Roland Summit created accommodation he was talking primarily about his clinical experience, in fact I make that very clear in my report. He makes that very clear both in his '83 paper and in the '92 . . . paper he wrote." 13T118-19. Dr. Lyon noted that just because CSAAS had no scientific basis to begin with does not mean that it cannot be scientifically supported after the fact through "systematic[] study." Id. at 119:1-10. Of course, this statement is fundamentally at odds with Dr. D'Urso's claim that CSAAS is not scientifically testable. See 12T78-79. Moreover, not one study within the record even purports to demonstrate the scientific validity of Summit's "five category" CSAAS theory, and experts

before other courts have noted the absence of any such research or findings. See Gersten, 426 F.3d at 600. Thus while it might be possible to make scientific a theory that begins as unscientific, no such transformation occurred here.

Nevertheless, CSAAS experts in New Jersey regularly testify on the exclusive basis of Summit's unscientific "five categories" theory. See, e.g., Ex. D-46 at 130-34 (Dr. D'Urso, in an unrelated prosecution, testifying that CSAAS is derived from Summit's theory, and then basing his testimony on direct on Summit's five categories); see also State v. J.R., 227 N.J. 393, 404-05 (2017) (Dr. Taska regarding same); W.B., 205 N.J. at 611 (Dr. Coco regarding same); J.Q., 130 N.J. at 574-75 (Dr. Milchman regarding same). Indeed, Dr. D'Urso testified that he has submitted several hundred expert reports on CSAAS on behalf of the State over the past thirty years, which "circumscrib[ed]" his proposed expert testimony and cited only Summit's non-scientific article for support. See 12T43:20-22, 62:7-14, 164:12-13; see also 12T58-60 (noting that he cuts and pastes the same report each time, because he "rel[ies] on the same principles case after case.").

Because Dr. Summit's CSAAS theory is not scientific, the State's experts testified that it is non-scientific, and Dr. Summit himself subsequently wrote that CSAAS is non-scientific, it is clear that Frye and N.J.R.E. 702 prohibit the admission of CSAAS evidence. To the extent that CSAAS experts rely on Summit's theory as the singular authority for their expert testimony, the inquiry might properly end here. However, because the State and its experts

suggest that some part of CSAAS is salvageable, those arguments are also addressed herein. See, infra, Part IV.

C. CSAAS By Any Other Name Would Smell As Sour.

Taking "syndrome" out of the Child Sexual Abuse Accommodation Syndrome's name will do nothing to cure constitutional concerns or its scientific invalidity. The State has all but conceded that CSAAS amounts to a misnomer. See 12T116:4-7 (assistant prosecutor referring to "the misnomer of the syndrome" in his direct examination of Dr. D'Urso). Of course, the conclusion that CSAAS is a misnomer is all but unavoidable given Summit's own subsequent publication stating the same, as well as the State's reliance on Dr. Lyon and his report rejecting use of the term "syndrome." See Ex. S-6; Ex. S-4, Dr. Lyon's Report at 3 ("deliberately refrain[ing] from using the term 'syndrome,'" because "'syndrome' invites analogies to battered child syndrome, in which a child's symptoms, taken together, suggest that otherwise innocent injuries are abusive.") However, the inclusion of the word "syndrome" in CSAAS's nomenclature is hardly the only reason why the underlying theory is scientifically unreliable. However, the misnomer is a major reason why CSAAS testimony is unduly prejudicial. See, infra, Part V.

CSAAS is scientifically unreliable, not because "syndrome" is a misnomer, but because the scientific research does not support its theoretical conclusions. That is not to say the improper use of the word "syndrome" is harmless; it is quite harmful because:

(1) "syndrome" implies diagnostic relevance when there is none;[8] (2) "syndrome" fosters a false aura of scientific authority by implying that CSAAS is a medically-recognized pathology, when it is not;[9] and (3) when "syndrome" is taken together with the words "Child Sexual Abuse Accommodation," the nomenclature implies that whatever CSAAS is, it is the causal result of suffering CSA, despite that the science does not support that assertion and instead refutes it. See, infra, Part III, A.

