

STATE'S RESPONSE TO DEFENDANTS MOTION TO PRECLUDE EXPERT TESTIMONY

Expert witness testimony may be introduced in a trial court if the expert's testimony will assist the trier of fact to understand the issues. If the witness is qualified as an expert, the witness may testify in the form of an opinion or otherwise.

The State of Arizona, by and through undersigned counsel, respectfully requests that this Court deny the defendant's motion to preclude the expert testimony of Dr. Jeffrey Harrison concerning Child Sexual Abuse Accommodation Syndrome (CSAAS), *i.e.*, general behavioral characteristics of child molest victims, and the general behavioral characteristics of sex offenders (hereinafter CSO). This testimony is admissible as a proper subject for expert testimony without the need for an evidentiary hearing. This response is supported by the attached Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

FACTS:

Between the dates of March 1, 1991 and June 30, 1991, the defendant committed various sexual offenses against two minor cousins, A.C. and I.S., who were 8 years old and 9 years old respectively at the time of the commission of the offenses. The defendant has been charged with four counts of Sexual Conduct with a Minor, class two felonies and dangerous crimes against children, and three counts of Molestation of a Child, class 2 felonies and dangerous crimes against children.

The State intends to present the testimony of Dr. Jeffrey Harrison concerning the general behavioral characteristics of child molest victims and sex offenders. Dr. Harrison is a licensed clinical psychologist who has been accepted as an expert on these and related issues in the Superior Court of Maricopa County on several occasions. *See, e.g., State v. Lopez*, 170 Ariz. 112, 822 P.2d 465 (App. 1991); *State v.*

Bailey, 166 Ariz. 116, 800 P.2d 982 (App. 1990); *State v. Tucker*, 165 Ariz. 340, 798 P.2d 1349, (App. 1990). A copy of Dr. Harrison's curriculum vitae is attached to this motion as Appendix A.

ARGUMENT:

I. The testimony of Dr. Harrison concerning the general behavioral characteristics of child molest victims and sex offenders is admissible as the proper subject of expert testimony.

A. Dr. Harrison is a qualified expert in these areas.

The general rule regarding the introduction of expert testimony provides as follows:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise. Rule 702, Ariz. R. Evid.

In *State v. Chapple*, 135 Ariz. 281, 660 P.2d 1208 (1983), the Arizona Supreme Court adopted four criteria that should be applied in order to determine the admissibility of expert testimony, described as follows: (1) qualified expert; (2) proper subject; (3) conformity to a generally accepted explanatory theory; and (4) probative value compared to prejudicial effect. 135 Ariz. at 291, 660 P.2d at 1218; see also *State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717, 730 (2001).

"A witness is qualified as an expert by knowledge, skill, experience, training, or education" Ariz. R. Evid. 702. The rule only requires that the "witness possess specialized knowledge [which] will assist the trier of fact...." *Id.*

Dr. Harrison is a qualified expert in the areas of general behavioral characteristics of child molest victims and sex offenders. Through his education, training, and clinical experience, Dr. Harrison has gained a great understanding of the

child molest victim and sex offender. In fact, other Maricopa County Superior Court judges have allowed his testimony on these issues. See generally *State v. Lopez*, 170 Ariz. 112, 822 P.2d 465 (App. 1991); *State v. Tucker*, 165 Ariz. 340, 798 P.2d 1349, (App. 1990). The qualification of an expert is clearly at the discretion of the trial court. *Chapple*, 135 Ariz. 281, 660 P.2d 1208. In fact, the trial court's ruling on expert testimony will not be disturbed on appeal absent a clear abuse of discretion. *State v. Stanley*, 156 Ariz 492, 753 P.2d 182 (App. 1988). Courts have not rejected this type of testimony, as the defendant states in page 4 of his motion. Dr. Harrison is a qualified expert in the areas at issue. The State respectfully requests that this Court, like others in this county already have, accept him as a qualified expert for this trial.

