

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
Attorneys for Defendant

6 IN THE YAVAPAI COUNTY SUPERIOR COURT

7 IN AND FOR THE STATE OF ARIZONA

8 STATE OF ARIZONA,
9

10 Plaintiff,

11 vs.

12 [REDACTED],
13

14 Defendant.

[REDACTED]
**MOTION TO PRECLUDE STATE'S
EXPERT WITNESS – [REDACTED]**

Daubert hearing requested

15
16 Defendant, through Counsel, moves this Court to preclude the testimony of the State's
17 expert witness, [REDACTED], because it does not meet the requirements of ARIZ. R. EVID 702.
18 Briefly, her testimony and opinions are not the result of sufficient facts or data, are not the result
19 of reliable principles and methods, and will not assist the jury to determine a fact in issue as
20 required by ARIZ. R. EVID. 702. This motion is supported by the following memorandum of
21 points and authorities.
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. Procedural background for this motion.**

3 Defendant, [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED] [REDACTED]

10 [REDACTED], Defense counsel requested an interview with [REDACTED], which was
11 not scheduled until [REDACTED]. On [REDACTED], Counsel for the State verbally
12 informed Defense Counsel that [REDACTED] was unavailable for trial and that the State would be
13 using [REDACTED] as an expert instead. [REDACTED], the State disclosed [REDACTED]
14 [REDACTED] as a “cold expert” pursuant to Ariz. R. Crim P. 15.1.

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16 **II. [REDACTED]’s proposed testimony.**

17 The topics of testimony listed by the State include “delayed reporting, script memory,
18 piecemeal disclosure and general characteristic of victimization”. (St.’s 7th supplemental
19 disclosure stmt. [REDACTED]. Defense Counsel interviewed [REDACTED] and
20 received a summary or position paper on her proposed topics of testimony after the interview.
21 Defense then requested a follow up interview with [REDACTED], which was completed on [REDACTED]
22 [REDACTED]. Upon review of those documents and after researching these issues more fully, Defense
23 Counsel began preparing this motion. Defendant now moves the Court to preclude [REDACTED]’s
24 testimony on the topics noted as they do not meet the standards required under ARIZ. R. EVID.
25 702 and requests that the Court conduct a hearing pursuant to *Daubert*.

1 **III. Requirements of ARIZ. R. EVID. 702.**

2 ARIZ. R. EVID. 702 states: A witness who is qualified as an expert by knowledge, skill,
3 experience, training, or education may testify in the form of an opinion or otherwise if:

- 4 (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact
5 to understand the evidence or to determine a fact in issue;
6 (b) the testimony is based on sufficient facts or data;
7 (c) the testimony is the product of reliable principles and methods; and
8 (d) the expert has reliably applied the principles and methods to the facts of the case.

9 It is often said by Courts and scholars that “reliability” is the touchstone of a Court’s
10 gatekeeping function under Rule 702 and *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993).
11 Indeed, Arizona Courts have stated that “[t]he *Daubert* analysis includes a reliability requirement
12 for '[p]ertinent evidence based on scientifically valid principles.'..." *State v. Bible*, 175 Ariz. 549,
13 580 (Ariz. 1993) (discussing difference between *Daubert* standard and Arizona’s prior *Frye*
14 standard).

15 Many courts have subjected expert testimony to the reliability requirement of Ariz. R.
16 Evid. 702 and the analog in the Fed. R. Evid. *See. e.g., State v. Romero*, 236 Ariz. 451, para 14
17 (App. 2014) (discussing the reliability of firearms identification and toolmarks evidence and
18 citing to Federal opinions analyzing such evidence), *overruled on other grounds by State v.*
19 *Romero*, 365 P.3d 358, (Ariz. 2016) (vacating paragraphs 19-32 of Court of Appeals opinion).

