A. The trial court erred in permitting Sergeant Kaminskas to testify as an expert witness and tell the jury that defendant had failed a lie-detector test (raised below).

Before admitting expert testimony, the trial court must find that (1) the testimony concerns a subject matter beyond the average juror's understanding, (2) the field about which the expert will testify is sufficiently reliable, and (3) the witness has sufficient expertise to offer the testimony. At its core, the testimony must assist the jury "to understand the evidence or to determine a fact in issue." N.J.R.E. 702; State v. Torres, 183 N.J. 554, 567-68 (2005).

The trial court should have precluded Sergeant Kaminskas' expert testimony below, as defendant requested, (1T32:10-35:12), because the testimony failed at least two of Rule 702's three requirements. Even if Kaminskas was sufficiently qualified, telling the jury that defendant failed a lie-detector test didn't concern a subject beyond the average juror's ken. Lie-detector tests concern one and only one thing: credibility. Our courts have repeatedly recognized that credibility is not a proper subject of expert testimony. State v. Frisby, 174 N.J. 583, 594-95 (2002). That rule has particular force here, where defendant's guilt hinged entirely on resolving the credibility of the child witness and defendant's denials. Telling the jury that defendant was lying when he denied the child's accusations was no

different than telling them that defendant was guilty of the sexual offenses charged against him, which is "wholly improper." State v. Odom, 116 N.J. 65, 77 (1989).

More than 30 years of caselaw confirm that lie-detector results aren't sufficiently reliable under Rule 702. As our Supreme Court recently noted in State v. Domicz, 188 N.J. 285, 312 (2006), polygraph examinations have "not achieved significantly greater acceptance in the scientific and legal community" over the past 30 years, with "thirty-one states ban[ning] polygraph evidence altogether" and state and federal courts "continu[ing] to express doubt about whether [polygraph] evidence is reliable." (citing United States v. Scheffer, 523 U.S. 303, 312, 118 S.Ct. 1261, 1266, 140 L.Ed.2d 413, 420 (1998)).

The State will no doubt defend Kaminskas' testimony on the ground that defendant and the State agreed that the lie-detector results would be admissible under the Supreme Court's 1972 decision in State v. McDavitt, 62 N.J. 36, 46 (1972). But even McDavitt recognized the presumptive rule that "lie detector testing has not yet attained scientific acceptance as a reliable and accurate means of ascertaining truth or deception," 62 N.J. at 44, and the "very narrow circumstances" under which the Court permitted the results into evidence in McDavitt were not present below.

In McDavitt, the Court permitted the polygraph results because the defendant, over the prosecutor's objection, had testified that he offered to submit to a polygraph examination after his burglary arrest. Id. at 41. That testimony, the Court noted, should not have been permitted. Id. at 43. But the door had been opened and, on cross-examination, the defendant again stated he would be willing to take a polygraph test, suggesting again to the jury that such a test would have cleared him of the State's burglary charge. Id. at 41. Eventually, the defendant and the State entered into a court-approved stipulation, agreeing to the admissibility of the results of a polygraph test as a means of balancing the unfairness to the State of the defendant's initial comments. Id. at 41-42. In short, McDavitt was born from an opening the door circumstance where the polygraph results were admitted as an attempt to counteract the improper evidence the defendant had presented to the jury in the first place:

> it was defendant who insisted on getting before the jury evidence that he had offered to take a lie detector test to prove his innocence. Once this was heard by the jury, its impact was obvious. A motion for a mistrial would have been futile since the trial court had ruled the evidence was admissible. The only way the prosecutor could negate the inference the jury would undoubtedly draw was to ask defendant if he was presently willing to take such a test. * * * It is clear that defendant and his attorney provoked the situation. It is equally clear that defendant's decision to submit to a polygraph test and have the test results submitted to the jury was made only after he had

> been fully advised on his right to refuse, and the consequence of his submitting to the test.
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> [McDavitt, 62 N.J. at 43-44]

Because that circumstance was not present in the case below, the "very narrow exception" permitted by McDavitt did not apply, and the trial court should have ruled Kaminskas' testimony inadmissible.

