ORIGINAL

IN THE SUPREME COURT OF FLORIDA

TIMOTHY RAY HADDEN,

Petitioner,

v. CASE NO. 87,574

STATE OF FLORIDA,

Respondent.

ON *DISCRETIONARY* REVIEW FROM *THE* FIRST DISTRICT COURT OF APPEAL

BRIEF OF PETIONER ON THE MERITS

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I PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court and the appellant in the lower tribunal. Attached hereto as an appendix is the opinion of the lower tribunal, which appears as Hadden v. State, 21 Fla. L. Weekly D405 (Fla. 1st DCA Feb. 14, 1996). The one volume record on appeal will be referred to as "R." A one volume transcript will be referred to as "T".

II STATEMENT OF THE CASE

By amended information filed August 10, 1992, petitioner was charged with three counts of capital sexual battery (R 3-4). The cause proceeded to jury trial on October 21, 1992, and at the conclusion thereof petitioner was found guilty of three counts of lewd assault as lesser offenses (R 7).

On January 13, 1993, petitioner was adjudicated guilty and sentenced to concurrent terms of 12 years in prison, followed by three years probation, with credit for 268 days served (R 30-38). On appeal, the lower tribunal in an en banc decision affirrned petitioner's judgment and sentence. The court summarily rejected petitioner's argument that the trial judge had made insufficient findings of reliability for admission of the the child's hearsay statements. 21 Fla. L. Weekly at D405. The court did not address petitioner's contention that his sentencing guidelines ccoresheet was incorrect. *Id.*

While the majority below found that evidence of rape trauma syndrome was properly admitted, it certified the following question:

> IN VIEW OF THE SUPREME COURT'S HOLDING IN *[STATE V. TOWNSEND]*, **DOES** *FLANAGAN V. STATE* REQUIRE APPLICATION OF THE *FRYE* STANDARD OF ADMISSIBILTTY TO TESTTMONY BY A QUALIFIED PSYCHOLOGIST THAT THE ALLEGED VICTIM IN A CHILD SEX ABUSE CASE EXHIBITS SYMPTOMS CONSISTENT WITH THOSE OF A CHILD WHO HAS BEEN SEXUALLY ABUSED?

21 Fla. L. Weekly at D407.

On March 13, 1996, a timely notice of discretionary review was filed.

III STATEMENT OF FACTS

T H , who was **11** years old **at** the time of trial, testified that petitioner moved in to a house which was one house down from hers. In November of 1990, after she helped him move his car into his backyard, he stuck his hands down into her pants and rubbed her vagina and stuck his finger inside her. He told her not to tell anyone. The same thing happened every couple of weeks at his house after school (T **13-19).**

She told her school guidance counselor about it in March of 1992 (T **19-20),** , the girl's mother, testified that her daughter often went to petitioner's house after school until she got home (T 33-36).

During a proffer, June Perry, school guidance counselor, testified that T came to see her in March of **1992** and told her that her neighbor, the petitioner, had been molesting her since 1990 (T 39-42). The court found the child hearsay statement to be reliable under §90.803(23), Fla. Stat. **(T** 48-49). The witness repeated her testimony before the jury (T **49-**53).

Investigator Michelle Peavy testified during a proffer that she interviewed T on April 6, **1992,** who stated that petitioner had placed his hand inside her pants and finger inside her vagina on many occasions since November of **1990.** She **also** interviewed petitioner, who denied the accusations. Petitioner later contacted her from the jail and stated that he

had fondled the girl twice, because the girl had come onto him (T 59-66).

The court found petitioner's statement to Peavy to be voluntary (T 70-71), and the child hearsay to be reliable (T 71-72). The witness repeated the testimony in front of the jury (T 72-79).

Pediatrician Neil McWilliams testified that the victim showed no evidence of penetration (T 85-88).

During a proffer, psychologist Doug Jones was qualified as an expert in rape trauma syndrome (T 90-105). Counsel objected to the testimony because the syndrome had no scientific reliability, but the objection was overruled on authority of Ward v. State, 519 So. 2d 1082 (Fla. 1st DCA 1988) (T 105-106). Jones testified before the jury that the victim exhibited symptoms of one who had been sexually abused (T 107-10).

Petitioner, age 34, testified that he did not molest the girl, and that his wife had divorced him over this incident (T 118-26). His renewed motion for acquittal on the same grounds was denied (T 127).

During a charge conference, petitioner requested lewd assault by handling and fondling as a lesser offense, which the court agreed to give (T 128-29). The jury found petitioner guilty of three counts of lewd assault (T 159).

At sentencing, the prosecutor noted that victim injury had been scored three times on the sentencing guidelines scoresheet

(T 23-24). The court imposed the sentences noted above (T 25-26).

IV SUMMARY OF THE ARGUMENT

ISSUE I: Petitioner will argue in this brief that the certified question must be answered in the affirmative. The judge allowed a psychologist to testify that the victim exhibited symptoms of one who had been sexually abused. This so-called rape trauma syndrome evidence had been held by the lower tribunal to be admissible under a relevancy analysis in 1988, and a majority of the lower tribunal adhered to its position in the instant case.

However, this Court has decided in the interim that such opinion testimony must meet the scientific reliability test for admissibility. The state presented no evidence at trial that the syndrome was scientifically reliable. The dissenting opinion of the lower tribunal must be adopted as the holding in this case. A survey of other jurisdictions and commentators will show that the rape trauma syndrome does not meet the scientific reliability test. The admission of the syndrome evidence was reversible and not harmless error. The proper remedy is to grant a new trial.

ISSUE 11: Petitioner will further argue that the judge erred in allowing evidence of the child's hearsay statements to a school counselor and to a police officer under the child

hearsay exception. Petitioner is permitted to raise other issues in addition to the certified question.

The judge's findings that the statements were reliable failed to satisfy the current state of the law in this sensitive area. Counsel sufficiently brought the matter to the court's attention to allow the issue to be preserved. Again, the admission of the hearsay evidence without sufficient findings of reliability constituted reversible and not harmless error. Again, the **proper** remedy is **to** grant a new trial.

ISSUE 111: Finally, petitioner will argue that his sentencing guidelines scoresheet is inflated by 60 points, which were assessed for victim injury. We now know that victim injury points cannot be assessed in a lewd assault case unless there is some identifiable physical trauma. Although petitioner did not object to these points, the matter may be raised for the first time on appeal. The **proper** remedy is to remand for resentencing.

V ARGUMENT

ISSUE I

APPLICATION OF THE *FRYE* STANDARD OF ADMISSIBILITY IS REQUIRED IN ADMITTING TESTIMONY BY A QUALIFIED PSYCHOLOGIST THAT THE ALLEGED VICTIM IN A CHILD SEX ABUSE CASE EXHIBITS SYMPTOMS CONSISTENT WITH THOSE OF A CHILD WHO HAS BEEN SEXUALLY ABUSED.

During a proffer, psychologist Doug Jones was qualified as an expert in rape trauma syndrome (T 90-105). Counsel objected to the testimony:

> Judge, I would object to the witness testifying for the syndrome. I don't think the syndrome has scientific reliability and I don't think the witness has specified enough diagnosis criteria to make the diagnosis that he's prepared to **make.** (T 105).

The objection was overruled on authority of Ward v. State, *supra* (T 105-106). Jones testified before the jury that the victim exhibited symptoms of one who had been sexually abused (T 107-**10).**

The lower tribunal has posed the question of whether the testimony was admissible in light of Flanagan v. State, 625 So. 2d 827 (Fla. 1993), and State v. Townsend, 635 So. 2d 949 (Fla. **1994).**

THIS COURT HAS ADOPTED THE *FRYE* TEST.

In Flanagan, the issue before this Court was whether an expert could testify that the defendant fit a profile of sex offenders, not whether the victim met a profile of sexual abuse victims. This Court held that the offender profile evidence was inadmissible because it failed to meet the test for scientific reliability under Frye v. ünited States, *293* F. 1013 (D.C. Cir. 1923), and because it was admitted as substantive evidence of guilt.

Thuc, on its face, Flanagan does not control the instant case, because the evidence admitted here was the victim abuse syndrome and not the offender profile. On its face, Ward controls the instant case. But further examination will show

that neither statement is true.

In Ward, the psychologist (who coincidentally was the same one as in Flanagan) testified during a proffer that a six-year-old female child exhibited symptoms consistent with sexual abuse. A personality test reflected anxiety and fear. Her mother said the child had recent stomach aches, a lack of willingness to play outside, sleep disturbances, and dependency.

Ward's counsel objected to the testimony because the field had not been adequately tested, because the testimony was not beyond the understanding of the average person, and because the expert had founded her conclusion upon her belief that the child was telling the truth. The judge found the testimony to be admissible because the field was sufficiently developed, and because it would aid the jury.

On appeal, the undersigned surveyed the law of other states, as it existed at the time, and argued that the child sex abuse syndrome was not admissible because it did not meet the Frye scientific reliability test, and because the court in Kruse v. State, 483 So. 2d 1383 (Fla. 4th DCA 1986), *rev. dism.*, *507 So.* **2d** 588 (Fla. 1987), had erroneously used the relevancy test rather that the scientific reliability test. The court in Ward affirmed on authority of Kruse's relevancy test.

It appears that Ward was wrongly decided, in light of Flanagan. As noted above, Flanagan clearly recognized the Frye

reliability test as the proper test for admissibility of "profile" or "syndrome" evidence, rather than the Kruse relevancy test.

Judge Ervin's separate opinion in Flanagan v. State, 586 So. 2d 1085, 1101-21 (Fla. 1st DCA 1991), questioned whether Kruse and Ward were correctly decided:

> Because I consider that novel psychological syndrome or profile evidence, when offered by the prosecution for a nonrehabilitative purpose, to be discussed at length *infra*, cannot survive a *Frye* analysis, Kruse, which held syndrome evidence admissible under the relevancy approach, may have to be reevaluated. It appears from the Fourth District's discussion of the facts in Kruse that the prosecution offered such evidence *solely* for a nonrehabilitative purpose. Additionally, I am not unaware that this court in *Ward v. State*, which relied on Kruse, held there to be no error in the admission of an expert's opinion classifying certain types of characteristics or symptoms typically displayed by children who have been abused. It is unclear from a reading of the *Ward* opinion whether such evidence was offered as substantive proof of guilt, or as a means of rehabilitating the child, once the child's credibility had come under attack. If the expert's opinion there was offered for the latter purpose, the *Ward* decision approving it would be consistent with case law from other jurisdictions. *See infra*.

586 So. 2d at 1109, note 19; emphasis in original.

The state in Ward offered the syndrome testimony to prove guilt, not to rehabilitate the child.

Judge Ervin's opinion in Flanagan discussed the law of

other states in ruling on the admissibility of rape trauma syndrome evidence. He concluded that the victim syndrome is not admissible as substantive evidence in the state's case in chief:

> The cases in which the issue is addressed appear to be divided into two general groups. In the first, the courts usually disallow such profile or syndrome evidence if offered by the prosecution during its case-in-chief for a nonrehabilitative purpose, i.e., when submitted simply for the purpose of proving that the victim had been abused. ...
>
> If, however, the defense has attacked a witness's credibility, the courts often permit profile or syndrome evidence for the purpose only of rehabilitating the witness by showing that such apparently inconsistent conduct is in fact consistent with the syndrome or characteristics of a cexually ascaulted victim. ...
>
> In the case at bar, Dr. Goslin's testimony, as previously stated, was offered to support the prosecution's position that the victim had been sexually abused, which was obviously a nonrehabilitative purpose. As such, her testimony under the clear weight of judicia1 authority should not have been admitted because it did not comply with the Frye general acceptance standard.

586 So. 2d at 1113-14; emphasis added.

Thus, since Ward and Kruse were wrongly decided, this Court should overrule them.

Moreover, this Court in Flanagan cited Judge Ervin's opinion with approval and adopted the Frye test for profile or syndrome evidence:

We begin our analysis of the admissibility of this testimony with the basic principle that novel scientific evidence is not admissible in Florida unless it meets the test established in *Frye v. United States*, 293 F. **1013 (D.C.** Cir. **1923). *See Stokes** v. State*, 548 So.2d 188, 195 (Fla. 1989). Under Frye, in order to introduce expert testimony deduced from a scientific principle or diccovery, the principle or discovery "must be sufficiently established to have gained general acceptance in the particular field in which it belongs." 293 F. at 1014.

* * *

Profile testimony, on the other hand, by its nature necessarily relies on some scientific principle or test, which implies an infallibility not found in pure opinion testimony. The jury will naturally assume that the scientific principles underlying the expert's conclusion are valid. Accordingly, this type of testimony must meet the *Frye* test, designed to ensure that the jury will not be misled by experimental scientific methods which may ultimately prove to be unsound. *See Stokes*, 548 So.2d at 193-94 (" [A] courtroom is not a laboratory, and as such it is not the place to conduct scientific experiments. If the scientific community considers a procedure or process unreliable for its own purposes, then the procedure must be considered less reliable for courtroom use.").

Here, it is virtually uncontested that sex offender profile evidence cannot meet this test. The State does not attempt to prove this evidence meets Frye by citing cases or authority showing this type of profile to be accepted in the scientific community, and the only evidence on this point at trial was Dr. Goslin's testimony that this type of information is generally relied on by people working in the field of child sexual abuse to determine what households are at risk and to aid in

> treatment. However, even Goslin went on to say that the profile could not be used to prove or disprove that a person was a child abuser. After examining relevant academic literature and case law, we find that sexual offender profile evidence is not generally accepted in the scientific community and does not meet the Frye test for admissibility. For an excellent and thorough discussion of this issue, see Judge Ervin's opinion below. *Flanagan*, **586** So.2d at **1112-20** (Ervin, J., concurring in part and dissenting in part).

Flanagan, 625 So. 2d at 828; emphasis added.

A little over a year later, this Court in Ramirez v. State, 651 So. 2d 1164 (Fla. 1995), reaffirmed the Frye requirement[1] and adopted the following "four-step process" in evaluating expert opinion testimony:

> The admission into evidence of expert opinion testimony concerning a new or novel scientific principle is a four-step process. See generally Charles W. Ehrhardt, *Florida Evidence* § 702.1 (1992 Edition); Michael H. Graham, *Handbook* of ***Florida*** *Evidence* **§ 90.702 (1987** Edition). First, the trial judge must determine whether such expert testimony will assist the jury in understanding the evidence or in determining a fact in issue. **§ 90.702,** Fla. Stat. **(1993)** (adopted by the Florida Supreme Court in In re *Florida* ***Evidence*** *Code*, **372 So.2d 1369** (Fla. **1979)).** Second, the trial judge must decide whether the expert's testimony is based on a scientific principle or discovery that is "sufficiently established to have gained general acceptance in the particular field in

[1]The Criminal Procedure Rules Committee's Proposed Amendments to Fla. R. Crim. P. 3.220(b)(1)(A)(i) also require an expert witness to satisfy the *Frye* test.

