In the United States District Court for the District of Maryland

United States	:	
	:	
	:	
v.	:	**Case No. 24-cr-152-DLB**
	:	
John Richard Ferguson,	:	
	:	
Defendant	:	

Motion to Exclude Proposed Expert Testimony of Margaret Sweeney

John Richard Ferguson, by and through undersigned counsel, files this motion to exclude the proposed expert testimony of Margert Sweeney pursuant to Federal Rules of Evidence 402, 403, 702, *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 589 (1993) and as an improper invasion of the province of the jury.

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INTRODUCTION

This is a "he said/she said" sexual assault case. [redacted]

Recognizing that [redacted] suffers from credibility problems, the Government has retained Margaret Sweeney, a forensic child abuse investigator, as an expert to bolster the complainant's testimony. According to the Government, Ms. Sweeney will testify about the common behaviors exhibited by sexual assault victims. Presumably, Ms. Sweeney's testimony will be used to sweep under the rug any credibility problems raised by the defense on cross-examination of [redacted]

Ms. Sweeney's testimony is inadmissible. Her proposed line of testimony about the common responses of sexual abuse victims is commonly referred to as "Child Sexual Abuse Accommodation Syndrome" or "CSAAS" testimony. Created in 1983 by Dr. Ronald Summit, CSAAS describes supposedly common behaviors exhibited by child sexual assault victims, for example, their tendency to recant. But "CSAAS" was not created to be used in the criminal trial setting; rather it was designed solely as a tool for professionals, like psychologists, treating purported victims of sexual abuse. Unfortunately, CSAAS testimony has been weaponized by prosecutors for an entirely different purpose for which it is not suited: to prove that sexual abuse did happen and rehabilitate a complainant's credibility.

Those courts that have closely examined CSAAS (and opinions drawing from it) have concluded that it is not admissible in a criminal trial. This is true for several reasons, and this

Court should follow suit.

Rule 702(c) – Reliable Method: As a threshold matter, CSAAS testimony (and Ms. Sweeney's testimony, which is obviously derived from it) fails *Daubert* and the Federal Rule of Evidence 702(c) requirement that an expert's opinion be based on reliable principles and methodology. Ms. Sweeney will describe "common victim dynamics," "responses," and "behaviors." Exhibit 2, Sweeney Disclosure. But, as explained below, no one has done empirical scientific testing to verify that the behaviors Ms. Sweeney claims are indicative of sexual assault *are* actually correlated to victimization. To the contrary, available evidence indicates that the behaviors that Ms. Sweeney will opine about are equally present in non-abused children, especially children who [redacted] have emotional problems stemming from unrelated issues. In other words, the behaviors that Ms. Sweeney will describe do not actually distinguish sexually assaulted children from non-assaulted children. Indeed, studies show that Ms. Sweeney's proposed opinions could have an error rate as high as 97%. Unsurprisingly then, the reliability and validity of CSAAS is hotly debated and has no general acceptance in the scientific community. Because of this reality, jurisdictions around the country have concluded that testimony similar to that proffered by Ms. Sweeney is not admissible.

Rule 702(d) – Reliable Application: Even if CSAAS testimony was generally reliable, the Court should still exclude Ms. Sweeney's proposed testimony under Rule 702(d) because it cannot be reliably applied to the facts of *this* case. For several reasons, CSAAS—and the purported behaviors associated with that syndrome that Ms. Sweeney will testify about—cannot apply in the particular context of this case. For one, the CSAAS behaviors were derived from observations of a very particular type of victim: where there was a close relationship between the victim and

abuser, and the abuse repeatedly occurred over an extended period. [redacted]. Additionally, CSAAS cannot reliably distinguish between children who have been sexually assaulted and children who have other emotional trauma. [redacted] Ms. Sweeney's opinions about what constitutes "common" behavior of sexual assault victims has no applicability to [redacted]

Rule 702(a) – Helpfulness: In addition to being unreliable, Ms. Sweeney's testimony should be excluded under Rule 702 as unhelpful. Numerous courts have held that testimony like Ms. Sweeney's is not helpful to the jury. Among other things, the purported behaviors of sexual abuse victims are so vague, broad, and contradictory that they can describe nearly any child—and thus offer no insight into the alleged victim's credibility. What's more, the jury is the ultimate arbiter of credibility, and testimony offered to bolster a witness's credibility is not helpful.

Rule 702 – Qualifications: Ms. Sweeney is not qualified. She will testify about purportedly common behaviors displayed by child sexual assault victims, but she is not a psychiatrist, psychologist, or physician. Rather, she is an investigator. She has done no studies or her analysis herself, but rather appears to solely be parroting Dr. Summit's debunked "CSAAS" theories.

Rules 402 and 403 – Relevance and Prejudice: Ms. Sweeney's testimony is further inadmissible because it is not relevant and any relevance is vastly outweighed by the risk of unfair prejudice. Many courts have recognized that CSAAS-like testimony has "questionable probative value," in large part because it does not actually reliably discern sexual assault victims from non-

victims. *State v. Foret*, 628 So.2d 1116, 1129 (La. 1993). At the same time, allowing Ms. Sweeney's testimony would unfairly prejudice Mr. Ferguson because there is a strong risk the jury would use it for an improper purpose (to assume that sexual abuse occurred) and because of the risk the jury will wrongly abdicate its duty to evaluate credibility to an expert like Ms. Sweeney.

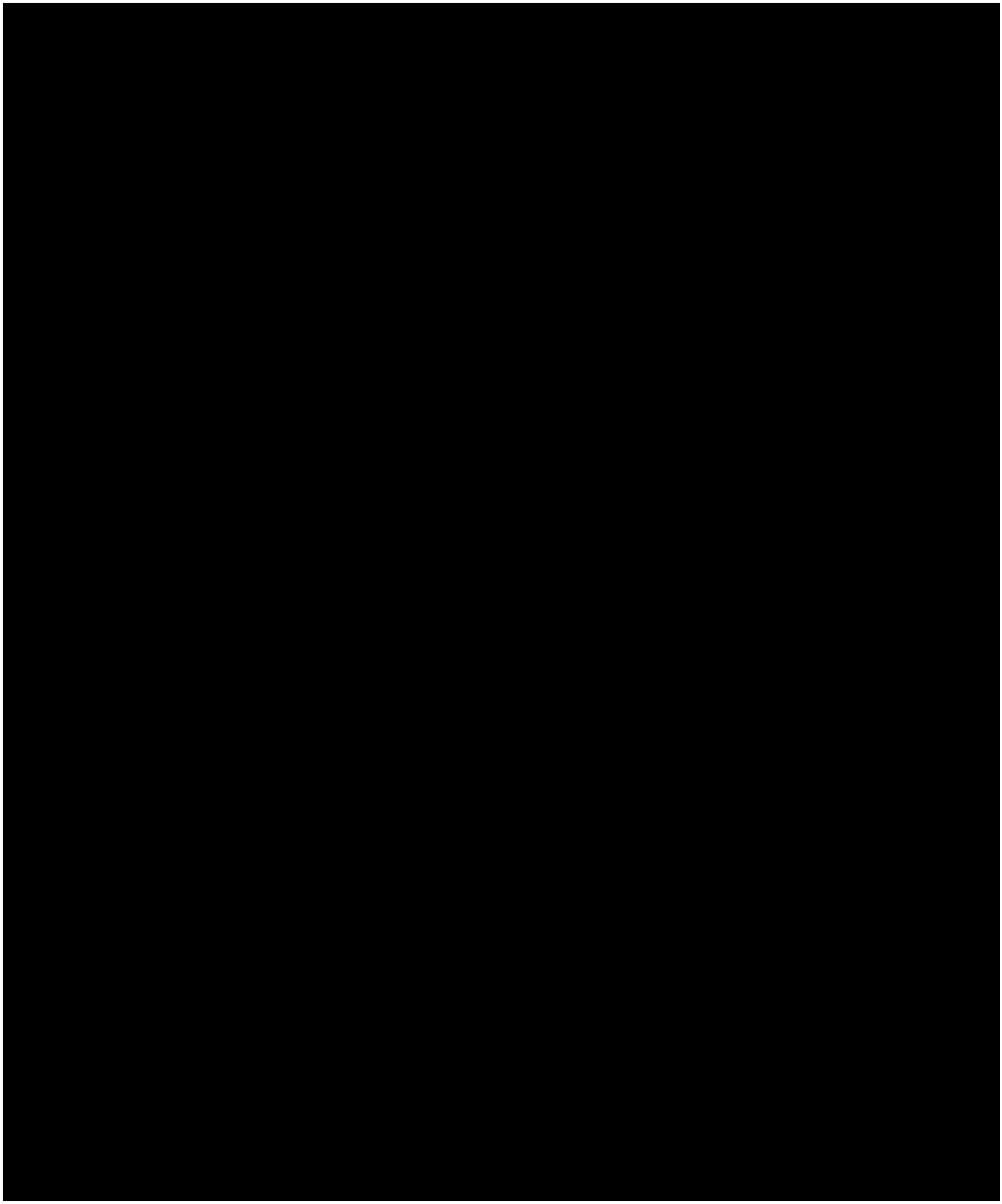
Improper Vouching: Finally, Ms. Sweeney's testimony is inadmissible because it amounts to unlawful vouching of a witness. Testimony that invades the province of the jury is inadmissible. It is the jury's duty, not an expert's job, to decide credibility questions. Ms. Sweeney's testimony is being introduced to, effectively, dictate to the jury that they should find [redacted] credible and, therefore, find Mr. Ferguson guilty. Purportedly "scientific" evidence about whether a witness is being truthful or how the jury should vote is never admissible.