"An accurate syndrome explains within its boundary conditions . . . all phenomena all of the time[.]" O'Donohue, "Problems with Child Sexual Abuse Accommodation Syndrome," at 26. That is simply not the case with CSAAS. Ibid. There appears to be no genuine dispute regarding the fact that CSAAS is not a "syndrome" and that Child Sexual Abuse Accommodation Syndrome is therefore a misnomer. Accordingly, Child Sexual Abuse Accommodation Syndrome evidence

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[8] See W.B., 205 N.J. at 610 (CSAAS is neither diagnostic nor predictive).

[9] CSAAS, Child Sexual Abuse Accommodation, or Child Sexual Abuse Syndrome are not included in the most recent edition of The Diagnostic and Statistical Manual of Mental Disorders, a manual published by the American Psychiatric Association that "contains a listing of diagnostic criteria for every psychiatric disorder recognized by the U.S. healthcare system." Diagnostic and Statistical Manual of Mental Disorders (DSM-5), Am. Psychiatric Ass'n, http://www.dsm5.org/about/pages/default.aspx; see also State v. King, 387 N.J. Super. 522, 544 (App. Div. 2006) ("General acceptance of the DSM in the psychiatric community is beyond dispute").

must be excluded, as any reference to the same can serve only to confuse and mislead a jury.

III. OUR COURTS' UNDERSTANDING OF CSAAS EVIDENCE IS AT ODDS WITH THE SCIENCE AND BASED ON LOGICAL FALLACIES.

When a person refers to something general, and then uses that generality to draw an erroneous conclusion about something specific, she has fallen victim to a syllogistic fallacy. An example of a proper syllogism, or deductive reasoning, is: "every virtue is laudable; kindness is a virtue; therefore kindness is laudable."[10] An example of a syllogistic fallacy is: "Socrates is a man; I am a man; I am Socrates" - a misinterpretation that leaps beyond reasonable conclusions into obvious error. The jurisprudence regarding the use of CSAAS is akin to the latter example.

The syllogistic fallacy regarding CSAAS is as follows: (1) some children delay disclosure of transgressions or any wrongdoing committed by themselves or others; (2) CSA amounts to a transgression; (3) therefore, children typically delay or recant allegations of CSA because of the particular dynamics of CSA itself. Clearly, "'[t]here [i]s a missing link in the chain of . . . reasoning. The syllogism [i]s not complete.'" Branzburg v. Hayes, 408 U.S. 665, 740 n.27 (1972) (quoting Sweezy v. New Hampshire, 354 U.S. 234, 251 (1957)). Namely, there is no scientific basis for the causal conclusion regarding CSA, nor is

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[10] *Syllogism*, Merriam-Webster Online, https://www.merriam-webster.com/dictionary/syllogism (last visited Aug. 7, 2019).

there basis to allege that the disclosure behaviors are typical among CSA victims. Instead, the experts and the literature agree that recantation and delayed disclosure of transgressions are not unique to the context of CSA, and are not necessarily typical, even with regard to children's disclosure of transgressions, in general.

A. Our Courts' Understanding Of The Disclosure Behaviors As Being The Causal Result Of CSA Is Not Supported By Science.

Our courts mistakenly rely on the conclusion that CSAAS is a reaction or response to child sexual abuse, but such conclusion is unsupported by the scientific literature and far from generally accepted by the relevant scientific community. See State v. P.H., 178 N.J. 378, 395 (2004) ("Such testimony properly can be used to explain why a victim's reactions, as demonstrated by the evidence, are not inconsistent with having been molested.") (emphasis added) (citing J.Q., 130 N.J. at 571); see also R.B., 183 N.J. at 323; W.B., 205 N.J. at 610 (CSAAS "assumes the presence of sexual abuse, and explains a child's often counter-intuitive reactions to it.") (emphasis added). Moreover, CSAAS expert testimony evidence in New Jersey apparently relies exclusively on Summit's 1983 article, which baselessly posited that CSAAS accounts for the "most typical reactions" to CSA. This assertion lacks a scintilla of empirical, scientific support within the record.

The literature does suggest the possibility of one relevant, but strikingly general, agreement within the field of child

psychology and memory research, which is that children sometimes delay disclosure or recant allegations of transgressions or wrongdoing, in the most general sense. For example, one study in support of this broad conclusion used the breaking of a puppet as the tested "transgression." See Lindsay C. Malloy & Mugno, A.P., "Children's recantation of adult wrongdoing: An experimental investigation," 145 J. OF EXPERIMENTAL CHILD PSYCH. 11-21 (May 2016) (finding that, within their controlled experiment, 23.3% of subjects recanted their allegation of adult wrongdoing regarding breaking of a puppet).

