SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

[redacted]

Plaintiff-Respondent,

v.

[redacted],

Defendant-Appellant.

Docket No. [redacted]

Civil Action

On Appeal from:

Superior Court of New Jersey,
Chancery Division, [redacted]ounty
Docket No. [redacted]

Sat below: The Hon. [redacted]
[redacted] J.S.C.

BRIEF OF *AMICUS CURIAE* THE CENTER ON THE ADMINISTRATION OF CRIMINAL LAW AT NEW YORK UNIVERSITY SCHOOL OF LAW IN SUPPORT OF DEFENDANT-APPELLANT

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the Center on the Administration of Criminal Law at New York University School of Law (the "Center") respectfully submits this brief in support of the Defendant-Appellant. The Center, based at New York University School of Law, is dedicated to defining and promoting good government practices in the criminal justice system through academic research, litigation, and participation in the formulation of public policy. In general, the Center's litigation practice concentrates on cases in which exercises of prosecutorial discretion raise significant substantive legal issues. Prosecutors' decisions regarding whether to charge are among the most routine, yet significant, prosecutors make, and thus are of great interest to the Center. The Center's litigation program, which consists of filing briefs in support of the government, criminal defendants, and civil litigants, brings the Center's empirical research and experience with criminal justice and prosecution practices to bear in important cases in state and federal courts throughout the United States.

This appeal presents important issues of interest, both to the Center and the public, regarding whether a prosecutor's

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

charging or declination decision can be used as evidence to determine credibility in a civil proceeding. The Center believes that such use can lead to prosecutors having undue and misplaced influence in civil cases, as well as put pressure on already-taxed prosecutors' offices. The Center is interested in preserving the integrity of prosecutors' charging decisions, ensuring the continued separation between criminal and civil cases, and facilitating the highest possible reliability of credibility determinations. Thus, this case presents issues important to the Center's mission.

STATEMENT OF FACTS[2]

This case presents an intricate and partially sealed fact pattern, which is fully addressed by the parties' submissions. However, for the purpose of the following brief, several unsealed facts are essential. It is undeniable that the decision at issue in this appeal found against the Defendant-Appellant, stripping her of custody of her children and awarding sole custody to their father, the Plaintiff-Respondent. Equally

[2]N.J. Court Rule 2:6-2(3) requires inclusion in briefs of a "concise procedural history." The record in this case is largely under seal. Moreover, this submission relates to the limited issue of the appropriateness of relying upon a declination of prosecution as evidence in a related civil case. Thus, this brief does not include a procedural history and incorporates by reference the procedural history set forth by the parties.

true is that the prosecutors who investigated the charges of child abuse against Plaintiff-Respondent declined to initiate criminal charges. Finally, the majority of experts to address the issue found that the claims of child abuse were corroborated and not manufactured.

Although the trial court's decision is currently sealed, a review of unsealed materials indicates that the trial court found the declination of prosecution to be relevant to the merits of the civil case. In at least one motion argument, the trial court noted that the prosecution's decision not to present the child abuse case to a grand jury was "noticeable" to the court because it was the equivalent of a prosecutor stating that the case "doesn't rise to the level of even the presentment" which, according to the court and the counsel for Plaintiff-Respondent, reflects the prosecutor's determination the case lacks "the likelihood that a crime has been committed." (Motion Tr. 11:18-23, 34:11-20, [redacted]2006). Thus, the unsealed record provides evidence that the trial court's decision was based at least in part on the prosecution's decision not to charge. The lack of a criminal prosecution in this case may have driven the trial court to ignore the weight of other evidence, including expert evidence refuting the notion that the child abuse claims were manufactured, and to strip Defendant-Appellant of all custodial rights.

PRELIMINARY STATEMENT

A prosecutor's decision not to bring criminal charges for child abuse should play no role in a civil child custody case. A prosecutor's decision not to bring charges in any given case can be motivated by a multitude of reasons having no connection to innocence. Among these considerations is the high legal burden of proof in criminal cases, constrained prosecutorial resources, and an overwhelming number of potential cases. Indeed, because prosecutors are not required to give any public basis for their decision, an individual declination may have been made for any conceivable reason. Therefore, because non-prosecution has no conclusive meaning, New Jersey prohibits the admission of or reliance on evidence of a lack of criminal prosecution in a subsequent civil proceeding. Were civil courts to allow evidence of non-prosecution, triers of fact would be unduly prejudiced by the evidence, abdicate their responsibility to directly determine the findings in the case, and inappropriately read meaning into the non-prosecution. Therefore, admission of or reliance on a lack of criminal prosecution injects irrelevant and inadmissible evidence into fact-finding that is likely to infect all other evidence and decisions in the case.