For all of these reasons, this Court should exclude Ms. Sweeney's testimony at trial. At a minimum, the Court should hold a *Daubert* hearing.

BACKGROUND

A. Allegations

[redacted]



[redacted]

B. Ms. Sweeney's Proposed Testimony Appears Based on "CSAAS."

According to the Government's Rule 16 disclosure, they intend to call Margaret Sweeney to provide an expert opinion at trial. Exhibit 2. Ms. Sweeney is a licensed social worker and forensic child interview specialist with the Federal Bureau of Investigation. Exhibit 3, Sweeney CV. She is not a psychologist, psychiatrist, or physician. *Id.* The Government wishes to call Ms. Sweeney as an expert in "Common Victim Dynamics" in sexual assault crimes. Exhibit 2 at 1-2. According to the Government, Ms. Sweeney proposes to "explain the ways that victims who have been sexually abused, assaulted, and exploited tend to react and cope during and after these experiences." *Id.* at 2.

Ms. Sweeney's testimony appears to be based on, or derived from, "CSAAS." That acronym stands for "Child Sexual Abuse Accommodation Syndrome." *State v. J.L.G.*, 190 A.3d 442, 445-46 (2018). The concept finds its origins in a 1983 article by Dr. Ronald Summit. *Id.* at 451 (citing Roland C. Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 Child Abuse & Neglect 177 (1983)). In that article, Dr. Summit purported to describe "'the most frequently

[redacted]

observed' behaviors of child sexual abuse victims." *Id.* at 457 (quoting Summit, *supra*, at 180). "[S]uccinctly stated, child sexual abuse syndrome refers to that group of signs and symptoms thought to be part of the post-incident experience of child victims of sexual abuse." *State v. Schimpf*, 782 S.W.2d 186, 190 (Tenn. Ct. App. 1999), *superseded by statute on other grounds as recognized in State v. Collier*, 411 S.W.3d 886 (Tenn. 2013). In particular, Dr. Summit identified categories of behavior that he claimed were frequently seen in child sexual abuse victims, including: (1) secrecy; (2) helplessness (*i.e.*, child victims typically submit to abuse rather than fighting back); (3) entrapment or accommodation (children are resilient and adapt to abuse); (4) delayed, conflicting, or unconvincing disclosures; and (5) retraction (*i.e.*, recantation of allegations). *J.L.G.*, 190 A.3d at 445-46, 451-52; *Foret*, 628 So.2d at 1124.

Although labeled a "syndrome," CSAAS is not actually a syndrome, diagnosis, or scientific test. *J.L.G.*, 190 A.3d at 457; *Foret*, 628 So.2d at 1124. Dr. Summit "conducted no research on CSAAS, and there was no scientific substantiation of it by others." Exhibit 1, Expert Opinion of Dr. Charles Brainerd, at 5. The five categories of "symptoms" were not based on any empirical evidence or data. *J.L.G.*, 190 A.3d at 458. Rather, Dr. Summit created the CSAAS profile entirely based on his own personal observations. *Id.* at 464. In creating the CSAAS profile, Dr. Summit may have assumed that all individuals that he treated were telling the truth about being sexually assaulted. *Newkirk v. Commonwealth*, 937 S.W.2d 690, 694 (Ky. 1996). He also created the syndrome based on a very particular type of abuse: where there was "a close relationship between the victim and the abuser," and the abuse occurred "over an extended period" of time. Cara Gitlin, *Expert Testimony on Sexual Abuse Accommodation Syndrome: How Proper Screening Should Severely Limit Its Admission*, 26 Quinnipiac L. Rev. 497, 515 (2008). Dr. Summit's goal in

creating CSAAS was not to ascertain whether a victim was actually abused, but rather to come up with a "common language" and "therapeutic aid" to help professionals assessing and treating potential child sex abuse victims. *Foret*, 628 So.2d at 1124; *In re Sara M.*, 239 Cal. Rptr. 605, 611 (Cal. Ct. App. 1987). Prosecutors, however, seized on to "CSAAS" testimony and have sought to introduce it at criminal trials to show that abuse did occur or to shore up credibility problems with their alleged victims. *Foret*, 628 So.2d at 1124.

This appears to be one of those cases. Although the Government's Rule 16 disclosure never uses the term "CSAAS," that is, in effect, what Ms. Sweeney proposes to testify about. The overlap between "CSAAS" and Ms. Sweeney's proposed opinions are remarkable. As just a few examples:

- Common Behaviors: CSAAS identifies "behavior that [is] reportedly common in victims." *J.L.G.*, 190 A.3d at 445-46; *see also id.* at 451 (noting that CSAAS purports to be "a common denominator of the most frequently observed behaviors of child sexual abuse victims" (cleaned up)). The Government puts forward Ms. Sweeney as an expert in "Common Victim Dynamics" in sexual assault crimes, including various "behaviors" and "common response[s]" such victims may show. Exhibit 2 at 1-4.
- Delayed Disclosure: Ms. Sweeney proposes to testify about how individuals who have experienced sexual abuse disclose the abuse, including that they may "not disclose right away (delayed disclosure)." Exhibit 2 at 3. Delayed disclosure "is regarded as one of the elements of CSAAS." *Newkirk*, 937 S.W.2d at 692.
- Recantation/Retraction: Ms. Sweeney also proposes to testify that "recantation of the allegation of abuse is not uncommon." Exhibit 2 at 3. Again, recantation is a major tenet of CSAAS. *J.L.G.*, 190 A.3d at 460 ("Dr. Summit believed that recantation is the

norm[.]") (quoting Summit, *supra*, at 188).

- Helplessness: Ms. Sweeney proposes to testify that "[m]any victims experience a sense of helplessness regarding the abuse or assault." Exhibit 2 at 3. Helplessness is one of the main components of Dr. Summit's "CSAAS." *J.L.G.*, 190 A.3d at 459.
- Accommodation: Ms. Sweeney proposes to testify that "[m]any victims . . . show accommodation behaviors." Exhibit 2 at 3. Again, accommodation is one of the core tenets of CSAAS. *J.L.G.*, 190 A.3d at 459 ("Accommodation refers to the coping mechanism by which a child adjusts to sexual abuse. Dr. Summit wrote that victims can accommodate abuse . . . .").
- Resistance: According to Ms. Sweeney, "one common response" of child sexual abuse victims "can be a lack of physical or verbal resistance." Exhibit 2 at 3. Dr. Summit similarly incorporated that idea into CSAAS, writing that "the child victim is expected to forcibly resist, to cry for help and to attempt to escape," but that, in actuality, they will likely "submit quietly" to the abuse. *J.L.G.*, 190 A.3d at 452 (quoting Summit, *supra*, at 183).
- Positions of Authority/Trust: Dr. Summit's research focused on abuse by an "'overpowering adult'" who 'is in a trusted and apparently loving position.'" *Id.* (quoting Summit, *supra*, at 182-83); *see also* Gitlin, 26 Quinnipiac L. Rev. at 500. The Government proffers that Ms. Sweeney will testify about victim responses when "the offender is an authority figure" and when the abuse is "by a known offender/someone in a position of authority." Exhibit 2 at 3-4.