However, even the State's experts explicitly rejected the faulty assumption of causality that pervades our CSAAS jurisprudence. For instance, Dr. D'Urso testified that CSAAS behaviors may arise in children who never experienced CSA, but that the "syndrome would not be applicable to that child." 12T162:3-16. Indeed, Dr. Lyon explained the significance of his research as follows: "the experimental work that I do is on child's disclosure of transgressions" which is "just a fancy way of saying something bad that happens"; "children may be afraid or embarrassed or warned not to reveal some kind of wrongdoing." 13T57:6-19. Dr. D'Urso testified that, "of course" he agrees with Dr. Cook's position that there is no evidence indicating that the relevant disclosure behaviors are in any way linked to CSA specifically, rather than being present within groups of children who have experienced any trauma at all. 13T17-18. In fact, Dr. Lyon noted his reliance on the "large body of laboratory research

demonstrating that . . . children will routinely conceal their transgressions," generally, in his report. Ex. S-4, Dr. Lyon's Report at 15.

Experts for the defense reaffirmed that there is no support for the conclusion that the disclosure behaviors are the causal result of CSA, in particular. For example, Dr. Bruck explained that these same disclosure behaviors are often present in "non-abused kids too." 15T92:2-8. Dr. Brainerd testified that CSAAS, as outlined in Summit's 1983 article, consists of little more than "proof by assertion" and "generalization[s]" based on "very little science" if any. 14T65-66. Therefore, the conclusion that CSAAS - particularly the disclosure behaviors - are a "reaction to" or causal result of suffering child sexual abuse, see, Ex. S-5 at 177, has no scientific support.

Reliance on this inaccurate causal conclusion is at the expense of a defendant's rights to due process and a fair trial. Errors in reasoning such as these are common, but our courts as gatekeepers have an obligation to avoid such pitfalls. To wit, research statistics courses often start with a common adage to explain the danger of overstating correlation to assume causation. It goes something like this: scientists have shown that when ice cream sales rise, so do shark attacks.[11] There is a statistical

[11] In fact, some institutions even name courses after the famous hypothetical. See, e.g., Stanford 2017-18 Course Catalogue, "Ice Cream Sales Don't Cause Shark Attacks: Debunking Pseudoscience and Conducting Good Research," http://explorecourses.stanford.edu/search?view=catalog&filter-coursestatus-Active=on&page=0&catalog=&academicYear=&q=ice+cream+&collapse=(last visited Aug. 4, 2017).

correlation between the two variables (ice cream sales and shark attacks), but it would be conclusory and inaccurate to assert a causal relationship between the two. Of course, ice cream sales do not cause shark attacks, but the famous example describes another common fallacy (that correlation implies causation).

The erroneous assumption is that because one phenomena occurs first, that a subsequent and correlated phenomena must then be the causal result. Sometimes, a correlation between two variables is nothing more than the product of chance. Sometimes, a correlation arises when two dependent variables have been influenced by some third, independent variable that has not yet been identified. For example, testing temperature as the independent variable in our shark and ice cream scenario might indicate that as temperature rises, so rises ice cream sales and ocean swimming, which is a condition precedent to most if not all shark attacks. Even still, such a hypothesis would not become <u>scientifically reliable</u> until and unless it is supported by data and then tested (and re-tested) to consistent results.

> When reporting scientific discoveries, the popular press hardly ever conveys the inherent uncertainties in the data or the interpretation. This seemingly innocent omission carries a subtle, misguided message: if it's a scientific study, the results are exact and correct. . . . New ideas put forth by well-trained research scientists will be wrong most of the time because the frontier of discovery can be a messy place. But scientists know this and are further trained to quantify their level of ignorance with an estimate of the claim's uncertainty. . . . A scientist typically presents a tentative result based on a shaky interpretation of poor data. Six

> months later, different, yet equally bad data become available from somebody else's experiment and a different interpretation emerges. . . . Eventually, excellent data become available and a consensus emerges[.]
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> [Neil deGrasse Tyson, "Certain Uncertainties, Part I," NATURAL HIST. MAG. (Oct. 1998), http://www.haydenplanetarium.org/tyson/read/1998/10/01/certain-uncertainties-part-i.]