Credibility determinations are particularly likely to be tainted if a finder of fact places any weight on a prosecutor's decision not to bring criminal charges. It has been well

documented that credibility determinations are fraught with error, even when relying on competent evidence. In fact, it has been shown that accuracy rates for credibility determinations are inherently problematic, even for those professionals who are trained and experienced. When the trier of fact considers or relies on a prosecutor's inadmissible declination in making its own credibility determination, it is likely to lead to even greater error, making the determination all the more suspect. A prosecutor, as noted, can opt not to bring charges for many reasons that have nothing to do with a prosecutor's assessment of a witness's credibility. To treat the declination in any way as an assessment that goes to whether or not a particular act occurred or as an aid in deciding whom to believe is therefore entirely inappropriate and further risks having actual probative evidence discounted if it is mistakenly viewed as being inconsistent with the prosecutor's decision.

ARGUMENT

I. DECLINATION OF PROSECUTION IS INADMISSIBLE AND IRRELEVANT IN CIVIL PROCEEDINGS

A prosecutor's decision not to charge is neither relevant nor admissible in a subsequent civil proceeding. Such evidence is inadmissible because it is highly prejudicial to the questions raised in the civil case and ignores myriad reasons

prosecutors decline to charge. Non-prosecution evidence is particularly unhelpful in a civil context because prosecutors' decisions are based on considerations that do not apply in civil cases such as a high burden of proof, office policies, priorities, resource constraints, and evidentiary issues unique to criminal matters. Thus, admission or reliance on non-prosecution evidence ignores completely the complicated, multi-layered, and indefinite nature of the charging decision.

A. Declination of Prosecution Is Inadmissible

New Jersey law prohibits the admission of or reliance on evidence of a lack of criminal prosecution in a subsequent civil proceeding. As the New Jersey Supreme Court has stated, "[t]he general rule is that the record in a criminal proceeding is inadmissible in evidence in a civil suit." Stein v. Schmitz, 137 N.J.L. 725, 727 (E. & A. 1948) (quoting Apgar v. Woolston, 43 N.J.L. 57, 64 (Sup. Ct. 1881)). New Jersey courts have held that admitting evidence of non-prosecution is improper because it has no probative value when determining either guilt or credibility. See Amoresano v. Laufgas, 171 N.J. 532, 560 (2002) (holding that "[s]imply because prosecutors have declined to charge defendant criminally does not ameliorate the contumacious nature of his conduct" when answering defendant's claim that his actions could not amount to contempt because he had not been

criminally prosecuted); Bonpua v. Fagan, 253 N.J. Super. 475, 478 (App. Div. 1992) ("[W]hether a tortfeasor's conduct results in a criminal conviction is not an accurate barometer of the egregiousness of that conduct. Prosecuting authorities may decline to prosecute or be unable to obtain a conviction for serious wrongdoing while relatively minor misconduct may result in a conviction for a petty offense."); State v. Tineo, 2009 WL 2356445, at *6 (N.J. Super. App. Div. Aug. 3, 2009) ("Certainly, the lack of prosecution provides no probative evidence of the truth or falsity of the prior allegation."). Therefore, under New Jersey law, outside of the specific factual circumstance of malicious prosecution,[3] evidence of non-prosecution is irrelevant, improper, and inadmissible.

Other jurisdictions are in agreement with New Jersey that "evidence that criminal charges were not brought is inadmissible in a civil case arising out of the same events as the criminal charges." Goffstein v. State Farm Fire & Cas. Co., 764 F.2d 522, 524-25 (8th Cir. 1985); see Munoz v. State Farm Lloyds of Texas, 522 F.3d 568, 572 (5th Cir. 2008); Rabon v. Great Sw. Fire Ins. Co., 818 F.2d 306, 309 (4th Cir. 1987); State Farm Fire & Cas. Co. v. Carter, 840 A.2d 161, 168-69 (Md. App. 2003) (collecting

[3] The only recognized exception allowing for the admission of evidence of non-prosecution is as proof of the mere fact that a criminal prosecution was terminated, in an action for malicious prosecution. See Stein, supra, 137 N.J.L. at 727.

cases). These courts have put forward three reasons for this rule: 1) such evidence goes directly to the principal issue before the trier of fact—i.e. innocence or guilt—and is highly prejudicial; 2) a prosecutor's decision not to prosecute is based on different criteria than those that apply in a civil proceeding and may take into account many factors irrelevant in a civil suit, such as the higher standard of proof required for criminal conviction;[4] and 3) a prosecutor's opinion whether a crime occurred is inadmissible since it is not based on knowledge from personal experience. See, e.g., Rabon, supra, 818 F.2d at 309.

Identical reasoning has been expressed by the federal circuit courts in decisions holding that evidence of the conceptually related, yet far more exculpatory, judgment of acquittal is also inadmissible in a parallel proceeding. See

[4] In fact, reliance on evidence of non-prosecution to determine a question of fact or credibility in a subsequent civil case in a way amounts to applying res judicata or collateral estoppel. However, the use of criminal determinations is inappropriate in a civil context due to the differing levels of proof. United States v. One Assortment of 89 Firearms, 465 U.S. 354, 361 (1984) ("It is clear that the difference in the relative burdens of proof in the criminal and civil actions precludes the application of the doctrine of collateral estoppel."); Helvering v. Mitchell, 303 U.S. 391, 397 (1938) ("The difference in degree in the burden of proof in criminal and civil cases precludes application of the doctrine of res judicata."); see New Jersey Div. of Youth & Family Servs. v. V.K., 236 N.J. Super. 243, 252 (App. Div. 1989). It is clear that a case which does not meet the beyond a reasonable doubt standard in a criminal case can still easily meet the preponderance-of-the-evidence burden in a civil proceeding.