> which it belongs." *Frye v. United States*, 293 F. 1013, 1014 (D.C.Cir.1923). This standard, commonly referred to as the "*Frye* test," was expressly adopted by this Court in *Bundy v. State*, 471 So.2d 9, 18 (Fla. 1985), *cert. denied*, 479 U.S. 894, 107 S.Ct. 295, 93 L.Ed.2d 269 (1986), and *Stokes v. State*, 548 So.2d 188, 195 (Fla. 1989). The third step in the process is for the trial judge to determine whether a particular witness is qualified as an expert to present opinion testimony on the subject in issue. § 90.702, Fla. Stat. (1993). All three of these initial steps are decisions to be made by the trial judge alone. See ***Johnson*** *v. State*, 393 So.2d 1069, 1072 (Fla. 1980), *cert. denied*, 454 U.S. 882, 102 S.Ct. 364, 70 L.Ed.2d 191 (1981); Rose *v. State*, 506 So.2d 467 (Fla. 1st DCA), *review denied*, 513 So.2d 1063 (Fla. 1987). Fourth, the judge may then allow the expert to render an opinion on the subject of his or her expertise, and it is then up to the jury to determine the credibility of the expert's opinion, which it may either accept or reject. ***Wuornos*** *v. State*, 644 So.2d 1000, 1010 (Fla. 1994) ("[T]he finder of fact is not necessarily required to accept [expert] testimony."); *Walls v. State*, 641 So.2d 381, 390 (Fla. 1994) ("[E]xpert opinion testimony [is] not necessarily binding even if uncontroverted.").

Ramirez, 651 *So.* 2d at 1166-67; emphasis added.

This Court in Ramirez explained the particular importance of the Frye test:

> The second step, concerning whether to allow expert opinion testimony on a new or novel subject, is especially important to the process. As Professor Ehrhardt has explained:
>
> > When a novel type of opinion is offered, the proffering party must

> demonstrate the requirements of scientific acceptance and reliability. The most widely adopted test has been that of *Frye v. United States* which involved the admissibility of an early polygraph. The court held the evidence inadmissible because the underlying scientific principle was not "sufficiently established to have gained general acceptance in the particular field in which it belongs."
>
> Ehrhardt, *supra*, § *702.2* (footnotes omitted). [FN2] The principal inquiry under the *Frye* test is whether the scientific theory or discovery from which an expert derives an opinion is reliable.

Id. at 1167. In footnote two of Ramirez, this Court reaffirmed the vitality of Flanagan:

> Professor Ehrhardt also notes that some Florida district courts of appeal had taken the position that section 90.403 of the Florida Evidence Code superseded the Frye test. Ehrhardt, *supra*, § 702.2. We clarified any confusion on this issue in *Stokes* where we noted that Florida continues to follow the *Frye* test. See *also Flanagan v. State*, 625 So.2d 827 (Fla. 1993).

Id. at 1167; emphasis added

In the interim, seven months after Flanagan and nine months before Ramirez, this Court in State v. Townsend, *supra*, used the following unfortunate language:

> [I]f relevant, a medical expert witness may testify as to whether, in the expert's opinion, the behavior of a child is consistent with the behavior of a child who has been sexually abused.

635 So. 2d 958; footnote omitted; emphasis added. The majority

of the lower tribunal seized upon this one sentence as authority for the proposition that evidence of the rape trauma syndrome is admissible under a mere relevancy test and the judge is not required to perform the more strict Frye reliability test.

Judge Ervin, writing for the seven dissenting judges below, plainly demonstrates that this Court did not mean to adopt a relevancy test for this type of evidence:

> As with the other cases listed in Judge Miner's opinion, nothing in *Townsend* divulges that a ***Frye*** objection was raised, or, indeed, whether the admissibility of any novel scientific technique was before the court. Rather, the above quoted statement was made in the context of an assertion that the trial judge had erred in allowing an expert to testify to a number of hearsay statements of the child-victim, some of which were obtained through the use of anatomical dolls. Consequently, *Townsend* furnishes no support for the theory that PTSD or RTS is no longer a new or novel technique, because nothing therein discloses whether the expert relied upon a syndrome in reaching her opinion. The applicability of ***Frye*** in *Townsend* was thus a non-issue.
>
> This conclusion is reinforced by ***Townsend's*** additional reference to ***Glendening,*** where the court stated that "[a] qualified expert may express an opinion as to whether a child has been the victim of sexual abuse." *Glendening,* 536 So. 2d at 220. In concluding that the witness was properly qualified, the *Glendening* court cited Kruse, which, as previously explained, applied the balancing test. No *Frye* objection was mentioned. That ***Glendening*** addressed only the admissibility of pure opinion testimony is underscored by the court's adoption of the following procedure for testing the

admissibility of expert opinion testimony:

> (1) the opinion evidence must help the trier of fact; (2) the witness must be qualified as an expert; (3) the opinion must be capable of being applied to evidence at trial; and (4) the probative value of the opinion must not be substantially outweighed by the danger of unfair prejudice.

Id. at 220. *Glendening* reiterated the time-worn rule recognizing that the admissibility of expert opinion testimony is tested on appeal by the abuse-of-discretion standard. *Id.* It is obvious that in formulating the above procedure, the court relied exclusively on sections 90.403 and 90.702 of the Florida Evidence Code and not on *Frye*.

Any lingering uncertainty whether Townsend's approval of expert opinion testimony involving common symptoms of typically abused children implied that the court had decided that such testimony need comply only with the relevance standard should be laid to rest by the supreme court's most recent pronouncement on the subject in *Ramirez v. State*, 651 So. 2d 1164 (Fla. 1995), wherein it once again reaffirmed its allegiance to *Frye*. ... Clearly, the court in *Ramirez* modified the procedure previously adopted in *Glendening* to include an additional factor relating to the admissibility of opinion testimony based on new or novel scientific techniques, i.e., the general acceptance standard. Therefore, the quoted statement in *Townsend*, with its reference to *Glendening* as supporting authority, must be understood as applying only to an expert's personal opinion which is not based upon a novel scientific technique or process.

21 Fla. L. Weekly at D409; emphasis added; footnote omitted[2].

The state presented no evidence at trial to satisfy the Frye and Ramirez tests. Judge Ervin's dissenting opinion below concluded that the syndrome evidence did not satisfy the Frye test. It, like his dissenting opinion in Flanagan, must be adopted as the holding in this case:

> Nothing in the expert's testimony below reveals that the syndrome is generally accepted in the particular field in which it belongs, presumably medical and mental health disciplines, as a diagnosis of sexual abuce. Moreover. a review of pertinent scientific and legal writings discloses no agreement of its general acceptance. As I stated in my concurring and dissenting opinion in *Flanagan* **I,** 586 So.2d at 1115-16: "[T]here is a lack of consensus regarding the ability of an expert to determine whether a particular child with such traits or symptoms has in fact been abused. Perhaps even more pronounced is the lack of agreement among the experts as to the reliability of such

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[2]Moreover, an examination of the Briefs in *State v. Townsend,* case no. 81,263 (Fla. State Archives), confirms that it was not a *Frye* case at all. The Brief of Respondent, filed by Jamec G. Kontos of Merritt Island on April 23, 1993, reveals that he raised many issues beyond the certified question. Issue IX, at 42-45, is entitled:

> AT TRIAL, DR. MEDEA WOODS IMPERMISSIBLY GAVE HER OPINION THAT THE DEFENDANT COMMITTED A SEXUAL BATTERY ON THE CHILD.

He argued that the victim's eight statements made to the psychologist while che was playing with anatomically correct dolls (the little girl doll and the "poppa" doll) were inadmissible because they conveyed the identity of the perpetrator. He cited only *Glendening.* He did not cite *Frye* or *Ward* or *Kruse.* The file contains no reply brief from the state.

profiles." See also authorities generally summarized in *Flanagan* I at 1115-16.

The following comments by the New Jersey Supreme Court in *State v. J.Q.*, **617 A.2d 1196, 1202** (N.J. 1993), in regard to CSAAS, are altogether pertinent to the issue at hand:

> The scientific community does not yet exhibit a consensus that the requisite degree of scientific reliability has been shown. Although some argue that "'under no circumstances should a court admit the opinion of an expert about whether a particular child has been abused * * *[,]' [t]he majority of professionals believe qualified mental health professionals can determine whether abuse occurred; not in all cases, but in some." 1 John E. B. Myers, *Evidence in* Child *Abuse and Neglect* ***Cases*** **§4.31,** at **283-84 (2d** ed. **1992) . . .** (quoting Melton & Limber, *Psychologists' Involvement* in *Cases* ***of Child*** *Maltreatment,* 44 ***Am.*** Psychol. **1225, 1230 (1989)).**

> While the debate continues among experts regarding whether the syndrome is an adequate therapeutic tool for determining the presence of abuse, it appears that there is clearly no consensus among the experts that it is useful as substantive evidence of guilt.

21 Fla. L. Weekly at D409-410; footnote omitted; emphasis added.

Again, this dissent, like the dissenting opinion in Flanagan, must be adopted as the holding in this case.

Justice Overton, dissenting from this Court's refusal to answer a Frye certified question whether the FBI method of maintaining population frequencies in DNA databases is reliable,

stated perfectly petitioner's position:

> There are two tests presently being uced by courts in this country to determine the admissibility of a new type of scientific evidence. The first is the established *Frye* test, which requires that, before new scientific evidence is admissible, there must be testimony establishing that such new scientific principle or discovery is "sufficiently established to have gained general acceptance in the particular field in which it belongs." *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). The second approach, now utilized in the federal courts and developed, in part, as a result of the United States Supreme Court's decision in Daubert *v.* Merrell *Dow* ***Pharmaceuticals, Inc.***, [509] **U.S. ___, 113** S.Ct. **2786, 125** L.Ed.2d 469 (1993), is the helpfulness or relevancy test based on Federal Evidence Rule 702. Under this test, various factors are taken into account including the general acceptance of the expert's theory. However, the ultimate admissibility decision does not turn on the theory having general acceptance in the scientific community. In Florida, we have made clear that the *Frye* test must be satisfied prior to the admission of new scientific evidence. ***See*** *Hayes v. State*, 660 So.2d 257 (Fla. **1995**); Ramirez *v.* State, **651** So.2d **1164** (Fla. **1995**); ***Stokes v. State*, 548 So.2d 188 (Fla. 1989).** Given our clear policy statement that *Frye* applies in Florida, I would refuse to accept the State's contention that *Frye* should apply only to the threshold analysis of DNA testing in general. Under the State's approach, a prosecutor would have to establish only that DNA theory and techniques are accepted in general; the reliability of DNA probability calculations would then be reviewed under either the federal relevancy standard or as a question of weight for the jury. Such a deviation is clearly contrary to both *Ramirez* and *Hayes*. I would reject

> any effort to ease the standard o admissibility for this crucial step in the overall DNA process. Florida has established a strong policy of using the ***Frve*** test in admissibilitv determinations for new scientific evidence, and I would envision substantial confusion in the courts if we were to sanction the use of both the *Frve* test and the federal relevancy test as part of the process to determine the admissibility of DNA evidence. It should be one or the other, and this Court has chosen the *Frye* test.

State v. Vargas, 20 Fla. L. Weekly S594, 595 (Fla. Dec. 12, 1995) (Overton, J.) (footnote omitted; emphasis added).

OTHER JURISDICTIONS AND AUTHORITIES DO NOT RECOGNIZE THE RAPE TRAUMA SYNDROME.

A survey of other jurisdictions and treatises confirms Judge Ervin's view that the syndrome is inadmissible.[3] The admissibility of expert testimony concerning the child sexual abuse cyndrome is discussed in many cases. A few states allow the testimony about a related condition concerning adult victims, known as the rape trauma syndrome,[4] to show lack of consent of adult victims in general, although not of a

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[3] *See* Wells, *Expert Testimony* on ***the Child Sexual Abuse Syndrome: To Admit or Not to Admit, 57*** FLA. BAR J. 673, 676, note 16 (1983), for an early analysis.

[4] This condition was first identified in 1974 in Burgess and Holstrom, ***Rape Trauma*** *Syndrome,* **131** AM. J. OF PSYCHIATRY 981. It is included in the category of post-traumatic stress disorders as described in the American Psychiatric Association's DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 5309.81 (4th ed.) [hereinafter referred to as DSMIV]. Adult victims suffer from various stages of fear, nightmares, and depression. Comment, ***Expert Testimony*** *on* ***Rape*** *Trauma Syndrome: Admissibility* ***and Effective Use in Criminal*** *Rape* ***Prosecution,*** **33 AM. U.** L. REV. 417 (1984).

particular victim. State v. Marks, 647 P.2d 1292 (Kan. 1982); State v. Liddell, 685 P.2d 918 (Mont. 1984); State v. McQuillen, 689 P.2d 822 (Kan. 1984); and State v. Huey, 699 P.2d 1290 (Ariz. 1985). Other courts do not allow any expert testimony about the rape trauma syndrome. State v. Saldana, 324 N.W. 2d 227 (Minn. 1982); State v. McGee, 324 N.W. 2d 232 (Minn. 1982); People v. Bledsoe, 681 P.2d 291 (Cal. 1984); and State v. Taylor, 663 S.W.2d 235 (Mo. 1984). A few courts allow testimony about the syndrome where the victim is a child. State v. Middleton, 657 P.2d 1215 (Ore. 1983); State v. Myers, 359 N.W. 2d 604 (Minn. 1984); Smith v. State, 688 P.2d 326 (Nev. 1984); State v. Ogle, 668 S.W.2d 138 (Mo. Ct. App. 1984); and Commonwealth v. Mandrala, 480 N.E. 2d 1039 (Mass. Ct. App. 1985). Most courts hold inadmissible any expert testimony about the child sexual abuse syndrome. Hall v. State, 692 S.W. 2d 769 (Ark. Ct. App. 1985); Allewalt v. State, 487 A.2d 664 (Md. Ct. App. 1985); and State v. Stafford, 334 S.E.2d 799 (N.C. Ct. App. 1985).

In the DSMZV, the psychiatrists' "Bible", neither the rape trauma syndrome nor the sexual abuse child syndrome is specifically described therein. They are thought to be sub-categories of the post traumatic stress disorder. This disorder requires the presence of six criteria.[5] Cogent criticism of the DSMIII, the predecessor to DSMIV, has been voiced in Ziskin, COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY (3d ed.

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[5]DSMIV at 427-29. They are set forth in an appendix to this brief.

