IN THE SUPREME COURT

STATE OF GEORGIA

K. M. D.,
Appellant/Petitioner

v. **Case No. S15C1757**

M. S. D.,
Appellee/Respondent)
)
_____)

AMICUS CURIAE BRIEF OF GEORGIA NETWORK TO END SEXUAL ASSAULT, *ET. AL.*, IN SUPPORT OF APPELLANT'S PETITION FOR WRIT OF *CERTIORARI*

Amici, composed of Georgia and national organizations working with adult and child victims of abuse in the family, as well as providing expertise to courts, legislatures, and professionals on issues of domestic violence, child abuse, and custody litigation, respectfully submit this brief in support of Appellant's Petition for *Certiorari*. In accordance with Rule 23 of the Rules of the Supreme Court of Georgia, a Statements of Interest for each amicus joining in this brief is provided as an Appendix hereto.

SUMMARY OF ARGUMENT

Amici submit this brief based on their serious concern for minor child E.D., and for future victims of child sexual abuse in Georgia, and because they believe

family courts need this Court's legal guidance in difficult cases like the present litigation. It is easy to look at a case such as this and conclude that the issues for review are purely factual and discretionary, as the Georgia Court of Appeals appeared to do below. Case No. A15A0434 (June 26, 2015) (unpublished). However, the trial court's ultimate factual determination that there was no abuse here was (i) facilitated by key legal and procedural errors, and (ii) is unsupportable on this record, which contains substantial *undisputed* evidence of an unacceptable level of risk to this child.

Because critical legal and procedural matters central to this case are also likely to arise in subsequent Georgia child custody cases, *certiorari* is not only appropriate, but necessary here. Specifically, *amici* respectfully submit that this Court should grant *certiorari* to address three critically important legal issues that all-too-frequently arise in child sexual abuse cases: (1) Whether a court adjudicating the risk of sexual abuse may rely on opinions from a Guardian Ad Litem and/or custody evaluator undisputedly lacking in the necessary expertise and/or a willingness to actually assess the claims of abuse (and risk of future abuse); (2) Whether, in a case where child sexual abuse has been credibly reported,[1] a court may exclude expert evidence of child pornography in possession of the alleged abuser; and (3) Whether it can ever be in the best interests of a child

[1] *See* pp. 16-20, *infra.*

to be in the custody of someone they have repeatedly reported to have sexually abused them (including reports which are found to be credible), *particularly* where there are multiple types of corroboration.[2] While a court can never attain complete certainty when abuse occurs in private, and doubts and inconsistencies are unavoidable, a court that prioritizes a child's best interests cannot allow the existence of uncertainty and doubts to outweigh that child's best interest – which interest includes avoidance of credible *risk* of future abuse.

SUPREME COURT JURISDICTION

This Court has jurisdiction over this petition pursuant to the Constitution of the State of Georgia (1983), Article VI, Section VI, Paragraph V: "The Supreme Court may review by certiorari cases in the Court of Appeals which are of gravity or great public importance."

STANDARD FOR CERTIORARI

The standard for certiorari review is set forth in Rule 40 of the Rules of the Supreme Court of Georgia: "A review on certiorari is not a right. . . . A petition for the writ will be granted only in cases of great concern, gravity, or importance to the public."

[2] *Id.*, pp. 16-20.

ARGUMENT

I. THE QUALIFICATIONS AND ROLES OF A GUARDIAN AD LITEM AND/OR CUSTODY EVALUATOR IN CUSTODY CASES WHERE CHILD ABUSE ALLEGATIONS ARE CENTRAL ARE LEGAL MATTERS OF GRAVE IMPORTANCE FOR GEORGIA COURTS.

The national consensus regarding child representatives in civil courts is clear that "a child's safety is paramount and that attorneys 'must' take the minimum steps necessary to protect the child from harm."[3] At the heart of the "best interest" standard is ensuring the child's safety. *See* Hon. Jerry J. Bowles, *et. al.*, NAT'L COUNCIL OF JUV. & FAMILY COURT JUDGES, A JUDICIAL GUIDE TO CHILD SAFETY IN CUSTODY CASES 5 (2008) ("A child's physical, emotional, and psychological safety are always in his or her best interest. . . . [S]afety of the child is the primary factor in determining his or her best interest."). In fact, the legal consensus in the U.S. is that when a child's safety is at issue, that factor outweighs all other potential "best interest" factors.[4] Thus, to maximize the safety of a child, a court

[3] National Conference of Commissioners on Uniform State Laws ("NCCUSL"), *Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act*, 42 FAM. L.Q. 1, 41 (2008) (construing the Uniform Act in the light of ABA Standards of Practice for Lawyers Representing Children in Custody Cases and the ABA Standards of Practice for Lawyers Representing a Child in Abuse and Neglect Cases); Although the language of the ABA standards themselves use the word "**may,**" the commentary specifically emphasizes that GALs **"must**" take steps to keep the child safe. NCCUSL at 41 (emphasis added).

[4] Allen M. Bailey, *Prioritizing Child Safety As the Prime Best-Interest Factor*, 47 FAM. L.Q. 35, 54 (2013).

must minimize the risks associated with causing them harm. *Id.* ("Evaluate safety risks . . . from initial filing through post-disposition.").