United States v. Gricco, 277 F.3d 339, 352-53 (3d Cir. 2002); United States v. De La Rosa, 171 F.3d 215, 219 (5th Cir. 1999); United States v. Marrero-Ortiz, 160 F.3d 768, 775 (1st Cir. 1998); United States v. Thomas, 114 F.3d 228, 249-50 (D.C. Cir. 1997); Prince v. Lockhart, 971 F.2d 118, 122 (8th Cir. 1992); United States v. Jones, 808 F.2d 561, 566 (7th Cir. 1986); United States v. Irvin, 787 F.2d 1506, 1516-17 (11th Cir. 1986); United States v. Sutton, 732 F.2d 1483, 1492 (10th Cir. 1984); Kinney v. Galvin, 701 F.2d 584, 586 n. 5 (6th Cir.1983); United States v. Viserto, 596 F.2d 531, 537 (2d Cir. 1979).

Galbraith v. Hartford Fire Ins. Co., 464 F.2d 225 (3d Cir. 1972), a case applying New Jersey law, is instructive on the application of this reasoning by the various courts which have addressed the admission of non-prosecution evidence. The Court of Appeals for the Third Circuit held that evidence of non-prosecution was inadmissible in a civil proceeding, ultimately reversing and remanding for a new civil trial because of the admission of the inappropriate evidence. In doing so, the Court of Appeals noted that, while there were no New Jersey cases on point at the time, New Jersey law clearly held evidence of acquittals and grand jury no-bills—which are both more likely to be based on the actual merits of the evidence than a mere declination of prosecution—to be inadmissible. See Galbraith, supra, 464 F.2d at 227 (citing Mead v. Wiley Methodist Episcopal

Church, 23 N.J. Super. 342, 351 (App. Div. 1952) (acquittals); Stein, supra, 137 N.J.L. at 727) (grand jury no-bills)). As the Court of Appeals explained, the "reasoning behind the exclusion of such proffered evidence is readily apparent." Id. The evidence is "highly prejudicial" to the central issue of the case because it can easily mislead the trier of fact to overlook the "complexities inherent in a prosecutor's deliberations" on whether or not to bring charges. Id. Namely, the lack of charges "may have meant a number of things. Perhaps a decision had been reached that definitive proof, 'beyond a reasonable doubt' was lacking, or it is certainly possible that the county's investigative procedures had proven inconclusive." Id. "At its most relevant, non-prosecution may have meant that the prosecutor had investigated the facts, considered them, and concluded from them that" the act had not occurred. Id. But even then, "[t]hus considered, it is apparent that the evidence would have been only an opinion which, moreover, would not have been based on personal knowledge." Id. at 227-28; see also Rabon, supra, 818 F.2d at 308-09 ("In any event, a prosecutor's opinion whether the insured started the fire is inadmissible since based on knowledge outside his personal experience.").

In fact, in one instance where the introduction of such evidence has been attempted—efforts to bring up non-prosecution for arson in a civil case for insurance proceeds—nearly every

court has held that admission is reversible error. See, e.g., Munoz, supra, 522 F.3d at 572; FIGA v. R.V.M.P. Corp., 874 F.2d 1528, 1532 (11th Cir. 1989); Rabon, supra, 818 F.2d at 309; Kelly's Auto Parts, No. 1, Inc. v. Boughton, 809 F.2d 1247, 1253 (6th Cir.1987); Am. Home Assurance Co. v. Sunshine Supermarket, Inc., 753 F.2d 321, 325 (3d Cir. 1985); Galbraith, supra, 464 F.2d at 227-28; Kamenov v. N. Assurance Co. of Am., 687 N.Y.S.2d 838, 839 (N.Y. App. Div. 1999); Cook v. Auto Club Ins. Assn., 552 N.W.2d 661, 662 (Mich. Ct. App. 1996).[5]

B. Declination of Prosecution is Not Probative of Innocence

A prosecutor's decision not to institute criminal charges against an individual cannot be understood as a determination of that person's innocence. Innocence is only one of a "host of reasons why a prosecutor may decline to bring charges." State v. Tineo, 2009 WL 2356445, at *6 (N.J. Super. A.D. Aug. 3, 2009). Relying on a decision not to prosecute in order to determine an individual's innocence or credibility in a civil case ignores these reasons and drastically oversimplifies the

