CASE NO. A10-1951
STATE OF MINNESOTA
IN SUPREME COURT

John Doe 76C,

Respondent,

vs.

Archdiocese of St. Paul and Minneapolis and Diocese of Winona,

Appellants.

BRIEF AND APPENDIX OF AMICUS CURIAE THE LEADERSHIP COUNCIL ON CHILD ABUSE AND INTERPERSONAL VIOLENCE

LAMEY LAW FIRM, P.A.
John D. Lamey, III, #0312009
980 Inwood Avenue North
Oakdale, MN 55128
(651) 209-3550
Attorney for Amicus Curiae Leadership Council

JEFF ANDERSON & ASSOCIATES, PA
Jeffrey R. Anderson, #2057
Patrick W. Noaker, #274951
Michael G. Finnegan, #033649X
366 Jackson Street, Suite 100
St. Paul, MN 55101
(651) 227-9990
Attorney for Respondent John Doe 76C

Thomas B. Wieser, #122841
Jennifer R. Larimore, #0386663
MEIER, KENNEDY & QUINN, CHTD.
2200 Bremer Tower
445 Minnesota Street
St. Paul, MN 55101
(651) 228-1911
Attorneys for Appellant Archdiocese of St. Paul and Minneapolis

Anna Restovich Braun, #323226
GEORGE F. RESTOVICH & ASSOC.
117 East Center Street
Rochester, MN 55904-3757
(507) 288-4840
Attorney for Appellant Diocese of Winona

Bruce Jones, #179553
FAEGRE & BENSON, LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
(612) 766-7000
Attorney for Amicus Curiae Minnesota Religious Council

Daniel A. Haws
Stacy E. Ertz
Murnane Brandt
30 East Seventh Street, Suite 3200
St. Paul, MN 55101
Attorneys for Amicus Curiae Minnesota Defense Lawyers Association

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Leadership Council for Child Abuse and Interpersonal Violence[1] was founded in 1998 as a nonprofit scientific and professional organization consisting of internationally recognized researchers and scholars within the scientific and legal communities. The mission of the Leadership Council is to provide professionals, officers of the court, and policy makers with the latest and most accurate scientific information on issues related to interpersonal violence. Advisory board members include internationally known forensic experts, clinical care providers for trauma victims, editors and reviewers for major journals, and leaders in both the American Psychological Association and the American Psychiatric Association.[2] As such, Amicus is familiar with and has an interest in participating in this appeal and seeks to provide this Court with relevant scientific and other information related to the likely impact of these proceedings on victims of trauma and other interested third-parties.

INTRODUCTION

The Leadership Council submits this amicus brief on the issue of whether "repressed memory"[3] evidence should be admissible in Minnesota. This Brief explains

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[1]Pursuant to Minn. R. Civ. P. 129.03, the amici state that no counsel for any party in this action authored this brief in whole or part. Nor has anyone made a monetary contribution for its preparation or submission. John D. Lamey, III, Esq. authored this brief at the request of and on behalf of the Leadership Council on Child Abuse Interpersonal Violence, formerly the Leadership Council on Mental Health, Justice, and the Media; hereafter "the Leadership Council."

[2]A list of the Leadership Council Scientific Advisory Board members is attached hereto as Appendix 1.

[3] Throughout the brief we refer to "dissociative amnesia" and "dissociative memory loss" to describe loss of traumatic memory that is too extensive to be explained by ordinary

why Appellants' position is wholly inaccurate regarding scientific acceptance of dissociative memory loss and why the Minnesota Court of Appeals' determination that testimony on dissociative memory loss and recovery, from an otherwise qualified expert, is admissible without a Frye-Mack hearing, is correct. See Doe v. Archdiocese of St. Paul & Minneapolis, 801 N.W.2d 203, 209 (Minn. Ct. App. 2011).

First, a Frye-Mack hearing is not appropriate when dealing with dissociative memory loss because this Court and the Legislature have recognized repressed memory in child sex abuse cases. Further, like battered child syndrome, experts should be allowed to testify to the existence of dissociative amnesia (repressed memory) because it is a concept that is beyond the typical jurors knowledge. Second, regardless of whether the testimony is weighed under a helpfulness or Frye-Mack test, the testimony should be allowed because dissociative amnesia was recognized in the DSM-IV, is accepted by the relevant scientific community, is supported by dozens of scientific studies, and because continuous memories and non-continuous are of equal reliability. Accordingly, evidence of dissociative memory loss should be allowed.

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forgetting. No specific mechanism or theory is implied. This memory loss is known by other labels such as delayed memory, recovered memory, repressed memory, etc. For the purposes of this brief, these terms are used interchangeably.