Thus, "[i]f the conduct of either of the parents endangers the child's physical or emotional well-being, the [GAL]'s *main task* is to protect the child by using all means possible." Linda D. Elrod, Child Custody Prac. & Proc. § 12:7 (June 2015) (emphasis added).[5]

Consistent with national standards, under Georgia law, a GAL represents the child's best interests and serves as the court's "expert witness." *See* Ga. Super. Ct. Rule 24.9(3),(7). As such, a GAL is required to obtain a broad range of training to properly carry out his or her duties. Ga. Super. Ct. Rule 24.9(2); *see also* Dan E. McConaughy, Ga. Divorce, Alimony, & Child Custody § 33:14 (Nov. 2014); Petition for Writ of Certiorari, *D. v. D.* at 17 (citing Uniform Superior Court Rule 24, *etc.*). This requisite training includes "recognition of issues of child abuse." Ga. Super. Ct. Rule 24.9(2).

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[5] Where there are serious allegations of a parent presenting a danger to the child in question, the GAL "should err on the side of investigating too much" rather than too little. *Id*. The more severe and substantiated the allegations, the more care the GAL should take in investigating to determine the child's best interests. *See* Charles T. Cromley, Jr., *[A]s Guardian Ad Litem I'm in a Rather Difficult Position.*, 24 OHIO N.U. L. REV. 567, 579 (1998). The GAL must also "evaluate all professional reports for errors and weaknesses… look for impartiality or neutrality of the expert, the competence of the expert, the comprehensiveness of the evaluation, the adequacy of the procedures used, and the scope of any recommendations," in order to serve the court with the most informed opinion of the child's best interest. Child Custody Prac. & Proc. § 12:7.

The record in this case establishes that the appointed GAL, Mr. Holmes, was not qualified as an expert, and he admitted to having no experience with either child sexual abuse or dissociation (behavior often displayed by abuse victims, *see infra*). Rather, he forthrightly and repeatedly stated that he did not need to assess his client's safety or risks of abuse and that he could not grasp the key concept of dissociation. T. 307-308:

> One, it was not part of my job description to determine that [whether his client was a victim of her father's sexual abuse]. Two, it had not been able to be determined by two different jurisdictions. . . I did not think I needed to make that decision to make my ruling [sic] and, quite frankly, that was contrary to what others wanted me to do. I refused to do it. I'm not a psychologist. I was advised not to do it, and I feel comfortable not doing it…..I just didn't go there.

Mr. Holmes was equally dismissive about the significance in this case of E.D.'s bizarre and hallucinating behaviors, which the dissociation expert[6] testified were classic episodes of dissociation experienced by a victim of child sexual abuse. T. 571, 583, 696. Mr. Holmes stated unequivocally that he had no experience in dissociation, that it was "a hard concept for [him] to wrap [his] small brain around" (T. 268), and that he was "not smart enough" to recognize or assess it. T. 286.

[6] Dr. Silberg described one video of E.D. as a prime example of dissociative behavior: "There was a videotape of her seeing – looking like she sees her father, and she is saying, get him away. Get him away. Her mother says, who is it? She says, it is daddy. He is coming. He is going to kill me. Let him kill me so he doesn't kill you. I'm scared, she continues. Her mother says, no, he is not there. She continues to say, yes, he is still there." T. 583.

> I'm not a dissociative expert…There are, I think, 30 references to dissociation in Dr. Green's notes. Dr. Green's notes is that big notebook sitting over there. It's always been there. Some people describe E.D. as a drama queen. Some people describe E.D. as histrionic. Some people describe E.D. as, in fact, being dissociative. I'm not smart enough to know."

T. 263. He then stated, "[N]o, I did not go out and try to find an expert in dissociation. If that was my mistake, I made it." T. 291.

It is also undisputed that Dr. Drutman, the custody evaluator, had no expertise in child abuse, child sexual abuse, or dissociation. T. 1138 – 1139. Yet he flatly rejected Dr. Silberg's dissociation explanation for E.D.'s conflicting behaviors,[7] stating emphatically "that's just wrong, okay? That's wrong. It is an interesting theory, but it is wrong." T. 178. Again, despite – or perhaps because of – his lack of expertise, Dr. Drutman stated that *even if there was a finding of sexual abuse, he would still recommend giving the father some custody.* T. 186.

Amici are concerned that the trial court here did not receive the benefit of proper and adequate guidance from the appointed GAL and custody evaluator on the central issues of alleged abuse and risk of future abuse because neither had the necessary training or expertise in this regard. Amici are even more concerned that such a scenario may be the rule in Georgia, and not the exception. And because these critical failings can (and no doubt, will) be repeated in subsequent child

[7] E.D.'s seeming apparent shedding of all her problems when switched to her father's care was surprising (T. 101-119), and was explained by Dr. Silberg as indicative of dissociation. T. 593-594.

custody cases absent clarity from this Court -- with the benefit of full briefing -- *certiorari* should be granted here. Simply put, future courts (and children) need guidance from this Court as to the minimum requirements for a representative of a child's best interests where the child has reported abuse. In particular, courts should be instructed as to whether it is ever lawful for a representative of a child's best interests to refuse to assess the child's abuse reports, while recommending that the child be in care of the person they reported as having abused them.

