TO THE HONORABLE JUDGE OF SAID COURT:

This brief is submitted to the Court to determine the admissibility of any state witness's testimony regarding "Child Sexual Abuse Accommodation Syndrome"(CSAAS) or similar behavioral characteristic testimony. The defense requests to voir dire potential state witnesses to examine their qualifications to offer opinion testimony on this subject. Additionally, the defense will challenge the scientific validity and reliability of "CSAAS."

I. Anticipated "CSAAS" Testimony from the State

The State intends to present opinion testimony to prove one can determine a child has been sexually abused if the child demonstrates certain behavioral characteristics. Defendant expects these witnesses to be psychologists, child protective services caseworkers, and/or police officers. Dr. Roland Summit published an article entitled "The Child Sexual Abuse Accommodation Syndrome" (CSAAS) in 1983. Dr. Summit described five characteristics commonly observed in child victims: (1) secrecy, (2) helplessness, (3) entrapment and accommodation, (4) delayed, conflicted, and unconvincing disclosure, and (5) retraction. Summit, "The Child Sexual Abuse Accommodation Syndrome," 7 Child Abuse & Neglect 177 (1983).

Defendant moves to have each witness who would testify to "CSAAS," or any variant thereof, to be examined outside of the presence of the jury as to their competence to testify and offer expert testimony.

II. The Admissibility of Scientific Expert Opinions

The admissibility of expert opinions is governed by case law and Texas Rules of Evidence 702, 703, and 705. The United States Supreme Court issued its landmark decision on expert testimony in *Daubert v. Merrell Dow,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). In *Daubert,* the Supreme Court changed the "*Frye*" general scientific acceptance to a test that expert testimony must be reliable and based on scientific methodology. *Daubert,* 125 L.Ed.2d at 482. The *Daubert* court held that evidence not grounded in methods and procedures of science is no more than subjective belief or unsupported speculation. *Kumho Tire Company v. Carmichael,* 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999). *See also Kelly v. State,* 824 S.W.2d 568 (Tex. Crim. App. 1992), *Jordan v. State,* 928 S.W.2d 550 (Tex. Crim. App.1996); and *Nenno v. State,* 970 S.W.2d 549 (Tex. Crim. App. 1998).

For the State to offer evidence of "CSAAS," it must show the evidence is reliable pursuant to the clear and convincing evidentiary standard. The State must prove the opinion testimony of "CSAAS" is scientifically valid and has been applied properly. "CSAAS" opinion testimony cannot be presented to the jury until after the trial court has ruled on its admissibility. *Jackson v. State,* 17 S.W.3d 664 (Tex. Crim. App. 2000).

Furthermore, the trial court must address both the reliability and relevancy of "CSAAS" evidence outside the presence of the jury. Tex. R. Evid. 401, 702. If the court finds the proposed testimony both relevant and reliable, then it must apply the balancing test of whether the evidence is more prejudicial than probative. Tex. R. Evid 403; *Morales v. State,* 32 S.W.3d 862 (Tex. Crim. App. 2000).

III. Texas Legal Standard for Admissibility of Expert Opinions

The Texas Supreme Court adopted the *Daubert* standard in *E.I. DuPont de Nemours and Co., Inc. v. Robinson,* 923 S.W.2d 549 (Tex. 1996). The *Robinson* court stated the standard of reliability applied to any expert testimony that may be offered. *Gammill v. Jack Williams Chevrolet, Inc.,* 972 S.W.2d 713 (Tex. 1998). A court should exclude the testimony of an expert whose testimony is not reliable. *Robinson, Id.* An expert witness may be qualified and highly credible, but their conclusions may be based on unreliable methodology. Unreliable evidence is of no assistance to the trier of fact and is therefore inadmissible under Rule 702 of the Texas Rules of Evidence. *Gammill, Id.* The Court of Criminal Appeals imposed similar standards on the admissibility of expert testimony. *Nenno v. State,* 970 S.W.2d 549 (Tex. Crim. App. 1998); *Hartman v. State,* 946 S.W.2d 60 (Tex. Crim. App. 1997, *en banc*); *Jordan v. State,* 928 S.W.2d 550 (Tex. Crim. App. 1996); *Kelly v. State,* 824 S.W.2d 568 (Tex. Crim. App. 1992, *en banc*).

To be admissible, expert testimony must "assist" the trier of fact. Tex. R. Evid. 702; *Duckett v. State,* 797 S.W.2d 906, 914 (Tex. Crim. App. 1990). Expert testimony assists the trier of fact when the jury is not qualified to "the best possible degree" to determine intelligently the particular issue without the help of the testimony. *Duckett,* at 914. But, the expert testimony must aid—not supplant—the jury's decision. *Id.* Expert testimony does not assist the jury if it constitutes "a direct opinion on the truthfulness" of a child complainant's allegations. *Yount v. State,* 872 S.W.2d 706 (Tex. Crim. App. 1993).