ARGUMENT

I. THE FRYE-MACK HEARING STANDARD IS NOT APPROPRIATE FOR QUALIFIED EXPERT TESIMONY ABOUT DISSOCIATIVE MEMORY LOSS.

A. This Court has repeatedly recognized memory repression (dissociative memory loss).

As recently as last year this honorable Court recognized repressed memory when determining the statute of limitations for child sex abuse cases: "It is for the district court to determine **whether Lickteig suffered memory repression** sufficient to toll the statute of limitations until 2007, when she first filed suit against Kolar. Lickteig v. Kolar, 782 N.W.2d 810, 820 (Minn. 2010) (emphasis added). Similarly in both Bugge and D.M.S. this court referred to repression as a disability or coping mechanism when a child is sexually abused. Bugge stated: "Accordingly, the statute of limitations begins to run once a victim is abused unless there is some legal disability, such as the victim's age, or mental disability, such as repressed memory of the abuse . . ." W.J.L. v. Bugge, 573 N.W.2d 677, 681 (Minn.1998) (emphasis added). In D.M.S. this Court held: "These coping mechanisms can take any number of forms, including feelings of denial, shame, and guilt, and repression of memories of the abuse." D.M.S. v. Barber, 645 N.W.2d 383, 387 (Minn. 2002). This Court's recognition of repressed memory, while not in the context of a challenge to expert testimony, strongly supports allowing a jury to hear evidence on repressed memory.

B. Barring Repressed Memory Evidence would make the Legislature's delayed discovery statute for victims essentially meaningless.

The Minnesota Legislature enacted the delayed discovery statute in order to provide victims of sex abuse more time to seek justice. This Court recognized this in D.M.S.:

> By enacting the delayed discovery statute, the legislature sought to address this phenomenon by giving sexual abuse victims more time to recognize the abuse they suffered.

D.M.S. v. Barber, 645 N.W.2d 383, 387 (Minn. 2002). If a person with repressed memory of his or her abuse – where he or she had no recall of the abuse until years later – didn't even get the benefit of the extended statute it is hard to imagine any situation where a court would allow anything more than the 6 years from the age of majority. If the legislature had intended the statute to only provide for six years from the age of majority it would have simply stated that. But it didn't and rather provided for six years from "the time the plaintiff knew or had reason to know that the injury was caused by the sexual abuse." MINN. STAT. § 541.073 (2011). This language was included for a reason and should be given meaning.

C. Testimony about dissociative memory loss should be evaluated under the helpfulness test.

This Court's decision in MacLennan supports allowing an expert to testify about dissociative memory loss without a Frye-Mack hearing. In MacLennan, this Court allowed expert testimony on battered child syndrome under the helpfulness test for expert testimony, rather than using the Frye-Mack standard:

> Expert testimony on syndromes, unlike DNA evidence or other physical science, is not the type of evidence that the analytic framework established by *Frye-Mack* was designed to address. Accordingly, we conclude that the *Frye-Mack* standard does not govern the admissibility of expert testimony on battered child syndrome.

State v. MacLennan, 702 N.W.2d 219, 233 (Minn. 2005). Here, at a minimum, expert testimony about dissociative memory loss would help the jury to understand Doe 76C's behavior related to when he brought his lawsuit. Accordingly, it should be allowed.

II. THE RELEVANT SCIENTIFIC COMMUNITY HAS ACCEPTED THAT FULL OR PARTIAL AMNESIA OF GENUINE MEMORIES OF ABUSE CAN OCCUR.

Under either the general helpfulness test or the Frye-Mack test, the jury should hear evidence of dissociative amnesia: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." MINN. R. EVID. 702. Essentially, the question for this test is whether the testimony would be helpful to the jury. Alternatively, Frye-Mack requires "[f]irst, a novel scientific technique must be generally accepted in the relevant scientific community, and second, the particular evidence derived from that test must have a foundation that is scientifically reliable." Goeb v. Tharaldson, 615 N.W.2d 800, 810 (Minn. 2000). Dissociative amnesia easily meets either test for the following reasons:

1. Major Professional Associations Recognize that Full or Partial Amnesia of Genuine Memories of Abuse Can Occur.

The fact that the brain can avoid conscious recall of traumatic information has

long been recognized by the American Psychiatric Association and the professional mental health community. Indeed, it is explicitly described as a phenomenon in the 1994 Diagnostic and Statistical Manual of Mental Disorders, 4th Edition, the main diagnostic manual used by psychiatrists and psychologists, American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders (4th ed). (Washington, DC: American Psychiatric Association Press, 1994) (hereafter DSM-IV) and continues to be recognized in a test revision of the DSM-IV, known as the DSM-IV-TR, published in 2000 (hereafter DSM-IV-TR).

The DSM-IV recognizes memory impairment to be a common feature of six post-traumatic conditions: Post-Traumatic Stress Disorder (PTSD), Acute Stress Disorder, Dissociative Amnesia, Dissociative Fugue, Dissociative Disorder Not Otherwise Specified, and Dissociative Identity Disorder. The term "dissociative amnesia" appears as follows in section 300.12 of the DSM-IV:

> Dissociative amnesia is characterized by an inability to recall important personal information, usually of a traumatic or stressful nature, that is too extensive to be explained by ordinary forgetfulness.[4]

This definition, alone, demonstrates that the concept of recovered memory is generally accepted in the relevant scientific community.

According to the authors of the manual, the diagnostic categories of DSM-IV attempt to reflect "a consensus of current formulations of evolving knowledge in our

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[4]The DSM further notes that "[t]he reported duration of the events for which there is amnesia may be minutes to years. . . . Some individuals with chronic amnesia may gradually begin to recall dissociated memories." DSM-IV at 478.

field"[5] Some diagnoses, such as premenstrual dysphoric disorder and binge eating disorder, did not meet DSM-IV standards for consensus and appear only as proposed diagnoses in appendix B.[6] But other diagnoses, including dissociative amnesia, attained official status in DSM-IV. Official recognition of dissociative amnesia in DSM-IV-TR is strong evidence that the phenomenon is generally accepted within the field.