[5] In Brown v. Allstate Ins. Co., 542 S.E.2d 723, 725 (S.C. 2001), the Supreme Court of South Carolina held that evidence of non-prosecution was unquestionably "irrelevant and inadmissible" in a civil case, but found the error of admitting such evidence to be harmless. But the court reached this conclusion only because there was absolutely no indication that the judge relied on the evidence in a bench trial. See Brown, supra, 542 S.E.2d at 725. Brown indicated that if reliance on non-prosecution evidence were a component of the trial court's decision, reversible error would have occurred. See id.

complexity of a prosecutor's declination decision. This is especially true in the context of non-prosecution of child abuse cases, which bring unique challenges.

i. The reasoning behind criminal charging decisions varies widely

Prosecutors have abundant grounds not to charge in any given case. Chief among these reasons is the "fundamental legal requirement that the government must prove its case beyond a reasonable doubt." Marc L. Miller & Ronald F. Wright, The Black Box, 94 Iowa L. Rev. 125, 148 (2008). This legal burden, far beyond the preponderance standard in civil cases, weighs heavily on charging decisions, making prosecutors wary of charging in all but the most air-tight cases. See id.; Galbraith, supra, 464 F.2d at 227. This hesitance to charge is fully justified in light of the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." Patterson v. New York, 432 U.S. 197, 208 (1977) (quoting In re Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring)). However, the calculus is different in civil cases which apply the preponderance standard to reflect "a societal judgment that both parties should share the risk of error in roughly equal fashion." Abbott ex rel. Abbott v. Burke, 199 N.J. 140, 236 (2009) (quoting Addington v. Texas, 441

U.S. 418, 423 (1979)). Indeed, in child custody cases, the possibility of harm to a child should be fully investigated because "the primary and overarching consideration is the best interests of the child." Kinsella v. Kinsella, 150 N.J. 276, 317 (1997).

Significant practical restrictions also affect a prosecutor's charging decision. Specifically, constrained resources and heavy caseloads require prosecutors to be mindful of the wider policy ramifications of charging in each case. See Austin Sarat & Conor Clarke, Beyond Discretion: Prosecution, the Logic of Sovereignty, and the Limits of Law, 33 Law & Soc. Inquiry 387, 391 (2008) ("A prosecutor may also decline to prosecute for policy reasons-for example, because she feels that her office is over-whelmed, and it would be impractical to take the case."). "It is axiomatic that all crimes cannot be prosecuted even if this were desirable. Realistically, there are not enough enforcement agencies to investigate and prosecute every criminal act that occurs." American Bar Association Criminal Justice Prosecution Function and Defense Function Standards § 3-3.9 Commentary (3d ed. 1993). In fact, the New Jersey Attorney General's Office stated in reference to this case that "if a prosecutor cannot expect to secure a conviction and to sustain it on appeal, then it would be inappropriate to allocate resources to pursue the matter." [redacted]

[redacted]

Additional reasons for a prosecutor's decision to decline charges can range from intricate constitutional evidentiary issues to gut instincts on the likelihood of obtaining a conviction. For example, prosecutors may decline to charge because of a concern that evidence could be challenged under the Confrontation Clause, because of uncertainty about how a rule of evidence will apply in the case, or even because the prosecutor has cases that are more pressing. Indeed, a prosecutor "may decline to prosecute for no apparent reason at all." Sarat & Clarke, supra, at 391.

Adding to the complexity, prosecutorial declination decisions are difficult to unravel because prosecutors are generally not required to publicly state a particular basis for their choice when they make it. See Miller & Wright, supra, at 133. Indeed, even when prosecutors do state a particular basis, declinations are not subject to traditional legal review. Id. at 130. This leaves prosecutors largely free to approach the declination decision in whatever way best matches current prosecutorial realities without attracting public scrutiny. See Mark Osler, Must Have Got Lost: Traditional Sentencing Goals, the False Trail of Uniformity and Process, and the Way Back Home, 54 S.C. L. Rev. 649, 677 (2003). This means that

prosecutors can set their own priorities and benchmarks for determining when to charge cases. For some prosecutors, that could mean prioritizing cases involving the leaders of criminal networks or particular bad actors in a community. For others, it might mean prosecuting the most easily achievable cases, i.e. "low-hanging fruit." Id. In the case of low-hanging fruit, prosecutors pursue cases that "require fewer resources and less complicated investigations in order to sustain an arrest and conviction." Marc D. Goodman, Why the Police Don't Care About Computer Crime, 10 Harv. J.L. & Tech. 465, 484 (1997); Osler, supra, at 677. This type of prioritizing is understandable in light of the resource challenges prosecutors' offices face.