Here, contrary to our case law, the State's experts do not allege scientific support for the conclusion that CSAAS is the causal result of CSA, so CSAAS evidence cannot properly be admitted for such a purpose.

Indeed, the majority of the scientific literature in the record could not possibly result in any such conclusion, because it does not purport to show that the disclosure behaviors are the dependent result of having suffered CSA. Instead, the research in the record purports to test only what may influence disclosure behaviors when CSA is a given. For example, Dr. Lyon and Malloy's 2007 "Filial Dependency and Recantation of Child Sexual Abuse Allegations" study was limited to subjects who had made "substantiated" CSA allegations. Ex. S-12 at 162. Whether CSA had occurred was not a variable at all, and certainly not the independent variable, so Lyon could not possibly draw conclusions regarding what role CSA itself had on the disclosure behaviors based on same. See ibid. Instead, Lyon and Malloy sought to test the relationship between factors such as age, gender, and abuse severity with regard to disclosure behaviors, only among those who suffered substantiated CSA. See id. at 166, table 1.

In order to show that CSA itself impacts or brings about the disclosure behaviors, as our case law wrongly implies, one would need to include in their sample children who have suffered substantiated CSA along with children who are not known to have suffered CSA, and then test to see if presence of CSA, as the **independent variable**, had some impact on the disclosure behaviors, as **dependent variables**. For example, even the State's experts agreed that the abuse allegations such as those arising in the famous McMartin Preschool case, which arose during the ritual-sex-abuse hysteria of the 1980s and 90s, were almost certainly fabricated. See 13T152-53 (Dr. Lyons testifying that those "satanic ritualistic abuse against daycare operators" allegations "were of questionable validity to - put it mildly."). Indeed, the allegations there included claims that the accused could fly, that the accused had ritualistically murdered and consumed the blood of babies, and that the victims were flushed down toilets that deposited them in secret rooms where the abuse allegedly occurred. See Julie Taylor & Markus Themessl-Huber, Safeguarding Children in Primary Healthcare 230 (2009). Since research in the record relied on such abuse allegations and therefore a data sample plainly exists, it is unclear why the disclosure behaviors in those cases could not be measured against disclosure behaviors in substantiated cases of CSA. See, e.g., 13T152-53 (Dr. Lyon noting that the conclusions of the "Gonzalez study," for example, are unreliable because the sample included subjects who had made ritual

sex abuse claims, but making no claim that such data does not still exist).

However, there does not appear to be any literature that so much as sets out to prove causation within the record, and scholars have repeatedly noted this absence of empirical support in general. See, e.g., Ex. D-28, Dr. Cook's Report in State v. R.R. at 2 ("what has emerged [since Summit's 1983 article] in both research and clinical practice is that the relationship between sexual abuse and a well-defined cluster of behavioral symptoms is unclear."); id. at 3 (quoting Dr. Terrence Campbell's 1997 publication in the American Journal of Forensic Psychology, noting that false allegations often also express delayed disclosures that are "conflicted and unconvincing").

Instead, the consensus is that there is no particular symptom or cluster of symptoms that arises in all or even most victims of CSA. See Kamala London et al., "Disclosure of Child Sexual Abuse: What Does Research Tell Us About the Way That Children Tell?," 11 PSYCH. PUB. POL'Y & L. 194, 194 (2005) ("there are no gold standard psychological symptoms consistent with sexual abuse"); Mary Ann Mason, "The Child Sex Abuse Syndrome: The Other Major Issue in State of New Jersey v. Margaret Kelly Michaels," 1 PSYCH. PUB. POL'Y & L. 399, 401 (1995) (this study of 122 appellate decisions demonstrated that testimony regarding alleged typical characteristics of CSA victims "is inconsistent and often contradictory"); John E. B. Myers, Myers on Evidence of Interpersonal Violence: Child Maltreatment, Intimate partner