In short: "Although this terminology is not specifically acknowledged in the government's expert

disclosure, the topics Ms. Sweeney proposes to testify about are straight out of CSAAS." Exhibit 1 at 4.

ARGUMENT

CSAAS—and testimony obviously derived from CSAAS like Ms. Sweeney's proposed testimony—is incredibly controversial, particularly in the legal setting. CSAAS is a "type of evidence [that] is of highly questionable scientific validity." *Foret*, 628 So.2d at 1127; *see also* Gitlin, 26 Quinnipiac L. Rev. at 498 ("CSAAS is of questionable scientific validity."). "[E]ven a minimal amount of investigation into the purported 'Child Sexual Abuse Accommodation Syndrome' . . . reveal[s] that it lack[s] any scientific validity for the purpose for which the prosecution utilize[s] it: as a generalized explanation of children's reactions to sexual abuse[.]" *Gersten v. Senkowski*, 426 F.3d 588, 611 (2d Cir. 2006). As a result, numerous jurisdictions prohibit prosecutors from using CSAAS for precisely the purpose the Government proffers to do so here: to purportedly explain away credibility problems with their child witness and/or to prove that sexual abuse occurred. *E.g.*, *J.L.G.*, 190 A.3d 442; *King v. Commonwealth*, 472 S.W.3d 523 (Ky. 2015); *Commonwealth v. Balodis*, 747 A.2d 341 (Pa. 2000); *Hadden v. State*, 690 So.2d 573 (Fla. 1997); *Foret*, 628 So.2d 1116; *State v. Rimmasch*, 775 P.2d 388 (Utah 1989); *Sara M.*, 239 Cal. Rptr. 605. Mr. Ferguson requests that this Court join these jurisdictions and hold, in this case, that Ms. Sweeney's testimony is inadmissible as unreliable, unhelpful, irrelevant, prejudicial, and an improper invasion of the jury's province.

I. The Court should exclude Ms. Sweeney's testimony under Rule 702.

Ms. Sweeney's proposed testimony fails virtually every prong of Federal Rule of Evidence 702. That rule "appoints trial judges as 'gatekeepers of expert testimony' to protect the judicial

process from 'the potential pitfalls of junk science.'" *Sardis v. Overhead Door Corp.*, 10 F.4th 268, 275 (4th Cir. 2021) (quoting *United States v. Bonner*, 648 F.3d 209, 215 (4th Cir. 2011)). As explained below, CSAAS testimony about the supposed behaviors of sexually abused children is "'an exemplar of junk science' that 'should not be used in any way in any context (particularly in legal settings, where impactful decisions are being made).'" *J.L.G.*, 190 A.3d at 458 (quoting William O'Donohue & Lorraine Benuto, *Problems with Child Sexual Abuse Accommodation Syndrome*, 9 Sci. Rev. Mental Health Prac. 20, 22-27 (2012)). Although she does not use the word "CSAAS" specifically, Ms. Sweeney's proffered opinion is CSAAS-based testimony. It should thus be excluded under Rule 702 because (1) it does not satisfy the *Daubert* test of reliability; (2) Ms. Sweeney's testimony cannot be reliably applied to the facts of this case; (3) Ms. Sweeney is not qualified to provide this testimony; and (4) Ms. Sweeney's testimony would not be helpful.

A. Ms. Sweeney's proposed testimony is not the product of reliable principles or methods.

Federal Rule of Evidence 702 governs the admissibility of expert testimony. Under that Rule, expert testimony is admissible "if that testimony is (1) helpful to the jury in understanding the evidence or determining a fact at issue, (2) 'based on sufficient facts or data,' (3) 'the product of reliable principles and methods,' and (4) the product of a 'reliabl[e] appli[cation] of th[ose] principles and methods to the facts of the case.'" *Sardis*, 10 F.4th at 281 (alterations in original) (quoting Fed. R. Evid. 702).

A core focus of Rule 702 is reliability. "[U]nder the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 589 (1993). A judge plays an "indispensable" "gatekeeping" role in ensuring that the jury hears only expert testimony based on *reliable*

methodology. *Sardis*, 10 F.4th at 284; *see also Nease v. Ford Motor Co.*, 848 F.3d 219, 230 (4th Cir. 2017) ("Rule 702 imposes a special gatekeeping obligation on the trial judge to ensure that an opinion offered by an expert is reliable.").

The United States Supreme Court's decision in *Daubert* provides the framework for ascertaining whether a proffered expert opinion meets the standards of reliability. Under *Daubert*, this Court must "examin[e] whether the reasoning or methodology underlying the expert's proffered opinion is reliable—that is, whether it is supported by adequate validation to render it trustworthy." *Bourne v. E.I. DuPont de Nemours & Co.*, 85 F. App'x 964, 966 (4th Cir. 2004).

Daubert provides four "guideposts" to aid in this analysis:

- Whether the expert's theory or technique can be or has been tested;
- Whether the theory or technique has been subject to peer review and publication;
- The known or potential error rate in the expert's theory/technique;
- Whether the methodology is generally accepted in the field of expertise.

Sardis, 10 F.4th at 281; *see also Daubert*, 509 U.S. at 593-94. This list is not exhaustive, and the Court can consider any factor that bears on reliability. *Sardis*, 10 F.4th at 281.

The proponent of the proposed evidence—*i.e.*, the Government here—bears the burden of proving that the prerequisites of Rule 702 are met. *Higginbotham v. KCS Int'l*, 85 F. App'x 911, 915 (4th Cir. 2004) (citing *Daubert*, 509 U.S. at 592 n.10).

As explained below, the Government cannot meet its burden with respect to Ms. Sweeney's testimony. Testimony about how child victims of sexual assault purportedly behave "fails to unequivocally pass the *Daubert* threshold test of scientific reliability." *Foret*, 628 So.2d at 1127. Ms. Sweeney's opinion (1) is based on personal assumptions, not reliable or scientific methods;

(2) has not been tested; (3) has not been adequately peer reviewed; (4) has no known error rate (but any error rate is likely unacceptably high); (5) is not generally accepted in the scientific community; and (6) provides a definition of "normal" child sexual abuse victim behaviors that is vague, unacceptably broad, and internally inconsistent. It is not surprising, then, that many courts have excluded testimony similar to that what the Government proffers here.

1. CSAAS-based testimony is based on personal observations, not reliable scientific or technological methods.

Under *Daubert*, an expert's testimony must have "a valid scientific connection to the pertinent inquiry." *Belville v. Ford Motor Co.*, 919 F.3d 224, 232 (4th Cir. 2019) (quoting *Daubert*, 509 U.S. at 592). Their testimony "must be based on scientific, technical, or other specialized knowledge and not on belief or speculation, and inferences must be derived using scientific or other valid methods." *Id.* (citations omitted). The problem with CSAAS testimony, and general descriptions of purported victim behavior, is that it is just based on "belief or speculation," rather than actual science. *Id.*

The tenets of CSAAS were not derived from scientific study, but rather just from Dr. Summit's personal observations. "CSAAS is a clinical opinion, not a scientific instrument." *J.L.G.*, 190 A.3d at 453 (citation omitted). As Dr. Summit, the creator of CSAAS, admitted, "CSAAS is 'not a laboratory hypothesis' or 'study of a defined population.'" *J.L.G.*, 190 A.3d at 453 (quoting Summit, *supra*, at 156). Rather, it is just based on Dr. Summit's own clinical or consulting experience. *Id.*; *see also id.* at 458 ("[I]t is important to note that CSAAS stems from observations made in clinical practice -- not systematic scientific study."); *Foret*, 628 So.2d at 1125 ("CSAAS is, itself, based upon a summary of diverse clinical consulting experience, making it a clinical opinion, not a scientific instrument." (cleaned up)). As Dr. Brainerd's opinion

summarizes, CSAAS is "based on an unreliable form of professional inference, which is known as behavioral symptomology," rather than "scientific substantiation." Exhibit 1 at 5.