ii. Child abuse cases carry unique prosecution challenges

While there are ample reasons to decline prosecution in any case, the decision whether or not to charge a child abuse case presents special hurdles, most significant of which are an overwhelmed child protection system and heavy reliance on child witnesses. "Child abuse is one of the most difficult crimes to detect and prosecute, in large part, because there often are no witnesses except the victim. A child's feelings of vulnerability and guilt and his or her unwillingness to come forward are particularly acute when the abuser is a parent." Pennsylvania v. Ritchie, 480 U.S. 39, 60 (1987). Since these

unique challenges can make securing convictions difficult for reasons apart from the merits of the cases, it is hardly surprising that empirical evidence shows that child abuse cases are "less likely to have charges filed than felonies overall and other violent crimes." Theodore P. Cross et al., Prosecution of Child Abuse: A Meta-Analysis of Rates of Criminal Justice Decisions, 4 Trauma, Violence & Abuse 323, 333 (2003) (finding charging rates lower than for other violent crimes but comparable to rape and other sexual assault crimes). In fact, there is some evidence that prosecutors may under-prosecute child abuse cases for reasons ranging from the general lack of direct evidence to the possibility of a juror's antiquated attitudes on child abuse. See Robert J. Levy, The Dynamics of Child Sexual Abuse Prosecution: Two Florida Case Studies, 7 J. L. & Fam. Stud. 57, 57 n.7 (2005).

A lack of resources is always a factor in declining prosecution. Scarce resources are amplified in child abuse cases, however, as child abuse officials such as social workers often lack adequate time and funding to fully investigate the volume of allegations before they even reach a prosecutor's office. See David Peterson, Judicial Discretion is Insufficient: Minors' Due Process Right to Participate with Counsel When Divorce Custody Disputes Involve Allegations of Child Abuse, 25 Golden Gate U. L. Rev. 513, 525-26 (1995); Susan

B. Apel, Custodial Parents, Child Sexual Abuse, and the Legal System: Beyond Contempt, 38 Am. U. L. Rev. 491, 500-01 (1989). Child abuse officials are therefore forced to respond to allegations on an expedited basis with inadequate resources, decreasing the ability of the child protection system to operate effectively. See Peterson, supra, at 525-26. And, in turn, prosecutor's offices receive more cases than they can reasonably charge, many of which are inadequately investigated when they arrive to a prosecutor.

More importantly, child abuse prosecution routinely relies heavily on child victims' testimony because other evidence can be sparse. Cross, supra, at 325. However, child witnesses raise various issues, not the least of which is that children are notoriously difficult to interview and to put on the witness stand. See, e.g., Lisa R. Askowitz & Michael H. Graham, The Reliability of Expert Psychological Testimony in Child Sexual Abuse Prosecutions, 15 Cardozo L. Rev. 2027, 2033 (1994) (examining the litany of reasons children witnesses in child abuse cases have difficulty testifying). While effective and appropriate techniques for interviewing children exist, young children—who may be confused and scared because of their age and the unusual circumstances of being formally interviewed—do not readily volunteer relevant information, sometimes compelling inexperienced interviewers to resort to questionable interview

techniques. See, e.g., id.; David B. Battin & Stephen J. Ceci, Children as Witnesses: What We Hear Them Say May not be What They Mean, 40 J. Am. Judges Assoc. 4, 4-5 (2003), available at http://aja.ncsc.dni.us/courtrv/cr40-1/CR40-1BattinCeci.pdf.

The difficulties in effectively questioning child witnesses so that the information can be used in a criminal trial are fully on display in this case. In reviewing the [redacted] County Prosecutor's Office's declination decision for abuse of discretion, the [redacted] noted that the children's initial interviews by the [redacted] County Prosecutor's Office were improperly conducted under difficult circumstances, creating a possibility that any relevant information obtained would be deemed suspect at trial. [redacted] Specifically, the letter indicated that the relevant answers in the [redacted] County interviews "were elicited through pointed and leading questions" from a distracted and uncooperative child. See id. at 2-3. Additionally, the [redacted] stated that the [redacted] County interviews relied heavily on answers obtained in an unrecorded interview by Shana Goldman. See id. According to the [redacted] these issues resulted in testimony that would present problems in a criminal case because it was susceptible to arguments that

it may have been tainted by suggestion and lacked clarity and was unlikely to withstand cross-examination. See id. However, while the unfortunate realities of inconclusive interviews, young witnesses, limited resources and the high burden of proof in a criminal trial were explicitly related as reasons for the declination of criminal prosecution, at no point did the [redacted] County Prosecutor's Office or the [redacted] state any finding or belief that child abuse did not, in fact, occur or that the children's statements were actually tainted.

Accordingly, civil courts—which take and must decide all cases presented to them, apply a much lower "preponderance of the evidence" standard, and in child custody cases serve the best interests of the child—should especially not be influenced by decisions made by criminal authorities to decline prosecution in cases based on child witnesses alleging sexual abuse because criminal authorities have discretion to pick and choose cases, can forego prosecution of some cases in order to pursue "low-hanging fruit," and must prove guilt beyond a reasonable doubt to a jury.

iii. [redacted] County charges less than a quarter of substantiated child abuse cases, further showing the lack of a correlation between non-prosecution and innocence

The lack of criminal charges in this case is particularly unhelpful as any indication of innocence, given the extremely large number of reported instances of abuse in Essex County compared to the small number of criminal charges actually initiated. In [redacted] County in 2007, it appears that no criminal charges were initiated in more than three-quarters of the cases of child abuse that child abuse investigators deemed substantiated. And it appears that only 3.1% of [redacted] County's total 9,663 child abuse referrals, substantiated or not, resulted in criminal charges in 2007. The unfortunate reality is that child abuse prosecutors in [redacted] County are responsible for the unenviable task of wading through thousands of child abuse claims every year and being forced to pick only a small fraction to charge criminally.