Although some argue that inclusion of a diagnosis in the DSM-IV is not evidence of its scientific validity, the development of the manual was carefully planned and was based on rigorous scientific standards.[7] The DSM-IV published in 1994 listed 297 disorders in 886 pages. The process was overseen by a steering committee of 27 people, including four psychologists. The steering committee created 13 work groups of 5-16 members. Each work group had approximately 20 advisers. A series of critical reviews were commissioned for each set of diagnoses to determine whether there was any new empirical evidence that would warrant changing diagnostic descriptions and definitions.

A three-stage process of empirical review informed all decisions. The three stages included (a) comprehensive and systematic reviews of the published literature, (b) re-analyses of already collected but previously unanalyzed data sets, and (c) field trials.[8]

In the first stage, each group conducted an extensive literature review of their diagnoses. The Work Groups generated 150 literature reviews on questions most crucial

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[5]DSM-IV-TR at xxvii.
[6]DSM-IV-TR at 703.
[7]Schaffer, D., A Participant's Observations: Preparing DSMIV, 41 Can. J. Psychiatry 325329 (1996).
[8]Widiger, T., Frances, A., Pincus, H., et al. Toward an empirical classification for the DSM-IV. 100 J. Abnormal Psychol. 280-288 (1991).

to the development of DSM-IV. A standard format was used to ensure that these reviews would be methodical, objective, and comprehensive.[9] Reviews were then carefully critiqued by Work Group members and advisors to ensure balance and cohesiveness. The goal was for DSM-IV decisions to reflect the conclusions of an ideal "consensus scholar" and not be unduly influenced by the preconceptions of the participants.[10]

In the second stage of the review, Working Groups requested data from researchers and conducted analyses to determine which criteria required change. All proposed diagnoses had to be supported by sound empirical evidence and reviewers were instructed to be conservative. The third stage consisted of field trials sponsored by the National Institute of Mental Health.[11] Diverse sites, with representative groups of subjects from a range of sociocultural and ethnic backgrounds, were selected to ensure generalizability of field-trial results.[12]

The findings of the DSM-IV Posttraumatic Stress Disorder (PTSD) Field Trial supported the existence of dissociative amnesia. The DSM-IV field trial for PTSD studied 395 traumatized treatment seeking subjects and 125 non treatment seeking subjects who had also been exposed to traumatic experiences. PTSD and dissociation were found to be highly interrelated. Moreover, subjects who had suffered interpersonal

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[9] Frances, A., Widiger, T. A., & Pincus, H., The Development of DSM-IV, 46 Arch. Gen. Psychiatry 373375 (1989); Widiger, T., Frances, A., Pincus, H., & Davis, W. W., The DSMIV literature Reviews: Rationale, Process, and Limitations, 12 J Psychopathol. Behav. Assess. 189-202 (1990).

[10] Frances, A., Mack, A. H., Ross, R., & First, M. B. The DSMIV Classification and Psychopharmacology. In Psychopharmacology: The Fourth Generation of Progress (Lippincott Williams & Wilkins, 2002).

[11] (DSM-IV at xix)

[12] Id.

abuse at or before age 14 developed significantly more dissociative problems than those traumatized after age 14. The researchers concluded that PTSD and dissociation often occur together and represent a spectrum of adaptations to trauma.[13]

The American Psychiatric Association is not the only professional scientific group to recognize dissociative phenomena. The World Health Organization included dissociative amnesia in their *International Statistical Classification of Diseases and Related Health Problems* 10th Revision (ICD10, 2007).[14]

> F44.0 Dissociative amnesia. The main feature is loss of memory, usually of important recent events, that is not due to organic mental disorder, and is too great to be explained by ordinary forgetfulness or fatigue. The amnesia is usually centered on traumatic events, such as accidents or unexpected bereavements, and is usually partial and selective.

The ICD-10 is the international standard diagnostic classification for all general epidemiological, many health management purposes, and clinical use. Id.

Similarly, dissociative amnesia or dissociative reactions to trauma have been recognized by the:

- U.S. Department of Health and Human Services and the Centers for Disease Control and Prevention's (CDC) National Center for Health Statistics[15]

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[13]Van der Kolk, B. A., et al., Dissociation, Somatization, and Affect Dysregulation: The Complexity of Adaptation of Trauma, 153(7 Suppl) Am. J. Psychiatry 8393 (1996).
[14]Available online at http://www.who.int/classifications/apps/icd/icd10online/
[15]Code Nos. 300.12 (Psychogenic amnesia; hysterical amnesia), 300.14 (Multiple personality; dissociative identity disorder), and 300.15 (Dissociative disorder or reaction, unspecified). DHHS Publication No. (PHS) 94-1260; see also http://emergency.cdc.gov/children/PDF/working/mental.pdf.

- The American Psychological Association[16],[17], and[18]
- American Medical Association[19]
- British Psychological Society[20]
- International Society for Traumatic Stress Studies.[21]

In summary, there is ample evidence that traumatic memory loss and recovery is accepted by the major scientific organizations representing mental health practitioners.