B. A *Frye* hearing is not necessary for CSAAS or for CSO.

Arizona courts have rejected the defendant's proposition that a *Frye* hearing is necessary to determine whether CSAAS is a generally accepted theory in the relevant scientific community. "The testimony concerning general characteristics of child sexual abuse victims is not new, novel or experimental scientific evidence and therefore does not require the additional screening provided by *Frye*." *State v. Varela*, 178 Ariz. 319, 873 P.2d 657 (App. 1993). The Court of Appeals has more recently come to the same conclusion in *State v. Curry*, 187 Ariz. 623, 931 P.2d 1133 (App. 1996). The Court stated that the proposition that a *Frye* hearing for CSAAS was necessary was "previously rejected by this court." The court in *Curry* stated that *Varela* was decided correctly and rejected the defendant's position that a *Frye* hearing was required. The defendant is requesting this court to revisit this issue yet again; however the established rule of law is clear.

Arizona courts have also opined that opinions offered by an expert witness concerning CSO is properly admissible testimony. In *State v. Tucker*, the Court of Appeals opined that “an expert may testify about the general characteristics and behavior of sex offenders. ...” *State v. Tucker, supra* at 356, 798 P.2d at 1355. Dr. Harrison has been specifically mentioned in a court opinion that held it his expert testimony in this area was proper. “The record shows that the opinions offered by Dr. Harrison were properly admitted; they were directed to the general characteristics of sex offender. ...” *State v. Lopez*, 170 Ariz. 112, 822 P.2d 465 (App. 1991). Dr. Harrison’s testimony would not be new, novel or experimental, therefore, a *Frye* hearing is not necessary.

C. Arizona follows the *Frye*¹ rule and not the *Daubert* rule.

The defendant requests that this court apply the *Daubert* rule for inquiry into the admissibility of Dr. Harrison's expert testimony. See *Daubert v. Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Arizona, however, has not accepted the *Daubert* rule and Arizona courts have specifically stated that the *Frye* rule is still in place. *Logerquist v. McVey*, 196 Ariz. 470, [insert page and paragraph cite], 1 P.3d 113 (2000); *State v. Johnson*, 186 Ariz. 329, 922 P.2d 294 (1996); *State v. Rodriguez*, 186 Ariz. 240, 921 P.2d 643 (1996); *State v. Bible*, 175 Ariz. 549, 858 P.2d 1152 (1993), *State v. Fields*, 201 Ariz. 321, [insert page and paragraph cite], 35 P.3d 82, 87 (App. 2001).

D. CSAAS and CSO are proper subjects for expert testimony.

Expert testimony is proper “if scientific, technical or other specialized knowledge will assist the trier of fact. . . .” Rule 702, Ariz. R. Evid. Descriptions of the general

¹ *Frye v. United States*, 54 App.D.C. 46, 47, 293 F. 1013, 1014 (1923)

patterns of behavior of child molest victims and sex offenders are proper subjects for expert testimony. The Court of Appeals described the basis for this conclusion as follows:

To summarize then, an expert witness may testify about the general characteristics and behavior of sex offenders and victims if the information imparted is not likely to be within the knowledge of most lay persons. The expert may neither quantify nor express an opinion about the veracity of a particular witness or type of witness. The expert may not explain that, based upon the characteristics and behavior he has described, a person's conduct is consistent or inconsistent with the crime having occurred.

Tucker, 165 Ariz. 340, 798 P.2d 1349. *Tucker* followed the guidelines established by the Arizona Supreme Court in *State v. Lindsey*, 149 Ariz. 472, 720 P.2d 73 (1986), and in *State v. Moran*, 151 Ariz. 378, 728 P.2d 248 (1986). In these decisions, the Court opined that the average juror would not be familiar with this type of information. In *State v. Curry*, 187 Ariz. 623, 931 P.2d 1133, the defendant asked the court to revisit this exact issue, arguing that this type of testimony is within the common knowledge and understanding of jurors. The Court of Appeals rejected this argument, noting that this argument had been "expressly rejected . . . on several occasions." *Curry*, 187 Ariz. at 628, 931 P.2d at 1138. Following the established guidelines of *Lindsey*, *Moran*, *Tucker*, and *Curry*, the general characteristics of child molest victims and sex offenders are proper subjects for expert testimony and Arizona courts have previously accepted expert testimony about those general characteristics as conforming to generally accepted explanatory theory.