1981):

> The foregoing should be sufficient to make clear that the assessment and diagnostic systems utilized in psychiatry and clinical psychology do not rest upon any basis of soundly established scientific principles. This is well known to many lawyers ... the data concerning the patient or subject do not dictate the conclusion as they must in any scientifically established discipline, but rather it is the manner in which the individual psychiatrist chooses to define the category and interpret the data that dictates the diagnosis. ... The prediction of outcome, or state - past, present, or future - from such unstable categories is impossible ... in most instances, relationship between diagnosis and legal issue have been demonstrated.

Id. at 158 (emphasis in original).

The testimony as to post traumatic stress syndrome should not be allowed because its relevance to this case was tenuous **at best,** a fact not explained to the jury, which thus led the jury into giving that testimony more credence than it deserved and led the jury into a verdict based upon inaccurate and misleading "expert" speculation.

The primary and essential criteria for diagnosing post traumatic stress syndrome is the pre-existence of a stressor, i.e., the cause of the syndrome. The variety of stressors is extremely broad. Thus, expert testimony specifying the cause of the syndrome is extremely speculative. Again, this is especially true when the psychiatrist or psychologist is presented with a "cause" by the police or the victim from the

outset. Of course, the syndrome generally lists the mechanism as some form of stress. Here, there was no testimony that the psychologist had made any inquiry into the victim's history to eliminate other possible causes of these symptoms, and the jury was never told that there were many possible alternative causes of these symptoms. Thus, the psychologist's testimony was not sufficiently definite and certain to ensure that the verdict was not based upon speculation.

The dangers of introducing unreliable expert testimony in a sexual assault case were well stated by the Maryland Court of Appeal in Allewalt v. State, *supra*, 487 A.2d at **670** (footnote omitted):

> While evidence of PTSD may be relevant to prove the victim's resulting injury, it does not establish that rape was the trauma causing it. **As** a result, the diagnosis has little probative value in a rape case in which the ultimate issue is the occurrence of rape, i.e., whether a rape caused the disorder.
>
> Furthermore, expert testimony regarding PTSD unduly corroborates the victim's rendition of the incident. By stating that a rape could cause the disorder, an expert implicitly verifies the victim's claim that rape did cause it. This leads to confusion as to the issue being decided and creates the perception that no further fact finding is necessary. (Emphasis in original).

The California supreme court stated these dangers:

> Thus, in this case, the prosecution introduced the rape trauma syndrome testimony, not to rebut misconceptions about the presumed behavior of rape victims, but rather as a means of proving - from the alleged victim's post-incident trauma - that a rape in the legal cence

had, in fact, occurred.

* * *

> It [the syndrome] does not consist of a relatively narrow set of criteria or symptoms whose precence demonstrates that the client or patient has been raped; rather, as the counselor in this case testified, it is an "umbrella" concept, reflecting the broad range of emotional trauma experienced by clients of rape counselors. Although there are patterns that have been observed, the ongoing studies reveal that a host of variables contribute to the effect of rape on its victims....

People v. Bledsoe, *supra*, 681 P.2d at 299, 300-301. The Minnesota supreme court stated the dangers this way:

> Permitting a person in the role of an expert to suggest that because the complainant exhibits some of the symptoms of rape trauma syndrome, the complainant was therefore raped, unfairly prejudices the appellant by creating an aura of special reliability and trustworthiness. Since jurors of ordinary abilities are competent to consider the evidence and determine whether the alleged crime occurred, the danger of unfair prejudice outweighs any probative value. To allow such testimony would inevitably lead to a battle of experts that would invade the jury's province of fact-finding and add confusion rather than clarity.
>
> Rape trauma syndrome is not a fact-finding tool, but a therapeutic tool useful in counseling. Because the jury need be concerned only with determining the facts and applying the law, and because evidence of reactions of other people does not assist the jury in its fact-finding function, we find the admission of expert testimony on rape trauma cyndrome to be error.

State v. Saldana, *supra*, 324 N.W.2d at 236 (footnote omitted).

The probative value of evidence rests largely upon the assumption that the witness is telling the truth. The probative value of Mr. Jones' testimony rested largely upon his assumption that the child was telling the truth. Although Mr. Jones was not permitted to express his opinion that the child had been truthful to him, it is obvious that Mr. Jonec would never have reached his conclusion that the child's behavior was the result of sexual abuse if Mr. Jones did not believe the child. In this regard, some courts hold that such expert opinion invades the province of the jury because it improperly bolsters the child's testimony:

> Credibility is a crucial issue because the children's and Fitzgerald's testimony directly conflict. It is improper for an expert to base an opinion about an ultimate issue of fact solely on the expert's determination of a witness' veracity. The physical evidence does not show whether sexual abuse of the children occurred. Dr. Griffith's opinion is based solely on her evaluation of the children's version of the events. "An expert may not go so far as to usurp the exclusive function of the jury to weigh the evidence and determine credibility."

State v. Fitzgerald, 694 P.2d 1117, 1121 (Wash. Ct. App. 1985). The same observation was made by the Supreme Court of Missouri:

> What does the testimony regarding rape trauma syndrome prove in this instance: Whether the victim had been raped at some time or that she had experienced some stressful sexual experience which may or may not have occurred at Mary's Moonlight

> Lounge? There is no evidence that Dr. Amanat was qualified to relate the specific incident that caused the victim's symptoms. Thus, the only purpose would be to bolster her testimony by unrelated scientific evidence.

State v. Taylor, *supra*, 663 So. 2d at 241. The greatest danger of such testimony is that the jury will decide that if the child's symptoms fit the pattern of behavior shown by most other victims, in the expert's opinion, the jury will accept the expert's testimony and conclude that the child must have been molested. ***See*** Hall v. State, *supra*.

Tn State v. Myers, 382 N.W. 2d 91 (Iowa 1986), the defendant was charged with indecent contact with an eight year old female child. At trial, the child's school principal and a child abuse investigator were permitted to testify as experts that children generally tell the truth when they report that they have been sexually abused. The experts did not testify that this particular child was truthful. The defendant did not challenge the qualification of either expert; rather, he argued that their opinions were not the proper subject of expert testimony under Iowa Rule of Evidence 702, which is identical to §90.702, Fla.Stat. The court rejected the state's argument that the testimony was offered merely to aid the jury:

> The credibility of the eight-year-old child was a fighting issue between the parties. The gist of the principal's testimony was that during her three-year period as principal no child had lied to her about being sexually abused; the

> investigator opined that in 16 years of work she had only one child lie to her about sexual abuse. The prosecutor's obviouc purpose in offering this expert testimony was to bolster the complainant's credibility. We believe the effect was comparable to telling the jury that the complainant would not lie about matters concerning sexual abuse.

Id. at 93. Citing Bledsoe, Saldana, and Taylor, the court held:

> Expert opinion testimony is admissible pursuant to [Rule] 702 if it "will assist the trier of fact to understand the evidence to determine a fact in issue". The ultimate determination of the credibility or truthfulness of a witness is not "a fact in issue", but a matter to be generally determined solely by the jury. An exception to this would be where the defendant is charged with perjury. Consequently, we conclude that expert opinions as to the truthfulness of a witness is not admissible pursuant to rule 702. [T]he effect of the expert opinions in this case was the same as directly opining on the truthfulness of the complaining witness.
>
> * * *
>
> We do not believe that an expert's testimony that young children do not lie about sexual matters is particularly helpful to the jury. It is within the common knowledge of a juror that the children would have to have some type of sexual experience, instruction or exposure in order to require the necessary knowledge to make such accusations and testify accordingly.
>
> * * *
>
> We understand and recognize the State's concern about the sexual abuse of

> children. These cases are difficult to prosecute because of the age of the victims and the lack of eyewitnesses. Such crimes are indeed detestable and society demands prosecution of these abusers. However, a sexual abuse charge alone carries a large stigma on the accused and conviction provides a serious penalty. In interpreting our Rules of Evidence, we must not only be aware of the needs of society, but also the defendant's right to a fair trial.

Id. at 97. The same is true in the instant case. The importance of Myers is that even though the witness does not expressly comment on the veracity of the child, the prosecutor is able to get the message across to the jury, through other means.

The unreliability of Mr. Jones' testimony can be shown by reference to a treatise: Sgroi, CLINICAL INTERVENTION IN CHILD SEXUAL ABUSE, which lists 20 behavioral indicators of sexual abuse:

> 1. Overly compliant behavior; 2. Acting-out, aggressive behavior; 3. Pseudo mature behavior; 4. Hints about sexual activity; 5. Persistent and inappropriate sexual play with peers or toys or with themselves, or sexually aggressive behavior with others; 6. Detailed and age-inappropriate understanding of sexual behavior (especially by young children; 7. Arriving early at school and leaving late with few, if any, absences; 8. Poor peer relationships or inability to make friends; 9. Lack of trust, particularly with significant others; 10. Non-particlpation in school and social activities; 11. Inability to concentrate in school; 12. Sudden drop in school performance; 13. Extraordinary fears of males (in cases of male perpetrator and female victim); 14. Seductive behavior with males (in cases of male perpetrator

> and female victim); 15. Running away from home; 16. Sleep disturbances; 17. Regressive behavior; 18. Withdrawal; 19. Clinical depression; and 20. Suicidal feelings.

Id. at 40-41. There was no testimony that the child here exhibited any of these symptoms. See also People v. Bledsoe, *supra*, 681 P.2d at 300, 301. Although the expert was cross-examined on the possibility that some other factor caused these troubles, such as a divorce of her parents, the danger in admitting the expert's testimony is that the jury will accept the expert's conclusion as the Gospel and not question its competence:

> As one commentator has observed, the psychological expert testimony "tend[s] to create the unfounded impression of infallibility in the minds of lay persons". Despite cautionary jury instructions by the court, this special aura of trustworthiness and reliability surrounding expert testimony serves to unduly influence the jury. This danger becomes more significant where, as with RTS evidence, the testimony addresses a dispositive issue in a criminal case. Even assuming that cross-examination of the expert brings out the inconsistencies of RTS evidence, the jury is likely to depend on the expert's conclusion to resolve the ultimate issue and ignore other evidence adduced at trial.
>
> Expert testimony on RTS further misleads the jury by embodying a legal conclusion in a clinical diagnosis. An expert testifying that the complainant exhibits the symptoms of "rape trauma syndrome" is, in essence, telling the jury that she has been raped. Apart from

> reliability concerns, evidence of an alleged victim's emotional response to sexual assault can in no way establish the mens rea element of rape. Moreover, unlike circumstantial physical evidence of violence, an R.T.S. diagnosis cannot impute intent to the defendant by proving that the victim could not have reasonably consented. Even where the expert is precluded from explicitly offering an opinion as to whether the complainant was raped, R.T.S. evidence nevertheless unfairly supports this inference in the jury's mind.

Note, *Rape Trauma Syndrome,* 70 **VA.** L. REV. 1657, 1701 (1984) (footnotes omitted).

The jury should never have heard the expert's testimony in this trial. It is well within the purview of the jury, using its common sense and life experiences, to determine whether the child's behavior was a result of sexual abuse or a result of some other stressor. As aptly stated by Judge Becton, concurring in State v. Stafford, *supra,* 334 S.E. 2d at 801:

> Some suggest that there are as many as 50 symptoms of the rape trauma syndrome today, many of which would be applicable to hijack victims, prisonerc of war, kidnap victims, as well as others who have been subjected to psychologically traumatic events.

Not only are there more than 50 symptoms associated with the rape trauma syndrome, as the Washington supreme court has pointed out, the common mantra in literature regarding the syndrome is that there is no typical response to rape. *See* State v. Black, 745 P.2d 12 (Wash. 1987). The Black case was a

case of first impression for the Washington court on whether rape trauma syndrome meets the Frye standard. The court held that it did not, and explained:

> Because the symptoms associated with 'rape trauma syndrome" embrace such a broad spectrum of human behavior, the syndrome provides a highly questionable means of identifying victims of rape ... . [T]he stress and trauma associated with rape is merely one type of a larger phenomenon known as "post-traumatic stress disorder" ... . Similar symptoms may be triggered by any psychologically traumatic event that is "generally outside the range of usual human experience," including simple bereavement, chronic illness, marital conflict, assault, military combat, natural disasters, automobile accidents, bombing, or torture ... . Even those symptoms more especially applicable to sexual experiences may not be caused by rape. Authorities indicate that they may be caused by any "sexually stressful experience" ... .

Id. at 16-17 (citations omitted).

In Black, an expert witness testified that "there is a specific profile for rape victims and [the victim] fits in." Id. at 15. Although rape trauma syndrome was not mentioned in the testimony, the court found that the expert relied on the syndrome in formulating his opinion. Id. at 19. The court cited its decision in State v. Maule, 667 P.2d 96 (Wash. 1983), for the exclusion of expert testimony pertaining specifically to characteristics of sexually abused children because the evidence failed the Frye standard. Id. at 15. Finally, the court cited People v. Bledcoe for its distinguishment of rape trauma

syndrome from other syndromes that have been evaluated under the Frye standard. Id. at 18.

These courts agree that rape trauma syndrome was developed to identify, predict, and treat emotional problems associated with rape, whereas, other syndromes were developed to determine the truth or accuracy of past events. Therefore, like rape trauma syndrome evidence, the child sexual abuse syndrome evidence in this case should not have been used to determine whether the child was sexually abused.

The contradictory nature of the literature in the area of child sexual abuse syndrome has also been noted by the Utah supreme court in State v. Rimmasch, 775 P.2d 388 (Utah 1989). The court cited seven different treatises for the proposition that there is no unanimity in the legal community as to the reliability of a child sexual abuse profile to show that abuse actually occurred or to identify sexually abused children as a class. Id. at 400-401, n.lO. Because child abuse experts have been "unable to agree on a universa1 symptomology of sexual abuse, especially [one] ... that is sufficiently reliable to be used confidently in a forensic setting as a determinant of abuse," the court in Rimmasch refused to take judicial notice of the syndrome's reliability. *Id.* at 401-402. Furthermore, because the lower court failed to make an affirmative determination that the scientific principles underlying the syndrome testimony were sufficiently reliable, the testimony was

inadmissible. Id. at 404. Regarding the use of syndrome testimony, the Utah supreme court stated that the "more persuasive decisions reject expert testimony on the truthfulness of allegations of abuse or on the credibility of a particular child." Id. at 406. Because the syndrome testimony in this case attempted to bolster the credibility of the victim and vouch for her truthfulness, it should have been excluded.

