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

REPLY BRIEF OF PETITIONER

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PETITIONER'S REPLY BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

Petitioner files this brief in reply to the brief of the respondent, which will be referred to as "RB". The state will be referred to as respondent or the state. Petitioner will rely on his initial brief as Issues II and III.

II ARGUMENT

ISSUE I

ARGUMENT IN REPLY TO RESPONDENT AND IN SUPPORT OF THE PROPOSITION THAT 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.

This Court must answer the certified question in the affirmative. The state cites four out-of-state cases which hold that the child victim's symptoms are admissible as substantive evidence of the defendant's guilt (RB at 19-20), but all are distinguishable.

In Cohn v. State, 849 S.W.2d 817 (Tex. Ct. Crim. App. 1993), the court did not mention Frye and held the evidence was admissible under a relevancy analysis. As demonstrated in the initial brief at 7-20, this Court has adopted the Frye test in Florida:

> We are mindful that the United States Supreme Court recently construed Rule 702 of the Federal Rules of Evidence as superseding the *Frye* test. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, --- U.S. ----, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). However, Florida continues to adhere to the *Frye* test for the admissibility of scientific opinions. *Stokes v. State*, 548 So.2d 188 (Fla. 1989).

Flanagan v. State, 625 So. 2d 827, 829, note 2 (Fla. 1993).

Significantly, the Cohn court limited its ruling to expert testimony that the child suffered some traumatic event, but not specifically a sexual traumatic event:

> Absent medical evidence or evidence of behavior more closely determinative of sexual abuse, ... it seems the psychological community is unwilling to find evidence of anxiety sufficient to support the conclusion, even to a reasonable medical certainty, that *sexual* abuse necessarily occurred.

849 S.W.2d at 819; emphasis in original.

In the instant case, the expert stated that the child's "anxiety" and "flat affect" were the first signs of abuse (T 99-104)[1]. Moreover, Dr. Jones went beyond Cohn and did testify that the victim had experienced sexual abuse.

In Broderick v. King's Way Assembly of God Church, 808 P.2d 1211 (Alaska 1991), the court held that a physician's opinion which validated a child's complaints of sexual abuse was admissible under that state's version of §90.702, Fla. Stat., but there is no mention of Frye in the opinion.

In State v. Resner, 767 P.2d 1277 (Kan. 1989), the question before the court was whether a clinical social worker with a master's degree was a qualified expert. The court ruled that she was. The court never discussed Frye, but went on to hold that the syndrome evidence was admissible. Since the Kansas court cited with approval the erroneous opinion of the Fourth District in Kruse v. State, 483 So. 2d 1383 (Fla. 4th DCA 1986), *rev. dism.*, 507 So. 2d 588 (Fla. 1987), (767 P.2d at

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[1]The undersigned knows of two unabused females in his household who exhibited those signs in pre-puberty.

1282), it appears that the court was using the relevancy test rather than the Frye test.

Finally, in State v. Bachman, 446 N.W.2d 271 (S.D. 1989), the defendant argued the rape trauma syndrome evidence did not meet the Frye test. The court held that it did. Although the opinion is silent about what evidence of reliability the state presented, the state must have presented some evidence to justify the court's ruling. In the instant case, the state presented no reliability evidence; rather, the state relied on the erroneous relevancy test announced in Ward v. State, 519 So. 2d 1082 (Fla. 1st DCA 1988) (T 105-106).

Respondent's arguments are all rebutted by the comprehensive opinion in State v. J.Q., 617 A.2d 1196 (N.J. 1993), and the undersigned urges this Court to read the entire opinion. The court relied heavily on the article Myers, Bays, Becker, Berliner, Corwin, and Saywitz, *Expert Testimony in Child Sexual Abuse Litigation*, 68 NEB. L. REV. 1, 67 (1989), and concluded:

> **Despite the considerable basis for this behavioral-science evidence, "most courts do not approve such testimony as substantive evidence of abuse."** Myers, *supra*, 68 Neb.L.Rev. at 65, 68 (citing *People v. Bowker*, 203 Cal.App.3d 385, 249 Cal.Rptr. 886, 890-92 (1988), *Lantrip v. Commonwealth*, 713 S.W.2d 816, 817 (Ky. 1986), *State v. Black*, 537 A.2d 1154, 1156-57 (Me. 1988)). However, this type of testimony has an important nonsubstantive purpose of which the majority of courts

> approve. It can be used on rebuttal "to rehabilitate" the victim's testimony when the defense asserts that the child's delay in reporting the abuse and recanting of the story indicate that the child is unworthy of belief. Myers, *supra*, 68 Neb.L.Rev. at 51, 86-92.