Violence, Rape, Stalking, and Elder Abuse § 6.09 (5th ed. 2011) ("There is no psychological symptom or set of symptoms observed in all or even a majority of sexually abused children," and "[t]here is no psychological symptom that is unique to sexually abused children."); Esther Deblinger et al., "Sexually Abused Children Suffering Posttraumatic Stress Symptoms: Initial Treatment Outcome Findings," 1 CHILD MALTREATMENT 310, 310 (1996) ("no single symptom or syndrome is characteristic of the majority of sexually abused children."); Ex. D-26, Dr. Atkin's Report in State v. Calix-Atunez ("there is no such thing as a behavioral profile of a 'typical' sexually abused child" and "no current scientific research has demonstrated any behaviors which are indicative of abuse.") (emphasis added); see also 13T17-18 (Dr. D'Urso acknowledging that the disclosure behaviors also occur in children who have experienced other trauma, and there is no evidence indicating particularity with regard to victims of CSA); 13T24-25 (same); 13T47:3-4 (same); 13T76:7-13 (Dr. Lyon noting that these "characteristics" are not any "more common in abused children" than in non-abused children). Accordingly, experts in the relevant scientific field agree that victims of CSA react differently to abuse, and that non-abused children often exhibit the same symptoms as victims of CSA, and they therefore reject the generalization that any one syndrome, set of symptoms, or responsive behavior is the prototypical response to CSA.

B. The Science Does Not Support Our Courts' Understanding Of The Disclosure Behaviors As Being The "Typical" Response To CSA.

Our courts have relied on the mistaken conclusion that "CSAAS 'represents a common denominator of the most frequently observed victim behaviors.'" W.B., 205 N.J. at 610 (quoting J.Q., 130 N.J. at 568). However, the collective testimony of the experts here, as well as the relevant literature in the record, eviscerates the conclusion that CSAAS's alleged disclosure behaviors are "typical."

"Typical" means, "combining or exhibiting the essential characteristics of a group." *Typical*, Merriam-Webster Online, https://www.merriam-webster.com/dictionary/typical (last visited Aug. 10, 2017). The disclosure behaviors are not "typical" of CSA victims, because "there is no such thing as a behavioral profile of a 'typical' sexually abused child. In fact, no current scientific research has demonstrated any behaviors which are indicative of abuse." Ex. D-26, Dr. Atkin's 2013 Report in State v. Calix-Atunez (emphasis added). Instead, as mentioned in the preceding subsection, the relevant scientific community - including the experts here – agree that there are no known prototypical responses that manifest in all or even most victims of CSA. See, infra, Part III, A.

Dr. Brainerd explained that any of the research alleging that the disclosure behaviors are specifically "prototypical . . . characteristics of abused children" is indeterminate at best. 14T57:18-20. Dr. Brainerd noted that adult retrospective survey

research allegedly supports the conclusion that delayed disclosure of CSA is typical, or at least more common than not, but that adult retrospective memory surveys are highly unreliable due to the confounding factors of memory and the inability of researchers to substantiate claims of abuse years after the alleged fact. See Ex. D-63 at 6. Indeed, the adult retrospective survey data relied on by Dr. Lyon in alleging high rates of delayed disclosure is so overbroad in its definition of CSA that it is, at best, irrelevant in a criminal CSA prosecution.[12] Even if such research was methodologically sound, retrospective memory surveys are only of "indeterminate" accuracy, because "[b]etween childhood and adulthood, there are many opportunities for memory-falsification processes . . . to operate." Ex. D-63, Dr. Brainerd's Report at 6.

Dr. Lyon has acknowledged the various limitations to relying on retrospective surveys, as well as the criticisms of such studies within the relevant scientific community. See, Ex. S-4, Dr. Lyon's Report at 5 (discussing "false positives" and "false negatives" as confounding to the research), 7-8 ("critical reviewers" cite the possibility that adult survey participants "forg[e]t that they

[12] Dr. Lyon's reliance on adult retrospective surveys rests on third-hand data, which was first collected in New Zealand in the 1970s, as it was later re-analyzed by other researchers in 2000. See S-4, Dr. Lyon's Report at 6-8, 24 (citing Ex. D-62, Fergusson et al., "The stability of child abuse reports: A longitudinal study of the reporting behavior of young adults," 30 PSYCH. MED. 529-44 (2000)). Therein, Fergusson and colleagues made the bizarre methodological choice to define CSA as including all manner of conduct that would not rise to any legal definition of CSA, such as "unwanted sexual propositions or lewd suggestions," without any distinction as to whether the alleged abuser was an adult or another child. Id. at 532-33.

disclosed their abuse"); 13T129:14-19 (Dr. Lyon testifying that false positive abuse allegations are "definitely . . . a problem" within the research). For that reason, while the adult retrospective surveys may provide some indicia of the prevalence of disclosure behavior among victims of CSA, they fall far short of satisfying the scientific reliability requirements of N.J.R.E. 702.