CSAAS-based testimony is unreliable not only because the theory itself is based on beliefs and observations rather than the scientific method, but also because it is premised on an untenable assumption: that all individuals who report being sexually abused as a child are telling the truth. Expert testimony is not admissible where the expert's purported methodology "rest[s] upon 'assumptions,' not science. *Higginbotham*, 85 F. App'x at 915. CSAAS-experts tend to operate on the assumption "that all accusations of child sex abuse are true." *Newkirk*, 937 S.W.2d at 694. That makes sense in the (non-scientific) context from which CSAAS was derived: CSAAS was not created as a scientific tool to analyze whether abuse actually occurred, but as a "common language" or "therapeutic aid" to help professionals assessing and treating potential child sex abuse victims. *Foret*, 628 So.2d at 1124; *Sara M.*, 239 Cal. Rptr. at 611. It is fine, and makes sense, for those professionals to assume that their clients are telling the truth about their sexual abuse when seeking treatment. *Newkirk*, 937 S.W.2d at 694. But that assumption cannot translate to the criminal justice realm, where the precise question is *whether* the accusations are true. *Id.* A methodology that assumes the victim's statements are true, and then bolsters her testimony by saying her behavior is consistent with the assumed sexual abuse, is not a reliable science, but rather a speculative, biased, personal belief that assumes the answer. *See id.*; *see also United States v. Scop*, 846 F.2d 135, 142 (2d Cir. 1988) (noting a "fatal" problem with an expert's opinion testimony was that his "opinions were based on his positive assessment of the trustworthiness and accuracy of the testimony of the government's witnesses").

Ms. Sweeney's expert disclosure reflects a lack of scientific rigor in her approach. She is

not a psychologist, psychiatrist, doctor, or researcher. Exhibit 3. She does not have a PhD in any relevant field. She does not purport to have conducted any scientific studies herself or read any literature verifying the scientific validity of her testimony. Additionally, her entire career has focused on *investigation*, rather than treating or analyzing sexual assault victims. Ms. Sweeney is a "LSW" (licensed social worker), not a "LSW-C," meaning that Ms. Sweeney can only do clinical work if supervised by another licensed clinical social worker. Additionally, she has been an investigator her entire career, with all her jobs being in law or law-adjacent roles, like investigating allegations of child abuse as a caseworker for Montgomery County. She admits that her opinion will be based on "working with and interviewing adolescent and child victims of sexual abuse and assault"—*i.e.*, personal observation and belief in a forensic/law enforcement setting—rather than based on academically rigorous analysis, study, or testing. Exhibit 2 at 2.

2. Ms. Sweeney's opinion has not been tested and, if it had been tested, the results would almost certainly show unreliability.

In analyzing whether a proposed expert opinion is reliable, *Daubert* asks the Court to look at "whether it can be (and has been) tested." *Belville*, 919 F.3d at 233 (citations omitted). "This factor concerns whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot be reasonably assessed for reliability." *United States v. Graham*, No. 4:23-cr-00006, 2024 WL 688256, at *6 (W.D. Va. Feb. 20, 2024) (cleaned up). Ms. Sweeney's proposed testimony fails under this factor: it is a subjective, conclusory approach that has not been tested for reliability.

Given that it is not based on any actual scientific inquiry, it is not surprising that CSAAS, and its purported observations about the typical behavior of child victims of sexual abuse, has not actually been tested. *See J.L.G.*, 190 A.3d at 458 ("[I]t does not appear that CSAAS's five-

category theory has been tested and empirically validated as a whole."); *Newkirk*, 937 S.W.2d at 695 ("The experts who testified in favor of admitting the [CSAAS] rebuttal testimony made no pretense of saying whether the scientific principle at issue is subject to testing for falsifiability or refutability[.]"). To be reliable, Ms. Sweeney or the Government would need to provide proof that CSAAS/Ms. Sweeney's list of proffered behaviors "would enable one to accurately identify victims of sexual abuse[.]" *Blount v. Commonwealth*, 392 S.W.3d 393, 397 (Ky. 2013). In other words, CSAAS would only be reliable if there had been testing to show that the behaviors that make up that "syndrome" reliably differentiate between abused children and non-abused children. Yet, as the Kentucky Supreme Court lamented, "[w]e have been shown no academic or scientific studies, or any other evidence, to indicate that the concept of CSAAS has attained th[is] kind of validity." *Id.*; *see also Foret*, 628 So.2d at 1125 ("The CSAAS acknowledges that there is no clinical method available to distinguish 'valid' claims from those that should be treated as fantasy or deception, and it gives no guidelines for discrimination." (citation omitted); *Sara M.*, 239 Cal. Rptr. at 608 (noting that proposed expert in victim behavior was "unaware of any studies used to develop this syndrome that compared the reactions of molested and nonmolested children"). In short, Ms. Sweeney's testimony fails this prong because her observations and CSAAS "ha[ve] not been scientifically tested." *J.L.G.*, 190 A.3d at 458; *see also Perez v. State*, 25 S.W.3d 830, 837 (Tex. App. 200) (citing evidence "that Dr. Summit's findings had never been subjected to customary scientific examination").

The available evidence suggests that, if it were or could actually be tested, CSAAS would be quite unreliable. Again, the aim of this testing inquiry is to evaluate whether the purported behaviors that Ms. Sweeney (and Dr. Summit) identify as "common" among child sex abuse

victims reliably distinguish abused children from non-abused children. But CSAAS is notoriously bad at making that distinction. All five behaviors that define CSAAS "can also be found in non-abused children"—in fact, those behaviors are "potentially equally prevalent" among non-abused children. *J.L.G.*, 190 A.3d at 457; *see also Newkirk*, 937 S.W.2d at 693 ("[C]hildren who have not been sexually abused often exhibit one or more symptoms of the CSAAS."). The flip side is also true: abused children may not display the behaviors supposedly consistent with abuse. *J.L.G.*, 190 A.3d at 458 (quoting expert who said "there's empirical support that some children show some of [the CSAAS] symptoms some of the time, but that's about it" (alteration in original)); *see also* Gitlin, 26 Quinnipiac L. Rev. at 498 ("[S]ome victims of sexual abuse exhibit no [CSAAS] symptoms whatsoever.").

The concern about CSAAS being unable to reliably distinguish between abused and non-abused children is particularly acute in this case given the complainant's background. The behaviors that Ms. Sweeney would testify are normal for children who have suffered sexual abuse "also describe persons suffering from a wide range of emotional problems unrelated to sexual abuse." *Rimmasch*, 775 P.2d at 401; *see also J.L.G.*, 190 A.3d at 457 (noting that the "core characteristics [of CSAAS] are potentially equally prevalent among . . . children who have suffered other types of trauma"); *Foret*, 628 So.2d at 1127 (noting that CSAAS has been criticized because of "the fact that behavior often attributed to abuse is sometimes the result of other emotional problems that do not stem from abuse"). [redacted]

[redacted]—providing further proof that Ms. Sweeney's opinion has no reliable basis.

3. Ms. Sweeney's opinion has been subjected to limited peer review.

The Court should also look to "whether the theory or technique has been subjected to peer review and publication." *Belville*, 919 F.3d at 233. Although publication and peer review "does not necessarily correlate with reliability, . . . submission to the scrutiny of the scientific community is a component of 'good science,' in part because it increases the likelihood that substantive flaws in methodology will be detected." *Daubert*, 509 U.S. at 593.

This factor also undermines the reliability of Ms. Sweeney's proposed testimony. Ms. Sweeney does not purport to have herself written any peer-reviewed articles about typical behaviors of sexual abuse victims; in fact, her CV reports zero publications from her at all. *See* Exhibit 2; Exhibit 3.