II. THIS COURT SHOULD GRANT REVIEW OF THIS CASE TO RULE WHETHER, WHERE CHILD SEXUAL ABUSE IS AT ISSUE, CREDIBLE EVIDENCE OF CHILD PORNOGRAPHY, INCLUDING EXPERT OPINION, MUST BE CONSIDERED.

As this Court has recognized, assessment of child sexual abuse reports is neither easy nor intuitive. *Allison v. The State*, 256 Ga. 851, 353 S.E. 2d 805 (Ga. 1987) (affirming admission of expert testimony on child sexual abuse syndrome as necessary for jury to understand the child's counter-intuitive behaviors, while ruling inadmissible expert testimony as to the ultimate fact, *i.e.*, whether the child was abused). Many aspects of how sexual abuse affects children, including seeming comfortable or happy with a perpetrator who is a parent, hallucinating, recanting, bedwetting, nightmares, conflicting disclosures, and dissembling dissociation (T. 572-583), are notoriously counter-intuitive and difficult for non-experts to grasp. *Allison, supra.* For these reasons, Georgia is in good company with other states, the majority of which have recognized that expert testimony

about child sexual abuse is essential to explain seemingly inconsistent or counter-intuitive victim behaviors and to rebut erroneous inferences of false allegations based on misunderstandings of such behavior.[8]

Given the widespread judicial recognition that sexually abused children's statements and behaviors are notoriously difficult for non-experts to accurately interpret, outside corroborative evidence is of particular importance. And in this case there was a particularly salient type of corroborative evidence available – *i.e.*, the evidence that Appellee's computer contained child pornography – most of which the court refused to admit and consider. The relevance and probativeness of such evidence is a matter on which this Court can provide guidance.

Unlike adult pornography, the viewing of *child* pornography is recognized by experts as a very significant red flag for child sexual abuse. Scientific research

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[8] *See, e.g.*, *Bostic v. State*, 772 P.2d 1089 (Alaska Ct. App. 1989); *State v. Moran*, 728 P.2d 248 (Ariz. 1986); *People v. Leon*, 263 Cal. Rptr. 77 (Cal. Ct. App. 1989); *State v. Spigarolo*, 556 A.2d 112 (Conn. 1989); *Wheat v. State*, 527 A.2d 269 (Del. 1987); *People v. Server*, 499 N.E.2d 1019 (Ill. App. Ct. 1986); *State v. Tonn*, 441 N.W.2d 403 (Iowa Ct. App. 1989); *State v. Black*, 537 A.2d 1154 (Me. 1988); *People v. Beckley*, 456 N.W.2d 391 (Mich. 1990); *State v. Garden*, 404 N.W.2d 912 (Minn. Ct. App. 1987); *Smith v. State*, 688 P.2d 326 (Nev. 1984); *State v. Bailey*, 365 S.E.2d 651 (N.C. Ct. App. 1988); *People v. Benjamin R.*, 481 N.Y.S.2d 827 (2d Dep't. 1984); *State v. Middleton*, 657 P.2d 1215 (Or. 1983); *Duckett v. State*, 797 S.W.2d 906 (Tex. Crim. App. 1990); *State v. Hicks*, 535 A.2d 776 (Vt. 1987); *State v. Madison*, 770 P.2d 662 (Wash. Ct. App. 1989); *State v. Jensen*, 415 N.W.2d 519 (Wis. Ct. App. 1987); *Griego v. State*, 761 P.2d 973 (Wyo. 1988). For a further list of cases, *see State v. J.Q.*, 599 A.2d 172 (N.J. Super. Ct. App. Div. 1991). *But see Brown v. Commonwealth*, 812 S.W.2d 502 (Ky. 1991); *Dunnington v. State*, 740 S.W.2d 896 (Tex. Ct. App. 1987).

is clear that individuals who possess child pornography are likely to sexually molest children. The leading study found, after an extensive comparison of offenders convicted of possession of child pornography with those who were known to have had sexual contact with a minor, that the *vast majority* of people who fantasize about sexually abusing a child in fact do so. *See* Michael Bourke and Andres Hernandez, THE 'BUTNER STUDY' REDUX: A REPORT OF THE INCIDENCE OF HANDS-ON CHILD VICTIMIZATION BY CHILD PORNOGRAPHY OFFENDERS, J. Fam Viol (2009) 24:183-91 (hereinafter "The Butner Study"). More specifically, the Butner Study found that *fewer than 2 percent* of subjects who possessed child pornography were "just pictures" offenders. *Id*. at 188. As one federal district court has put it: "most who appear to be lookers are, in fact doers." *U.S. v. Crisman*, 2011 WL 5822731, *21 (D.N.M. 2011) (affirming detention order and denying motion for release).

Research has similarly found that child pornography offenders who reside with a child pose a greater risk to sexually molest a child, either their own or their child's friends. *See e.g.*, TESTIMONY ON COMMISSIONER QUESTIONS ON CHILD PORNOGRAPHY SENTENCING GUIDELINES, Michael C. Seto, Ph.D, C.Psych. Royal Ottawa Health Care Group (Apr. 25, 2012); *see also* Butner study at 185 (finding that all but a very small minority of child molestors are "motivated by pre-existing sexual interest in minors").