One reason for the contradiction in literature on this subject is that an expert who offers testimony on child sexual abuse accommodation syndrome usually examines the alleged victim and, for purposes of treatment, relies on whatever the alleged victim reports. These professionals operate under the assumption that abuse has occurred. ***See*** Askowitz, ***Restricting the Admissibility of Expert Testimony in Child Sexual Abuse Prosecutions: Pennsylvania*** *Takes* ***It to*** *the* ***Extreme,*** 47 **U.** MIAMI L. **REV.** 201, 210 (1992). "The fact that a child honestly feels abused ... does not necessarily indicate that the legal offense of child abuse has been committed. Furthermore, a determination that the child was abused at some point in time does not prove that the child was abused by the defendant at the particular point in question." Id. Because an expert witness such as Doug Jones is accustomed to treating children and evaluating their symptoms, he inevitably serves as an advocate for the victim by assuming the truthfulness of the statement, rather than serving as an objective observer in search of the truth. His testirnony

regarding the alleged victim's "symptoms" and the child sexual abuse syndrome should have been excluded at trial.

The state of Kentucky is adamant in its refusal to admit testimony on the child sexual abuse accommodation syndrome under a Frye analysis. In Tungate v. Commonwealth, 901 S.W.2d 41 (Ky. 1995), the court refused to admit testimony on a pedophile profile because it constituted "the opposite side of a coin stamped on the other side 'child sexual abuse accommodation syndrome'". Id. at 43. The court cited four of its prior reversals based on the failure of the child sexual abuse accommodation syndrome to pass the Frye test, and reiterated its statement from one of those cases:

> There was no evidence that the so-called "sexual abuse accommodation syndrome" has attained a scientific acceptance or credibility among clinical psychologists or psychiatrists. Even should it become accepted, ... there would remain the question of whether other children who had not been similarly [sexually] abused might also develop the same symptoms or traits.

Id. (*citing* Lantrip v. Commonwealth, 713 S.W.2d 816 (Ky. 1986)). Although Florida courts have failed to summarize the decisions relating to syndrome testimony in such a succinct fashion, the Flanagan and Ramirez decisions clearly indicate that Frye should apply to the testimony that was admitted in this case, and that the testimony fails that standard of admissibility.

In Pennsylvania, the child sexual abuse syndrome also fails

the Frye test. Commonwealth v. Dunkle, 602 A.2d 830, 833-834 (Pa. 1992) (holding that the "uniformity of behaviors exhibited by sexually abused children" has not been ectablished as scientifically reliable because, among other reasons, "all maltreated children may react similarly -- whether the victims of sexual abuse or another type"). In Dunkle, the expert testified:

> [T]he "victim usually experiences initially a lot of fear of the offender, a lot of anger towards the alleged offender." The "victim is usually very confused," "the children initially feel very very guilty." The expert also testified that the "child is usually very confused over the relationship." "Child victims of sexual abuse usually have a very low self esteem." Additionally, "children frequently withdraw after the disclosure of sexual abuse, they will isolate themselves [and] not want contact with other people." "[T]hey are not performing as well as they did at school, they are disassociating themselves with common practices or common friends at the school, they're [sic] grades frequently will fall, they have [an] inability to concentrate on their school work."

Id. at 833. The court commented on this testimony:

> While all of these behavior patternc may well be typical of sexually abused children, even a layperson would recognize that these behavior patterns are not necessarily unique to sexually abused children. They are common to children whose parents divorce and to psychologically abused children.

Id. (footnotes omitted). The Pennsylvania supreme court held that the syndrome testimony in Dunkle not only failed the Frye test, but also failed the relevancy test. Id. at 832. The

court s application o the relevancy test consisted o determining whether the testimony "render[ed] the desired inference more probable than not." Id. at 834. The court held that the testimony did not render an inference at all, but rather made a mere suggestion that the victim was exhibiting symptoms of sexual abuse, which "invite[s] speculation and will not be condoned." Id. at 835.

Although Louisiana follows the federal relevancy rule of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. ___, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), which includes the Frye test as one of its factors, the Louisiana supreme court has explicitly held that the child sexual abuse accommodation syndrome is not scientifically reliable. State v. Foret, 628 So.2d 1116, 1125 (La. 1993); *see also* People v. Pullins, 378 N.W.2d 502 (Mich. 1985) (holding that rape trauma syndrome is not scientifically reliable); State v. Black, 537 A.2d 1154 (Me. 1988) (holding that the child abuse profile/syndrome is not scientifically reliable). The court in Foret based its holding on the original purpose of the syndrome in treating abuse victims, as opposed to diagnosing them. In pointing out that the creator of the syndrome, Dr. Roland C. Summit, intended to create a common language for those who treat children who have been abused, the court criticized the use of the syndrome as a diagnostic tool:

> Summit did not intend the accommodation

> syndrome as a diagnostic device. Rather, it assumes the presence of abuce, and explains the child's reactions to it. Thus, child abuse accommodation syndrome is not the sexual abuse analogue of battered child syndrome, which is diagnostic of physical abuse... . [B]attered child syndrome is probative of physical abuse... . With child sexual abuse accommodation syndrome, by contrast, one reasons from the presence of sexual abuse to reactions to sexual abuse. Thus, the accommodation syndrome is not probative of abuse.

Id. at 1124 (*citing* Myers, Bays, Becker, Berliner, Corwin, and Saywitz, ***Expert Testimony*** in ***Child Sexual Abuse Litigation, 68*** NEB. L. REV. 1, ***67 (1989));see also*** State v. Michaels, 625 A.2d 489 (N.J. Super. Ct. App. Div. 1993), aff'd, 642 A.2d 1372 (N.J. 1994)(relying on the differences among the uses of profiles and syndromes, whewe child sexual abuse syndrome assumes the presence of sexual abuse and seeks only to explain a child's reaction to it). In this case, the syndrome testimony should not have been admitted because it wrongfully served as a weapon, a diagnostic tool, for the purpose of determining whether abuse actually occurred.

Finally, an Ohio court has also held that child sexual abuse accommodation syndrome testimony is inadmissible because it is not scientifically reliable. State v. Davis, 581 N.E.2d 604 (Ohio Ct. App. 1989). The court stated that "it has not been demonstrated with sufficient accuracy that a causal relationship even exists between a condition of sexual abuse and the

alleged 'symptoms of sexual abuse.'" Id. at 610. Furthermore, the court stated that even if the syndrome testimony was found to be scientifically reliable, it cannot be used to bolster the alleged victim's credibility. Id.

The testimony should never have been admitted. That error was compounded when the prosecutor used the expert to vouch for the credibility of the child five times during closing argument (T **140-46).**

THE ERROR CANNOT BE CHARACTERIZED AS HARMLESS.

This Court must reverse for a new trial, because, unlike Flanagan, the state cannot show that the error is harmless beyond a reasonable doubt. In Flanagan, this Court found the error to be harmless "in light of the brevity of the improper testimony and the lack of emphasis placed on the testimony by the state, as well as the overwhelming evidence of Flanagan's guilt." 625 So. 2d at 830. The same cannot be said in the instant case because there was a paucity of physical evidence and because the prosecutor relied heavily upon the improper opinion testimony in his closing argument:

> But we know from Mr. Jones, the psychologist, that that is absolutely typical and normal in this type of case for a child when she first comes forward to minimize the abuse, and that she goes on and tells you more and gets more comfortable in that you can go about it, then the full story comes out. (T 140; emphasis added).

* * *

> And as I have said today that is totally consistent as Mr. Jones told you with a child who has been sexually abused. (T 143-44; emphasis added).
>
> * * *
>
> We noticed from Mr. Jones, the psychologist's testimony, that she has symptoms of a child that has been sexually abused. And you have had an opportunity to observe T on the stand and you watched her talk about it. And she didn't show much emotion. She acted exactlv like Mr. Jones told you a child acts as a victim of sexual abuse, unemotional in telling you what happened. (T 144; emphasis added).
>
> * * *
>
> And I ask you to consider her testimony and all the other testimony that has been presented particularly that of Mr. Jones in determining -- and certainly there has been no -- no evidence of any motive on any part for him to fabricate anything or to testify other than truthful. (T 145-46; emphasis added).

Likewise, Judge Ervin expressed the view of seven judges of the lower tribunal that the error cannot be harmless:

> In sum, the syndrome testirnony introduced below was submitted for one objective only: as substantive evidence of guilt and for no other purpose.
>
> * * *
>
> Nor can I conclude that the evidence admitted at bar was not harmful. The evidence consisted essentially of a "swearing match" between Hadden and the victim, and their credibilitv was the main focus of closing arguments. Although a sheriff's investigator testified regarding Hadden's confession, she said that the defendant gave numerous accounts--both

> inculpatory and exculpatory--of his involvement with the child. Moreover, Hadden testified and denied that he had given a confession. Finally, there was no medical evidence substantiating the abuse.
>
> In contrast to the overwhelming evidence of guilt admitted in *Flanagan*, and determined to be harmless, which, in addition to the victim's testimony, included that of a physician who described the physical condition of the victim as being consistent with repeated incidents of vaginal penetration, as well as that of other witnesses who observed the sexual acts, and the admission of similar-fact evidence, the only direct evidence connecting the defendant to the crimes was the victim's testimony and the defendant's confession. Under the circumstances, I am unable to conclude beyond a reasonable doubt that the admission of the syndrome evidence, which had the effect of bolstering the child's credibility, may not have affected the verdict. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986).

21 Fla. L. Weekly D410; 411; emphasis added; footnote omitted.

This Court must reverse for a new trial.

ISSUE II
THE TRIAL COURT'S FINDINGS FOR ADMISSION OF THE CHILD'S HEARSAY STATEMENTS WERE INSUFFICIENT.

During a proffer, June Perry, school guidance counselor, testified that T came to see her in March of 1992 and told her that her neighbor, the appellant, had been molesting her since 1990 (T 39-42). The court found the child hearsay statement to be reliable under §90.803(23)(a)1. and (c), Fla. Stat., which allows child hearsay statements into evidence if:

> 1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate ... .
>
> * * *
>
> (c) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this subsection.

The judge in the instant case found as follows, as to the school counselor:

> THE COURT: And in *so* far as the requirements under 990.803(23) [sic], the court finds that the statements made by T. to her possess the necessary indicia of reliability. And the court has considered the age of T. at the time these statements were made and the extent of her relationship with Ms. Perry and the type of setting that the statements were made in, and the fact that the statements were volunteered by T. without any type of prodding or prompting, and the fact that T. used her own terminology in describing the events and how the events or series of events occurred and unfolded, and the fact that Ms. Perry -- or Ms. Perry is not a direct relative, but indeed a third party. And based on all of these circumctances and factors, the court finds that these statements and admissions by T to Ms. Perry possessed sufficient indicia of reliability to warrant admission and submission to the trier of fact. So your objection is properly

noted, but overruled. (T **48-49;** emphasis added).

Investigator Michelle Peavy testified during a proffer that she interviewed T. on April 6, **1992,** who stated that appellant had placed his hand inside her pants and finger inside her vagina on many occasions since November of 1990 (T 60).

The judge again found the child hearsay to the police officer to be reliable:

> THE COURT: As far as the other aspects, the court is satisfied under 803.23 that her testimony concerning the interview with the child victim here possesses sufficient indicia of reliability the requirements of 803.23 for previous -- for reasons previously stated. And the court finds that these were statements given to a third party, not just a parent. They are consistent with other statements that she had given to other individuals concerning the incident, and the court finds that they are all essentially consistent and not contradictory. And the court finds that they should be admitted as well. (T 71-72; emphasis added).

Petitioner argued on appeal that the hearsay testimony of both witnesses was inadmissible in light of State v. Townsend, 635 So. 2d 949 (Fla. **1994);** Seifert v. State, 636 So. 2d 716 (Fla. **1994);** **Feller** v. State, 637 So. 2d 911 (Fla. 1994)[6]; and Hopkins v. State, 632 So. 2d 1372 (Fla. 1994).

The lower tribunal summarily rejected this argument:

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[6] *Feller* reaffirmed this Court's view that it has jurisdiction to reverce other issues when it accepts review over a certified question.

> [W]e hold that the trial court's findings were sufficient to permit introduction of the child's hearsay statements and affirm on this point without further comment.

21 Fla. L. Weekly D405.

In Hopkins, the defendant was on trial for three counts of sexual battery on a child and the state sought to have the child testify through closed circuit television, pursuant to 592.54, Fla. Stat. The judge made general findings that the child would suffer at least moderate harm if required to testify in person. On appeal, Hopkins argued that these findings were insufficient.

The lower tribiunal held he had not preserved the issue and the failure to make sufficient findings was not fundamental error, but certified the question. Hopkins v. State, 608 So. 2d 33 (Fla. 1st DCA 1992).

This Court agreed the error was not fundamental. But this Court held the issue had been preserved by counsel's rather general objection to the child being allowed to testify out of the presence of the defendant.

Also in Hopkins, the state proffered testimony of out-of-court hearsay statements by the child, and sought a reliability determination under section 90.803(23). Counsel objected that the statements were not reliable. The trial judge found that they were, and again made only a general finding of reliability:

> ... the time, content and circumstances of the statements provides [sic] sufficient safeguards for reliability.

632 So. 2d at 1376.

The lower tribunal again held Hopkins had not preserved the issue. This Court again quashed the lower tribunal's opinion and held that the judge had not made sufficient case-specific findings of reliability, and that the error was sufficiently preserved.

Because of the two errors, this Court granted a new trial on two out of three countc of sexual battery.

In Feller, supra, this Court had before it a similar certified question to that in Hopkins, **i.e.,** whether the failure to make findings for admission of videotaped testimony of a child victim was fundamental error. This Court adhered to Hopkins and held that it was not fundamental error.

However, this Court also addrecsed another issue beyond the certified question, i.e., whether the trial judge erred in allowing testimony from two police officers and a child abuse investigator about hearsay statements made by the child victim. The lower tribunal had "summarily affirmed" on this issue, just like In the instant case. Feller v. State, 617 So. 2d 1091, 1092 (Fla. 1st DCA 1993). The trial judge had found the statements to be reliable based upon his "personal experience:"

> Well, I'm satisfied that -- and I hate to call on my personal experience on these kind [sic] of cases, but I don't

> think it's unusual that child victims have this kind of -- this kind of testimony or these kind [sic] of changes in their stories. And it's pretty consistent -- seems supportive of that, so on the truthfulness of the testimony -- but, I think as far as reliability goes, I'm comfortable with it. And that's something that can be argued to the jury.

637 So. 2d at 915; emphasis added.

This Court held these findings did not satisfy the statute; the judge's "personal experience" could not substitute for the factual findings; and quashed the lower tribunal's opinion and granted a new trial.

In State v. Townsend, *supra*, a two-year-old child was "unavailable" due to his age, and so her hearsay Statements were proffered by the state. The judge made a general finding of reliability:

> I'm going to find that the time, content and circumstances of certain statements provides [sic] sufficient safeguards of reliability.

Townsend v. State, 613 So. 2d 534, 539 (Fla. 5th DCA 1993), Cobb, J., Concurring. On further review, this Court found the trial judge's findings to be insufficient and reversible error.