617 A.2d at 1201; bold emphasis added. The New Jersey court further found:

> **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) [hereinafter Myers, *Evidence in Child Abuse and Neglect Cases*] (footnote omitted) (quoting Melton & Limber, *Psychologists' Involvement in Cases of Child Maltreatment*, 44 Am. Psychol. 1225, 1230 (1989)).
>
> * * *
>
> We must examine the scientific premises supporting the expert's testimony and the purpose for which the testimony was used. We note first that testimony on the child sexual abuse accommodation syndrome has been placed within the category of behavioral-science testimony that describes behaviors commonly observed in sexually-abused children. **Courts rarely permit the testimony for the purpose of establishing substantive evidence of abuse, but allow it to rehabilitate the victim's testimony**. *See* Myers, *supra*, 68 Neb.L.Rev. at 51, 66-69, 86-92.

* * *

> Hence, **the behavioral studies of CSAAS are designed not to provide certain evidence of guilt or innocence** but rather to insure that all agencies, including the clinician, the offender, the family, and the criminal justice system, offer "the child a right to parity with adults in the struggle for credibility and advocacy." Summit, *supra*, 7 Child Abuse & Neglect at 191. CSAAS achieves that by providing a "common language" for analysis and a more "recognizable map" to the understanding of child abuse. *Ibid.*

617 A.2d at 1202, 1203, 1205; bold emphasis added.

The New Jersey court found the expert's final conclusion, that the children had been sexually abused, to be inadmissible as substantive evidence of guilt:

> The final question to the witness was: "Doctor, based on your examinations of the girls can you give this jury your expert opinion as to whether or not both [Connie] and [Norma] were sexually abused?" Answer: **"I believe that they were sexually abused."** At this point, whether Dr. Milchman had reached that opinion on the basis of her credibility assessments or on the basis of her understanding of CSAAS evidence is not clear to us and could not have been clear to the jury. If it were the former, it would be improper opinion evidence because it would introduce an unwarranted aura of scientific reliability to the analysis of credibility issues. If it were the latter, it would be improper opinion evidence because CSAAS is not relied on in the scientific community to detect abuse.
>
> **There has not been a showing in the record in this case, nor seemingly in other scientific literature or decisional law, of**

> **a general acceptance that would allow the use of CSAAS testimony to establish guilt or innocence.** *See* David McCord, *Expert Psychological Testimony About Child Complainants in Sexual Abuse Prosecutions: A Foray into the Admissibility of Novel Psychological Evidence*, 77 J.Crim.L. & Criminology 1, 24, 38 (1986).

617 A.2d 1208-1209; bold emphasis added.

The court rejected the state's argument, also present in the instant case, that the expert could testify that the victims' symptoms were consistent with sexual abuse:

> The State has argued before us that it is appropriate to admit Dr. Milchman's testimony describing CSAAS and concluding that Norma's and Connie's symptoms were consistent with sexual abuse and rendering an expert opinion that they had been sexually abused. Obviously, scientific evidence exists to aid a jury in determining whether sexual abuse has occurred. As we understand CSAAS, however, it does not purport to establish sexual abuse but helps to explain traits often found in children who have been abused. Hence we believe that in this case the "accommodation syndrome was being asked [by the State] to perform a task it could not accomplish." Myers, *supra*, 68 Neb.L.Rev. at 68.
>
> * * *
>
> In this case, the only scientific basis or methodology referred to by the witness was CSAAS and as we have seen, **qualified mental health professionals do not regard CSAAS as a sufficiently reliable scientific indicator of the substantive fact of abuse.**

617 A.2d at 1211; bold emphasis added.

Respondent alternatively argues that Dr. Jones' testimony

was admissible to rehabilitate the victim (RB at 21-25), and cites two out-of state cases for this proposition. Again, they are distinguishable, and both actually help petitioner.