In this case, significant evidence of child pornography was found on Appellee's computer, consisting both of numerous child pornography websites and a number of specific photographs that may have represented children in sexual acts. The court below did admit the undisputed fact that the imprints of the following websites were found on Appellee's computer: teenietarts.com; schoolbuschicks.com; delicatepussies.com; nubileones.com; feableminds.com; herfirstbigcock.com; herfirstasstomouth.com; secretfriends.com; cuteteenvideo.com; bustyamateurfriends.com; and her firstkisses.com. T. 550-555; T. 912-913.

However, additional concerning evidence was excluded: During trial, Mr. Kressell,[9] a former law enforcement officer and forensic expert in child pornography, re-examined the computer and identified at least one image that he believed to be child pornography and several others that he believed likely constituted child or child-like pornography. T. 714-715. During a court-directed follow-up deposition, he testified that an image ('P1') showing the naked buttocks of two individuals, one over the other, depicted a child under the age of 18 being

[9] In his opposition to *certiorari*, Appellee asserts that because Dr. Kressel was not permitted to testify and his deposition was not admitted into evidence, the court should refuse to consider any references to Mr. Kressler's deposition testimony. Appellee Response to Petition for Writ of Certiorari, p. 2. However, this claim is incorrect: Appellant explicitly proffered the testimony and it is therefore part of the appellate record. T. 1117.

raped.[10] T. 723-724. Mr. Kessler believed that the girl in a second image ('P5'), who wore pigtails, to be under 18 -- probably around 16 or 17. He testified that a third image (P2) depicted a girl in her late teens or early 20s, although she was dressed to appear much younger, in pigtails with pompoms. T. 721, 724.

Despite this potentially critically important evidence, which could have powerfully corroborated E.D.'s reports of sexual abuse, the court excluded Mr. Kressel's deposition and opinion as well as the photographs, thereby excluding almost all the evidence of child pornography. The judge stated, "I didn't find that to be of a character of the evidence that was this concerning, apparently, as you feel it is. On that basis, I think its value is far more prejudicial than it is probative." T. 923.

Amici submit that this decision was error and needs to be established as such. Neither the probative/prejudicial standard nor any procedural concern can justify the exclusion. The probative/prejudicial standard is aimed at protecting *juries* from inflaming or sensational evidence. Weissenberger's Federal Rules of Evidence (1995-96) 80-81 (must be more than merely prejudicial but rather, *unfairly* so; rule is aimed at protecting juries' deliberations); Jack Weinstein & Margaret Berger, Weinstein's Evidence Manual Student Edition (7th Ed.) 6-17

[10] Appellant's attorney advised the court that Mr. Kessler reported his findings to the Georgia Bureau of Investigation ('GBI') T. 714.

(Rule 403 requires court to assess whether search for truth will be hindered by admission of prejudicial evidence), 1-9 (it is necessary to recognize very real distinctions in practice between bench and jury trials . . .”). That the rule could not justify exclusion here was particularly clear in light of the fact that the judge had *already looked at the evidence, so any unfair “prejudice” had already occurred.* More generally, given the priority to a child’s best interests in custody proceedings exclusion of probative evidence of possible child abuse cannot be justified on mere technical grounds.

Given the known strong link between viewing child pornography and actually molesting children, *see supra*, a court seeking to determine whether an accused individual has perpetrated child sexual abuse or is a risk for committing such behavior cannot exclude credible evidence of child pornography on the accused’s computer. While the court here was not required to agree with the pornography expert’s assessment, it should have been admitted and considered along with the photos on which it was based.

Amici submit that, where a court’s mandate is to determine the “best interests of the child,” the law should be clear that if child sexual abuse is at issue, and expert opinion is available to identify child pornography on the reported abuser’s computer, the exclusion of such evidence is legal error, because it unacceptably reduces the court’s ability to objectively and fairly assess the

evidence of sexual abuse. *Certiorari* is an appropriate vehicle for such a determination.

III. WHERE SUBSTANTIAL CREDIBLE EVIDENCE OF SEXUAL ABUSE EXISTS, EVEN IF CERTAINTY IS LACKING, THE *CREDIBLE RISK* OF FUTURE ABUSE MEANS THAT IT CANNOT BE IN THE BEST INTERESTS OF A CHILD TO BE IN CUSTODY OF THE REPORTED ABUSER.