In State v. Townsend, this Court also discussed the interplay between the statute and the right to confront witnesses found in the Sixth Amendment, U.S. Const., and in art. I, §16, Fla. Const. The United States Supreme Court had held in Idaho v. Wright, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638

(1990), that a judge cannot look at other corroborating evidence to determine if a hearsay statement is reliable. This Court set forth the following procedure to be used in such circumstances:

> To clarify, however, any possible inconsistencies between the United States Supreme Court decision in *Wright* and the requirements of section 90.803(23), we hold that under section 90.803(23), the trial judge must adhere to the following procedure: First, the trial judge must determine whether the hearsay statement is reliable and from a trustworthy source without regard to corroborating evidence. If the answer is yes, then the trial judge must determine whether other corroborating evidence is present. If the answer to either question is no, then the hearsay statements are inadmissible.

635 So. 2d at 957.

In Seifert v. State, 616 So. 2d 1044 (Fla. 2nd DCA 1993), the appellate court found that the defendant had not preserved an objection to the admissibility of child hearsay because, while he apparently objected to the admission of the testimony, he did not specifically object to the failure of the court to make sufficient findings of reliability under the statute.

Upon further review, in Seifert, *supra*, 636 So. 2d 716, this Court relied upon its recent trio of cases and found the objections to be proper enough to preserve the error, but found the admission of the hearsay to be harmless.

Application of the foregoing quartet of recent cases to the instant case is obvious. The issue was preserved when it was called to the court's attention prior to trial by the prosecu-

tor, who requested a proffew, even though the defense did not specifically object to the failure of the judge to make sufficient findings.

The purpose of the contemporaneous objection rule is to bring a matter to the court's attention so that it may be ruled upon. Castor v. State, 365 So. 2d 701 (Fla. 1978). A judge is placed on notice when the matter is brought to his attention immediately prior to trial, and he deals with the issue during trial. Thomas v. State, 599 So. 2d 158 (Fla. 1st DCA), *rev. denied*, 604 So. 2d 488 (Fla. 1992).

The judge in ruling the statement to Ms. Perry specifically overruled appellant's objection (T 49). When the judge used the same rationale in finding the statement to the detective to be reliable (T 71-72), any further objection by appellant would have been futile. A lawyer is not required to perform a useless act. Since the judge was on notice of the need to make findings, the issue was preserved under Hopkins.

The judge's findings were insufficient under the statute. He, like the judge in Feller, believed if the child's statements were consistent with each other, then they must be reliable. But that finding misses the whole point of the statute, and violates the holding of Idaho v. Wright, *supra*.

The admission of the child hearsay in the instant case cannot be harmless, especially when coupled with the improper expert opinion discussed in Issue I, *supra*. There was no physi-

cal evidence to support the convictions. The state cannot show beyond a reasonable doubt that the two hearsay statements did not affect the verdicts, because the prosecutor relied upon the child hearsay in his closing argument:

> Now, the defense also has made a big deal about all you're hearing is hearsay and all that kind of stuff. Well, ladies and gentlemen, the reason that is admissible is because she's a child and because of the nature of the offense. (T 144).
>
> * * *
>
> We are dealing with a child, and that certain latitude is given in terms of the hearsay statements that have been admitted, but they are admitted for that reason so you will understand and you will have an opportunity to know what went on. (T 146).

Because the child hearsay statements were improperly admitted, and because the error was not harmless, this Court must grant a new trial.

ISSUE III

THE TRIAL COURT ERRED IN SCORING VICTIM INJURY ON THE SENTENCING GUIDELINES SCORESHEET.

Turning to the sentence, the scoresheet in the record (R 36) assesses 60 points for victim injury (20 points for contact but no penetration for each lewd assault x 3). These should not have been assessed, because the state presented no evidence of excessive physical injury to the victim. Karchesky v. State, 591 So. 2d 930 (Fla. 1992).

Counsel did not object to these victim injury points, and the lower tribunal has held an objection is necescary to preserve the matter for direct appeal. Perryman v. State, 608 So. 2d 528 (Fla. 1st DCA 1992), *rev.* den. 621 So. 2d 432 (Fla. 1993). Other appellate courts have held that the assessment of victim injury points may be raised on direct appeal even without objection. Hood v. State, 603 So. 2d 642 (Fla. 5th DCA 1992); Morris v. State, 605 So. 2d 511 (Fla. 2nd DCA 1992); Linkous v. State, 618 So. 2d 294 (Fla. 2nd DCA), *rev.* den. 626 So. 2d 208 (Fla. 1993) ; and Singleton v. State, 620 So. 2d 1038 (Fla. 2nd DCA 1993).

This Court should adopt the view of the other appellate courts and hold that the victim injury points may be attacked on direct appeal without an objection.

If the 60 points are deducted, the point total becomes 259, which calls for a 5 ½ to 7 year recommended range. Appellant received nine year sentences based upon the 7-9 year recommended range on the incorrect scoresheet. This Court must vacate them and remand for resentencing, because although the nine year sentences are within the new permitted range, we cannot know that the judge would have imposed them with a lower recommended range. State v. Sellers, 586 So. 2d 340 (Fla. 1991).

VI CONCLUSION

Petitioner requests that the certified question be

answered in .heaffirma ive,[7] the judgment and sentence be reversed, and the cause remanded for a new trial. In the alternative, petitioner requests that the sentence be vacated, and the cause remanded for resentencing.

Respectfully submitted,

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[7]The same question has been certified in *Beaulieu v. State*, 21 Fla. L. Weekly D659 (Fla. 5th DCA March 15, 1996). The court there seemed to agree with the dissent in the instant case, but nevertheless adhered to its prior position in Toro *v. State*, 642 So. 2d 78 (Fla. 5th DCA 1994), and certified the question.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the forgoing Brief of Petitioner on the Merits has been furnished to Thomas Falkinburg, Assistant Attorney General, by delivery to the Plaza Level, The Capitol, Tallahassee, Florida, and a copy has been mailed to petitioner, #848315, P.O. Box 699 West, Sneads, Florida 32460, this 9th day of April, 1996.

P. DOUGLAS BRINKMEYER

IN THE SUPREME COURT OF FLORIDA

TIMOTHY RAY **HADDEN,**

Petitioner,

v. **CASE NO. 87,574**

STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW FROM THE
FIRST **DISTRICT** COURT OF **APPEAL**

APPENDIX TO **BRIEF** OF PETIONER **ON THE MERITS**

Opinion in Hadden v. State, 21 Fla. L. Weekly D405
(Fla. **1st** DCA Feb. **14,** 1996)

Diagnostic Criteria for 309.81 Posttraumatic Stress Disorder from American Psychiatric Association,
Diagnostic and Statistical Manual of Mental Disorders,
[DSMIV] §309.81 **(4th ed.)**

rather, appellee uses only so much of Lot 23 (a corner 15' x 25' in size) as is required to use the well. ''[A]n easement carries with it by implication the right to do what is reasonably necessary for the full enjoyment of the easement itself. Generally the rights of an easement owner are measured and defined by the purpose and character of the easement." 20 Fla. Jur. 2d "Easements" §29 (1980). See *also Florida Power Corp. v. McNeely*, 125 So. 2d 311 (Fla. 2d DCA 1960); 25 Am. Jur. 2d "Easements and Licenses'' §72 (1966). According to the Restatement (First) of Property § 480 comment a (1944): ''[t]he making of repairs and improvements necessary to the effective enjoyment of the use privileged by an easement created by prescription is incidentai to the easement,'' so long as they do not "unreasonably increase the burden on the servient tenement." *See generally Crescent Harbor Water Co. v. Lyseng,* 51 Wash. App. 337, 753 P.2d 555 (1988) (prescriptive easement for use of well and water system), and *O'Connor v. Brodie,* 153 Mont. 129,454 P.2d 920 (1969) (prescriptive easement for water diversion system, including fenced intake system).'

AFFIRMED. (JOANOS, MICKLE and VAN NORTWICK, JJ., CONCUR.)

'We recognize the equity of appellant'sposition, in that it appears he may be unable to construct a well on his lot, given the outcorne here, but we believe there are also equities in appellee's favor. having operated the well for over forty years, serving 73 customers.

* * *

Criminal law—Lewd and lascivious acts on child under twelve years of age—Evidence—Expert testimony that alleged child victim exhibited syrnptoms consistent with those of a child who had been sexually abused—Such scientific evidence is not new and novel so as to require showing that scientific principles undcrgirding the evidcnce be sufficiently cstablished so as to have general acceptance in the field in which it bclongs—No requirement to show general acceptance of scientific evidence where testimony is phrased in terms of opinion based on expert'sexperience and observation—Question certified: In view of the supreme court's holding in Townsend v. State, does Flanagan v. State require application of the Frye standard of admissibility to testimony by a qualified psychologist that thc alleged victim in a child sex abuse case exhibits symptoms consistent with those of a child who has been sexually abused?

TIMOTHY RAY HADDEN, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 93-436. Opinion filed February 14, 1996. An appeal from thc Circuit Court for Escambia County, Nickolas P. Geeker, Judge. Counsel: Nancy A. Daniels, Public Defender; P. Douglas Brinkmeyer, Assistant Public Defender. Tallahassee, for Appellant. Robert A. Butterworth, Attorney General; James W. Rogers, Senior Assistant Attorney General, Tallahassee, for Appellee.

EN BANC

(MINER, J.) Appellant, Timothy Ray Hadden seeks review of his convictions and sentences on three counts of lewd and lascivious acts on a child under twelve years of age. Hadden's appellate counsel filed an initial brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and pursuant to *State v. Causey*, 503 So. 2d 321 (Fla. 1987), this court reviewed the record on appeal and ordered supplementai briefing on two issues: (1) whether the trial court's findings were sufficient to permit the introduction into evidence of the alleged child victim's hearsay statements; and (2) whether reversible error occurred when the trial court admitted expert testimony that the alleged child victim exhibited symptoms consistent with those of a child who had been sexually abused. Having considered the record and the responses to the Court's briefing order, we hold that the trial court's findings were sufficient to permit introduction of the child's hearsay statements and affirm on this point without further comment. Although we also affirm as to the second issue supplementally raised, we find that some further discussion is warranted.

Hadden was charged by amended information with three counts of sexual battery on a person under twelve years of age by vaginal penetration with his finger between November of 1990 and March of 1992 in violation of section 794.011(2), Florida Statutes. During the course of trial, the state proffered, out of the jury's presence, opinion testimony from veteran mental health counselor and school psychologist, Doug Jones, concerning the symptoms and diagnostic criteria typicaily associated with sexually abused children. Although Hadden accepted Jones as an expert in child abuse, he objected to this testimony, arguing that it lacked scientific reliability and that Mr. Jones failed to identify enough diagnostic criteria to give an adequate description of the child's condition. The state responded by citing to *Ward v. State*, 519 So. 2d 1082 (Fla. 1st DCA 1988), wherein this court held that testimony similar to Jones' was admissibie as circumstantiai evidence that the child had been sexually abused. The trial court overruled Hadden's *Frye*[1] objection and permitted Jones to testify before the jury, without objection, that the alleged victim exhibited symptoms similar to those of a child who had been sexually molested.

Before addressing this case on its merits. we deal first with whether objection to the subject testirnony was both timely and sufficient as required by *Correll v. State*, 523 So. 2d 562 (Fia.), *cert. denied*, 488 U.S. 871, 109 S.Ct. 183, 102 L.Ed.2d 152 (1988). In that case, the prosecution sought to introduce the results of a blood test obtained using the electrophoresis method of testing. The defense raised a *Frye* objection at trial which was overruled. The supreme court agreed with the trial court that the defense objection was not timely or sufficient:

> [W]e hold that when scientific evidence is to be offered which is of the same type that has already been received in a substantial number of other Florida cases, any inquiry into its reliability forpurposes of admissibility is only necessary when the opposing party makes a tirnely request for such an inquiry supported by authorities indicating that there may not be general scientific acceptance of the technique employed.

Correll, 523 So. 2d at 567. Because it was clear from the record before the court in *Correll* that the electrophoresis method at issue had been routinely admitted throughout Florida, and the state's expert had testified more than 70 times concerning such testing, the court concluded that the defcnse could not surprise the state at trial with what. under the circumstances, must be deemed an unexpected *Frye* objection.

By contrast, the record in the case at bar contains nothing to indicate that evidence of the type here in question has regularly been admitted in Florida courts or was deemed routinely scientificaily reliable at the time of Hadden's 1992 trial. Even if the timeliness of the defense objection in this case were disregarded, we believe that *Correll* is inapplicable to the instant facts.

Turning next to the merits, the pertinent parts of counselor/psychologist Jones' jury testimony are set out, as follows:

DIRECT EXAMINATION BEFORE THE JURY

Q. Mr. Jones, based upon your experience and training in sexual abuse cases, is it normal for say a child of ten who is the victim of sexual abuse to initially only reveal part of the sexual abuse and then as time goes on to reveal more of what occurred in the sexual abuse?

A. That is common.

* * * *

Q. It would not be usual then based upon what you've testified to or would it be unusual or not for the—child to initially say there had only been fondling and then move on to indicate that there had [been] a penetration by the finger?

A. That is not uncornmon.

Q. And have you had occasion to see T. H., the victim in this case?

A. Yes, I have, on May 13th was the initial visit.

Q. And how many times have you seen her since tlien?

A. Since that time it has been ten times.

Q. And for what purpose were you seeing T.H.?

A. Seeing her because of emotional adjustment type of issues

at home and at school and related to an incident of *alleged* sexual molestation.

Q. Now, based upon your experience and training in this area, does she exhibit any of the symptoms of a child who has been sexually abused?

A. She does.

Q. And what symptoms are those?

A. Primary things are an unemotional recounting when asked specifically about this incident, flat affect, difficulty describing sometimes very specific details about when and where. those kinds of issues, a sense of guilt, sense of responsibility in ways, number of issues that have to do with a child's reaction to an adult perpetrator.

* * * *

A. Now, would it be consistent or not consistent for a child who had been a victim of sexual abuse to continue to go over to the place where she has been sexually abused if she were going over there to see someone other than the person who had abused her such as a friend or sornething?

A. That's not unusual.

CROSS EXAMINATION

Q. So, doctor, what you're saying is that it's your opinion that this girl was sexually abused?

A. She has the *symptoms* of a child who has been molested.

(Emphasis added).

In his supplemental brief, appellant cites to the supreme court's decision in ***Flunugun v. State,*** **625 So.** 2d **827** (Fla. 1993), as support for the proposition that this court's opinion in Wurd, supra, is no longer viable and thus cannot support the trial court's ruling regarding the disputed evidence in the case at hand. We find this argument to be without merit. ***Ward*** involved testimony by a clinical psychologist relating to symptoms generally exhibited by children who are sexually abused and that psychologist's opinion that the child-victim in that case dispiayed symptoms typically seen in sexually abused children.