IV. Texas Legal Standard for Admission of "Soft Science" Expert Opinions

In *Nenno,* the court curtailed the legal requirements established in its "*Kelly*" decision when the "gatekeeper" is asked to evaluate the reliability of "soft science" (psychology/social sciences) as compared to "hard science." The court in *Nenno* stated:

> When addressing fields of study aside from the hard sciences, such as the social sciences or fields that are based primarily upon experience and training as opposed to the scientific method, *Kelly*'s requirement of reliability applies but with less rigor . . . The appropriate questions are: (1) whether the field of expertise is a legitimate one, (2) whether the subject matter of the expert's testimony is within the scope of that field, and (3) whether the expert's testimony properly relies upon and/or utilizes the principles involved in the field . . . [H]ard science methods of validation, such as assessing the potential rate of error or subject in a theory to peer review, may often be inappropriate for testing the reliability of fields of expertise outside the hard sciences. *Nenno v. State,* 970 S.W.2d 549 (Tex. Crim. App. 1998).

V. The Court as "Gatekeeper" for Purported Expert Testimony

The United States Supreme Court held the trial court judge was the "gatekeeper" to determine both scientific reliability and validity of expert testimony. *Daubert, supra.* The Defendant requests this Court to exercise its "*Daubert*" gatekeeper function and determine the competence of any such experts to testify at any proceeding herein. Tex. R. Evid. 702; *Nenno v. State,* 970 S.W.2d 549 (Tex. Crim. App. 1998); *Hartman v. State,* 946 S.W.2d 60 (Tex. Crim. App. 1997, *en banc*); *Jordan v. State,* 928 S.W.2d 550 (Tex. Crim. App. 1996); *Kelly v. State,* 824 S.W.2d 568 (Tex. Crim. App. 1992, *en banc*).

VI. The Questionable Reliability and Validity of "CSAAS" Testimony

For "CSAAS" evidence to be legally admissible, it must be supported by the application of scientific validity and reliability. This legal standard questions whether psychologists, caseworkers, or police officers are competent to provide expert testimony on this issue. A hearing outside the presence of the jury will demonstrate the inherent deficiencies of said witnesses attempting to make a sexual abuse conclusion through observed behavior nexus. Furthermore, any statements attributing sexual abuse to observed symptomatic behavior would be nothing more than the witness's personal opinion. Personal opinion is not a proper substitute for proper scientific methodology.

A major function of science is to test mistaken common-sense notions. An opinion does not attain reliable scientific status simply because its practitioners say it is so, or because they share a common set of beliefs. Rather, the purpose of science is to rigidly test such claims for their accuracy or support. In this case, a witness for the State may claim "CSAAS" principles are broadly accepted in their community. This may be true, but such a proclamation does not establish the "CSAAS" principle has achieved reliable scientific status.

The following points illustrate the conflict within the scientific and legal community concerning the validity of "CSAAS" as a method of determining sexual abuse:

1. "CSAAS" Presumes the Abuse Occurred

"CSAAS" operates from the presumption that sexual abuse occurred and seeks to explain how children commonly react to such abuse. The sole function of "CSAAS" was to start with a known child victim of sexual abuse and then explain the child's behavioral reactions to the abuse. *People v. Peterson,* 537 N.W.2d 857, 873 (Mich. 1995, Cavanaugh, J. dissenting).

2. "CSAAS" Is Non-Falsifiable

The particular symptoms of "CSAAS "are as consistent with false testimony as with true testimony. *People v. Patino,* 32 Cal.Rptr.2d 345, 349 (Cal. App. 1994). "CSAAS," like all psychodynamic theories, "is essentially irrefutable." *State v. Foret,* 628 So.2d 1116 (La. 1993). It is impossible to prove a child is *not* suffering from "CSAAS." The error rate and falsifiability guidelines for "CSAAS" equally risk both false positive and false negative errors. Once an allegation hits a professional who believes in the validity of the "CSAAS" concept, nothing can falsify it. "Expert Testimony on Child Sexual Abuse Accommodation Syndrome: How Proper Screening Should Severely Limit its Admission," Gitlin, C. 26 Quinnipiac L. Rev 497 (2008).