In State v. Gokey, 574 A.2d 766 (Vt. 1990), the state introduced the expert's testimony as substantive evidence of guilt, not as rebuttal or rehabilitation. The court properly held this was reversible error, even with a jury instruction "cautioning them not to use the psychologist's testimony 'to conclude that the defendant committed the specific sexual abuse alleged.'" *Id.* at 767.

Respondent also cites People v. Peterson, 537 N.W.2d 857 (Mich. 1995). In that case, the court adhered to its view, expressed five years earlier in People v. Beckley, 456 N.W.2d 391 (Mich. 1990), that an expert may not testify that sexual abuse occurred, and added the following conclusions:

> Since our decision in *Beckley*, the majority of jurisdictions considering the proper use of expert syndrome evidence testimony in child sexual abuse cases have limited its admissibility. See, generally, *State v. Gokey*, 154 Vt. 129, 574 A.2d 766 (1990), *State v. J.Q.*, 130 N.J. 554, 617 A.2d 1196 (1993), *State v. Chamberlain*, 137 N.H. 414, 628 A.2d 704 (1993), *State v. Jones*, 71 Wash.App. 798, 863 P.2d 85 (1993), *Frenzel v. State*, 849 P.2d 741 (Wyo., 1993), and *People v. Patino*, 26 Cal.App.4th 1737, 32 Cal.Rptr.2d 345 (1994). See also Myers, *Expert testimony in child sexual abuse litigation*, 68 Neb.L.R. 1, 68 (1989). **Most courts will not allow expert testimony in this area if offered to prove**

> **that the abuse occurred**. See *State v. Gokey*, *State v. J.Q.*, and *Frenzel v. State*, *supra*. **Several jurisdictions**, consistent with our holding in *Beckley*, **limit the admissibility of expert testimony solely to rehabilitate the victim's credibility**. *People v. Nelson*, 203 Ill.App.3d 1038, 149 Ill.Dec. 161, 561 N.E.2d 439 (1990), *Frenzel v. State*, and *State v. Jones*, *supra*. **A few jurisdictions never admit expert testimony concerning syndrome evidence because it has not attained scientific acceptance**. *See State v. Foret*, 628 So.2d 1116 (La., 1993).
>
> * * *
>
> **When the credibility of the particular victim is attacked by a defendant**, we think it is proper to allow an explanation by a qualified expert regarding the consistencies between the behavior of that victim and other victims of child sexual abuse.

537 N.W.2d at 866-67, 869; footnote omitted; bold emphasis added.

The credibility of the victim in the instant case was not seriously attacked. Her cross examination only lasted eight pages (T 24-31), and there is nothing in the record to indicate that its tenor was particularly accusatory. The state cannot justify the admission of Dr. Jones' testimony as rehabilitation, particularly 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 exactly 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).

Finally, respondent predictably argues that the error, if any, was harmless, because petitioner was convicted of lesser offenses (RB at 26-28). Not so. Again, the prosecutor referred repeatedly to the expert's testimony as

substantive evidence during his closing argument. *See*, above.

The observations of Judge Ervin on this point are worth repeating:

> In sum, **the syndrome testimony 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 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 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 at D410, D411; emphasis added; footnote omitted. This Court must reverse for a new trial.

III CONCLUSION

Based upon the foregoing arguments and authorities, as well as those cited in the initial brief, the petitioner respectfully requests that the certified question be answered in the affirmative, the opinion of the lower tribunal be quashed, the opinions in Ward and Kruse, *supra*, be overruled, and the judgment and sentence be reversed for new trial. In the alternative, petitioner requests that his sentences be corrected.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Carolyn Mosley, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to petitioner, on this 9 day of May, 1996.

P. DOUGLAS BRINKMEYER