This Court should also grant *certiorari* because the question of when protective action is required (or not) in family court cases involving child sexual abuse allegations is one of grave importance to the State of Georgia, and all states.[11]

Local and national *Amici* have observed many family courts' handling of child sexual abuse allegations both in Georgia and around the country. *Amici,* as well as courts and scholars, have recognized that family courts often set a particularly high bar for proof of such allegations, because they are seen as "criminal"[12] in their significance and implications.[13] *See In re Christine H*, 451

[11] Data from the U.S. Children's Bureau indicates that in 2013 there were 806 validated victims of child sexual abuse in Georgia. http://www.acf.hhs.gov/sites/default/files/cb/cm2013.pdf#page=31

[12] Catherine Paquette, *Handling Sexual Abuse Allegations in Child Custody Cases*, 25 N. Eng. L. Rev. 1415, 1437 (1991)(child abuse allegation "introduces a criminal allegation into a civil proceeding")

[13] Meredith Sherman Fahn, *Allegations of Child Sexual Abuse in Custody Disputes: Getting to the Truth of the Matter,* 14 WOMEN'S RTS. L. REP. 123, 130-31 (1992) ("the alleging parent's standard of proof [in a civil custody suit], realistically, is

N.Y.S.2d 983, 986 (Fam. Ct. 1982) (holding in civil child protective action that child abuse must be proved by clear and convincing evidence rather than the normal preponderance, because "the private interests affected by the proceeding are the stigma of child abuse, possible criminal prosecutions, and possible termination of parental rights").

However, in a case such as this, protection of an accused's rights (as understood in *criminal* settings) is directly opposed to protecting children's best interests. That is, a court's caution about validating abuse unavoidably, but improperly, places the risk of error on the child – should the court err in concluding the accused has *not* committed the alleged acts, it is the child who will pay the price. While in criminal court, society rightly accepts the risk of the "guilty going free" as the price of avoiding incarcerating an innocent person, in family court, the balance of interests is, as a legal matter, reversed: Children's best interests *must* trump the interest of an adult in not being falsely accused. Since the best interests of children require their safety, and since courts can never be 100% sure of the truth of private abuse, "safety" must mean avoidance of unreasonable risk.

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more akin to that of a criminal case"); *Bailey v. Woodcock*, 574 So.2d 1369, 1374 (Miss. 1990) ("This is not a criminal case, but we are of the opinion that the right of confrontation should be accorded to an accused parent in such cases as this. The fact that the accusation is a terrible and shameful one ought not blind us to the plight of one who may stand wrongfully accused").

This Court should grant *certiorari* to make clear to future Georgia family courts that where even a single report of child sexual abuse is credible, the best interests of the child require protection from the *risk* of future abuse. While uncertainty, confusion, or inconsistency in other respects may also exist, a credible report must trump (unless it is somehow rendered non-credible), and lead to a protective ruling if the "best interests of the child" standard is to have real meaning.

A. The Quantity and Types of Undisputed Evidence of Sexual Abuse in this Case are Unusually Great.

The evidence of child sexual abuse in this record is not minimal – rather, it is unusually robust. *Much of this evidence is also undisputed.* Even the skeptics involved in the litigation *do not dispute* that, for over four years, E.D. described in detail multiple episodes of sexual abuse to her therapist Dr. Green (T. 462–463),[14]

[14] Among other things, Dr. Green, an expert in child sexual abuse and one of E.D.'s therapists for three years (T.455), testified that E.D. told her that she "didn't feel safe" at her father's house, that "stuff happens . . . that involved touching" and "she was confused because sometimes it felt good." T. 462-63. E.D. told her that "keeping the secret . . . made her stomach hurt and made her head hurt." T. 465. Subsequently E.D. told Dr. Green about "her father touching her vagina" and "her father putting his penis inside her vagina." T. 466. When asked to "[d]raw something you feel guilty about," E.D. wrote "I had a hard time telling the truth when my dad was doing bad things to me!!!" and added "I tell the truth now" T. 472 – 473. Dr. Green further testified that E.D. would "make general statements about wishing it didn't happen, wanting it to go away." T. 478. She noted that in those early days E.D. consistently indicated that "what she reported was the truth, that she had not lied about it, and that she wanted to see her dad but that she would not be safe doing it alone." T. 479.

forensic evaluators Constance Wallace (T. 749),[15] and Dr. Fox (T. 807),[16] and even to subsequent therapist Dr. Levy (T. 97).[17] Each of these adults was recognized as an expert in child sexual abuse, with Dr. Fox also an expert in psychosexual evaluations and child psychology (T.788-792), and Dr. Wallace an expert in forensic examinations of children for sexual abuse. T. 728.

Nor is it disputed that three of the four found that E.D. either "was" or "may have been" sexually abused. T. 479-80 (Green), T. 814 (Fox), T. 735, 785 (Wallace, recommending no contact). Two also diagnosed her with post-traumatic stress disorder ("PTSD"). T. 507, 479-480, 814. And three recommended treatment for sexual abuse. T. 495, 735, 785.

E.D.'s undisputed disclosures included direct and specific verbal descriptions (see notes 16-18 *supra*); indirect written disclosures in response to

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[15] Ms. Wallace asked E.D. whether she knew why she was at the interview; she said her dad had been touching her in a way that he shouldn't be and that there was a secret she had been keeping from her mom that her dad wanted her to keep. T. 749.

[16] Dr. Fox testified that E.D. had visions of herself or her mother being killed, and said her father made these threats during his sexual acts. T. 808. She recommended that the protective order against the father remain in place. T. 815-816. She also testified that E.D. "reported penetration both with his penis and his fingers. She stated that there were things he had her do with her mouth. She would not elaborate on that . . . She also reported that at one time he would stick his finger down her throat and choke her." T. 807.