One reason why this record is so voluminous is that research on the disclosure behaviors has yielded particularly disparate, and therefore scientifically unreliable and un-replicable, results. See, e.g., Ex. S-4, Dr. Lyon's Report at 10-13 (noting, for example, that research tracking disclosure behaviors among children presenting with gonorrhea has yielded disparate results, but then cherry picking a study of **only 24 subjects** to assert that 71% of victims do not disclose CSA when first questioned) (citing Farrell et al., "Prepubertal gonorrhea: A multidisciplinary approach.," 67 PEDIATRICS 151-53 (1981)); 13T195:15-18 (Dr. Lyon noting that, at odds with his own assertions, Bruck and London found that when children are asked directly about abuse, sexually abused children typically disclose); Ex. D-60, Dr. Bruck's Report at 5-6 (noting Lyon's reliance on second-hand data from the gonorrhea studies was unreliable due to: unsound interviewing techniques, age of the subjects, and that it is unclear whether subjects were questioned about CSA at all), id. at 4 (rates of denial of abuse allegations in studies relying on abuse or medical assessment data range from 4% to 76%; rates of recantation in same

context range from 4% to 27%); Ex. D-39, Ceci & Bruck, Jeopardy in the courtroom: A scientific analysis of children's testimony, AM. PSYCH. ASSOC. (1995) (concluding that the majority of children made deliberate or accidental disclosures of CSA, rather than keeping it a secret). As discussed above, other literature alleging to show typicality of the disclosure behaviors was later debunked, because it relied on subjects who had made ritual satanic abuse CSA allegations that were later revealed to be likely fabricated. Id. at 4-5.[13]

Indeed, even in the broader scientific context of research on how children report or fail to report transgressions in general, there is no consensus among researchers that such behaviors are "typical." For example, Dr. Lyon's 2010 and 2016 studies failed to yield statistically significant results regarding the impact of a child's "maltreatment status" on their beliefs regarding the disclosure of transgressions - meaning Dr. Lyon's own research

[13] The interconnectedness of CSAAS and wrongful CSA convictions during the ritual-sex-abuse hysteria of the 1980s and 90s only underscores the importance of ensuring reliability of alleged scientific evidence. See de Becker et al., "Destruction of Innocence: How Coerced Testimony & Confessions Harm Children, Families & Communities for Decades after the Wrongful Convictions Occur," NAT'L CTR FOR REASON & JUSTICE T.1, 23 (May 2013), http://ssrn.com/abstract=2228941 (charting 49 exonerations and explaining the role of CSAAS at that time, calling CSAAS "fractured logic" which caused "some detectives, therapists, and parents [to] believe that when a child said nothing happened, that very statement meant something did happen. The more assertive the denial, the more deeply the abuse was 'buried.'").

implies that abuse may not influence disclosure behaviors at all.[14] Thus, the science does not even support the conclusion that children typically delay or recant allegations of "transgressions," even in the most general sense of the word.

Amicus does not take the position that the phenomena of recantation and delayed disclosure do not sometimes occur within the CSA population. Even defense experts have acknowledged that such behaviors do sometimes occur. See, e.g., Ex. D-60, Dr. Bruck's Report at 7. However, the fact that a particular phenomenon sometimes occurs, without any causal nexus or support for same, and without any reliable scientific evidence of commonality or typicality, cannot render CSAAS evidence admissible under N.J.R.E. 702. Indeed, the research tends to show that the disclosure behaviors occur within non-abused children as often, if not more

[14] Thomas D. Lyon et al., "Children's Reasoning About Disclosing Adult Transgressions: Effects of Maltreatment, Child Age, and Adult Identity," 81:6 CHILD DEVELOPMENT 1714-28 (Nov. 15, 2010) (299 child subjects were asked if they should or would disclose adult transgressions in various hypothetical situations, but "[t]he effects of maltreatment and age were not significant"; "maltreatment status did not influence children's responses to the *Belief* vignettes"; and "no differences emerged between maltreated and non-maltreated children in terms of anticipated belief"); see also Thomas D. Lyon, et al., "The effects of secret instructions and yes/no questions on maltreated and non-maltreated children's reports of a minor transgression," 34 BEHAV. SCI. LAW 784-802 (2016) (testing to see if "age, maltreatment status and/or the secret instructions had any effect on disclosures prior to yes/no questions" and noting that "[w]e were surprised by the lack of significant findings") (emphasis added). Indeed, Dr. Lyon described his relevant experimental work as being "on child's disclosure of transgressions," generally. 13T58:6-7.

often, and that CSA may have no measurable impact on the likelihood that the disclosure behaviors will occur.