[redacted] County has consistently had the [redacted] number of child abuse cases of any county in New Jersey. See, e.g., State of New Jersey Department of Children & Families, Child Abuse and Neglect Substantiations 1 (2008) [hereinafter 2008 Child Abuse][6] (showing [redacted] County with [redacted] of the reported child abuse

[6] Available at http://www.state.nj.us/dcf/home/childdata/referrals/ChildAbuseNeglectSubstantiationDataCY08_07.14.09.pdf.

cases in New Jersey, more than [redacted] of the other [redacted] New Jersey counties); State of New Jersey Department of Children & Families, Child Abuse and Neglect Substantiations 1 (2007) [hereinafter 2007 Child Abuse][7] (showing [redacted] County with [redacted]). In recent years, New Jersey's Division of Youth and Family Services ("DYFS") has been referred over 8,000 child abuse cases per year in [redacted] County. See, e.g., 2008 Child Abuse at 1 (8,599 cases); 2007 Child Abuse at 1 (9,663 cases).

In 2007, the most recent year for which all relevant data is available, [redacted] County received 9,663 referrals of child abuse. See 2007 Child Abuse at 1. Initial investigations into each of the referrals by DYFS resulted in 1,316 substantiated instances of abuse. Id. That same year, the Child Abuse Unit of the [redacted] County Prosecutor's Office opened 649 child abuse cases and brought criminal charges in 295 cases. See [redacted] County Prosecutor's Office - Child Abuse Unit, http://www.njecpo.org/childab.htm. The statistics of substantiation and criminal charges in [redacted] County are not directly linked, as prosecutors may bring charges in cases that are deemed "unfounded" by DYFS or decline to charge in cases that are "substantiated" by DFYS. In addition, many cases continue into subsequent years. However, the statistics do show

[7] Available at http://www.state.nj.us/dcf/home/childdata/referrals/ChildAbuseNeglectSubstantiationDataCY07_.pdf.

that the number of investigations by the Child Abuse Unit was less than half the number of substantiated cases of abuse, and that only half of those investigations yielded charges. Thus, even assuming that all of the investigations opened by the Child Abuse Unit were from cases substantiated by DYFS that year, charges were only brought in 22.4% of the substantiated cases in [redacted] County. Therefore, no charges were initiated in at least 77.6% of the substantiated abuse cases in [redacted] County in 2007.

Additionally, assuming that the cases charged by the Child Abuse Unit were ones initially referred to DYFS, only 3.1% of [redacted] County's total 9,663 child abuse referrals resulted in criminal charges in 2007. Although it is likely that abuse or neglect did not occur in many of the County's "unfounded" referrals, studies and commentary have indicated that "substantiation is an imperfect measure of child maltreatment." Theodore P. Cross, Caseworker Judgments and Substantiation, 14 Child Maltreatment 38, 50 (2009) (noting specifically that, in his study of national data of child mistreatment, there was a concerning "group of children who were judged to be at moderate to severe risk and harm and did *not* have cases that were substantiated"); see, e.g., Brett Drake, Unraveling "Unsubstantiated", 1 Child Maltreatment 261, 265 (1996) ("Data support the assertion that large numbers of cases exist in which maltreatment occurs but substantiation is not officially

noted."). New Jersey's own definitions of the two possible outcomes to a DYFS investigation—substantiated or unfounded—indicate the possibility of abuse even when it can not be substantiated. Although substantiation is a determination that "abuse or neglect occurred and there was sufficient evidence to make a finding that it occurred," the unfounded label is not a determination that no abuse occurred but rather that "there was not sufficient evidence to establish that abuse or neglect occurred." State of New Jersey - Department of Children & Families - Abuse/Neglect Substantiations, http://www.state.nj.us/dcf/home/childdata/referrals/#4. That the substantiation process is imperfect is amply illustrated by the fact that in this case it appears DYFS has changed its conclusion three times, most recently in response to the lower court's decision. So while only 13.62% of the referrals in [redacted] County were substantiated, it is possible and very likely that abuse occurred in some of the 86.38% cases that were determined to be "unfounded," making it even more apparent that the Child Abuse Unit of the [redacted] County Prosecutor's Office has not filed criminal charges in a significant number of child abuse cases.