What's more, CSAAS generally has limited peer review. "When Dr. Summit's article [describing CSAAS behaviors] first appeared, . . . it was not subject to peer review." *J.L.G.*, 190 A.3d at 458. In fact, it "was originally rejected from a peer-reviewed journal." Demothenes Lorandos, Litigator's Handbook of Forensic Medicine, Psychiatry and Psychology, 3 Litig Hnbk Forensic Med Psy § 25:5 (Dec. 2024 update). Later, it was "published in a special issue by invitation of Kee McFarlane[,] who was the interviewer in the *McMartin* case, one of the since discredited ritual abuse cases[.]" *Id.* Additionally, CSAAS "is not recognized in the Diagnostic and Statistical Manual of Mental Disorders and has not been accepted by the American Psychiatric Association, the American Psychological Association, or the American Psychological Society." *J.L.G.*, 190 A.3d at 458. In short, any claims that CSAAS has been peer reviewed should be

viewed skeptically.

4. The error rate of Ms. Sweeney's purported opinion is unknown, but probably quite high.

In analyzing the reliability of Ms. Sweeney's proposed testimony, the Court should consider "the known or potential rate of error" inherent in the expert's theory or technique. *Sardis*, 10 F.4th at 281 (citations omitted). The error rate looks to whether a particular theory produces false positives or false negatives. *See* Sophia Gatowski et al., *Asking the Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a Post-Daubert World*, 25 L. & Hum. Behav. 433, 445 (2001). So, as applied here, the error rate would look at how often the "symptoms" or behaviors that CSAAS identifies, or Ms. Sweeney purports to testify about, apply to children who were not sexually abused ("false positives"), and how often they fail to apply to children who were in fact sexually abused ("false negatives"). When testimony would be a "critical factor in determining guilt or innocence," the Court "must tolerate only a very small rate of error." *United States v. Adams*, 444 F. Supp. 3d 1248, 1264 (D. Or. 2020). "Even an error rate of five percent, which would be low in many contexts, would be unacceptably high where it drives a guilty verdict because it would mean that one in twenty convictions could be wrong." *Id.*

As applied here, there does not appear to be a definitive known error rate for CSAAS-like testimony, but the available studies suggest that any error rate would be unacceptably high.

"[T]he CSAAS has no known error rate." Lorandos, *supra*, 3 Litig Hnbk Forensic Med Psy § 25:5; *see also Newkirk*, 937 S.W.2d at 695 ("The experts who testified in favor of admitting [CSAAS] testimony . . . certainly did not pretend to know the potential error rate."). Some studies have attempted to ascertain the error rate (*i.e.*, how often application of CSAAS wrongly identifies whether an individual has been abused), and the error rates are frighteningly high. One "peer

reviewed study suggested that the error rate could be as high as 97%." Lorandos, *supra*, 3 Litig Hnbk Forensic Med Psy § 25:5. The Louisiana Supreme Court rejected the admissibility of CSAAS testimony under *Daubert* because "[o]ne of the few sources for validation of expert determinations of the existence of child sexual abuse" concluded that "[t]he factors relied upon by clinicians in their determinations were prevalent in 68% of the cases." *Foret*, 628 So.2d at 1125-26. The Court explained that it was not "comfortable" "with a 32% margin of error" in a criminal trial. *Id.* at 1126.

Overall, "[CSAAS] evidence is not compatible with both the error rate and falsifiability guidelines, based on the risks of both false positive and false negative errors with syndrome evidence in general and CSAAS evidence in particular." Gitlin, 26 Quinnipiac L. Rev. at 537.

5. Ms. Sweeney's opinion is not generally accepted.

The Court should also look at "whether the technique or theory has gained 'general acceptance'" in the scientific community. *Rich v. Dennison Plumbing & Heating*, No. 1:23-cv-00705-SAG, 2025 WL 43181, at *3 (D. Md. Jan. 7, 2025) (quoting *Daubert*, 509 U.S. at 594). CSAAS, most assuredly, does not have general acceptance.

As one court explained when analyzing this issue, there is "'great controversy within the scientific community' about 'the tenets of CSAAS.'" *J.L.G.*, 190 A.3d at 450. "[T]he literature in the area is disparate and contradictory and . . . child abuse experts have been unable to agree on a universal symptomology of sexual abuse, especially a precise symptomology that is sufficiently reliable to be used confidently in a forensic setting as a determinant of abuse." *Rimmasch*, 775 P.2d at 401. Several other courts have recognized the same. *E.g.*, *Hadden*, 690 So.2d at 575 (holding that "a psychologist's opinion that a child exhibits symptoms consistent with what has

come to be known as 'child sexual abuse accommodation syndrome' (CSAAS) has not been proven by a preponderance of scientific evidence to be generally accepted by a majority of experts in psychology"); *Newkirk*, 937 S.W.2d at 693 ("[T]his Court has not accepted the view that the CSAAS or any of its components has attained general acceptance in the scientific community justifying its admission into evidence to prove sexual abuse or the identity of the perpetrator"). The lack of general consensus is further reflected in the fact that, as noted, "neither the American Psychiatric Association nor the American Psychological Association has recognized CSAAS," and it also "does not appear in the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), the mental health field's authoritative list of mental disorders." *J.L.G.*, 190 A.3d at 446.

In short, the purported "symptoms" of child sex abuse victims to which Ms. Sweeney will testify have "no pedigree of scientific acceptance," *Blount*, 392 S.W.3d at 397, and are "highly controversial," *Friedman v. Rehal*, 618 F.3d 142, 157 n.9 (2d Cir. 2010).

6. The purported behaviors of child sex abuse victims are broad and contradictory.

Although this is not a specific *Daubert* factor, additional evidence that CSAAS testimony lacks reliability comes from the fact that the purported behaviors of child sex abuse victims are extraordinarily vague and internally inconsistent.

The behaviors underlying CSAAS (and Ms. Sweeney's proposed testimony) are "vague," "overinclusive," *Rimmasch*, 775 P.2d at 401, and "extremely generic," Gitlin, 26 Quinnipiac L. Rev. at 509. This suggests a lack of reliability insofar as the behaviors can be stretched and contorted to describe almost any complaining witness.

Not only are the purported behaviors of child sex abuse victims proffered by experts like Dr. Summit and Ms. Sweeney overbroad, they are also contradictory and "conflicting."

Rimmasch, 775 P.2d at 401. For example, in rejecting the admissibility of CSAAS testimony, the Kentucky Supreme Court "note[d] with curiosity" that the claimed "'symptoms' of sexual abuse" can be "remarkably different" from case to case. *Blount*, 392 S.W.3d at 397. In one case, "being an apparently happy, well-adjusted child" was described as normal behavior for an alleged sexual abuse victim, while in another case more negative behavioral changes (like caring less about appearance and gaining weight) were also considered signs of sexual abuse. *Id.* at 395-97. Even Ms. Sweeney herself admits that there is "no standard victim behavior after abuse has occurred or a disclosure has been made." Exhibit 2 at 4. Per Ms. Sweeney, "[s]ome victims display behavioral and/or emotional changes while others do not." *Id.*

In the end, these broad and conflicting descriptors make it so that a so-called expert like Ms. Sweeney could testify that *any* behavior is somehow associated with or symptomatic of sexual abuse. If [redacted] did well in school following the alleged assault, Ms. Sweeney could say that was not abnormal of a child sex abuse victim. But if her grades suffered, Ms. Sweeney could say the same thing—that this was not uncommon for a sexual abuse victim. An opinion that can be molded to describe any and all situations is not scientific or reliable.

7. Many courts have excluded similar testimony.

Perhaps the final nail in the coffin in the admissibility of Ms. Sweeney's testimony is the fact that numerous courts around the country have held testimony akin to what she proposes to testify to inadmissible. *E.g.*, *J.L.G.*, 190 A.3d 442; *King*, 472 S.W.3d 523; *Balodis*, 747 A.2d 341; *Hadden*, 690 So.2d 573; *Foret*, 628 So.2d 1116; *Rimmasch*, 775 P.2d 388; *Sara M.*, 239 Cal. Rptr. 605. Those courts that have allowed such testimony into evidence have only done so after abdicating their gatekeeping duty under *Daubert*. Gitlin, 26 Quinnipiac L. Rev. at 531. "Courts

are either not considering whether CSAAS is reliable enough to be admissible, or their reliability considerations are falling far short of their applicable standards for admissibility." *Id.* Mr. Ferguson requests that this Court avoid that trap and instead hold, as *Daubert* requires, that Ms. Sweeney's testimony is inadmissible here due to lack of a reliable scientific foundation.