20 Defense counsel believes the State will offer her testimony as it has been previously
21 described in *State v. Starks*, 251 Ariz. 383 (App. 2021) and *State v. Salazar-Mercado*, 234 Ariz.
22 590 (2014) and numerous other cases. And on the prior occasions Arizona court’s have opined
23 upon the relevancy and admissibility of [REDACTED] “cold” testimony, Courts have consistently
24 placed limits upon it, and cautioned the State about its use. For example, the Arizona Supreme
25 Court stated in *Salazar Mercado*:

We do not hold that CSAAS evidence or like evidence is always admissible.
Based on a more complete record, a trial court *may exercise its gatekeeping role*

1 *to conclude that proffered expert testimony does not satisfy Rule 702 or that such*
2 *testimony should be excluded under Rule 403..*

3 234 Ariz. 590, para 20 (emphasis added).

4 More recently, other Courts have re-examined this type of evidence and held that it is not
5 admissible for lack of reliability or helpfulness under that State's analog of Ariz. R. Evid. 702.
6 *State v. JLG*, 190 A.3d 442 (N.J. 2018).

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8 **IV. ██████'s testimony is not reliable and will not assist the jury and should be precluded**
9 **under Ariz. R. Evid. 702.**

10 During the follow up interview, ██████ was asked about the basis of her testimony and
11 opinions for each of the disclosed topics of delayed reporting, script memory, piecemeal
12 disclosure and general characteristic of victimization. Regarding each of these topics, ██████ was
13 asked whether the behavior had any discriminate or predictive value, and she acknowledged that
14 it did not. She also acknowledged that children who make false reports of abuse can exhibit these
15 behaviors. For example, the following exchange occurred:

- 16 • Q: Your testimony would be that if someone is sexually abused, they can or will
17 delay disclosure, right?
- 18 • A: It's common for that to happen, yes.
- 19 • Q: Sometimes someone who is sexually abused doesn't delay disclosure, right?
- 20 • A: Some disclose immediately, yes.
- 21 • Q: Some who are making a false or unfounded report also delay disclosure, too,
22 correct.
- 23 • A: It's possible yes. So, basically, the timing of the disclosure doesn't have any
24 bearing on whether or not the allegation is true.

25 Defense interview of ██████ ██████, ██████ ██████ at 15:30.

26 ██████ also ██████ identify any study regarding one of these disclosed or proposed
27 topics which identified a false positive rate for the reference population (i.e., the rate or
28 percentage of reports of abuse by the studied population which were determined or
29 acknowledged to be false reports), which is a basic tenet or requirement of the scientific method

1 (i.e., falsifiability, the concept which makes the theory predictive or verifiable). *See. State v.*
2 *Romero*, 365 P.3d 358, para 24 (Ariz. 2016) (discussing the scientific method, or lack thereof, in
3 toolmark’s analysis and noting that “Dr. Haber’s testimony was intended to highlight that the
4 conclusions drawn by firearms examiners from toolmarks do not result from the application of
5 articulable standards and lack typical safeguards of the scientific method such as independent
6 verification by other examiners.”)

7 [REDACTED] may attempt to justify her opinion that these behaviors (e.g., delayed or piecemeal
8 disclosure) were “common” or a “general pattern” of children who have been sexually abused
9 based on her experience of conducting numerous forensic interviews of children. [REDACTED] or the
10 State, may claim that in the interviews she has conducted over a course of years, more often than
11 not [REDACTED] hears from children that they have, for example, disclosed in a piecemeal manner. But
12 this belief in the predictive value or commonality of the behavior based on the experience of a
13 forensic interview is extremely misplaced.

14 As [REDACTED] acknowledged in her interview, it is absolutely not the role of the forensic
15 interviewer to determine whether the allegation the child is making is true or not. This would
16 inject subjectivity and confirmation bias into the forensic interview process. What is more, one
17 of the articles listed in [REDACTED] list of references regarding piecemeal disclosure found that
18 “over half (55.5%) of children who were repeatedly forensically interviewed were determined to
19 have unfounded claims of abuse.”¹ Thus to argue that [REDACTED] should be able to testify to a
20 general pattern based on her experience interviewing children is not only inapposite to the
21 accepted role of the forensic interviewer, the reliability or utility of the opinion based thereon is
22 directly contradicted by the literature that even [REDACTED] claims to rely on.