IV. NO PART OF SUMMIT'S THEORY SATISFIES N.J.R.E. 702, THUS MORE LIMITED "ACCOMMODATION" EVIDENCE MUST ALSO BE EXCLUDED.

The State and Dr. Lyon suggest that if the court dismisses Summit's larger framework of the "five categories," it should retain Summit's explanation of the disclosure behaviors under his "accommodation" category. However, just as there is no consensus regarding what CSAAS is, there is also no generally accepted definition of Summit's accommodation "category." This is because each of Summit's five categories are as vague and ill-defined as the whole of CSAAS. O'Donohue, "Problems with Child Sexual Abuse Accommodation Syndrome," at 22-23 (e.g., it is unclear how Summit defines "delay," and he otherwise relies on unclear, outdated, psychodynamic terms throughout).

Indeed, Summit also contradicts himself with regard to his posited theory of "accommodation." First, he alleges that "accommodation" is the process by which "[t]he healthy, normal, emotionally resilient child will learn to accommodate to the reality of continuing sexual abuse," by "learning to accept the situation and to survive." Ex. S-5 at 184. However, he also writes that accommodation often leads to "self-destruction and reinforcement of self-hate; self-mutilation, suicidal behavior, promiscuous sexual activity and repeated runaways are typical." Id. at 185.

In contrast, Dr. D'Urso claimed that "accommodation" explains why CSA victims are often "asymptomatic." 12T105-06. He alleged that, "helplessness, entrapment and accommodation contribute to the period of secrecy," which he characterized as "the pre-disclosure events that happened in child abuse." 12T76:1-5. In direct contrast to Dr. Lyon, who characterizes accommodation as encompassing the disclosure behaviors, Dr. D'Urso claimed "[e]ntrapment and accommodation were more of the external to the child dynamics that occurred." 12T76:20-21 (emphasis added). He continued, "Accommodation refers to mechanisms by which the child adjusts or copes with the abuse over a protracted period of time" (12T76-77), and then claimed that the disclosure behaviors fall under the umbrella of "secrecy." Id. at 98-99.

In fact, Dr. Lyon testified that there is no generally accepted definition of "accommodation" or the disclosure behaviors within the relevant scientific community. 13T143:7-16. According to Dr. Lyon, "[a]ccommodation" should stand for the proposition that "children deliberately deny, delay, and recant" allegations of abuse. 13T194:16-17. Dr. Lyon explicitly disclaimed that his understanding of "accommodation," and what he understands to be the manifestations of accommodation – recantation and delayed disclosure – are generally accepted by the relevant scientific community. 13T142-43 (Dr. Lyon noting that Bruck and London disagree with his definition of "recantation," and characterizing their definition as "weird"). To the extent that Dr. Lyon posits his own new theory of accommodation now, limited to his

idiosyncratic understanding of the disclosure behaviors, his novel theory is not before this court and otherwise fails to satisfy N.J.R.E. 702. See, infra, Part IV.

Therefore, just as is true of CSAAS as a self-contained theory, the State has plainly failed to meet its burden in establishing that the "accommodation" category of Summit's theory is independently scientifically reliable. As there is no cohesive definition of "accommodation," no research that reliably supports it, and therefore no general acceptance of same, there can be no assertion that narrower accommodation evidence satisfies N.J.R.E. 702.

V. CSAAS EVIDENCE IS UNDULY PREJUDICIAL.

CSAAS evidence is not scientific and therefore inadmissible under N.J.R.E. 702. However, even if CSAAS evidence was scientifically reliable, it must otherwise be excluded under N.J.R.E. 403, because CSAAS evidence is also unduly prejudicial.