3. Behavioral Patterns and Symptoms of "CSAAS" Are Non-Specific

Alleged behavioral indicators of sexual abuse are found in many different circumstances, including divorce, conflict between parents, economic stress, absent fathers, and almost every stressful situation children experience. The behavioral stages of "CSAAS" are not specific to child victims of sexual abuse. Gitlin, C., in his article stated:

> The same behavioral patterns of "CSAAS" also apply to children who are not victims of sexual abuse. Some victims of sexual abuse exhibit no symptoms whatsoever. "CSAAS" cannot be considered helpful to the trier of fact when it cannot reliably distinguish between abused and non-abused children. Gitlin,C., *Id.* 26 Quinnipiac L.Rev 497 (2008).

Several courts have held the same position as Gitlin. In *Commonwealth v. Dunkle*, 602 A.2d 830, 836 (Pa. 1992) the court found:

> "[I]t is virtually impossible to clinically describe the elements of the child abuse syndrome with any realistic degree of specificity." The principle flaw with "CSAAS" is that there is no evidence indicating that it can discriminate between sexually abused children and those who have experienced other trauma.

The Supreme Court of New Hampshire agreed:

> "[G]enerally speaking, the psychological evaluation of a child suspected of being sexually abused is, at best, an inexact science." *State v. Cressey,* 628 A.2d 696 (N.H. 1993).

Many additional courts have cautioned against the attempt to compile a list of behaviors to serve as an evidentiary indicator of child sexual abuse. *Dunkle, Id, State v. J.Q.,* 252 N.J.Super. 11, 33–35, 599 A.2d 172, 184–85 (1991), aff'd, 130 N.J. 554, 617 A.2d 1196 (N.J. 1993); *State v. Rimmasch,* 775 P.2d 388, 401–02 (Utah 1989). "The consensus among scholars is that there are as yet no scientifically reliable indicators of child sexual abuse." *State v. J.Q.,* 252 N.J.Super. at

33, 599 A.2d at 184.

Finally, no current scientific research has demonstrated any set of behaviors common to sexually abused children which are indicative of abuse. Lawlor, R. J. "The Expert Witness in Child Sexual Abuse Cases: A Clinician's View," in *Expert Witnesses in Child Abuse Cases* (Ceci, S.J. & Hembrooke, H. 1998).

4. The Jury Appeal of "CSAAS"

Despite its questionable legitimacy, "CSAAS" is deeply appealing to jurors. The syndrome is a weapon for prosecutors because it satisfies the jury's need to find a rational explanation for the socially unacceptable behavior exhibited by alleged victims. With an explanation from a trusted State's witness, the jury is reassured the child's poor behavior is merely a manifestation of the actual trauma it expected to see in a victim.

According to "CSAAS" experts, anything and everything is indicative of sexual abuse. It is consistent with "CSAAS" if the child does not report sexual abuse immediately. It is likewise consistent with "CSAAS" if the child has immediately reported abuse. Poor performance in school is explained away by State experts relying on the syndrome as a result of sexual abuse. Excellent performance in school is likewise indicative of the syndrome, as the expert will explain the child invested all their time and attention to school work to avoid the trauma of abuse. "CSAAS" has been described as the "magic bullet" for the prosecution as bad behavior, trouble in school, the failure to tell an accurate story, and even the recantation of the entire allegation of abuse are all indicators the sexual abuse occurred. Every criterion used by the defense to discredit a witness is actually consistent with abuse according to the State.

5. Diagnostic of Abuse

A criticism of "CSAAS" (one subsequently admitted by its author, Dr. Summit) is that the syndrome is not diagnostic. Summit, R. "Abuse of the Child Sexual Abuse Accommodation Syndrome," 1(4) Journal of Child Sexual Abuse, 157 (1992). "CSAAS," per Dr. Summit, was never intended to be used in a manner to diagnose a child as having been sexually abused. "Disclosure of Child Sexual Abuse: What Does the Research Tell Us about the Ways That Children Tell?" London, Bruck, Ceci, Shuman, *Psychology, Public Policy, and Law,* Vol 11, No.1, 194–226 , 196 (2005)); Summit, R. (1992) "Abuse of the Child Sexual Abuse Accommodation Syndrome," *Journal of Child Sexual Abuse,* 1, 153–163.

London and Bruck cited the well-established rule that courts "have uniformly excluded 'CSAAS' evidence that is used to persuade a jury that a child's testimony about sexual abuse is truthful or diagnostic of abuse." London, *Id.* at 197. *State v. Foret,* 628 So.2d 1116 (La. 1993)(since CSAAS did not have peer support, nor could it be tested, nor could it establish a rate of error as a tool for child abuse detection, it could not be used as a diagnostic tool in child abuse cases). *Steward v. Indiana,* 652 N.E.2d 490, 493 (Ind. 1995).