[17] "[E.D. told me] he put his private in her mouth, took it out, held her mouth shut and told her to swallow it and threatened to choke her." T. 97. She also described it as "slimy." T. 123.

open questions (*e.g.*, when asked to draw something that disappointed her, drawing a time when her father was "not nice to her body" (T. 478); describing how she felt about her father (saying she would not be safe there alone (T. 462 -463); describing physical symptoms of suppressing the abuse (keeping the secret made her stomach and head hurt (T. 465)[18]; abnormal and non-calculated behaviors such as bed-wetting (T. 930) and extremely sexual behavior with her peers which triggered police calls (T. 133); displaying advanced sexualized knowledge by describing advanced sexual acts in detail (T. 123); and dissociative states such as screaming that her father was coming to kill her and her mother even though he was not there (T. 808)).

Perhaps most significantly, the very witness the court found "most compelling," E.D.'s more recent therapist Dr. Levy, testified that "E.D. gave some very specific details that had not been reported previously. As a mandated reporter, yes, I felt that was my duty to make a report." T. 123.

In addition to the four child sexual abuse experts' (and Dr. Silberg's) opinions that the child had been or may have been reporting true sexual abuse, the

[18] It is undisputed that E.D. experienced headaches and stomach aches, along with pain in her genital area. In a worksheet that asked E.D. about the impact of keeping her feelings inside, E.D. colored the top half of her head, her stomach, and genital area to indicate where she felt pain. T. 474-475 (R131).

court was informed[19] that leading researchers of child sexual abuse have identified several of the behaviors seen in this record as "high probability indicators" of prior abuse, because empirical research has established that they are extremely rare in non-abused children:

[19] Dr. Silberg, an author of two books on child trauma and dissociation, and globally recognized expert on child sexual abuse, was admitted as an expert in the areas of child trauma, clinical psychology, custody, psychological testing, child sexual abuse, and child dissociation. T. 564, 566. She explained many of the above factors as signs of sexual abuse, as well as explaining how E.D.'s behaviors were dissociative or indicative of dissociation. T. 572, 575, 583, 566, 591-94. Dr. Silberg was the only expert in dissociation, the missing link which helped explain many of E.D.'s strange behaviors and particularly her astounding flip-flop when placed in the care of her father, which appears to have convinced Dr. Levy as well as others that the allegations were false. T. 110, 119.

The trial court rejected Dr. Silberg's testimony in its entirety (Opinion at 7) on erroneous grounds. Stating that she "stepped outside the acceptable parameters for an expert doing a record review" the court dismissed all of her testimony as "not credible," Opinion at 7. The court ruled that she had exceeded ethical bounds by offering an opinion about an individual she had never met. *Id.* However, the court was misled on this point by Dr. Drutman's quotation of only one part of the relevant ethics rule. Drutman T. 1119. In the section not quoted by Dr. Drutman, the rule specifically recognizes that opinions *may* be proffered without an interview of the subject: "When psychologists conduct a record review or provide consultation . . . and an individual examination is not warranted or necessary for the opinion, psychologists explain this and the sources of information on which they based their conclusions and recommendations. APA Ethical Principles 9.01(c), *available at* http://www.apa.org/ethics/code/. *See also* Specialty Guidelines for Forensic Psychology, 9.03 (provided that the records reviewed contain "sufficient information or data to form an adequate foundation for those opinions," an expert may come to a conclusion or diagnosis without personally examining the individual). http://www.apa.org/practice/guidelines/forensic-psychology.aspx. In short, the court's rejection of Dr. Silberg's legitimate record review and opinion was based on error.

- **Disclosing sexual abuse**: In fact, "[f]alse allegations by children represent between 1 and 5 percent of reports."[20]
- **Advanced sexual knowledge and behavior** in children 10 years old and under: Faller, *supra* n. 22 at 26; *See* T. 460 (describing advanced sexual acts); William N. Friedrich et al., Child Sexual Behavior Inventory: Normative, Psychiatric, and Sexual Abuse Comparisons, CHILD MALTREATMENT, Vol. 6 No.1 Feb. 2001, 37-49 ; William N. Friedrich, et al., Dissociative and Sexual Behaviours in Children and Adolescents with Sexual Abuse and Psychiatric Histories, J. INTERPERSONAL VIOLENCE, Vol. 12 No. 2 Apr. 1997, 155-171 (significantly uncommon in non-abused children).
- **Sexual aggression toward other children**: Faller at 27. *See* T. 460, 133 (describing E.D.'s sexual aggression at school which resulted in her being reported to the police); Friedrich et al., page 43 (extremely uncommon in populations of non-abused children).
- **Description of intimate sensory details, such as taste, touch, and feeling**: Faller at 27. *See* T. 123, T. 97 (E.D. described her father's penis in her mouth as "slimy").

[20] Kathleen Faller, CHILD SEXUAL ABUSE: INTERVENTION AND TREATMENT ISSUES (U.S. Dep't. Health and Human Svcs., Administration for Children and Families, National Center on Child Abuse and Neglect, 1993) at 28 (hereinafter "Faller").