* * *

Ms. Sweeney's proposed testimony about the purported "common" behaviors of child sexual abuse victims is not the product of reliable principles and methods. This Court should exclude it under Rule 702(b) and (c) and *Daubert*.

B. Ms. Sweeney's opinion cannot be reliably applied to the facts of this case.

Assuming arguendo that CSAAS had some modicum of reliability such that it could be testified to in some cases, this is not one of those cases. CSAAS cannot be reliably applied to the facts of *this* case.

Rule 702 and *Daubert* require not only that the proposed expert's opinion be generally reliable, but also that the opinion "reflects a reliable application of the principles and methods to the facts of the case." Fed. R. Evid. 702(d). In other words, an expert's opinion should still be excluded, even if it invokes a generally reliable area of science or expertise, if that technique cannot be reliably applied to the particular facts of the case. *E.g.*, *Acosta v. Vinoskey*, 310 F. Supp. 3d 662, 670 (W.D. Va. 2018) (finding expert testimony inadmissible because the methodology was both unreliable *and* could not be reliably applied to facts of case). For example, a methodology about whether a particular chemical increases the chances of cancer in an *animal* might be reliably sound in that context, but cannot be reliably applied to ascertain the chances of cancer in *humans*. *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 743 (3rd Cir. 1994). So, even if this Court

believes that CSAAS testimony is reliable in some instances, it might still be inadmissible in a particular case. *See Wood v. Showers*, 822 F. App'x 122, 125 (3d Cir. 2020) ("*any* step that renders the analysis unreliable under the *Daubert* factors renders the expert's testimony inadmissible." (emphasis omitted)).

Here, there are at least two reasons that CSAAS-like testimony cannot be reliably applied to the facts of this case: (1) CSAAS only applies in cases of repeated abuse from a known individual; and (2) CSAAS cannot be reliably applied where, as is true here, the child has other emotional problems.

1. Ms. Sweeney's testimony cannot be reliably applied to the facts of this case because this case involves an allegation of a one-off encounter with a stranger, but CSAAS was derived under the assumption that there was repeated sexual abuse by a trusted figure. "In order for CSAAS to manifest itself, according to Dr. Summit, there must be a close relationship between the victim and the abuser, and the abuse must have occurred over an extended period." Gitlin, 26 Quinnipiac L. Rev. at 515; *see also id.* at 498 ("The description of CSAAS describes the syndrome as one that applies primarily to girls who have been repeatedly abused by a close male figure in their lives."). "The stages of CSAAS all rest on these two presumptions, as there is no need for secrecy, denial, and recantation if the victim does not feel obligated to protect her family and keep the family intact." *Id.* at 515. "It follows, therefore, that CSAAS testimony is not relevant in a case that does not involve both a close relationship between the child and her abuser, and repeated instances of abuse." *Id.*

This case falls squarely out of "CSAAS" territory, and thus the propositions underlying that "syndrome" cannot be reliably applied to the facts of the case. [redacted]

[redacted]. Obviously, then, this is not a case involving a close relationship between the victim and alleged abuser, and it is also not a case of extended, repeated abuse. CSAAS principles, like secrecy, denial, recantation, and trusted adult figures—all of which the Government proffers Ms. Sweeney will testify about—are simply not relevant here. Yet, Ms. Sweeney proffers that she *will* testify about this inapplicable topic, as her expert disclosure says she will testify about the "[i]mpact of abuse by a known offender/someone in a position of authority." Exhibit 2 at 4-5.

In short, any CSAAS testimony "should be limited to cases that feature the characteristics to which CSAAS, according to Dr. Summit himself, is limited: namely intrafamilial (or similar) and ongoing abuse." *Id.* at 537. This not one of those cases.

2. Additionally, CSAAS cannot be reliably applied to the facts of this case because [redacted]. As explained *supra*, the purported "symptoms" of CSAAS can be caused not only by sexual abuse, but also "emotional problems unrelated to sexual abuse." *Rimmasch*, 775 P.2d at 401; *see also J.L.G.*, 190 A.3d at 457. CSAAS cannot reliably distinguish between those two causes. Gitlin, 26 Quinnipiac L. Rev. at 498. [redacted]. CSAAS is unable to help the jury distinguish between whether [redacted]s behaviors are attributable to sexual abuse or those other emotional causes. Gitlin, 26 Quinnipiac L. Rev. at 509 ("[T]he behaviors most often associated with sexually abused children are extremely generic and cannot dependably differentiate those children who have been sexually abused from those who are acting out in response to circumstances that may have nothing to do with sexual abuse.").

For these reasons, this Court should also exclude the evidence under Rule 702(d) and *Daubert*.

C. Ms. Sweeney's opinion would not be helpful to the jury.

Under Rule 702, an expert's opinion must not only be reliable, but also must "help the trier of fact." *See also United States v. White*, 309 F. App'x 772, 775 (4th Cir. 2009) (affirming exclusion of evidence that was not helpful).

For many of the same reasons that CSAAS-based testimony is unreliable, it is also not helpful. For example, CSAAS-based testimony is not helpful because it is so broad and overinclusive that it provides almost no insight into a child's behavior. As noted, the list of behaviors that purportedly can be associated with sexual abuse are generic, vague, contradictory, and overlap. Even Ms. Sweeney admits that behaviors following abuse can manifest "in a variety of ways" and that there is "no one 'normal' response for all victims." Exhibit 2 at 3.

As another example, as noted, the purported CSAAS behaviors/symptoms that Ms. Sweeney will testify about do not actually correlate with abuse. Such testimony "cannot be considered helpful to the trier of fact when it cannot reliably distinguish between abused and non-abused children." Gitlin, 26 Quinnipiac L. Rev. at 498.

Ms. Sweeney's testimony is also not helpful because it is, effectively, an attempt to bolster the credibility of the Government's star witness. Evaluating credibility is a crucial job of a jury. *See United States v. Hurley*, 454 F. App'x 175, 177 (4th Cir. 2011) ("It is well established that credibility determinations are within the sole province of the jury[."]). Juries do not need "help" deciding credibility: "Testimony by a [CSAAS] expert is not particularly helpful to a jury that must rely upon its own common sense as a barometer for the evaluation of truthfulness." *Foret*,

628 So.2d at 1128. As a Tennessee appellate court said when excluding evidence like that proffered in this case: "[T]he jurors had no need for [t]his testimony. We daily submit to juries the question of whether unlawful sexual activity has occurred. They routinely return verdicts without the assistance of expert psychological testimony." *Schimpf*, 782 S.W.2d at 194.

D. Ms. Sweeney is not qualified to give her purported testimony.

Even if Sweeney's proposed "CSAAS-in-disguise" testimony was sufficiently reliable and relevant under *Daubert*, the Court should still exclude her testimony because Sweeney herself is not qualified to give such an opinion. *See* Fed. R. Evid. 702 ("A witness who is *qualified* as an expert . . . may testify . . . " (emphasis added)). In *Perez*, the Texas appellate court held a trial court abused its discretion in finding a social worker with substantial experience in investigating, interviewing, and advocating for child sexual abuse victims was an expert in CSAAS or how child abuse victims supposedly act. 25 S.W.3d at 832, 837. The Court explained that the purported expert was "not a psychiatrist, psychologist, scientist, or physician" and was largely just parroting the findings of another person (Dr. Summit). *Id.* at 837. The Court held as much even though the purported expert had "taken part in more than 1,000 child sexual abuse investigations" and was "a master social worker." *Id.*

The same is true here. Like the expert in *Perez*, Ms. Sweeney is not a psychiatrist, psychologist, scientist, or doctor but rather a child abuse investigator with the FBI and social worker. Exhibit 3. There is no evidence that she is familiar with the scientific method. She has not authored any publications in the last 10 years. She does not appear to research or treat alleged victims of child sexual abuse. Rather, all her experience has been in an advocacy role—investigating claims of sexual abuse—rather than a clinical role. And it appears her testimony is

simply a parroting of Dr. Summit's (discredited and inapplicable) CSAAS theory. While Ms. Sweeney may be an expert in the forensic interviewing of alleged child victims, that does not qualify her as an expert in child behavior or psychology. *See Perez*, 25 S.W.3d at 837; *cf. Hardin v. Ski Venture, Inc.*, 50 F.3d 1291, 1296 (4th Cir. 1995) (experience in ski safety policies and testimony in other ski accident cases did not qualify expert to opine about snowmaking machine safety).