This case, no matter the outcome of the shifting DYFS determination, thus shares the same fate as at least 77.6% of the *substantiated* cases in [redacted] County: non-prosecution. Thus,

reliance on non-prosecution as proof of innocence ignores completely the complicated, multi-layered, and indefinite nature of the charging decision, and the realities facing the Essex County Prosecutor's Office.

iv. Admission of and reliance on evidence of non-prosecution would inappropriately appoint prosecutors the gatekeepers of child abuse determinations in both criminal and civil cases

That many of the child abuse cases in which no criminal charges are brought are heard in family and civil court is unsurprising. Similarly unsurprising is that the number of New Jersey family and civil court cases far outnumber their criminal counterparts. See The State of New Jersey Administrative Office of the Courts, Report of the New Jersey Courts 2008-2009 (2009). There are less than 55,000 total criminal cases filed in New Jersey every year. Id. at 29. These criminal cases are dwarfed by the hundreds of thousands of yearly family and civil court cases filed in New Jersey, including approximately 67,000 dissolution, 55,000 domestic violence, and 4,300 child abuse cases. Id. If New Jersey courts allow the admission of or reliance on evidence of non-prosecution in these family and civil court cases—whether for child abuse, assault, or any number of criminal acts—it would have the undesirable effect of inserting prosecutorial declinations, which could be based on

reasons wholly unrelated to the merits of the abuse allegation, into the civil context.

In this specific case, and others involving child abuse, the admission of this evidence essentially appoints a prosecutor the gatekeeper of a child abuse determination in both civil and criminal contexts. Not only would this lead to unwelcome effects in civil cases, but prosecutors of child abuse would be put in an even more difficult position than they already occupy. Prosecutors would continue to be constrained by limited resources and a heavy burden of proof, but would operate under the knowledge that every individual they did not charge would be entitled to present evidence of their non-prosecution in civil proceedings, leading to unpredictable and potentially disastrous consequences, such as increasing the likelihood that child abusers will be awarded custody of their children.

II. Declination of Prosecution Is Not Appropriately Used as Probative Evidence and Risks Tainting Credibility Determinations

Credibility determinations have been empirically proven to be difficult and fraught with error, even for those who are trained and experienced at perceiving the difference between truth and deception. Accuracy rates for credibility determinations hover around pure chance when making decisions based on properly introduced and relied upon evidence. These

low accuracy rates reflect an inherent human inability to detect lies and can derail even the most professional, good faith, and skilled credibility determinations.

Since declinations of prosecution present complicated and multi-layered decisions, which may or may not include a prosecutor's credibility determination, consideration of or reliance on non-prosecution evidence for the purpose of credibility is highly problematic. However, even if a declination of prosecution was an explicit credibility determination—which appears not to have been the case here—it would still be the product of a process with accuracy rates just above 50%. When a court makes a credibility determination, such a determination is prone to error on its own terms. When that court considers inadmissible evidence of non-prosecution—itself also possibly based on an error-prone credibility determination—and inappropriately interprets that non-prosecution as bolstering innocence or undermining the trustworthiness of allegations, the court's credibility determination is prone to even more error and is thus all the more suspect. Indeed, reliance on inadmissible and prejudicial non-prosecution evidence increases the risk that the trier of fact will abdicate his or her responsibility to directly determine the findings in the case and that the remaining evidence will be viewed through a faulty lens, infecting the entire case.

A. Credibility Determinations are Notoriously Suspect

Decades of empirical studies have shown "that, as a general rule, people are poor human lie detectors." Saul M. Kassin, Human Judges of Truth, Deception, and Credibility: Confident but Erroneous, 23 Cardozo L. Rev. 809, 809 (2002). In fact, the generally accepted view from legal commentators and psychological studies is that individuals making credibility determinations do "no better than pure chance in evaluating live witnesses." Max Minzner, Detecting Lies Using Demeanor, Bias and Context, 29 Cardozo L. Rev. 2557, 2563 (2008) (quotation omitted); see Charles F. Bond Jr. & Ahmet Uysal, On Lie Detection "Wizards", 31 Law & Hum. Behav. 109, 109 (2007) ("In judging whether or not others were lying, the average person is accurate roughly 54% of the time, when 50% would be expected by chance.").

Individuals who regularly make credibility determinations for a living—including police officers, prosecutors and judges—are similarly "highly prone to error." Saul M. Kassin & Christina T. Fong, "I'm Innocent!": Effects of Training on Judgments of Truth and Deception in the Interrogation Room, 23 Law & Hum. Behav. 499, 511 (1999). These professionals, with specific training and hands-on experience in credibility determinations, are not significantly differentiated from the general population. See generally Paul Ekman & Maureen

O'Sullivan, Who Can Catch a Liar?, 46 Am. Psychologist 913 (1991). One study found the accuracy rate for judges to be 56.73%, less than three percent better than the general population and less than seven percent better than chance. Id. at 916. The highest testing group in the study, the Secret Service, scored only 64.12%. Id.