Forensic evaluators skilled in the assessment of child sexual abuse typically look for at least one other form of corroboration besides a child's convincing statement. Faller, *supra* at 57. Here, the cumulative evidence in this case far surpasses the evidence seen in many *founded* cases of child sexual abuse.[21] Even if any one of the above indicators of sexual abuse is not credible or unreliable, the combination of three or more independent signs of sexual abuse leads to a high level of probability that a given case is a real case of abuse.[22] In this case, the combination of multiple disclosures, multiple sexualized behaviors observed by a variety of people and psychiatric symptoms of PTSD and dissociation increases the probability exponentially.

For all these reasons, it was an abuse of discretion for the trial court and Court of Appeals to essentially disregard the risks that this child has been abused and may be abused by her father in the future. This case is, for the reasons stated hereinabove, a case of "great concern" and "gravity," and is representative of

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[21] *See* Seth Goldstein, *THE SEXUAL EXPLOITATION OF CHILDREN: A PRACTICAL GUIDE TO ASSESSMENT, INVESTIGATION AND INTERVENTION*. (CRC Press 1998) pp. 54-91; INVESTIGATION AND PROSECUTION OF CHILD ABUSE, 3rd Edition, American Prosecutor's Research Institute (Sage, 2004), pp 17-36; Faller at 21-29.

[22] *See* Mark D. Everson, *Base Rates, Multiple Indicators, and Comprehensive Forensic Evaluations: Why Sexualized Behavior Still Counts in Assessments of Child Sexual Abuse Allegations*, 21 J. CHILD. SEXUAL ABUSE, 45 (2012).

several present and future child custody cases in Georgia. Accordingly, *certiorari* review is appropriate.

B. The Court's Three Key Witnesses Did Not Rule Sexual Abuse out; Mr. Holmes and Dr. Drutman expressly refused to decide it, and Dr. Levy took positions both pro and con.

Of the three professionals the Court relied on to disbelieve the abuse, two were undisputedly unqualified to opine about child sexual abuse, admittedly lacking any expertise in this complex field. T. 284, T. 1121, 1138-1139 (Holmes and Drutman); *see also*, *supra*, pp. 6-7. The GAL, Mr. Holmes, even forthrightly stated repeatedly that he *could not* grasp the key concept of dissociation and he *did not believe he needed to come to a conclusion about risk of abuse*. T. 307 (stating, remarkably, that it was not "in my job description").

The trial court also relied heavily on Dr. Levy, in concluding that the sexual abuse was not true. Opinion at 5 (stating that Dr. Levy stated that she "does not believe" the sexual abuse). It is true that Dr. Levy distrusted much of what E.D. said.[23] However, while both the court (Opinion at 5), and Appellee (Opposition at

[23] "What I would say is that there are a lot of things that [E.D.] does and says, and there are a lot of things that [Appellant] has said and done throughout . . . that lead me to question a lot of the allegations." T. 121. "[T]aken in totality, the entire case and the evasiveness and the inconsistencies and the difficulties [E.D.] has had in providing, aside from those details that she provided to me, which, to me, were the only time that they were reasonable detailed sexual information, I believe that most of the rest of it has been inconsistent and evasive and confusing and that there was something to gain." T. 138.

7), make much of her somewhat confused, ambivalent answer to the question of whether she believed E.D. was an abuse victim (T. 138), both fail entirely to mention the testimony where she *expressly refused* to say that E.D. was *not truthfully reporting* the abuse: "I wouldn't say that I have the opinion that she [E.D.] is not telling the truth about sexual abuse." T. 121. In fact, Dr. Levy's belief in the credibility of E.D.'s detailed narrative on January 17, 2012 caused her to file a sexual abuse report with the child protection agency. T. 123. "E.D. gave some very specific details" and it "was my duty to make a report." T. 123. *At no time did she ever retract her belief in the truthfulness of that particular disclosure.*

In short, if one takes away the two non-experts, the only qualified expert[24] who disbelieved the sexual abuse was Dr. Levy, and *even she believed that one of E.D.'s harrowing reports was truthful.* Given that fact, as well as the substantial additional evidence, diagnoses, and reports, and behaviors indicating abuse, record of child sexual abuse here is substantial.

While the record also indicates that E.D. displayed manipulativeness, inconsistency and some lying (T. 178-79, 173), and while such behaviors understandably generate distrust, they cannot negate – in fact, they potentially

[24] It is important to note that Dr. Levy was an expert on child sexual abuse, but *not* on dissociation, because she lacked such experience, and had even hesitated to take the case for that reason. T. 494.

corroborate – E.D.'s many non-calculated expressions and behaviors, as detailed above and in Appellant's Petition.[25]

CONCLUSION

Consideration of a child's best interests forms the core of any custody determination and the child's safety is at the heart of such an inquiry. If this record and these facts do not raise a serious concern for this child's safety and the possibility of continued abuse, it is hard to conceive of a record that would, and hard to imagine a sexual abuse victim who can be protected in custody litigation. Certainty about child abuse is almost never possible, of course, but a child's best interests require protection from real *risk*: An "experiment" with a child's safety is never in her best interest.