E. That Ms. Sweeney does not use the term "CSAAS" does not alter this analysis.

This Court should apply the foregoing principles and exclude Ms. Sweeney's proposed opinions, even though she does not specifically use the terms "child sexual abuse accommodation syndrome" or "CSAAS" in her expert disclosure.[2]

The fact that Ms. Sweeney does not explicitly rely on CSAAS does not mean her proposed opinion is somehow admissible. Both "CSAAS in general, *and its component behaviors*," are scientifically unreliable. *J.L.G*, 190 A.3d at 446. For example, a Florida appellate court held the admission of expert testimony to be reversible error, even though the expert "never used the magic words 'syndrome' or 'profile,'" but rather vaguely testified about "symptoms consistent with those of one who has been sexually abused." *Irving v. State*, 705 So.2d 1021, 1023 (Fla. Dist. Ct. App. 1998). The Kentucky Supreme Court reached the same conclusion: it found the admission of testimony about the purported behaviors of sexual abuse victims inadmissible, even though the witness "did not use the term 'child abuse accommodation syndrome.'" *King*, 472 S.W.3d at 528.

[2] Given that Ms. Sweeney's expert disclosure uses language that comes right out of Dr. Summit's CSAAS playbook, the failure to mention Dr. Summit or his "syndrome" is glaring. *See Blount*, 392 S.W.3d at 396 (suggesting that "the prosecution was clearly trying to evade the prohibition against CSAAS evidence by" instead just "insinuating" that certain "behavioral changes were recognized as symptoms of sexual abuse").

As the Court explained, "omission of the term 'syndrome' does not transform the objectionable nature of the testimony into reliable scientific evidence." *Id.* Here, even if Ms. Sweeney does not use the term "CSAAS" or invoke Dr. Summit by name, her proposed testimony is all about the component behaviors of CSAAS, like accommodation, helplessness, recantation, and power dynamics. For all of the reasons explained above, any claim that an expert can reliably describe behaviors typical of child sexual abuse victims is simply unreliable, no matter how that expert tries to label it. *See State v. Marrington*, 73 P.3d 911, 915 (Or. 2003) (rejecting State argument that they did not have to prove expert testimony was scientifically valid because the expert did not "use . . . 'syndrome' evidence," reasoning that "[w]hether evidence comparing the behavior of allegedly similarly situated children is labeled as syndrome evidence or the 'typical reactions of child-victims' is not the point"); Gitlin, 26 Quinnipiac L. Rev. at 519, 547 (noting that experts frequently "testif[y] as to general indicators of sexual abuse without referring to CSAAS" and arguing overall that such evidence "has little place in the courtroom").

F. The normal adversarial tools are insufficient to protect Mr. Ferguson.

The Government's response to this motion will presumably be that any problems with Ms. Sweeney's testimony go to the weight the jury should give, not the admissibility, and that any problems with Ms. Sweeney's testimony can be resolved through cross-examination or dueling experts. In the context of unreliable CSAAS testimony, that argument cannot fly.

Expert testimony can have a powerful effect on juries. *Daubert*, 509 U.S. at 595 ("Expert evidence can be both powerful and quite misleading."). Juries may overvalue the weight they should give to expert testimony or abdicate their duty to decide the case themselves to the expert. *State v. Southard*, 218 P.3d 104, 111 (Or. 2009); Scott Brewer, *Scientific Expert Testimony and*

Intellectual Due Process (1998). And that is *especially* true when, as here, "the expert witness [will] over-claim[] the significance of the . . . result of forensic scientific inquiry." Lewis H. LaRue & David S. Caudill, *A Non-Romantic View of Expert Testimony*, 35 Seton Hall L. Rev. 1, 7 (2004) (quotation marks and citation omitted). As noted above, Ms. Sweeney's CSAAS-esque testimony has almost no probative value with respect to whether sexual abuse actually occurred or whether the complainant was sexually abused, so her testimony will inevitably over-claim its probative value.

Unsurprisingly, then, courts have "reject[ed] th[e] view" that "reliability concerns [with CSAAS] went only to the weight to be given the evidence, not to its admissibility." *Rimmasch*, 775 P.2d at 403. The "gravity" of the situation, including "the serious personal and social consequences at stake," demands that the "proponents . . . demonstrate the validity" of CSAAS. *King*, 472 S.W.3d at 530. As a Court explained in the very context of CSAAS testimony:

> A courtroom is not a research laboratory. The fate of a defendant in a criminal prosecution should not hang on his ability to successfully rebut scientific evidence which bears an "aura of special reliability" and "trustworthiness," although, in reality the witness is testifying on the basis of an unproved hypothesis in an isolated experiment which has yet to gain general acceptance in its field.

Schimpf, 782 S.W.2d at 191 (quoting *United States v. Brown*, 557 F.2d 541, 556 (6th Cir. 1977)). Nor can dueling experts solve this problem. *Id.* ("It was simply not enough to pitch the two experts into the ring and preside over the battle, with the jury decision being awarded to the expert able to engender more credibility."). In short, testimony about the purported common behaviors of sexual assault victims is simply too dubious to have any place in a criminal case.

"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." *Hadden*, 690

So.2d at 577-578. As noted above, CSAAS-based opinions are incredibly controversial in the scientific community. The Court should shield the jury from the Government's attempt to introduce an unreliable, unverified science experiment before the jury.

II. Ms. Sweeney's Proposed Testimony Is Inadmissible Under Federal Rules of Evidence 402 and 403.

Even if this Court deems Ms. Sweeney's testimony admissible under Rule 702, it should nonetheless exclude her testimony as irrelevant and too prejudicial under Federal Rules of Evidence 402 and 403.

Ms. Sweeney's testimony has "questionable probative value." *Foret*, 628 So.2d at 1129. The testimony is irrelevant for the reasons discussed above: CSAAS "cannot be considered helpful to the trier of fact when it cannot reliably distinguish between abused and non-abused children." *Gitlin*, 26 Quinnipiac L. Rev. at 498. Indeed, the Kentucky Supreme Court excluded similar testimony because "children who have not been sexually abused often exhibit one or more symptoms of the CSAAS" and thus, "[a]s such, the symptoms . . . to lack *probative value* of the existence of sexual abuse and [are] *irrelevant* as to the guilt or innocence of a particular person." *Newkirk*, 937 S.W.2d at 692 (emphases added) (citation omitted); *see also Schimpf*, 782 S.W.2d at 194. Further, as noted, even if CSAAS-like testimony may be relevant in *some* cases, it has no relevance outside of the context of repeated abuse by a known adult figure, which does not describe this case. Gitlin, 26 Quinnipiac L. Rev. at 537 ("In order for CSAAS evidence to be sufficiently relevant, the evidence should be limited to cases that feature the characteristics to which CSAAS, according to Dr. Summit himself, is limited: namely intrafamilial (or similar) and ongoing abuse."). Accordingly, courts have concluded that testimony like that Ms. Sweeney proposes to give should be "rejected on grounds that it lacks relevancy for failure to make the existence of any

fact of consequence more probable or less probable than it would have been without the evidence." *Newkirk*, 937 S.W.2d at 693.

While Ms. Sweeney's proposed testimony has minimal relevance, there is a great risk of undue prejudice. *See Foret*, 628 So.2d at 1127-29 (excluding CSAAS-based testimony under Rule 403); *see also* Gitlin, 26 Quinnipiac L. Rev. at 498 (arguing that "[t]he probative value of CSAAS may be substantially outweighed by its prejudicial effect"); *Southard*, 218 P.3d at 111-12 (holding expert testimony that child victim had been sexually abused was inadmissible under Rule 403). In particular, there are two acute risks of prejudice.