2. There is General Acceptance for Dissociative Phenomena in the Relevant Scientific Community.

Scientific surveys of mental health professionals also provide strong support for the conclusion that dissociative amnesia is generally accepted among mental health practitioners. Appendix 2 provides a table which summarizes the data across all eight published randomized surveys on dissociative amnesia. The data across surveys include data from psychiatrists, social workers, and both clinical and experimental psychologists.

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[16]American Psychological Association Public Interest Government Relations Office, Child Abuse and Neglect, 1 (n.d.) Available online at http://www.apa.org/ppo/pi/child_abuse_and_neglect_fact_sheet.pdf.

[17]American Psychological Association, Violence and the Family: Report of the American Psychological Association Presidential Task Force on Violence and the Family (American Psychological Association, 1996) at 73 (noting "Absent or delayed memories about the abuse may be caused by dissociative amnesia...").

[18] Alpert, J. L., Brown, L. S., & Courtois, C. Symptomatic Clients and Memories of Childhood Abuse: What the Trauma and Child Sexual Abuse Literature Tell Us. In J. L. Alpert, L. S. Brown, S. J. Ceci, C.A. Courtois, E. F. Loftus, & P.A. Ornstein: Working Group on Investigation of Memories of Childhood Abuse: Final Report, 712 (American Psychological Association, 1996).

[19]American Medical Association, Council on Scientific Affairs, Memories of Childhood Abuse (Washington, D.C.: American Medical Association, 1994).

[20]British Psychological Society, Report by the Working Group on Recovered Memories at 13-14 (1995).

[21]International Society for Traumatic Stress Studies, Childhood Trauma Remembered: A Report on the Current Scientific Knowledge Base and its Applications, 23 (1997).

Column 3 shows that the percentage of relevant professionals who do not believe that dissociative amnesia or repressed memories exist ranges from 4-25% and averages 9%, with nonclinical, experimental psychologists and biologically-oriented psychiatrists comprising the greater portion of those who do not believe in the concept. Column 4 shows the percentage of professionals who somewhat believe in the concept ranges from 25-48% and averages 37%. Column 5 shows that the percentage of professionals who believe in the existence or validity of dissociative amnesia/repressed memories ranges from 23-71% and averages 53%. Across surveys the percentage of all professionals endorsing the concept of dissociative amnesia/ repressed memories as valid or somewhat valid averages 90%, leaving an average of only 9% who do not at all believe in the concept.[22]

In summary, not only is there is ample evidence that traumatic amnesia and recovery of memories is accepted by major scientific organizations, there is also strong support for the conclusion that dissociative amnesia is generally accepted among mental health practitioners.

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[22]Danmeyer, M. D., Nightengale, N. N. & McCoy, M. L., Repressed Memory and Other Controversial Origins of Sexual Abuse Allegations: Beliefs Among Psychologists and Clinical Social Workers, 2 Child Maltreatment 252-263 (1998); Dunn, G.E. Paolo, A.M., et al., Belief in the Existence of Multiple Personality Disorder Among Psychologists and Psychiatrists," 50 J. of Clinical Psychology 454-457 (1994); Pope, K. S. & Tabachnick, B. G., Recovered Memories of Abuse Among Therapy Patients: A National Survey, 5 Ethics & Behavior 237-248 (1995); Polusny, M. A., & Follette, V. M., Remembering Childhood Sexual Abuse: A National Survey of Psychologists' Clinical Practices, Beliefs, and Personal Experiences, 27 Professional Psychology 41-52 (1996).

3. A Wealth of Scientific Literature Documents the Reality of Dissociative Phenomena.

Although the more typical response to trauma is hyperamnesia (the inability to forget), a substantial minority of trauma patients are consistently diagnosed with amnesia.[23] Over the last century, mental health experts have documented traumatic amnesia in response to war trauma[24], the Holocaust[25], refugee experiences[26] and natural disasters.

One of the strongest reviews of evidence regarding prevalence for dissociative amnesia was conducted by Brown, Scheflin and Hammond in their book, *Memory, Trauma Treatment, and the Law.*[27] The book received the American Psychiatric Association's 1999 prestigious Manfred S. Guttmacher Award for that year's finest

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[23]Some critics have argued that traumatic events cause hyperamnesia, not amnesia. Numerous studies exist that show that traumatic events caused either hyperamnesia or amnesia, or both, in the same individual at different points in time. McNally's book Remembering Trauma (2003, Harvard University Press), for example, has made the logical error that because many traumatized individuals have vivid recollections of trauma, therefore, amnesia for trauma must not exist.

[24]Rivers, W. H R., The Repression of War Experiences. Lancet, 194, 717 (1918). See also, Thom, D. A. & Fenton, N., Amnesias in War Cases, 76 American Journal of Insanity 437-448 (1920); Sargent, W., & Slater, E., Amnesic Syndromes in War, 34 Proceedings of the Royal Society of Medicine 757-764 (1941).

[25]Wagenaar, W., & Groenweg, J., The Memory of Concentration Camp Survivors. 4 Applied Cognitive Psychology, 77-87 (1990); Kuch, K., & Cox, B., Symptoms of PTSD in 124 Survivors of the Holocaust, 149 Am. J. of Psychiatry 337-340 (1992).