In Wurd, the defendant had unsuccessfully objected to such testimony, arguing that it was unreliable because the field of child sexuai abuse had not been adequately explored and developed to such a point as to permit a reasonable opinion in the premises, that the expert's conclusion lent credibility to the child's testimony and that the subject of the expert's testimony required no expertise not already possessed by the jury,

In affirming the trial court's ruling admitting this evidence, this court applied the three-point test contained in Hawthorne *v. State*, 408 So. 2d **801 (Fla.** 1st DCA), *rev.* den., **415 So.** 2d **1361** (Fla. 1982),[2] when it found **(1)** that the expert was qualified to express an opinion in the matter; (2) that the subject area of child abuse was developed well enough to permit an expert to express an opinion; and **(3)** that child abuse is not so understandable that lay persons know as much about it as a properly qualified expert.

Subsequent to ***Ward,*** this court has had occasion to re-affirm the admissibility of expert testimony similar to that involved in Ward and the case at hand. *See Calloway v.* State, 520 ***So.*** 2d 665,668 (Fla. 1st DCA). *rev.* den., 529 **So.** 2d 693 (Fla. **1988);** Brown ***v. State,*** **523 So.** 2d 729 (Fla. 1st **DCA** 1988). While suggesting that the time may be nght to re-examine the use in Florida courts of expert testimony in child sex abuse cases, the Fifth District has also upheld the admissibility of such evidence. ***Toro v. State,*** **642 So.** 2d 78 (Fla. 5th DCA **1994).** By contrast, the Second District has rejected such expert opinion testimony in cases involving older children on the ground that its primary purpose and effect is to bolster the credibility of the alleged victim. Bull *v.* ***State,*** **651 So.** 2d 1224(Fla. 2d DCA 1995);***Audano v. State,*** 641 ***So.*** 2d 1356 (Fla. 2d DCA **1994);** ***J.H.C. v.*** State, **642** So. 2d 601 (Fla, 2d DCA **1994);** ***Drawdy v. State,*** **644 So.** 2d 593 (Fla. 2d DCA **1994).**

In ***Flanagan, supra,*** the case on which appellant relies to support his contention that Wurd is no longer good law, the Supreme Court addressed two issues pertaining to the admissibility of pedophile profile testimony which concerned traits generally associated with *perpetrators* of child sexuai abuse tather than *victims* of such abuse. The court made clear that it was concerned with the expert's testimony "about common characteristics of the home environment where sexual abuse occurs and about characteristics of abusers.'' Although both parties to this appeal argue that ***Flanagan*** and the case at bar are factually inapposite, the fact is that Flunugun stands for the proposition that new and novel scientific evidence is no longer admissible in Floridauniess it meets the test enunciated in *Frye* ***v. United States,*** **293 F.** 1013 (D.C. Cir. 1923), which requires that the scientific principle(s) undergirding such evidence be sufficiently established so as to have general acceptance in the particular field in which it belongs, In concluding that the pedophile profile evidence offered in ***Flanagan*** did not meet the ***Frye*** standard, the court noted that the state did not attempt to satisfy the Ftye test by citing cases or other authority showing that such profiles were accepted in the scientific community.

As we see it, the question with which we are faced is whether or not expert testimony of the type admitted below, which is admittedly scientific, is new and novel so as to require ***Frye*** testing before its admission? We believe that it is not, based upon ***State v. Townsend.*** *635* So. 2d **949** (Fla. 1994), which case was decided by the supreme court a year after *Flanagan* and which also involved child sexual abuse. Inter *alia*, *Townsend* unequivocally holds:

> if relevant. a medical expert witness may testify as to whether, in the expert's opinion, the behavior of a child is consistent with the behavior of a child who has been sexually abused.

Id. at 958 (footnote omitted) (emphasis added).

In support of this proposition, the supreme court cited with approval this court's opinion in ***Ward*** wherein the issue on appeal was the admissibility of expert testimony of the precise kind as that challenged below and on appeai in the case at bar and approved by a unanimous vote of the Florida Supreme Court in ***Townsend.***

In our view there are only two ways to interpret the above holding in *Townsend*, both of which militate against the position taken by appellant in his supplemental brief: (1) that the supreme court concluded that the type of testimony at issue in ***Wurd,*** scientific though it was, was not so new or novel as to require Frye testing under ***Flunugun*** (hence the use of the prefatory words (''if relevant") or (2) opinion testimony from an expert on the subject based upon training, experience and observation (as *Flanagan* holds) would be exempt from Ftye testing.

The disputed testimony in the case at bar, like that in ***Ward,*** only addresses whether the "the behavior of a child is consistent with the behavior of a child who has been sexually abused." This differs from the pedophile (proclivity) profile evidence condemned in ***Flunugun*** where the disputed testimony was intended to and did identify the defendant as the likely perpetrator. The testimony at bar is innocuous by comparison in that it only demonstrates circumstantially that sexual abuse has occurred without identifying a likely perpetrator or that the abuse took place at the time and place charged. Given the clear language in Townsend with its favorable cite to ***Ward,*** we conclude that the holding in ***Flanagan*** is inapplicable to the type of testirnony below.

Even if the conclusion above be found erroneous and the distinction set out in Flanagan (i.e., opinion vs, profile/syndrome) is found to be applicable to this kind of testimony thereby draining Wurd of its continuing viability as appellant suggests, it is at best unclear how Jones' trial testimony below could be categorized as profile/syndrome so as to require ***Frye*** testing under ***Flanagan.*** His testimony was couched in terms of his experience and training in child sex abuse cases.' After explaining that he had ten or so visits with the child victim. he testified that, based upon his training and experience, the child exhibited symptoms indicating that she had been sexually abused.

Although the witness went on to describe the symptoms he observed, he did not do so in terms of syndrome or profile. He did refer to certain studies during thc course of his proffered testimony. but the jury did not hear any reference to profile syndromc or to studies on the subject. Thus, it is clear that Jones' *trial* testirnony did not imply infallibility or suggest to jurors that they should give his conclusions unduc weight because they were based on presumably tried and true scientific rnethod as opposed to merely the expert's own experience. *(See Flanagan* at p.828). Had Jones testified that the child victim had been sexually abused because she happened to fit a profile or syndrome expounded upon by another expert in the field, arguably a good case could be made for *Fïye* testing under *Flanugan.* However, we believe it clear that Jones' trial testimony was phrased in terms of an opinion based upon his own experience and observation. Consequently. no *Fïye* testing was required,

To summarize, in view of the supreme court's opinion in *Townsend*, we re-affirm this court's commitrnent to the proposition stated in *Ward* that, if the relevance of such testirnony is not outweighed by its prejudice to the defendant, a properly qualified expert witness may testify in a child sex abuse case brought under section 794.011(2), Florida Statutes, that the alleged child victirn exhibits symptoms consistent with those displayed by a child who has been sexuaily abused. While we affirm appellant's conviction and the sentences imposed upon him, we believe there is some rnerit in the Fifth District's suggestion that the supreme court may wish to re-define the parameters of expert testimony in cases of this type, particularly in the light of what rnay be described as both inter-district and intra-district philosophical cracks that are beginning to appear in Florida's heretofore adopted position in favor of broad admissibility of such evidence. Accordingly. we certify the following question to the Florida Supreme Court as one of great public importance:

> IN VIEW OF THE SUPREME COURT'S HOLDING IN *TOWNSEND V. STATE,* DOES *FLANAGAN V.* STATE REQUIRE APPLICATION OF THE *FRYE* STANDARD OF ADMISSIBILITY TO TESTIMONY BY A QUALIFIED PSYCNOLOGIST THAT THE ALLEGED VICTIM IN A CHILD SEX ABUSE CASE EXHIBITS SYMPTOMS CONSISTENT WITH THOSE OF A CHILD WHO HAS BEEN SEXUALLY ABUSED?

(BOOTH, JOANOS, KAHN, MICKLE, and LAWRENCE, JJ., CONCUR. BENTON, J., CONCURS IN RESULT AND IN CERTIFICATION. WOLF, J., SPECIALLY CONCURS WITH OPINION AND CONCURS IN CERTIFICATION. ERVIN, J., DISSENTS WITH OPINION, IN WHICH ZEHMER, C.J., and BARFIELD, ALLEN, WEBSTER, DAVIS, and VAN NORTWICK, JJ., CONCUR. ZEHMER, C.J., CONCURS IN CERTIFICATION.)

(WOLF, J., specially concurring.) I concur 'with the majority's view that evidence which has been readily admitted in Florida courts since at least 1988 (*see Ward v. State*, 519 *So.* 2d 1082 (Fla. 1st DCA 1988)), does not have to now undergo retroactive application of the Frye test.

I cannot, however, agree that the testimony in question would be admissible purely as opinion testimony based on personal experience and observations of this particular psychologist. Nor can I agree with my colleagues that there are situations where testimony of this type could be categorized as pure opinion rather than syndrome testimony.

In reaching conclusions concerning whether traits exhibited by a child are consistent with sexual abuse victim, it would appear that a psychologist's experience, training, and reliance on syndrome studies would be inextricably intertwined. Thus, seeking to determine whether an expert's opinion was based on any one tool to the exclusion of the others would be an inappropriate method of determining the admissibility of this type of evidence.

(ERVIN, J., dissenting.) Judge Miner concludes that the expert's opinion testimony need not comply with *Frye*[4] because first, the profile or syndromc evidence was neither ncw nor novel, and second, as the opinion was not couched in terms of a profile or syndrome. but rather was based on the expert's personal training and experience, it must be considered ''pure'' opinion testimony, which is not subject to Frye. I will first address Judge Miner's second reason, because if his conclusion is correct, *i.e.*, that the expert's testirnony was solely based on his own opinion. one need not decide whether the syndrome is new or novel, in that such an analysis presupposes the existence of a syndrome. As I reach the contrary conclusion that the opinion was grounded essentially on a syndrome of common symptoms associated with sexually abused children, I will next explain why I believe the syndrome, never previously ''*Frye*-tested'' is Florida, is a novel scientific technique, and, finally, why it fails the *Frye* standard of general acceptance, thereby requiring that the convictions be reversed and the case remanded for new trial.

I.

In deciding whether this expert's opinion is the proper subject of pure opinion or founded upon a scientific principle or study, the Florida Supreme Court in *Flanugan v. State, 625 So.* 2d 827, 828 (Fla. 1993) *(Flanagan II)*, approved that portion of my concurring and dissenting opinion in *Flanagan* v. *State,* 586 *So.* 2d 1085 (Fla. 1st DCA 1991) (Flanagan I), which advocated that *Frye* is not applicable to pure opinion testimony, but only to testimony founded upon studies involving profiles or syndromes. I cited *Seering v. Department of Social Services of California*, 239 Cal. Rptr. 422 (Ct. App. 1987), in my opinion as a case iilustrating the difference between the two approaches. In *Seering*, the expert identified the two methods he used in forming his opinion that the child had been rnolested: first, on personal observations that her behavior was consistent with the child sexuai abuse accommodation syndrome (CSAAS);[5] and second, on interviews with the child and on his own professional experience with abused children. Id. at 431. The California appellate court held that the testimony involving the first method should have been excluded because the syndrome was a new method of proof, and therefore was subject to thc *Frye* standard of reliability, with which it failed to comply. As to the second rnethod, the court decided that the expert's opinion ensuing from his interviews and experience was his personai opinion and therefore excluded from *Ftye.* Id. at 431-32.

Following the approach I recommended in *Flanugan* I. which the supreme court approved in *Flanagan II*, the three-judge panel initially assigned to this case decided from its examination of the record that Dr. Jones's opinion testimony, while recounting his own experiences in counseling and interviews with children whom he considered to be sexually abuscd, was inseparably linked with psychological studies showing a correlation between certain traits or characteristics of sexually molested children, and, as such, was required to satisfy the *Frye* analysis, which it did not. I am of the firm belief that the record supports the panel's conclusion.

At the beginning of the trial, defense counsel moved to exclude Dr. Jones's opinion testimony, as counsel anticipated that the state would use such opinion for the purpose of showing that the alleged victim suffered from the rape trauma syndrome (RTS),[6] termed a component of post-traumatic stress disorder (PTSD). He urged that such testimony was inherently unreliable and prejudicial and would bc used by the state as a means of bolstering the testimony of the victim. An exmination of the witness was tliereafter conducted outside thc jury's presence to determine the admissibility of the proposed evidence, and, at the conclusion of same, the state argued only that the opinion testimony complicd with the Ftye standard, and it relied exclusively onthiscourt'sopinion in *Ward v. State,* 519 So. 2d 1082 (Fla. 1st DCA 1988). The trial court agreed with the state's argument and

denied the motion. Thus, the issue of whether the expert's opinion testimony was solely his own personal opinion was never presented to the lower court for decision.

I acknowledge that one specific question given the witness, asking whether, based on his "experience and training in this area," the victim exhibited symptoms of a child who had been sexually abused, may suggest that Jones's opinion was not based on a syndrome.[7] Other portions of the record, however, compel an opposite conclusion. For example, during cross-examination of the witness, again before the jury, when asked what diagnostic criteria the expert had used to formulate his opinion that the child possessed the symptoms of a typically abused child, Jones replied: "Adjustment disorders with mixed emotional features or post-traumatic stress disorders, symptoms of post-traumatic stress disorders." The expert was asked repeatedly about his understanding of the term PTSD; what specific diagnostic criteria were used to diagnose the syndrome; what were the symptoms of the syndrome. etc. During the 26 pages of the record involving the witness's testimony, both outside and within the jury's presence, the term PTSD was used seven times, "syndrome" five times, "sexual abuse syndrome" twice, "rape trauma syndrome" once, "adjustment disorder" twice. and, finally, "personality disorder" once.

Considering, then, the numerous references to the term "syndrome" and to related diagnostic categories throughout the expert's testimony, the clear expression of a *Frye* objection by defense counsel, the state's response thereto on the merits and the court's ruling thereon, I am unable to justify an affirmance on the ground that the expert provided pure opinion testimony. Indeed, the cross-examination testimony unequivocally shows that this witness's opinion had to be based on diagnostic standards which have not yet been subjected to the *Frye* test. To allow this type of testimony to be received as pure opinion testimony results in nothing more, in my judgment. than an evasion of the Frye rule.

II.