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24 ¹ Carnes, C., Nelson-Gardell, D., Wilson, C., & Orgassa, U. (2001). “Extended forensic
25 evaluation when sexual abuse is suspected: A multi-site field study. *Child Maltreatment*, 6,
230-242.

1 Lastly, [REDACTED] or the State, attempt's to justify her opinion by stating that it is not
2 designed to determine whether the child is telling the truth but it simply explains "general
3 behavior patterns of child sexual abuse victims [and] may help the jury understand the
4 evidence..." *State v. Salazar-Mercado*, 234 Ariz. 590, para 15 (Ariz. 2014). But this argument is
5 an illogical fallacy--it's not helpful to the jury if it does not anyway discriminate between
6 children who have been abused and those who have not, because then it does not help the jury to
7 "determine a fact in issue" as required by ARIZ. R. EVID. 702(a).

8 Put another way, if children who have been abused both delay disclosure *and* disclose
9 immediately, *and* children who falsely report abuse also delay disclosure, then the testimony
10 cannot in any way help explain behaviors of alleged victims because it does not discriminate
11 between or among them. It is of course true that an expert cannot testify about the credibility of
12 an alleged victim or their opinion on the degree of a witness' credibility (*State v. Lindsey*, 149
13 Ariz. 472, 475 (1986)), but if the testimony they are offering does not in any way accurately
14 describe, segment, or discriminate between someone who has been abused and someone who has
15 not, how can it be said that their testimony is in any way helpful to the jury? And if *Salazar-*
16 *Mercado* approved of this type of testimony because it described "general behavior patterns" of
17 victims of abuse because it "might have helped the jury to understand the possible reasons for the
18 delayed disclosure", why is this testimony at all helpful to the jury if it has been shown to not at
19 all be a "general behavior pattern" of abused children (because it has no predictive ability or
20 discriminate validity).

21 The foregoing demonstrates that [REDACTED] [REDACTED] testimony is neither "based on
22 sufficient facts or data" nor "the product of reliable principles and methods". Ariz. R. Evid.
23 702(b) & (c). And it likewise will not "help the trier of fact to understand the evidence or to
24 determine a fact in issue." ARIZ. R. EVID. 702(a). It should therefore be precluded under ARIZ. R.
25 EVID. 702.

1 These are precisely the reasons that the Supreme Court of New Jersey held that similar
2 testimony (which it describes as child sexual abuse accommodation syndrome) was inadmissible
3 under its rule of evidence regarding expert testimony. Though New Jersey uses the *Frye*
4 standard, it still requires reliability and helpfulness. The Supreme Court of New Jersey stated:

5 Accommodation encompasses the full spectrum of behaviors -- from well-
6 adjusted young adults who are high-achievers to self-destructive children who are
7 failing. The theory is not based on scientific data; it describes the straightforward
8 reality that all child victims cope with sexual abuse in one way or another. That is
undoubtedly true, but by defining "accommodation" so broadly that it includes all
forms of behavior, the category both proves too much and very little at the same
time.

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10 To satisfy the reliability prong of Rule 702, it is not enough to state that certain
behaviors can be observed in some victims some of the time -- or that those
behaviors are not inconsistent with abuse. That is not the type of "state of the art"
11 evidence the case law requires.

12 Nor is it sufficient for the State to claim that expert evidence is being admitted
13 only to educate jurors and dispel misconceptions, and not as a diagnostic or
predictive tool. The underlying claims of the syndrome must themselves be
14 reliable to be admitted under Rule 702. In short, the expert testimony must satisfy
Frye's reliability test and find general acceptance in the scientific community.

15 *State v. J.L.G.*, 190 A.3d 442, 464 (N.J. 2018)

16
17 **V. Conclusion.**

18 For the foregoing reasons, [REDACTED] testimony does not meet the requirement of
19 Ariz. R. Evid. 702 and should be precluded.
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1 RESPECTFULLY submitted this [REDACTED].

2
3 [REDACTED]
4 [REDACTED]

5 [REDACTED]
6 Attorney for Defendant
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11 **COPY OF THE FOREGOING** efiled/emailed February 21, 2022:

12 Clerk of the Court
13 [REDACTED]
14 [REDACTED]

15 Courtesy Copy
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
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