We acknowledge that many lower courts, including the court below, have almost casually accepted polygraph test results into evidence at trial as long as the State and the defendant consent to their admission. But these courts have read McDavitt too broadly and have extended the use of polygraph results to situations that McDavitt does not embrace and where our caselaw does not allow.

The Supreme Court's recent decision in Domicz confirms this reading of the governing precedent. The Court emphasized that McDavitt creates at most a "very narrow exception" to the general rule *against* the admission of polygraph results, and that the McDavitt exception applies only where the circumstances at issue match those presented in McDavitt. Domicz, 188 N.J. at 312. While it concluded that the discrete holding of McDavitt was not before it, the Domicz Court clearly disapproved of McDavitt's reasoning, declined to extend it to permit polygraph results in a suppression hearing to "bolster" a defendant's credibility, and essentially limited

McDavitt—to the extent it remains at all viable—to its facts. 188 N.J. at 309. This general rule of inadmissibility is consistent with the bulk of scientific and judicial precedent from around the country, as the United States Supreme Court has explained:

> By its very nature, polygraph evidence may diminish the jury's role in making credibility determinations. . . . a polygraph expert can supply the jury only with another opinion, in addition to its own, about whether the witness was telling the truth. Jurisdictions, in promulgating rules of evidence, may legitimately be concerned about the risk that juries will give excessive weight to the opinions of a polygrapher, clothed as they are in scientific expertise and at times offering, as in respondent's case, a conclusion about the ultimate issue in the trial. Such jurisdictions may legitimately determine that the aura of infallibility attending polygraph evidence can lead jurors to abandon their duty to assess credibility and guilt. . . .
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> [United States v. Scheffer, 523 U.S. 303, 313-14, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998)(confirming "the President is within his constitutional prerogative to promulgate a *per se* rule that simply excludes all such evidence" and emphasizing that a "fundamental premise of our criminal trial system is that 'the jury is the lie detector'"(citation omitted)]

Reversal is the right result here, because the unreliability and risk of undue weight that a jury might give to lie-detector results was not improved one bit because defendant consented to their admission. The consent didn't advance the interests of justice any more than had he contested them because the reliability of the results remained the same. Evidence is either reliable enough to go before a jury in a criminal case or it's not. Agreement to its

use doesn't change that. And using unreliable evidence in a major criminal case simply because an unrepresented defendant consented to its admission—nearly three years before the trial below—runs roughshod over the most basic notions of truth-seeking that our justice system must strive to maintain.

These concerns are reflected in the Rule 104 hearing below, which the trial court conducted to confirm that defendant had indeed voluntarily consented to take the test and have the results deemed admissible at any subsequent "judicial proceeding." Detective Genna claimed that the polygraph was administered only "three times" and that defendant "failed" all three tests, (1T29:1-15), yet defendant claimed that police had administered the test "like more than ten times," (1T14:1-10), and that Genna told him he'd done "good" until the last test, which he "failed." (1T14:10-24). That testimony contrasts starkly with the open-court consent obtained from the defendant in McDavitt and is troubling enough by itself to warrant reversal in this case.

Finally, if there was ever any doubt about the impact of telling the jury about the lie-detector results, the statements of Kaminskas and the prosecutor completely wipe those doubts away. They both told the jury—in

no uncertain terms—what the results meant to the determination of defendant's guilt:

- there had never been a "confirmed mistake," (3T56:18-25);
- the polygraph results were 95% to 97% accurate, (3T48:12-22);
- of 302 tests Kaminskas had ever conducted on the same polygraph machine, there had never been any external evidence that contradicted the test results, (3T56:12-20);
- "[Defendant] denies these allegations and he thinks - - fool the machine. Guess what? He can't. The machine said he lied . . ." (7T63:1-9).

Admitting the lie-detector results was clearly capable of producing an unjust result and warrants reversal of defendant's resulting convictions below. R. 2:10-2.