Judge Miner's alternative reason for affirmance is that *Frye* is inapplicable because he considers, even if the expert's opinion had been founded on a syndrome. that the syndrome is neither novel nor new. In reaching this result, he relies largely upon *State v.* Townsend, 635 So. 2d 949 (Fla. 1994), and Ward *v. State,* 519 So. 2d 1082 (Fla. 1st DCA 1988). I agree that "[o]nce a technique is sufficiently established, a court may take judicial notice of the principle and the technique, thereby relieving the offering party of the burden of producing evidence on these issues." Paul C. Giannelli, *The Admissibility of Novel Scientific* Evidence: Ftye *v. United States,* A *Half-Century* Later, 80 Colum. L. Rev. 1197, 1202-03 (1980) (footnote omitted) [hereinafter Giannelli], Nevertheless, before one can reach a decision that a particular technique is no longer new or novel, a showing must first be made that it has in fact been *Frye*-tested, and, in this regard, I have found no Florida case which specifically holds that RTS or PTSD has survived the Frye standard of general acceptante. The authorities which Judge Miner cites in his opinion do not support his conclusion that the syndrome is neither new nor novel, because they do not reveai whether any Ftye issue was raised, and because they invoive pure opinion testimony as illustrated by their application of the relevancy test and resultant abuse-of-discretion standard of review. I acknowledge that some of the earlier cases Judge Miner relies upon suggest that the proper standard to be applied to all forms of opinion testimony is not that of *Frye*, but of relevance. That this is not now the appropriate standard, as applied to expert opinion testimony based on new scientific discoveries, becomes clearly evident from an examination of pertinent case law.

In Hawthorne *v.* State, 470 So. 2d 770 (Fla. 1st DCA 1985), I wrote a concurring and dissenting opinion in which I urged adoption of the relevance standard for testing the validity of the battered spouse syndrome. I pointed out that the Florida Evidence Code, particularly sections 90.401, .402, .403 and .702, Florida Statutes, contains no requirement of a novel scientific technique's general acceptance in the particular field in which it belongs; that all relevant evidence is deemed admissible unless, pursuant to section 90.403, it should be excluded on grounds of prejudice or confusion.

The following year. the Fourth District, in *Kruse v. State*, 483 So. 2d 1383 (Fla. 4th DCA 1986), *cause dismissed*, 507 So. 2d 588 (Fla. 1987), citing with approval my concurring and dissenting opinion in Hawthorne, adopted the relevance standard in affirming the admissibility of expert opinion testimony pertaining to PTSD. In so deciding, the court observed: "We believe her [the expert's] unrebutted testimony sufficiently established the reliability of the method of diagnosing the syndrome and its use in the medical community to permit the expression of an opinion under the statutory relevance standard." *Id.* at 1386 (emphasis added). Thus, it is clear from the above statement that *Kruse* approved the admission of the opinion testimony, which had compared the expert's observations of the victim's behavior with commonly observed patterns of other syndrome patients, by applying the relevance standard.[8]

One year thereafter, this court decided Wurd *v. State,* finding "no abuse of discretion in thc trial court's ruling that child abuse syndrome is an area sufficiently developed to permit an expert to testify that the symptoms observed in the evaluated child are consistent with those displayed by victims of child abuse." Wurd, 519 So. 2d at 1084. Although it may appear from the above statement that Wurd applied the Ftye standard, the court never mentioned Ftye in the opinion. Indeed, the only specific authority cited in *Wurd* directly supporting its conclusion that such testimony is reliable is *Kruse v. State*, which Ward described as holding that "expert testimony on posttraumatic stress syndrome [is] admissible in a child sexuai assault case when proven relevant under Section 90.403, Florida Statutes. and more probative than prejudicial." Id. Obviously, the Wurd court's references to the term "relevant" and to section 90.403 (the Evidence Code's baiancing test) strongly infer that the court in *Ward* reached its decision by employing the relevance standard and not that of Frye.

Two other cases from this court which followed Wurd. *Brown v. State,* 523 So. 2d 729 (Fla. 1st DCA 1988). and *Calloway v. State*, 520 So. 2d 665 (Fla. 1st DCA), review denied, 529 So. 2d 693 (Fla. 1988), which Judge Miner cites as reaffirming "the admissibility of expert testimony similar to that involved in Ward," ante at 7, once again make no reference to Frye. Clearly, none of the above cases offers any precedential authority for the conclusion that if a syndrome were involved. it was *Frye*-tested.

In 1989, the supreme court held, by approving Ftye and specifically rejecting "balancing," that hypnotically refreshed testimony failed to comply with the general acceptance standard. *Stokes v. State,* 548 So. 2d 188, 195 (Fla. 1989). It reached its conclusion, not by employing the abuse-of-discretion standard typically applied to review of the trial court's admission of an expert's opinion testimony. but by conducting essentially a de *novo* review, by judicially noticing pertinent scientific literature and judicial decision?,. In 1993, the court once again reaffirmed its adherence to the *Frye* rule and disapproved balancing in holding that profiles of child sexuai abusers were inadmissibie as evidence of guilt. *Flanagan II*, 625 So. 2d at 829.

Less than one year thereafter, the supreme court decided *State v. Townsend*, 635 So. 2d 949 (Fla. 1994), the case which Judge Miner primarily relies upon to support his thesis that syndromes of sexuaily abused children are no longer new or novel. Judge Miner points to the comment made in *Townsend* that "if relevant, a medical expert witness may testify as to whether, in the expert's opinion, the behavior of a child is consistent with the behavior of a child who has been sexually abused." *Id.* at 958 (referencing Ward and *Glendening v. State, 536* So. 2d 212 (Fla. 1988), *cert. denied,* 492 U.S. 907, 109 S. Ct. 3219, 106 L. Ed. 2d 569

(1989)) (footnote omitted).

As with the other cases listed in Judge Miner's opinion, nothing in *Townsend* divulges that a Frye objection was raised, or, indeed, whether the admissibility of any novel scientific technique was before the court. Rather, the above quoted statement was made in the context of an assertion that the trial judge had erred in allowing an expert to testify to a number of hearsay statements of the child-victim. some of which were obtained through the use of anatomical dolls. Consequently, Townsend furnishes no support for the theory that PTSD or RTS is no longer a new or novel technique. because nothing therein discloses whether the expert relied upon a syndrome in reaching her opinion. The applicability of *Frye* in *Townsend* was thus a non-issue.

This conclusion is reinforced by *Townsend*'s additional reference to *Glendening.* where the court stated that "[a] qualified expert may express an opinion as to whether a child has been the victim of sexual abuse." *Glendening,* 536 So. 2d at 220. In concluding that the witness was properly qualified, the *Glendening* court cited *Kruse,* which, as previously explained. applied the balancing test. No *Frye* objection was mentioned. That *Glendening* addressed only the admissibility of pure opinion testimony is underscored by the court's adoption of the following procedure for testing the admissibility of expert opinion testimony:

> (1) the opinion evidence must help the trier of fact; (2) the witness must be qualified as an expert; (3) the opinion must be capable of being applied to evidence at trial; and (4) the probative value of the opinion must not be substantially outweighed by the danger of unfair prejudice.

Id. at *220. Glendening* reiterated the time-worn rule recognizing that the admissibility of expert opinion testimony is tested on appeal by the abuse-of-discretion standard. *Id.* It is obvious that in formulating the above procedure, the court relied exclusively on sections 90.403 and 90.702 of the Florida Evidence Code and not on Frye.

Any lingering uncertainty whether *Townsend*'s approval of expert opinion testimony involving common symptoms of typically abused children implied that the court had decided that such testimony need comply only with the relevance standard should be laid to rest by the supreme court's most recent pronouncement on the subject in *Ramirez v. State,* 651 So. 2d 1164 (Fla. 1995), wherein it once again reaffirmed its allegiance to *Ftye.* The *Ramirez* court adopted the following four-step procedure for determining the admissibility of expert testimony after a *Frye* objection is raised: First, the trial judge must decide whether the testimony will assist the jury in understanding the evidence or in determining a fact in issue. Second, the judge must decide whether the expert's testimony meets the Frye standard. Third, the judge must determine whether a particular witness is qualified as an expert to present opinion testimony on the subject in issue. Fourth, the judge may then allow the expert to render an opinion on the subject, and the jury will then determine its credibility. *Id.* at 1167, Clearly, the court in *Ramirez* modified the procedure previously adopted in *Glendening* to include an additional factor relating to the admissibility of opinion testimony based on new or novel scientific techniques, *i.e.*, the general acceptance standard. Therefore, the quoted statement in *Townsend,* with its reference to *Glendening* as supporting authority, must be understood as applying only to an expert's personal opinion which is not based upon a novel scientific technique or process.[9]

I therefore find no legal foundation for Judge Miner's alternative conclusion that the expert's opinion testimony, if placed on a syndrome, was nonetheless admissible because the syndrome was not new or novel. The cases which Judge Miner relies upon appear to have been decidcd either by applying the balancing test, now inapplicable as the method of gauging opinion testirnony based on novel scientific techniques, or on the ground that the opinion at issue was pure opinion testimony. Under either theory, the appropriate standard of appellate review is highly deferential to the trial court: that of abuse of discretion. The review standard applicable to the admission of expert opinion testimony based on a new scientific technique, however, is whethcr the lower court erred as a matter of law in authorizing the opinion's admission. As one court explained: "The answer to the question about the reliability of a scientific technique or process does not vary according to the circumstances of each case. It is therefore inappropriate to view this threshold question of reliability as a matter within each trial judge's individuai discretion." *Reed v. State,* 391 A.2d *364,* 367 (Md. 1978). *Cf. Stokes v. State,* 548 *So.* 2d 188 (Fla. 1989).

Indeciding a *Frye* issue, an appellate court does not confine its examination solely to the record before it, but conducts a *de novo* review, considering, in addition to the expert testimony in the record, scientific literature and judicial decisions. *Vargas* v. *State,* 640 So. 2d 1139, 1144 (Fla. 1st DCA 1994) ("Our review of pertinent cases indicates that the correct manner of review is a *de novo* review of whether the evidence in question is generally accepted in the relevant scientific community, encompassing expert testimony, scientific and legal writings, and judicial opinions."), *quashed on* other *grounds,* 20 Fla. L. Weekly S594 (Fla. Dec, 14,1995).

As a result, none of the cases Judge Miner cites provides any precedential, binding authority. because none involves the application of the Frye standard. The rule is clear that the doctrine of *stare decisis* does not apply to any question not raised or considered in an earlier case, even if the question may have been involved in the facts. *City* of *Miami Beach* v. *Traina,* 73 *So.* 2d 860 (Fla. 1954); *State* Dep*'t of Pub. Welfare v. Melser,* 69 *So.* 2d 347 (Fla. 1953). Moreover, to the extent the courts in the cases Judge Miner cites applied the relevance standard in reaching their decisions, these cases must now be understood as implicitly overruled by later case law. Therefore, it is impossible to conclude that syndromes of sexually abused children are neither new nor novel.

III.

As there is no binding precedent of either the Florida Supreme Court or *of* this court, I find no impediment to our now deciding, as a case of first impression, whether RTS or PTSD is admissible under *Frye* as substantive evidence of guilt. I think it clear that they are not. After conducting the type of *de novo* scarch commended by this court in *Vargas v. Srate,* 640 *So.* 2d 1139 (Fla. 1st DCA 1994) (an examination of expert testirnony. scientific and legal writings and judicial opinions), *quashed on other grounds,* 20 Fla. L. Weekly 5594 (Fla. Dec. 14, 1995), and undertaken by the Florida Supreme Court in numerous decisions, see, for example, *State v. Hickson, 630 So.* 2d 172 (Fla. 1993) (battered woman syndrome admissible); *Flanagan II* (profile molester testirnony inadmissible); *Stokes v. State* (hypnotically refreshed testimony inadmissible), I find no general consensus in the relevant field that such syndrome evidence is generally accepted as proof of sexual abuse.

Nothing in the expert's testimony bclow reveals that the syndrome is generally accepted in the particular field in which it belongs, presumably medical and mental health disciplines. as a diagnosis of sexual abuse, Moreover, a review of pertinent scientific and legal writings discloses no agreement of its general acceptance. As I stated in my concurring and dissenting opinion in *Flanagan* I, *586 So.* 2d at 1115-16: "[T]here is a lack of consensus regarding *the* ability of an expert to determine whether a particular child with such traits or symptoms has in fact been abused. Perhaps even more pronounced is the lack of agreement among the experts as to the reliability of such profiles." See also authorities generaily summarized in *Flanagan I* at 11 15-16.

The following comments by the New Jersey Supreme Court in *State v. J. Q.,* 617 A.2d 1196, 1202 (N.J. 1993). in regard to CSAAS, are altogether pertinent to the issuc at hand:

> The scientific community does not yet exhibit a consensus that the requisite degree of scientific reliability lias been shown.

> Althougli some argue that '' 'under no circurnstances should a court adrnit the opinion of an expert about whether a particular child has been abused * * *[,]' [t]he majority of professionals believe qualified mental health professionals can determine whether abuse occurred; not in all cases, but in some." 1John E. B. Myers, *Evidence in Child Abuse and* Neglect *Cases* § 4.31, at 283-84 (2d ed. 1992) . . . (quoting Melton & Limber, *Psychologists' Involvement in Cases* of *Child Maltreatment,* 44 *Am. Psychol. 1225,* 1230 (1989)).

While the debate continues among experts regarding whether the syndrome is an adequate therapeutic tool for determining the presence of abuse, it appears that there is clearly no consensus among the experts that it is useful as substantive evidence of guilt.lo

The difficulty of constructing a syndrome of characteristics typically associated with victims of sexual abuse as a means of diagnosing sexual abuse has been explained by one expert in the field in the following terms:

> [T]he fact that a child suffers nightmares and regression says little about sexual abuse. Myriad other circumstances cause such symptorns. In fact, a child with nightmares and regression is more likely not to be abused than abused. This conclusion derives from the base rate at which particular symptoms occur in children. To understand the base rate, consider the total population of ***nonabused*** American children. A small percentage of nonabused children have nightmares and regression. For purposes of illustration, suppose there are 30 million nonabused children, 5 percent of whom have nightmares and regression. Thus, in the population of nonabused children, 150,000 have nightmares and regresion. Now consider the population of sexually abused children. Assume there are 300,000 sexually abused children, and that 10 percent of them have nightmares and regression. Thus in the population of sexually abused children, 30,000 have nightmares and regression. If a child with nightmares and regression is selected at random, tlie odds are the child is drawn from the much larger pool of *nonabused* children.

Myers, *supra* note 3, § 4.32, at 286 (footnotes omitted).