Other social scientists have agreed with London: "[I]t is an error in diagnosis to use non-discriminating signs to make a diagnosis." *Behavioral Indicators,* Ralph C. Underwager and Hollida Wakefield (1995). "CSAAS" is not based on an empirical foundation as it contains no data and seems to be predicated solely on clinical intuition. Dr. Summit provided only clinical findings without any controlled experimental data. Gitlin, infra, 26 Quinnipiac L. Rev 497 (2008). "CSAAS" was not derived through the scientific method (experimentation and observation). "CSAAS: Issues of Admissibility in Criminal Trials," IPT , Vol. 10, 1998, Garrison, A. Expert testimony by psychologists must be consistent with current scientific research. Ornstein, P. & Gordon, B. "The Psychologist as Expert Witness: a Comment," in *Expert Witnesses in Child Abuse Cases* (Ceci, S.J., & Hembrooke, H. 1998).

6. The *Daubert* Criteria Analysis

"CSAAS" is likely to fail the admissibility test if all the *Daubert* factors are properly applied. The Louisiana Supreme Court performed its own evaluation of the known or potential rate of error for "CSAAS." The court found the error rate for "CSAAS" to be too high to be acceptable. *State v. Foret,* 628 So.2d 1116 (La 1993). *See Newkirk v. Commonwealth,* 937 S.W.2d 690, 695 (Ky. 1996). One court held "CSAAS" lacked the scientific validity to explain a child's general reactions to sexual abuse. *Gerstein v. Senkowski,* 426 F.3d 588, 611 (2nd Cir. 2005). In *Dunkle, supra,* the court held "CSAAS" was not derived through the scientific method and was not accepted in the discipline to which it belonged and was thus inadmissible. In *Dunkle,* the court also held: "permitting an expert to testify about an unsupportable behavioral profile and then introducing testimony to show that the witness acted in conformance with such a profile is an erroneous method of obtaining a conviction." 602 A.2d 830 (Pa. 1992).

7. Improper Use of "CSAAS"

Once "CSAAS" testimony is admitted there is a significant danger that jurors will improperly draw the inference the sexual abuse at issue occurred. Gitlin, infra C. 26 Quinnipiac L. Rev 497 (2008). Dr. Summit has acknowledged the intent for "CSAAS" was not to be applied in the liberal manner it has been used in the courts. Summit, R. (1992) "Abuse of the Child Sexual Abuse Accommodation Syndrome." *Journal of Child Sexual Abuse,* 1, 153–163). Dr. Summit further noted how "CSAAS" testimony had been improperly used by prosecutors and experts. His list of improper applications included:

1. An offer of proof that a child had been abused;
2. An assertion that a child was suffering from or displaying "CSAAS";
3. A contention that silence was consistent with "CSAAS"; and
4. A claim that a retracted complaint was more believable than a consistent one.

Summit, R. (1992) "Abuse of the Child Sexual Abuse Accommodation Syndrome." *Journal of Child Sexual Abuse,* 1, 153–163.

8. Insufficient Balance: Prejudice vs. Probative Value

The probative value of "CSAAS" testimony is outweighed by the risk of undue prejudice to the defendant. Gitlin, C. 26 Quinnipiac L. Rev 497 (2008). There is no real difference between a prosecutor's claim that a child's behavior was consistent with sexual abuse and stating the child had been sexually abused.

McGough, L., made the following argument:

> Such testimony is not simply rehabilitating the credibility of the witness—it is presented as a characteristic of a sexually abused child, giving the jury the impression that the child's behavior is not only not inconsistent with, but also typical of, a sexually abused child.

McGough, L. "A Legal Commentary: the Impact of Daubert on 21st-Century Child Sexual Abuse Prosecutions," in *Expert Witnesses in Child Abuse Cases,* 265, 266 (Stephen J. Ceci, & Helene Hembrooke, Eds. 1998).

Indeed, relying on the jury's ability to make the correct legal distinction between the syndrome offered as direct evidence of sexual abuse versus being admitted for a limited purpose is unrealistic at best. The admission of such evidence presents a significant risk of unfair prejudice to a defendant. Gitlin stated: "the admission of theoretical expert evidence which presumes guilt from the very fact of the accusation is contrary to our most fundamental rights." Gitlin, C, infra. 26 Quinnipiac L. Rev 497 (2008).