For these reasons this Court should grant the Petition for Writ of *Certiorari* filed by Appellant and review the trial and appellate courts' decisions, not only to protect E.D.'s physical, sexual and emotional safety, but to guide future trial courts regarding the minimum required competence for a Guardian Ad Litem in a case involving abuse; the legal obligation to consider credible corroborative evidence of

[25] Children who are subjected to traumatic sexual offenses and then forced to keep them secret by a parent who presents a false persona to the world, are learning firsthand about lying and manipulation. "[I]f you have those kinds of threats and you are being forced to kind of live a lie because you are terrified about the threats, then what will happen is, the lies may come out in other contexts." T. 574 (Dr. Silberg).

child abuse rather than excluding it (such as, possession of possible child pornography); and the legal obligation under the "best interests of the child" standard to protect a child from credible *risk* of abuse, even without certainty about past abuse.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2015, I electronically filed the foregoing document with the Clerk of Court via the Court's SCED e-filing system, and served the following counsel of record via U.S. Mail, First Class, postage-paid:

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APPENDIX

STATEMENTS OF INTEREST of AMICI

GEORGIA NETWORK TO END SEXUAL ASSAULT

The Georgia Network to End Sexual Assault (GNESA), the federally-recognized state sexual violence coalition for Georgia, is a non-profit organization incorporated in the state of Georgia representing local-level sexual assault centers throughout the state. GNESA builds statewide capacity to end sexual violence by raising awareness and creating social change. Our ultimate vision is "To lead Georgia to a society free from sexual violence".

GNESA envisions a Georgia free of sexual violence. We empower survivors and the programs that serve them, we educate the public, and we advocate for responsive public policy. Our strength is in numbers, as we collaborate throughout Georgia to stop sexual violence. As the State's leading advocates on sexual violence we often see state family courts fail to protect sexually abused children, which we fear may have occurred here.

GNESA supports a system wide approach to supporting survivors of sexual violence and holding accountable the perpetrators and our systems to ensure that victims' voices are heard and survivors are not further traumatized.

VOICE TODAY

VOICE Today, Inc., a non-profit organization that was founded in 2008 by one of the nation's leading child advocates, Angela Williams. The mission of VOICE Today is to break the silence and cycle of child sexual abuse and exploitation. Child sexual abuse and exploitation is an epidemic in our society with 1 in 4 girls and 1 in 6 boys sexually abused before age 18; only 1 in 10 tell and the median age is 9 years old. There are 42,000,000 reported victims of child sexual abuse and approximately 300,000 are commercially sexually exploited in America alone. VOICE Today advocates and provides local support and national awareness to bring justice to child victims and child sexual abuse survivors.

GEORGIA COALITION AGAINST DOMESTIC VIOLENCE

The Georgia Coalition Against Domestic Violence (GCADV), the federally-recognized state domestic violence coalition for Georgia, is a non-profit organization incorporated in the state of Georgia representing 53 local-level domestic violence shelters and non-residential programs throughout the state. Tracing our roots back to 1980, GCADV envisions a Georgia free of domestic violence. We empower survivors and the programs that serve them, we educate the public, and we advocate for responsive public policy. Our strength is in numbers, as we collaborate throughout Georgia to stop domestic violence. As the

leading State domestic violence organization, we routinely hear from victims of domestic violence whose abusive partners also victimize their children - who are then put at risk by unsafe family court decisions, as may have happened here.

GCADV supports its mission by fostering quality services for victims by increasing capacity of members and service providers, mobilizing a statewide voice to increase public policy development that helps victims and prevents DV, and educating the public to take action and prevent domestic violence.

DOMESTIC VIOLENCE LEGAL EMPOWERMENT AND APPEALS PROJECT (DV LEAP)

The Domestic Violence Legal Empowerment and Appeals Project (DV LEAP) was founded in 2003 by one of the nation's leading domestic violence lawyers and scholars. DV LEAP provides a stronger voice for justice by helping overturn unjust trial court outcomes, advancing legal protections for victims and their children through expert appellate advocacy, training lawyers, psychologists and judges on best practices, and spearheading domestic violence litigation in the Supreme Court. DV LEAP works to ensure that federal and state courts understand the realities of domestic violence and the law when deciding cases with significant implications for domestic violence litigants. DV LEAP has co-authored amicus briefs in numerous state courts and in the United States Supreme Court, on

domestic violence, child custody and many related issues. DV LEAP is a partnership of the George Washington University Law School and a network of participating law firms.

DV LEAP specializes in custody and abuse litigation, and has partnered with the U.S. Department of Justice to provide trainings and technical assistance to judges, lawyers, advocates, and litigants, on custody and abuse to seek to reverse the growing trend toward awards of custody to abusive parents.

CHILD JUSTICE

Child Justice is a national organization that advocates for the safety, dignity and self-hood of abused, neglected and at-risk children. The mission of Child Justice, Inc. is to protect and serve the rights of children in cases where child sexual, physical abuse or domestic violence is present. It works with local, state and national advocates, legal and mental health professionals, and child welfare experts to defend the interests of affected children. It provides public policy recommendations, community service referrals, court watching services, research and education. Child Justice also serves important public interests by securing pro bono representation for protective parents in financial distress and by seeking appropriate judicial solutions to the threats facing abused, neglected and at-risk children.