N.J.R.E. 403 provides, in relevant part, that "[e]xcept as otherwise provided by these rules or other law, relevant evidence may be excluded if its probative value is substantially outweighed by the risk of . . . undue prejudice, confusion of issues, or misleading the jury." The rule therefore allows judges, in their discretion, "to exclude otherwise admissible evidence under specified circumstances." Benevenga v. Digregorio, 325 N.J. Super. 27, 32 (App. Div. 1999), certif. denied, 163 N.J. 79 (2000). Evidence must be excluded as unduly prejudicial when "its probative value 'is so significantly outweighed by [its] inherently

inflammatory potential as to have a probable capacity to divert the minds of the jurors from a reasonable and fair evaluation' of the issues in the case." Belmont Condo. Ass'n v. Geibel, 432 N.J. Super. 52, 96 (App. Div.) (quoting State v. Thompson, 59 N.J. 396, 421 (1971)), certif. denied, 216 N.J. 366 (2013). Further, "[e]vidence of an inflammatory nature must be excluded under N.J.R.E. 403 if probative, non-inflammatory evidence on the same point is available." Biunno, Current N.J. Rules of Evidence, Comment 5 on N.J.R.E. 403 (2015).

Because N.J.R.E. 403 presupposes that the evidence is otherwise admissible, it is only necessary to engage in such an analysis if CSAAS first satisfies N.J.R.E. 702 by being scientifically reliable. CSAAS evidence should be inadmissible in the first instance because it is not scientific and therefore unreliable. However, it also lacks probative value and is overwhelmingly prejudicial, making it further inadmissible.

Our courts have long held that "CSAAS cannot be used as probative testimony of the existence of sexual abuse in a particular case." W.B., 205 N.J. at 611 (citing Michaels, 264 N.J. Super. at 598-99). Indeed, it is not clear what, if anything, CSAAS evidence is actually probative regarding. Our courts have misunderstood CSAAS to be probative in the sense that it instructs the finder of fact as to the typical reactions to CSA, but as set forth above, that understanding is not based in science, and was actually contradicted by the experts here and the literature within the record. The State contends that CSAAS is an educational tool

for our juries, but if there is no scientific basis to the purported "education" it offers, CSAAS can only serve to mislead and confuse our jurors. Based on this record, it is obvious that there is no clear probative value to CSAAS evidence.

Moreover, CSAAS is overwhelmingly prejudicial. First, it misuses clinical terminology to suggest that CSAAS is a pathology or diagnosable condition, when the experts here and in the literature in the record all agree that CSAAS is not a "syndrome" at all. See, infra, Part II, C. Moreover, our courts wrongly rely on the misunderstanding that CSAAS is the causal result of experiencing the trauma of CSA. See, Part III, A.

Even though our case law contends that the purpose of CSAAS evidence is not to prove whether CSA actually occurred, the framework in which we present the amorphous concept of CSAAS evidence to our juries plainly suggests otherwise. Moreover, the CSAAS jury instruction does little to remedy that injustice after the fact. CSAAS testimony suggests that certain behaviors are the causal result of CSA, and CSAAS evidence is introduced only when such behaviors are present in an alleged victim, making it highly likely that jurors will draw inferences not intended by the courts. It is one thing to say to a jury, in attempting to explain why an individual failed to report a CSA promptly, that children sometimes delay reporting a variety of actions or transgressions. It is far different and quite prejudicial to say that children who are victims of CSA delay reporting, specifically, because of some unscientific theory called Child Sexual Abuse Accommodation

Syndrome. Exacerbating this prejudice, we allow CSAAS experts to characterize the disclosure behaviors as being typical, when the record reveals that the scientific community has repeatedly asserted that the opposite is true.

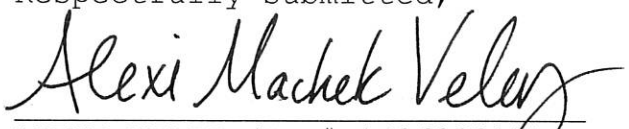
Therefore, CSAAS evidence must also be excluded because it is unduly prejudicial and lacks any discernable countervailing probative value.

CONCLUSION

In New Jersey, CSAAS evidence is entirely dependent on Summit's unscientific theory, and there is no credible argument that Summit's five categories of CSAAS approaches satisfaction of N.J.R.E. 702. To the extent that the State asks this Court to recognize new scientific theories here, or asks this Court to continue to rely on the same unscientific evidence by some other name, *Amicus* ACLU-NJ respectfully suggests that this Court decline such invitations as improper.

Accordingly, CSAAS, by any name or in any revised form, should be excluded pursuant to N.J.R.E. 702, Frye, and if nothing else, N.J.R.E. 403.

Respectfully submitted,



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