B. Credibility Determinations' High Error Rates are Exacerbated by Reliance on Inadmissible Evidence

As discussed in Section I, non-prosecution is likely to be based on a host of reasons unrelated to credibility determinations and without a contemporaneous explanation of what those reasons were. But even if it were possible to find out the reason and the non-prosecution decision was based in part on the prosecutor's assessment of a witness's credibility—a determination that would have been made without the benefit of the adversary process and without further investigation—the prosecutor's credibility determination would be fraught with the same high probability of error as every other credibility determination. Therefore, if a court were to rely on the inadmissible evidence of a prosecutor's explicit credibility determination in making its own highly error-prone credibility findings, it would, for all intents and purposes, be basing already shaky conclusions upon a foundation of error.

However, it is unnecessary here to delve too deeply into a convoluted morass of intertwined credibility determinations. It is more likely that most non-prosecution decisions in child abuse cases are a practical decision balancing the resources of the office, the volume of cases, and the complexities of child witnesses. In fact, the available information from the prosecutors in this matter indicates that their decision was not based on credibility, but rather on the perceived issues the prosecutors would encounter in the face of the New Jersey Supreme Court's decision in State v. Michaels, 136 N.J. 299 (1994)—specifically the *possibility* that the child testimony would be *perceived* as being tainted by an inadequate interview—and the high burden of the beyond a reasonable doubt standard. See [redacted]

The record here suggests that the trial court relied on this inadmissible evidence. The court appears to have viewed the non-prosecution decision as relevant to the merits of the civil case when, in fact, that decision was the result of factors wholly unrelated to the merits. Thus, this Court should not defer to such a determination. Furthermore, the trial court's decision to interpret the non-prosecution evidence as proof that the child abuse claims were manufactured is likely to

have infected all other factual determinations, making all of the trial court's findings suspect .

New Jersey law has addressed an analogous situation in the admission of polygraph tests. See New Jersey v. A.O., 198 N.J. 69 (2009); New Jersey v. Domicz, 188 N.J. 285 (2006). As a general rule, polygraph results are inadmissible in New Jersey because they are considered unreliable. A.O., supra, 198 N.J. at 83. Compounding the issues of reliability is the potential that triers of fact may give polygraph evidence "undue weight and distract [them] from judging the credibility of witnesses directly." Id. at 92. This reasoning applies equally to judges and juries alike. See Domicz, supra, 188 N.J. at 311. In Domicz, the New Jersey Supreme Court reversed a decision that had created an exception to the general rule of inadmissibility, admitting polygraph evidence in a suppression hearing because, as the Appellate Division noted, the judge could give it "such weight as it warrants." Id. The Supreme Court found that admission of the polygraph evidence was error, holding that the admission of such unreliable evidence distracts the judge from directly assessing the credibility of the witnesses. Id. at 314.

The principles involved in considering non-prosecution evidence while making a credibility determination are identical. A judge's admission or reliance on non-prosecution as an

indication of innocence or of a prosecutor's independent credibility determination is wholly improper because it "is an area in which there is so much uncertainty concerning the reliability of the [evidence] itself and which distracts the judge from fulfilling his essential function of assessing directly the credibility of the witnesses." Id.

C. The Scope of the General Abuse of Discretion Standard of Review is Expanded When Judges Incorrectly Rely on and Draw Implications from Non-prosecution Evidence

In New Jersey, credibility determinations are generally given deference and reviewed for abuse of discretion. New Jersey Div. of Youth & Family Servs. V. G.L., 191 N.J. 596, 605 (2007). However, "there is an exception to that general rule of deference: Where the issue to be decided is an alleged error in the trial judge's evaluation of the underlying facts and the implications to be drawn therefrom" a court will "expand the scope of [its] review". Id. (quotations omitted). The question for this Court then becomes whether the trial judge's findings "went so wide of the mark that the judge was clearly mistaken." Id.

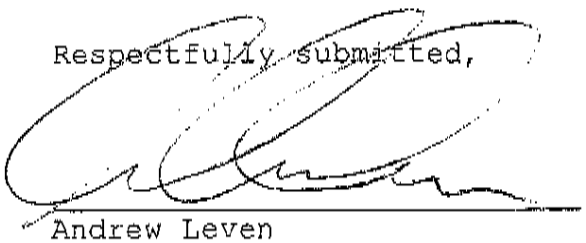
It is clear that any civil court's reliance on evidence of non-prosecution—whether as a misguided proxy for a prosecutor's inadmissible credibility determination or as factual support for a trial court's own credibility findings—shows error in the

evaluation of the meaning and implications of a declination of prosecution. That is especially so when the court ignores or misinterprets other evidence. See In re Guardianship of J.T., 269 N.J. Super. 172, 188-91 (App. Div. 1993) (finding that the court dismissed ample expert evidence and misinterpreted the implications of the evidence presented). Thus, any findings based on the use of such evidence should be analyzed under an expanded scope of review.

CONCLUSION

For the foregoing reasons, this Court should reject the use of non-prosecution evidence in civil proceedings and reverse the trial court.

Respectfully submitted,



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