[26]Carlson, E., & Rosser-Hogan, R., Mental Health Status of Cambodian Refugees Ten Years After Leaving Their Homes, 63 Am. J. of Orthopsychiatry 223-231 (1993). See also, Weine, S. M., Becker, D.F. et al., Psychiatric Consequences of "Ethnic Cleansing": Clinical Assessments and Trauma Testimonies of Newly Resettled Bosnian Refugees, 152:4 Am. J. Psychiatry 536 (1995) (documenting full and partial amnesia in Bosnian refugees).

[27]Brown, D., Scheflin, A., & Hammond, C. Memory, Trauma Treatment, and the Law (New York: Norton, 1998).

publication in law and forensic psychiatry.[28] The authors reviewed 43 studies relevant to the subject of traumatic memory and found that every study that examined the question of dissociative amnesia in traumatized populations demonstrated that a substantial minority partially or completely forget the traumatic event experienced, and later recover memories of the event. Moreover, the studies demonstrated that dissociative amnesia can occur after any type of traumatic event. Some of the highest rates of either partial or full amnesia were found in adult victims of childhood sexual abuse.

A more recent review in 1999 by Brown, et. al. found that a total of 68 studies have been published that document dissociative amnesia after childhood sexual abuse.[29] In fact, the authors found that no study that specifically looked for evidence of traumatic or dissociative amnesia after child sexual abuse failed to find it.[30]

A total of 34 additional studies on complete forgetting of childhood sexual abuse have been published since the publication of Brown et al.'s 1999 review. These also show that a significant minority of victims of childhood sexual abuse will completely or partially forget the abuse only to recover the memories later, after an extended period of memory incapacitation. As these studies have appeared over the past 20 years, they have shown progressive methodological improvements and meet a common standard of reliability in science, that of replication. Scientific standards hold that greater confidence can be placed in scientific findings when the scientific inquiry is conducted with different

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[28]The book also received the Arthur Shapiro Award from the Society for Clinical and Experimental Hypnosis.
[29] Brown, D., Scheflin, A., & Whitfield, C., Recovered Memories: The Current Weight of the Evidence in Science and in the Courts, 27 J. Psychiatry & L. 5-156 (1999).
[30]Id. at 126.

methodological strategies, by different investigators, with different sample populations, and across different sites. A summary of these studies is found in Appendix 3. Although space limitations prevent listing every study, a mention of a few of the studies is necessary.

Linda Williams and colleagues, in a prospective study of women's memories of child sexual abuse, interviewed 129 women with previously documented histories of sexual victimization in childhood.[31] Subjects were asked detailed questions about personal experiences including sexual abuse during childhood. Women who denied that any sexual abuse had occurred were asked if anyone else might have made such a report about them. Williams found that 38% of the women did not recall the abuse that had been documented 17 years earlier. In addition, 16% of those who recalled the abuse reported that at some time in the past they had forgotten about the abuse. Similarly, studies done in the last 10 years have also confirmed the existence of dissociative amnesia.[32]

Moreover, in the only similar study done by someone from the False Memory

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[31]Williams, L. M., Recall of Childhood Trauma: A Prospective Study of Women's Memories of Child Sexual Abuse, 62 J. Consulting & Clinical Psych. 1167-76 (1994); Williams, L., Recovered Memories of Abuse in Women with Documented Child Sexual Victimization Histories, 8 J. Traumatic Stress 649 (1995); Williams, Consulting & Clinical Psych., supra, at 1167-76.

[32]Ghetti, S., Edelstein, R. S., et al., What Can Subjective Forgetting Tell Us About Memory for Childhood Trauma? 34 Mem. Cognit. 1011-25 (2006)(finding that 15% of child sex abuse victims self reported complete forgetting); Wilsnack, S. C., et al., Self-reports of Forgetting and Remembering Childhood Sexual Abuse in a Nationally Representative Sample of US Women. 26 Child Abuse & Neglect 139-147 (2002); Ezzati-Rice, T. M., & Murphy, R. S., Issues Associated with the Design of a National Probability Sample for Human Exposure Assessment, 103(Suppl 3) Environ. Health Perspect. 55-59 (1995).

Syndrome Foundation, Dr. Elizabeth Loftus' study, found a portion of victims forget the abuse for some period of time. Dr. Loftus designed her study specifically to eliminate some of the flaws she identified in previous studies. She found 12% claimed to remember parts but not all of the abuse, while 19% claimed that they forgot the abuse for a period of time, and later the memory returned.[33]

Taken as a whole, especially considering the range of populations studied and the many different experimental designs utilized, the empirical research constitutes an irrebuttable conclusion as the reality of recovered memory/dissociative amnesia phenomena.

Some "false memory" advocates seek to counter the overwhelming scientific research documenting the prevalence of posttraumatic amnesia by performing literature reviews using a "didn't ask–didn't tell" approach.[34] Dalenberg notes that this dubious approach is based on reviewing previously published studies on longitudinal reactions to trauma (often on natural disasters, none on childhood sexual abuse) that do not focus on (and often do not mention) traumatic amnesia. In other words, the review includes studies where authors typically do not measure memory for the trauma and do not ask about current or prior memory loss. The fact that these studies do not report that participants

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[33] Loftus, E. F., et al., Memories of Childhood Sexual Abuse: Remembering and Repressing 18 Psychol. of Women Q. 67 (1994).