In ***State v. J.Q.***, an issue was raised whether CSAAS was admissible for the purpose of detecting sexual abuse, In concluding that there had been no showing in the record before it, nor in the scientific literature or decisions of law, the New Jersey Supreme Court quoted extensively with approval from an article by Myers, Bays, Becker, Berliner, Corwin & Seywitz, *Expert Testimony in Child Sexual Abuse Litigation,* 68 Neb. L. Rev. 1, 67-68 (1989):

> "Summit [the author of the article first describing CSAAS] did not intend the accommodation syndrome as a diagnostic device. The syndrome does not detect sexual abuse. Rather, it assumes the presence of abuse, and explains the child's reactions to it. Thus, child sexual abuse accommodation syndrome is not the sexual abuse analogue of battered child syndrome, which is diagnostic of physical abuse. With battered child syndrome, one reasons from type of injury to cause of injury. Thus, battered child syndrome is probative of physical abuse. With child sexual abuse accommodation syndrome, by contrast, one reasons from presence of sexual abuse to reactions to sexual abuse. Thus. the accommodation syndrome is not probative of abuse.
>
> "Unfortunately, a number of mental health professionals, lawyers, and commentators drew unwarranted comparisons between battered child syndrome and child sexual abuse accommodation syndrome. This error led to considerable confusion. First, some professionals misinterpreted Summit's article, believing Summit had discovered a "syndrome" that could diagnose sexual abuse. This rnistake is understandable, if not forgivable. Mental health and legal professionals working in the child abuse area had long been accustomed to thinking in terms of syndrome evidence to prove physical abuse. Battered cliild syndrome was an accepted diagnosis by the time Summit's accommodation syndrome came along in 1983. It was natura! for professionals to transfer their understanding of battered child syndrome to this new syndrome, and to conclude that the accommodation syndrome, like battered child syndrome, could be used to detect abuse.
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> * * * * * *
>
> "* * * [T]he accommodation syndrome was being asked to perform a task it could not accomplish.

In sum. the syndrome testimony introduced below was submitted for one objective only: as substantive evidence of guilt and for no other purpose. This conclusion is supported by only a cursory examination of the record. For example, in response to the prosecutor's question whether the victim exhibited typical symptoms of a child who had been sexually abused, Jones stated:

> Primary things are an unemotional recounting when asked specifically about this incident, flat affect, difficulty describing sometimes very specific details about when and where those kinds of issues [occurred], a sense of guilt, sense of responsibility in ways. number of issues that have to do with a child's reaction to an adult perpetrator.

In describing what was meant by the term "flat affect," Jones explained that such children frequently displayed "frozen emotions" when the subject of the abuse is raised, resulting from their anxiety associated with the offense. During his closing arguments, the prosecutor emphasized the above testimony, calling to the jury's attention the child's lack of emotion while on the stand, and asserting as well the absence of any motive by Dr. Jones to falsify his testimony.

If there existed any continuing question as to the state's intent in offering into evidence Dr. Jones's syndrome testimony, surely the above references to the record conclusively demonstate that it was subrnitted for the purpose of proving the guilt of the accused. As such, it was inadmissible not only for failing to comply with the *Frye* test of reliability, but as an improper bolstering of the victim's credibility. ***See, e.g., Tingle v. Stute, 536 So.*** 2d 202, 204 (Fla. 1988); ***Williams v. State,*** 619 So.2d 1044, 1046 (Fla. 4th DCA 1993). I am therefore compelled to the conclusion that the trial court erred as a matter of law in allowing the introduction of the syndrome evidence; consequently, reversal is required.

Judge Miner also justifies the admission of the opinion testimony on the ground that such "testimony . . . is innocuous . . . in that it only demonstrates circumstantially that sexual abuse has occurred without identifying a likely perpetrator or that the abuse took place at the time and place charged." ***Ante*** at 10. This evidence is clearly the type that was emphatically denounced by the Florida Supreme Court in ***Flanagan II***:

> Profile testimony, on the other hand, by its nature necessarily relies on some scientific principle or test, which implies an infallibility not found in pure opinion testimony. The jury will naturally assume that the scientific principles underlying the expert's conclusion are valid. Accordingly, this type of testimony must meet the *Frye* test, designed to ensure that the jury will not be misled by experimental scientific methods which may ultimately prove to be unsound.

Flanagan 11, 625 So. 2d at 828. It is obvious from the above statement that if the underlying scientific principle is unreliable, the opinionon which it is based cannot be admitted. ***Cf. Ramirez,*** 651 So. 2d at 1168 ("[T]he burden is on the proponent of the evidence to prove the general acceptance of both the underlying scientific principle and the testing procedures used to apply that principle to the facts of the case at hand.").

The clear import of the opinion testimony admitted below was to infer to the jury that the victim. because she had symptorns in common with those associated with typical victims of child sexual abuse, necessarily fit the syndrome, and, as the defendant was the only person on trial for the abuse, he was obviously the child's abuser. Testimony of this type, which has the effect of inferring indirectly the guilt of the defendant, was thoroughly disapproved by the Supreme Court of Washington in ***State v.*** *Black,* 745 P.2d 12 (Wash. 1987). wherein an expert witness testified, similar to the expert below, that rape victims exhibited consistent symptoms, and that there was a specific profile for

rape victims which the victim "fits in." In holding such testimony inadmissible, the Washington Supreme Court made the following pertinent observations:

> No witness. lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference. Here, rape counselor Bermensolo testified that, in her opinion, R.J. suffered from rape trauma syndrome, and that "[t]here is a specific profile for rape victims and R.J. fits in." In *Saldana* [*State v. Saldana*, 324 N.W.2d 227 (Minn. 1982)], at 230, the Minnesota Supreme Court aptly observed that:
>
> > [p]ermitting a person in the role of an expert to suggest that because the cornplainant exhibits some of the symptoms of rape trauma syndrome, the complainant was therefore raped, unfairly prejudices the [defendant] by creating an aura of special reliability and trustworthiness.
>
> The danger of prejudice is especially acute where, as here, the expert expressly uses the term "rape trauma syndrome." As one court cogently notes, "[t]he term itself connotes rape." It carries with it an implied opinion that the alleged victim is telling the truth and was, in fact, raped. It constitutes, in essence, a statement that the defendant is guilty of the crime of rape.

Id. at 19 (citations omitted),

I therefore cannot conceive that if syndrome testimony of the kind given below fails to comply with the Frye standard of general acceptance, it would be deemed admissible, regardless of whether the expert couched his testimony in direct terms by opining that the child had been victimized by a sexual assault, or indirectly by saying that the victim had symptoms consistent with those of a child who had been abused.

Nor can I conclude that the evidence admitted at bar was not harmful. The evidence consisted essentially of a "swearing match" between Hadden and the victim," and their credibility was the main focus of closing arguments. Although a sheriff's investigator testified regarding Hadden's confession, she said that the defendant gave numerous accounts—both inculpatory and exculpatory—of his involvement with the child. Moreover, Hadden testified and denied that he had given aconfession. Finally, there was no medical evidence substantiating the abuse.

In contrast to the overwhelming evidence of guilt admitted in *Flanagan*, and deterrnined to be harmless, which, in addition to the victim's testimony. included that of a physician who described the physical condition of the victim as being consistent with repeated incidents of vaginal penetration, as well as that of other witnesses who observed the sexual acts, and the admission of similar-fact evidence, the only direct evidence connecting the defendant to the crimes was the victim's testimony and the defendant's confession. Under the circumstances, I am unable to conclude beyond a reasonable doubt that the admission of the syndrome evidence, which had the effect of bolstering the child's credibility, may not have affccted the verdict. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986).

For all of the above reasons, I would reverse the convictions and remand the case for new trial.

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[1] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

[2] We believe the fact that this case dealt with the admission of battered wife syndrome evidence is of no consequence. The *Hawthorne* test remains viable where the admissibility of so-called syndromc evidence is at issue. Also to be noted is that the second prong of the *Hawthorne* test encompasses the *Frye* test. *State v. Hickson*, 630 So. 2d 172. 174 n.4 (Fla. 1993).

[3] 'Out of the presence of the jury. the prosecutor established counselor/psychologist Jones' qualifications in the area of child sex abuse and tendered him as an expert. Defense counsel asked to *voir dire* the witness regarding his expert credentials and then proceeded to question him closely about what testimony he intended to give. The prosecutor objected that counsel was going beyond credential *voir dire* but was overruled. Defense counsel then elicited virtually the same testimony that Jones later gave before the jury. At the conclusion of this "voir *dire*" questioning, defense counsel asked rhetorically: "So you're basically testifying from your experience?" The witness rcsponded: "That's true."

[4] *Frye v. United States*, 293 F. 1013(D.C. Cir. 1923).

[5] As explained in *Flanagan* I. 586 So. 2d at 1110, n.22 (Ervin, J., concurring and dissenting):

> "CSAAS was first described in a 1983 articlc by Dr. Ronald Sunimit, iisting five general auributes of child sexual victims (secrecy, helplessness, denial, delayed disclosure, and retraction), whom hc had treated over a substantial period of time. Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 Int'l. J of Chiid Abuse & Ncglcct 177 (1983)."

[6] RTS was first developed following a study Burgess and Holmstrom conducted in 1974, in which it was defined as -- 'the acute phase and long-term reorganization process that occurs as a result of forcible rape or attempted forcible rape. This syndrome of behavioral. somatic, and psychoiogical reactions is an acute stress reaction to a life-threatening situation.' " 1 John E.B. Myers. *Evidence in Child Abuse and Neglect* § 4.34, at 289-90 (2d ed. 1992) [hereinafter Myers] (quoting Burgess & Holmstrom, *Rape Trauma Syndrome*, 131 Am. J. Psychiatry 981. 982 (1974)).

[7] 'Basing an opinion on experience and training, which in turn is supported by diagnostic studies, cannot, however, qualify as one's own personal opinion, as more fully discussed *infra*.

[8] 'Professor Ehrhardt cites *Kruse* as one of several district court of appeal decisions which have been implicitly overruled by later opinions of the Florida Supreme Court, because of their application of thc balancing or reievance test. i Charles W. Ehrhardt. *Florida Evidence* § 702.3 & n.11, at 524 (1995 ed.),

[9] Judge Miner also cites *Toro v. State*, 642 So. 2d 78 (Fla. 5th DCA 1994), wliich affirmed the admission of an expert's opinion testimony based on PTSD. Considering the *Toro* court's acknowledged uncertainty, following its examination of many of the same cases discussed in Judge Miner's opinion, of whether PTSD is admissible, I have strong reservations whether *Toro* would have been so decided if the Fifth District had before it the procedure later approved in *Ramirez* for testing the admissibility of expert opinion testimony once a *Frye* objection is raised.

[10] In fact. Professor Myers flatly states: "At present, there is no syndrome that detects or diagnoses child sexual abuse." Myers. *supra* note 3, § 4.33, at 288.

[11] In addition to the child-victim's own testimony, the court admitted several of the child's hearsay statements to certain witnesses concerning the abuse.

* * *

Workers' compensation—Heart attack—No error in concluding that claimant had burden of proving that her husband's work-related injury was the major contributing cause of his subsequent heart attack, rather than merely proving causal connection—Evidence supported determination that claimant failcd to prove that work-celated accident was major contributing cause where four cardiologists testified that several pre-existing risk factors could easily have accounted for the heart attack

CAROL MANGOLD. as personal representative of the ESTATE OP WILLIAM MANGOLD and individually as claimant, Appellant, v. RAINFOREST GOLF SPORTS CENTER and EXECUTIVE RISK CONSULTANTS. INC., Appellees. 1st District. Case No. 95-666. Opinion filed February 13, 1996. An appeal from an order of the Judge of Cornpensation Claims. Kathleen R. Hudson, Judge. Counsel: Keith R. Pallo of Adams, Coogler. Watson & Merkel, P.A., West Palm Beach and Marjorie Gadarian Graham, Palm Beach Gardens, for Appellant. Randall T. Porcher of Rigell & Leal, P.A., West Palm Beach. for Appellees.

(SHIVERS, Senior Judge.) Carol Mangold, the Appellant, seeks review of a workers' compensation order finding that her husband's heart attack following his work-related injury was not cornpensable under section 440.09(1), Florida Statutes (Supp. 1994). We affirm.

William Mangold (Mangold) was injured in the course and scope of his employment on January 3, 1994 when a go-cart struck and pinned his right leg. Mangold, however, did not receive medical treatment for two weeks following thc accident as he was unable to obtain authorization from Rainforest Golf Sports Center, the employer. and Executive Risk Consultmts, Inc., the carrier (together, the E/C). The cmployer continued to refuse authorization of any treatment, to file a notice of injury, or to report the claim to the carrier. As a result of his difficulties in seeking authorized treatment, Mangold suffered emotional stress and financial hardship.

On February 16, 1994, suffering from chest pain, Mangold sought treatment from Dr. Patel, a cardiologist. Fifty-two ycars of age at the time, Mangold had a history of hypertension, arteriosclerotic heart disease, congestive heart failure, hypercholesterolemia and a family history of myocardial infarction. Dr. Patel admitted Mangold into the hospital, but on Febnuary 17, 1994, Mangold suffered a massivc, fatal heart attack.

DIAGNOSTIC CRITERIA FOR 309.81 POSTTRAUMATIC STRESS DISORDER.

A. The person has been exposed to a traumatic event in which both of the following were present:

(1) the person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others.

(2) the person's response involved intense fear, helplessness, or horror. Note: In children, this may be expressed instead by disorganized or agitated behavior.

B. The traumatic event is persistently reexperienced in one (or more) of the following ways:

(1) recurrent and intrusive distressing recollections of the event, including images, thoughts, or perceptions. Note: In young children, repetitive play may occur in which themes or aspects of the trauma are expressed.

(2) recurrent distressing dreams of the event. Note: In children, there may be frightening dreams without recognizable content.

(3) acting or feeling as if the traumatic event were recurring (includes a sense of reliving the experience, illusions, hallucinations, and dissociative flashback episodes, including those that occur on awakening or when intoxicated). Note: In young children, trauma-specific reenactment may occur.

(4) intense psychological distress at exposure to internal or external cues that symbolize or resernble an aspect of the traumatic event.

(5) physiological reactivity on exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event.

C. Persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness not present before the trauma), as indicated by three (or more of the following:

(1) efforts to avoid thoughts, feelings, or conversations associated with the trauma.

(2) efforts to avoid activities, places, or people that arouse recollections of the trauma.

(3) inability to recall an important aspect of the trauma.

(4) markedly diminished interest OP participation in significant activitiec.

(5) feeling of detachment or estrangement from others.

(6) restricted range of affect (e.g., unable to have loving feelings)

(7) sense of a foreshortened future (e.g., does not expect to have a career, marriage, children, or a normal life span)

D. Persistent symptoms of increased arousal (not present before the trauma), as indicated by two (or more) of the following:

(1) difficulty falling or staying asleep.

(2) irritability or outbursts of anger.

(3) difficulty concentrating.

(4 hyper vigilance

(5) exaggerated startle response

E. Duration of the disturbance (symptoms in Criteria B, C, and D) more than 1 month.

F. The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.

Specify if:
Acute: if duration of symptoms is less than 3 months.
Chronic: if duration of symptoms is 3 months or more.
Specify if:
With Delayed Onset: if onset of symptoms is at least 6 months after the stressor.