E. The probative value of this testimony outweighs any unfair prejudicial effect.

Relevant evidence may be excluded if its "[probative] value is substantially outweighed by the danger of unfair prejudice." Rule 403, Ariz. R. Evid. The defendant here alleges that the introduction of CSAAS testimony is unfairly prejudicial because

“underlying the CSAAS ‘theory’ is the assumption that the victim is telling the truth, and the assumption that the CSAAS is a valid theory.” (Defendant's Motion at 10.) It is not necessary at this time to discuss whether CSAAS is a valid theory, as this was previously addressed in this written response. It is sufficient at this time to point out that CSAAS has been accepted as a valid theory in the Superior Court of this county on many occasions.

The Arizona Supreme Court and the Court of Appeals have previously addressed this exact issue. In *State v. Moran*, 151 Ariz. 378, [insert page and ¶ cite], 728 P.2d 248 (1986), the Arizona Supreme Court stated:

Such [CSAAS] evidence may harm defendant’s interests, but we cannot say it is unfairly prejudicial; it merely informs jurors that commonly held assumptions are not necessarily accurate and allows them to fairly judge credibility.

The testimony that the State wishes to present from Dr. Harrison will not include any statements from him regarding the veracity of the victims in this case. No unfair prejudice results from testimony relating to the general characteristics of victims and offenders. The testimony will merely serve to assist the jurors in fairly judging the credibility of witnesses. The State will not ask Dr. Harrison for his opinion regarding either the victim’s veracity or the defendant’s culpability. The Court of Appeals concluded that as long as the expert is “[careful] to point out the limitations of the CSAAS concept and clearly points out that the CSAAS factors alone do not indicate whether abuse occurred in a particular case,” there is no unfair prejudice. *State v. Curry*, 187 Ariz. at 629, 931 P.2d at 1139. The expert evidence in this case will not be unfairly prejudicial for the foregoing reasons.

F. Expert testimony regarding CSAAS and CSO is not inadmissible hearsay.

The defendant's argument – that the expert testimony in this case is inadmissible hearsay – is without merit and is an issue that has already been decided in the Arizona courts. Dr. Harrison's expertise is not solely based upon his own personal research and experience, but also on the research and writings of others. The CSAAS testimony, for example, will be based upon the research of the individual who developed this theory, Dr. Smith. The defendant argues that since Dr. Smith will not testify and will not be subject to cross-examination, Dr. Harrison's testimony will be hearsay.

The Arizona courts have clearly and definitively rejected this argument. In discussing this argument, the Court of Appeals wrote in *State v. Curry*, 187 Ariz. 623, 931 P.2d 1133 (App. 1996): "Such a conclusion would result in depriving courts and jurors of testimony from almost every expert witness in the country and would, upon the death of each 'original' cause the loss of the benefit of that research." 187 Ariz. at 628, 931 P.2d at 1138. The Arizona Supreme Court has also written that "if expert witnesses could not rely on information gained through their study of scientific literature because of its hearsay nature, then it would be virtually impossible for any expert to evaluate the facts presented in any lawsuit, because early everything a person has learned technically constitutes hearsay." *Reeves v. Markle*, 119 Ariz. 159, 162, 579 P.2d 1382, 1385 (1978). Therefore, there is no merit to the defendant's contention that Dr. Harrison's testimony is inadmissible hearsay.

Conclusion:

Dr. Harrison is a qualified expert. The subjects he will testify about are proper ones for expert testimony because they are outside the experience of jurors and they are in conformity with generally accepted explanatory theory, as accepted by Arizona courts. The evidence is also not unfairly prejudicial and does not constitute inadmissible

hearsay. Therefore, the State's expert testimony on the general behavioral characteristics of child molest victims and sex offenders is admissible.