[34] Dalenberg, C. C., Recovered Memory and the Daubert Criteria: Recovered Memory as Professionally Tested, Peer Reviewed, and Accepted in the Relevant Scientific Community, 7 Trauma, Violence & Abuse 274, 285 (2006). See e.g., Pope, H. G., Hudson, J., Bodkin, J., & Oliva, P., Questionable Validity of "Dissociative Amnesia" in Trauma: Evidence from Prospective Studies, 172 British Journal of Psychiatry 210-215 (1998).

spontaneously reported memory loss, is then construed as evidence that no one in the study suffered any amnesia.

Beyond the obvious methodological problems with the samples studied (e.g., the inclusion of studies on earthquakes or hurricanes in which, unlike sexual abuse, there is visual evidence, consensual discussion, and public attention), there is a clear problem in the inference of lack of memory impairment when memory impairment was never measured. Dalenberg notes that "the equivalent pseudoscientific argument on the physical effects of the hurricane would be as follows:

- Participants in Study A were asked about damage to their homes in a hurricane.
- They were not asked about damage to their cars.
- No one spontaneously mentioned their cars in the interview about their homes.
- Therefore, it is impossible for hurricanes to damage cars."[35]

"False memory" advocates also seek to counter evidence for dissociative amnesia found in population surveys by pointing to a lack of controlled experimental evidence showing that the mind is capable of forgetting and then recovering traumatic memories of childhood sexual abuse. This assertion, at first blush impressive, is intended to fool the naive reader who does not realize that traumatic "repression" cannot be directly studied in a laboratory. Research of this nature would require investigators to actually traumatize human subjects under controlled conditions, which would be highly unethical and therefore never permitted by an investigational review board. Far less likely, then, would be a laboratory experiment involving the sexual molestation of a child by a primary

[35]Dalenberg, supra at 285

caregiver to measure whether the victimized child endured memory loss.[36]

Likewise, researchers cannot ethically induce Alzheimer's disease in healthy patients to study the ways this brain disease occurs. And yet, as with dissociative memory loss, though scientists barely understand the mechanics of Alzheimer's disease, it cannot reasonably be doubted that the affliction exists and has effects on memory. Indeed, the effect of Alzheimer's on memory been proven through the same types of research and scientific studies that, as with abuse victims, depend largely on the self reports of patients.

In summary, numerous studies looking at whether the brain can suffer dissociative memory loss regarding childhood sexual abuse have found that some sub-group within the sample reported either full or partial substantial forgetting for the events.

4. Research Indicates that Recovered Memories and Continuous Memories are of Equal Accuracy.

The reliability of the information recalled after a period of forgetting has been documented in a number of carefully performed studies. These studies have found that, when subjected to independent corroboration, continuous memories and spontaneously recovered memories (like those recovered by the plaintiff in the current case) are of similar accuracy.

For example, Williams studied amnesia and memory recovery in a prospective

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[36]But see comments by FMSF advisory board member Hollida Wakefield in a journal that advocates for pedophiles. Wakefield, Interview: Hollida Wakefield and Ralph Underwager, 3 Paidika: J. Paedophilia 12 (1993) ("It would be nice if someone could get some kind of big research grant to do a longitudinal study of let's say, a hundred twelve-year-old boys in relationships with loving paedophiles").

study of adults whose childhood abuse was documented in hospital records.[37] To evaluate the accuracy of the memories of sexual abuse, Williams compared the recollections obtained at the follow-up interview with the original medical records. Williams found that, "In general, the women with recovered memories had no more inconsistencies in their accounts than did the women who had always remembered." Further, "their retrospective reports were remarkably consistent with what had been reported in the 1970s." Williams found that "the stories were in large part true to the basic elements." More specifically, Williams compared nine descriptive features of the abuse from the hospital record to accounts 17 years later and found a mean of 2.00 inconsistencies in the recovered memory group (78% accuracy). Only common dating errors and errors of minor detail were found. Williams concluded that:

> ...this study does suggest that recovered memories of child sexual abuse reported by adults can be quite consistent with contemporaneous documentation of the abuse and should not be summarily dismissed by therapists, family members, judges, or the women themselves.[38]

In another study, Elke Geraerts, a postdoctoral fellow at Harvard University, examined the validity of recovered memories by attempting to corroborate the memories through outside sources.[39] The results, published in Psychological Science, a peer reviewed journal of the Association for Psychological Science, showed that, overall, spontaneously recovered memories were corroborated about as often (37% of the time) as

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[37]Williams, J. Traumatic Stress, supra.
[38]Id.
[39]Geraerts, E., Schooler, J.W., Merckelbach, H., et al., The Reality of Recovered Memories: Corroborating Continuous and Discontinuous Memories of Childhood Sexual Abuse, 18 Psychological Science 564-568 (2007).

continuous memories (45%). The researchers concluded that abuse memories that are spontaneously recovered may indeed be just as accurate as memories that have persisted since the time the incident took place.