For one, there is a great danger that the jury will misuse the testimony. If CSAAS-based testimony has any relevance, it is to rehabilitate the victim's credibility by explaining behaviors that typically suggest a lack of credibility. But there is a substantial likelihood that the jury will not just limit Ms. Sweeney's testimony to this context, but rather will "draw a substantive inference from testimony that was only intended to be relevant to the victim's credibility." Gitlin, 26 Quinnipiac L. Rev. at 498. But, as noted, the CSAAS symptoms are simply not probative of whether or not sexual abuse occurred—which is the very issue central to Mr. Ferguson's trial. If Ms. Sweeney testifies, Mr. Ferguson will be unduly prejudiced because the jury will almost certainly—wrongly and inappropriately—draw that inference based on Ms. Sweeney's testimony. *See Blount*, 392 S.W.3d at 397 (concluding that expert testimony "suggest[ing] that [the complainant's] behavior was indicative of abuse . . . misleading and prejudicial"); Gitlin, 26 Quinnipiac L. Rev. at 498 ("even when CSAAS is offered to rehabilitate a child victim's credibility, and not to substantiate claims of abuse, the jury will likely draw the impermissible inference that a child who exhibits symptoms of CSAAS has been sexually abused").

There is also a risk of undue prejudice in the form of the jury abdicating their role as factfinders and credibility determiners to Ms. Sweeney. The crucial job of the jury is to determine credibility. But testimony like Ms. Sweeney's proposed expert opinion raises "fears of the jury surrender[ing] its own common sense in weighing [victim] testimony and deferr[ing] to" the expert. *Foret*, 628 So.2d at 1127 (alterations in original) (citation omitted); *see also Mangal v. Warden*, No. No.: 6:18-cv-00106-RBH, 2019 WL 1517141, at *7 (D.S.C. Apr. 8, 2019) ("Prejudice can result from an expert's testimony about the victim's credibility, by giving factfinders little more than a false sense of security based on the incorrect assumption that a reasonably accurate scientific explanation for behavior has been provided." (citation omitted)); *Southard*, 218 P.3d at 111 (doctor's opinion that child victim suffered sexual abuse was unduly prejudicial because the "diagnosis came from a credentialed expert, surrounded with the hallmarks of the scientific method," thus "creat[ing] substantial risk that the jury may be overly impressed or prejudiced by a perhaps misplaced aura of reliability or validity of the evidence" (quotation and citation marks omitted)).

It does not matter that the Government claims Ms. Sweeney's testimony will be limited to generalizations, rather than specifically applied to the facts of this case. According to the Government, "Ms. Sweeney has not been provided with very much specific information regarding the details of this case," but rather will just generally "explain the ways that victims who have been sexually abused, assaulted, and exploited tend to react and cope during and after these experiences." Courts have repeatedly excluded testimony like Ms. Sweeney's proposed opinion under *Daubert* and Rules 402/403 even where the so-called expert's testimony was so limited. For example, in *Newkirk*, the trial court had held that a proposed expert's testimony about how

purported child sex abuse victims act was admissible because it was "rebuttal" evidence and was "present[ed] in general terms rather than being specific to this case." 937 S.W.2d at 694. The Kentucky Supreme Court held that was wrong. *Id.* ("We are simply unable to accept the trial court's view.") The Court explained that the "unmistakable message" from the expert's testimony "was that, in general, a jury should believe the initial accusations made by a child," regardless of whether the expert specifically talked about the complainant's behavior in that case. *Id.* In fact, as the Kentucky Supreme Court explained, the proposed expert testimony had no relevance *unless* the goal was to bolster the credibility of the jury—so it did not matter, for admissibility purposes, if the testimony was generalized or specific. *Id.* ("[I]t is of no consequence that the testimony was presented in a general manner rather than as specific to the case or on rebuttal rather than as evidence in chief."). Similarly, the Louisiana Supreme Court held this sort of evidence was inadmissible, regardless of how it was offered. *Foret*, 628 So.2d at 1121.

III. Ms. Sweeney's Proposed Testimony Would Improperly Invade The Jury's Province.

Finally, this Court should exclude Ms. Sweeney's testimony because it improperly invades the jury's province to determine credibility and decide guilt or innocence. This Court should have "grave concern that the expert may invade the province of the jury by unduly influencing its assessment of credibility." *Newkirk*, 937 S.W.2d at 693.

"Expert testimony should not be permitted if it concerns a subject improper for expert testimony, for example, one that invades the province of the jury." *United States v. Binder*, 769 F.2d 595, 602 (9th Cir. 1985). The Court should not allow expert testimony that "would give the appearance that the court was shifting to witnesses the responsibility to decide the case." *Scop*, 846 F.2d at 140 (citation omitted). Deciding the credibility of witnesses is the jury's job—and the

jury's job alone. *United States v. Dorsey*, 45 F.3d 809, 815 (4th Cir. 1995) ("[T]he evaluation of a witness's credibility is a determination usually within the jury's exclusive purview."); *United States v. Barnard*, 490 F.2d 907, 912 (9th Cir. 1973) ("Credibility, however, is for the jury—the jury is the lie detector in the courtroom."). Accordingly, a prosecutor cannot "elicit one witness' opinion that another witness has told the truth." *United States v. Hayes*, 322 F.3d 792, 800 (4th Cir. 2003); *see also United States v. Prince-Oyibo*, 320 F.3d 494, 497 (4th Cir. 2003) (holding that polygraph tests are "not admissible to bolster or undermine credibility").

In attempting to introduce Ms. Sweeney's testimony, the Government is trying to get around this principle. In effect, Ms. Sweeney's testimony will be used to vouch, bolster, or patch the holes in the complainant's credibility. Ms. Sweeney will testify about behaviors that the complainant exhibited in order to show that such behaviors are consistent with, or at least not at odds with, the complainant experiencing sexual abuse. In effect, Ms. Sweeney will be offering testimony that the complainant was truthful. But such testimony is obviously inadmissible: "scientific expert testimony that purports to determine whether a witness is truthful on a particular occasion is not admissible." *Rimmasch*, 775 P.2d at 406; *see also United States v. Whitted*, 11 F.3d 782, 785-86 (8th Cir. 1993) ("A doctor also cannot pass judgment on the alleged victim's truthfulness in the guise of a medical opinion, because it is the jury's function to decide credibility.").

Courts have consistently applied this principle to exclude CSAAS-like testimony. *E.g.*, *Balodis*, 747 A.2d at 345-46; *Newkirk*, 937 S.W.2d at 593; *Foret*, 628 So.2d at 1127. To allow this testimony "would be an invitation for the trier of fact to abdicate its responsibility to ascertain the facts relying upon the questionable premise that the expert is in a better position to make such

a judgment." *Foret*, 628 So.2d at 1128 (citation omitted); *see also Hodge v. Hurley*, 426 F.3d 368, 387 n.26 (6th Cir. 2005) (condemning expert testimony that "essentially allow[ed the complaining witness]'s contested testimony—the credibility of which was the key issue in the trial court—to bootstrap its way to scientific certainty").

The concern about invading the province of the jury is especially acute in a case like this, which is essentially a "he said/she said" case. There is limited, disputed physical evidence of sexual abuse. The Government's case hinges, effectively, on [redacted]s testimony. Obviously, "[a]n expert witness may not testify that a defendant is guilty." *Newkirk*, 937 S.W.2d at 694. But that is effectively what Ms. Sweeny would do. "When, as in this case, an expression of opinion as to credibility is the equivalent of an opinion as to guilt or innocence," that testimony is inadmissible. *Id.*

Ms. Sweeney could not testify directly that [redacted] was telling the truth. *United States v. Azure*, 801 F.2d 336, 339-40 (8th Cir. 1986) (holding it was error to allow a doctor to testify on behalf of the Government that he believed the alleged victim of child sexual abuse was telling the truth). This Court should not allow her to indirectly give essentially that same opinion.

CONCLUSION

For these reasons, this Court should exclude Ms. Sweeney's testimony at trial. Mr. Ferguson requests a hearing on this matter.

Date: March 7, 2025

/s/

ELLIE MARRANZINI, #817525
CYNTHIA FREZZO
CLAIRE MADILL
Assistant Federal Public Defenders
Office of the Federal Public Defender
6411 Ivy Lane, Suite 710
Greenbelt, Maryland 20770
Phone: (301) 344-0600
Fax: (301) 344-0019
Email: ellie_marranzini@fd.org
cynthia_frezzo@fd.org
claire_madill@fd.org