VII. Texas Caselaw on "CSASA" and Behavioral Characteristic Evidence

A. Authorized Testimony on Behavioral Characteristics

The Court of Criminal Appeals, Clinton, J., held that expert testimony concerning behavioral characteristics typically exhibited by sexual abuse victims and describing behavior observed in complaining witnesses was admissible as substantive evidence. *State v. Cohn,* 849 S.W.2d 817 (Tex. Crim. App. 1993). In Texas, an expert may testify the child exhibited symptoms consistent with sexual abuse. *Fox v. State* (citing *Cohn*), 175 S.W.3d. 475 (Tex. App. —Texarkana 2005); *Edwards v. State,* 107 S.W.3d 107 (Tex. App.—Texarkana 2003, pet. ref'd). Expert testimony that identified certain physical or behavioral manifestations of sexual abuse and related those characteristics to the complainant was admissible even if the complainant had not been impeached. *Yount v. State,* 872 S.W.2d 706, 708–09 (Tex. Crim. App. 1993).

Texas has admitted expert testimony a child exhibited behavioral characteristics that had been ***empirically*** [emphasis added] shown to be common among children who have been abused. *See Perez v. State,* 113 S.W.3d 819 (Tex. App.—Austin 2003, pet. ref'd) (*citing Hitt v. State,* 53 S.W.3d 697, 707 (Tex. App.—Austin 2001, pet. ref'd); *Vasquez v. State,* 975 S.W.2d 415, 417 (Tex. App.—Austin 1998, pet. ref'd); *Yount,* 872 S.W.2d 706, 709, and *Cohn,* 849 S.W.2d 817, 819–21, overruled on other grounds); *Taylor v. State,* 268 S.W.3d 571, 578 (Tex. Crim. App. 2008). Such testimony was not objectionable on the grounds that it bolstered the credibility of the child complainant. *Cohn, Id.*

B. Limitations on Testimony Concerning Behavioral Characteristics

i. The Witness May Not Testify Regarding "Truthfulness"

In Texas, expert testimony is admissible if it assists the jury to intelligently determine an issue but does not decide the issue for the jury. *See Duckett v. State,* 797 S.W.2d 906, 914 (Tex. Crim. App. 1990, disapproved on other grounds), *Cohn v. State,* 849 S.W.2d 817, 819 (Tex. Crim. App. 1993); *Drake v. State,* 123 S.W.3d 596, 606 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd). An expert witness may not testify that a witness is truthful. The Court of Criminal Appeals in *Schutz v. State* explained: "[E]xpert testimony does not assist the jury if it constitutes a direct opinion on the truthfulness of a child complainant's allegations." *Schutz v. State,* 957 S.W.2d 52, 59 (Tex. Crim. App. 1997) (quoting *Yount,* 872 S.W.2d at 708).

The witness may not "cross the line" and testify directly to the victim's truthfulness, as it does not concern a subject matter on which the testimony of an expert witness could assist the trier of fact. *Yount v. State,* 872 S.W.2d 706, 709 (Tex. Crim. App. 1993). In *Flores,* expert testimony that "consistency was the most important indicator of credibility and that complainant's statements were consistent" impermissibly decided an ultimate question of fact. *Flores. v. State,* 513 S.W.3d 146 (Tex. App.—Houston [14th Dist.] 2016, pdr ref'd.). The *Flores* court found testimony regarding the factors for truthfulness observed by the experts directly commented on the truthfulness of the child. Therefore, the court held the testimony did not assist the jury and was inadmissible. Similarly, expert testimony admitting statistical opinion on false allegations was error. *Wiseman v. State,* 394 S.W.3d 582 (Tex. App.—Dallas 2012). In *Wiseman,* the court noted the State offered no independent evidence of the offense, and the case was entirely based upon the credibility of the complainant and her outcry witnesses. *Wiseman, Id.*

ii. The Witness Must Be Qualified to Offer Behavioral Characteristic Testimony

In *Perez v. State,* 25 S.W.3d 830 (Tex. App.—Houston [1st Dist.] 2000), the Court of Appeals found the trial court abused its discretion by allowing a child advocacy center director to testify concerning the "child abuse accommodation syndrome" theory propounded by Dr. Roland Summit. The witness had substantial experience in the field of child sexual abuse investigation but was not an expert in the field of psychology, psychiatry, medicine, or science.

The court additionally found the record weak regarding the acceptance of Dr. Summit's writings in the relevant scientific community and the existence of literature supporting Dr. Summit's findings. *Perez v. State, Id.* The witness in *Perez* testified she understood the "scientific method" only "to a degree." She had never written an article about the "Child Abuse Accommodation Syndrome," nor did she possess similar qualifications necessary to testify as an expert. The court held the testimony significantly strengthened the State's case by giving it the apparent endorsement by an expert child psychiatrist, Dr. Summit. The conviction was reversed. *Perez, Id.*