In summary, research confirms that all memory, recovered or continuous, is subject to some distortion; however, data indicates that the majority of the details of the accounts for either type of memory will be accurate. Based on an extensive review of all available scientific research, Scheflin and Brown have suggested that if courts require an evidentiary hearing on the issue of whether repressed memories are reliable, then they "must, consistent with the science, hold either that such memories are reliable or that all memory, repressed or otherwise, is unreliable."[40]

5. Reliability Can be Demonstrated Through Scientific Standards in Instances When Error Rates Are not Directly Applicable.

To support efforts to exclude recovered memory evidence, defendants generally rely on legal standards (Frye-Mack in Minnesota, Daubert in certain other states) designed to regulate novel scientific evidence in "hard" science cases. However the test's application has been awkward in delayed memory cases because of its focus on objectively testable "hard" science. Procedures for evaluating the error rate of a technique generally involve use of the technique (compared to others) in a controlled setting, leading to agreement as to the standards for varying decisions (e.g., the decision on number of ridge comparisons that must be identical in a fingerprint before it is called a match). Consequently, while a Frye-Mack type test applies well to the standards and

[40] Scheflin, A., and Brown, D., Repressed Memory or Dissociative Amnesia: What the Science Says, 24 J. Psychiatry & L. 143,183 (1996).

controls (and error rate) for a particular "hard science" evaluative technique (e.g., fingerprinting, blood spatter analysis, psychological testing), it is problematic to use the logic of error rate for a technique and apply it to an internal mental phenomenon such as memory.

How, for instance, would one establish an error rate for continuous memory? We can show that people do claim to recall their pasts, and we can show that they are often right and sometimes wrong. But the error rate for continuous memory for one's past depends on thousands of factors (e.g., time since the event, knowledge of the alleged perpetrator, duration of the assault, reality testing capacity of the accuser, physical disabilities [e.g., eyesight] of the accuser, age of the accuser, etc.). One cannot reasonably condense these factors into one error rate for memory, whether that memory is continuous or recovered. Proving that an experience happened is typically established through testimony and the matching of testimony and behavior through external evidence. Discriminating between veridical and mistaken memories is a question to be answered by the fact-finder based on a totality of the evidence, and can be informed, but not ultimately answered by science.

The United States Supreme Court recognized the difference between the "hard" sciences and the social sciences in a follow-up case to Daubert. The Court in Kumho[41] found that the Daubert factors should be flexible and that each factor does not apply to each expert. It also noted that the focus should be on the "expert's particular method of

[41]Kumho Tire Company, Ltd. v. Carmichael, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d (1999).

analyzing the data obtained to draw a conclusion regarding *the particular matter to which the expert testimony was directly relevant...*"[42] Therefore, instead of applying to the memories themselves, which would be difficult for continuous or non-continuous memories, error rates can be applied to the methods used – the scientific studies. For example, error rates are addressed in scientific studies through the use of appropriate control groups, significance testing and/or by calculating confidence intervals. In testimony dealing with "soft" sciences such as psychology, Frye-Mack's requirements can be fulfilled when an otherwise qualified expert's opinion is backed by data that adheres to appropriate scientific standards for determining reliability.

III. THE LAW IN STATE AND FEDERAL COURTS OVERWHELMINGLY RECOGNIZES THE VALIDITY OF "DISSOCIATIVE MEMORY LOSS AND RECOVERED MEMORY."

Testimony based on dissociative amnesia has gained widespread acceptance in courts across the United States. Many state and federal courts have addressed the reliability of delayed memory and related issues involving the statute of limitations. The majority of reported cases directly addressing this issue recognize the existence of the phenomenon of dissociative/traumatic amnesia and the related experience of delayed recovery of traumatic memories.[43]

For example, the Florida Supreme Court permitted a cause of action based on repressed memories (traumatic amnesia) to go forward ruling that "Numerous courts around the country apply the delayed discovery doctrine to cases alleging childhood

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[42]Kumho, supra at 154 [emphasis in the original].
[43]See Gothard, S., & Ivker, N. A. C., The Evolving Law of Alleged Delayed Memories of Childhood Sexual Abuse, 5 Child Maltreatment 176-189 (2000).

sexual abuse followed by a temporary loss of memory.... Application of the doctrine to such cases constitutes both the majority rule and the modern trend in American jurisprudence."[44]

As for the reliability of expert testimony regarding the phenomenon of dissociative/traumatic amnesia and recovered memories, several courts have upheld the admissibility of such testimony after concluding that the phenomenon is valid and has gained general acceptance in the relevant scientific community.[45] In a more recent ruling, the New Jersey Supreme Court unanimously held that a cause of action based on spontaneously recovered repressed memories does not require expert testimony about the manner in which the memories returned.[46]

In addition, numerous courts have liberally applied the discovery rule to toll the statute of limitations in cases in which the plaintiff did not discover injuries and/or the causal relationship between those injuries and prior abuse until years after the abuse ended, even where the legislature has not enacted such a tolling provision.[47] Other cases

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[44]Hearndon v. Graham, 767 So.2d 1179 (Fla. 2000).
[45]See e.g., Isley v. Capuchin Province, 877 F.Supp. 1055 (E.D. Mich. 1995); Shazade v. Gregory, 923 F.Supp. 286 (D. Mass. 1996).
[46]Phillips v. Gelpke, 190 N.J. 580, 921 A.2d 1067 (2007).
[47]See e.g., Farris v. Compton, 652 A.2d 49 (D.C. 1994); Herald v. Hood, 1993 WL 277541 (Oh. App. 9 Dist., Summit County, July 21, 1993), appeal dismissed, 639 N.E. 2d 109 (Oh. 1994), cert. denied, 115 S.Ct. 1363 (1995); McCollum v. D'Arcy, 638 A.2d 797 (N.H. 1994); Ault v. Jasko, 70 Ohio St. 3d 114, 637 N.E. 2d 870 (Ohio Sup. Ct. 1994). Other courts have issued similar rulings, Phillips v. Johnson, 231 Ill. App. 3d 890, 599 N.E. 2d 4, 174 Ill. Dec. 458 (Ill. App. 3 Dist., June 29, 1992); Petersen v. Bruen, 792 P.2d 18, 106 Nev. 271 (Nev. Sup. Ct., 1990), Doe v. Redeemer Lutheran Church, 555 N.W. 2d 325 (Minn. App. 1996); Sellery v. Cressey, 48 Cal.App.4th 538, 55 Cal. Rptr.2d 706 (Cal. App. 2 Dist. 1996); Evans v. Eckelman, 216 Cal. App. 3d 1609, 265 Cal. Rptr. 605 (Ct. App. 1990); Marsha v. Gardner, (1991) 231 Cal.App.3d 265, 281 Cal. Rptr 473);

involving delayed memories have proved successful and have been affirmed by appellate courts.[48]

Although a few cases have been decided that favor the position that recovered memories are unreliable, it is worth noting that in some cases, judges did not receive a full and adversarial analysis of the science. For example, the court in Kelly v. Mercantonio received an amicus brief solely on the side of "false memory" proponents. The brief cited the writings of FMSF Board members (Loftus, Ofshe, Slovenko, and Pope) and the research supporting the contrary position were largely absent.[49] Accordingly, the majority rule and modern trend is to allow evidence on dissociative amnesia.

CONCLUSION

The sexual abuse of children is a serious social problem. That it can cause "dissociative memory loss and recovered memory" is beyond scientific dispute. The ability of the human brain to avoid conscious awareness of traumatic events has been documented in the medical literature for more than a hundred years. As noted above, many, many studies have demonstrated the reality of this phenomenon. Most

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Fager v. Hundt, 610 N.E.2d 246 (Ind. 1993); Leonard v. England, 445 S.E.2d 50 (N.C. App. 1994); Isley v. Capuchin Province, supra; Franklin v. Duncan, 844 F.Supp. 1435, 1438 (N.D. Cal. 1995).

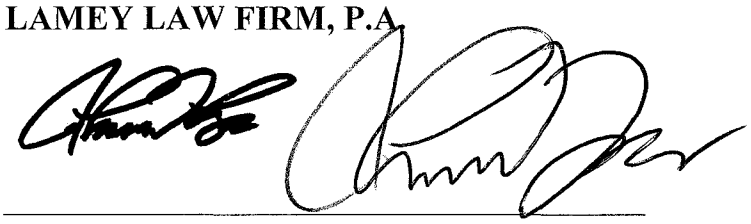
[48]See Hoult v. Hoult, 57 F.3d 1 (1st Cir. 1995) (plaintiff was abused from age four to age thirteen but did not recall the abuse until eleven years after it ended); Herald v. Hood, 1993 WL 277541 (Oh. App.9 Dist., Summit County, July 21, 1993), appeal dismissed, 639 N.E. 2d 109 (Oh. 1994), cert. denied, 115 S.Ct. 1363 (1995) (plaintiff was abused from age three to age fifteen but she did not recall the abuse until fifteen years after it ended); Van Housen v. Ipsen, 1992 WL 682159 (T.S. Cal. Jury) (San Mateo Cty. Super. Ct. Cal. 1992).

[49]Kelly v. Marcantonio, 678 A.2d 873, 879 n.7 (R.I. 1996).

importantly, the DSM-IV, the "gold standard" for professional consensus in the mental health community, has long recognized dissociative memory as a common feature of posttraumatic conditions. Thus, where the state of the science is both longstanding and well-settled, a Frye-Mack hearing should not be required before an otherwise qualified expert can testify to matters involving dissociative memory loss or recovered memory.

For all the above reasons, Amicus respectfully requests that this Court affirm the Court of Appeals' decision and uphold the admissibility and reliability of testimony related to dissociative amnesia and recovered memories.

LAMEY LAW FIRM, P.A.



Dated: November 23, 2011

John D. Lamey, III, #0312009
980 Inwood Avenue North
Oakdale, MN 55128
(651) 209-3550
(651) 789-2179

Attorney for Amicus Curiae Leadership Council

CERTIFICATE OF COMPLIANCE

I hereby certify that Brief of Amicus Leadership Council for Child Abuse and Interpersonal Violence in Case No. A10-1951 complies with Minnesota Rules of Appellate Procedure 132.01, Subd. 3(a)(1) and that the brief contains 6,446 words. The brief was prepared using Microsoft Office Word 2007 and complies with the typeface requirements of Rule 132.01.

Dated: November 23, 2011

John D. Lamey III, Esq. #0312009