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SUPERIOR COURT OF NEW JERSEY
HUDSON COUNTY
CRIMINAL DIVISION,
INDICTMENT NO. 12-11-1994

STATE OF NEW JERSEY

CRIMINAL ACTION

Plaintiff,

v. OPINION

J.L.G.

Defendant.

_____

DECIDED: September 1, 2017

Najma Rana, Assistant Prosecutor, and Keith Travers, Assistant Prosecutor, for the State (Ester Suarez, Prosecutor of Hudson County, attorney).

Joseph J. Russo, Deputy Public Defender, and Lauren S. Michaels, Assistant Deputy Public Defender, for the defendant (Joseph E. Krakora, Public Defender, attorney).

Alex Shalon, for amicus curiae the American Civil Liberties Union of New Jersey.

Theo Pollack (The Law Offices of Theo Mackey Pollack) and Jerome C. Roth and Jeremy A. Lawrence (Munger, Tolles, & Olson, LLP), for amicus curiae American Professional Society on the Abuse of Children.

Herbert I. Walderman (Javerbaum, Wurgaft, Hicks, Kahn Wikstrom, & Sinins, P.C.) for amicus curiae New Jersey Association for Justice.

Laura Sunyak, Assistant Prosecutor, and Joseph Paravecchia, Assistant Prosecutor for amicus curiae County Prosecutors Association (Richard T. Burke, Assistant Prosecutor, attorney).

Sarah E. Ross, Deputy Attorney General, for amicus curiae Attorney General of New Jersey (Christopher S. Porrino, Attorney General of New Jersey, attorney).

John J. Zefutie, Jr. (Duane Morris, LLP) for amicus curiae The Last Resort Exoneration Project at Seton Hall University School of Law

Brian J. Neary, (The Law Offices of Brian J. Neary) for amicus curiae The Association of Criminal Defense Lawyers of New Jersey

Bariso, A.J.S.C.

This matter arises on remand by the Supreme Court of New Jersey. State v. J.L.G., ___ N.J. ____ (Mar. 17, 2017). That order tasked this court with one purpose: to conduct "a hearing, pursuant to N.J.R.E. 104, to determine whether [Child Sexual Abuse Accommodation Syndrome ("CSAAS")] evidence meets the reliability standard of N.J.R.E. 702, in light of recent scientific evidence[.]" Based on the following findings of fact and conclusions of law, this court finds as a fact that there is no general acceptance of CSAAS among the relevant scientific community, rendering CSAAS testimony inadmissible under N.J.R.E. 702.

I.

Findings of Fact

On consideration of the proofs adduced by the parties and testimony presented, the court makes the following findings of fact.

Factual Background.[1] Before his trial on allegations of sexual abuse, defendant J.L.G. moved to exclude testimony on CSAAS. The trial judge denied the motion, and the State offered CSAAS expert testimony at trial. The jury convicted defendant on charges of sexual abuse.

Following an unsuccessful appeal, defendant sought certification from the Supreme Court of New Jersey, in part on whether the trial court properly denied his motion to exclude CSAAS testimony. "[C]onclud[ing] that there is not an adequate factual record on which it can determine whether CSAAS is sufficiently reliable to meet the standard of N.J.R.E. 702[,]" Ibid., the Supreme Court retained jurisdiction, and ordered the limited remand noted earlier.

Procedural Background. On April 19, 2017, oral argument was heard on several requests to participate as amici curiae. Without objection, the American Civil Liberties Union of New Jersey, the Associations of Criminal Defense Lawyers of New Jersey, the American Professional Society on the Abuse of Children, the Attorney General of New Jersey, Last Resort Exoneration Project at Seton Hall University School of Law, the New Jersey Association for Justice, and the County Prosecutors Association were granted

[1] Given the circumscribed nature of these proceedings, only a limited factual overview is provided, focusing instead on the procedural history relevant to the current proceedings.

leave to file briefs as amici curiae. The application of Audrey Hepburn Children's House at Hackensack University Medical Center's ("AHCH") for leave to participate as amicus curiae was reserved in order to allow the parties proper time to brief the issues raised at the hearing.

On May 10, 2017, AHCH's motion seeking to appear as amicus curiae was denied: given the position of Dr. Anthony V. D'Urso, Psy.D. ("D'Urso") as both Section Chief and Supervising Psychologist for AHCH and the State's expert witness, it was inappropriate to allow him a second opportunity to address the court, first as an expert on behalf of one of the parties and then as amicus. A final pre-hearing conference was held on July 10, 2017. The N.J.R.E. 104, Frye v. United States, 293 F. 101 (D.C. Cir. 1923) hearing ("the Frye hearing") took place on July 17, 18, 20, and 21 2017, and consisted of the testimony of four separate experts.

D'Urso testified for the State on July 17, 2017 and the morning of July 18, 2017. D'Urso holds a doctor of psychology from the Graduate School of Applied and Professional Psychology at Rutgers University, teaches as an Associate Professor in Psychology at Montclair State University, and is Section Chief & Supervising Psychologist at AHCH. In that capacity, D'Urso oversees, among other things, clinical and therapeutic care for child sexual abuse victims at AHCH.

Dr. Thomas D. Lyon, J.D., Ph.D. ("Lyon") testified on behalf of the State on July 18, 2017. Lyon holds a Ph.D. in Psychology from Stanford University as well as J.D. from Harvard Law School; he is the Judge Edward J. and Ruey L. Guirado Chair in Law and Psychology at the University of Southern California, where he teaches courses in law and psychology as well as conducts seminars on interviewing victims of child sexual abuse.

Dr. Charles Brainerd, Ph.D. ("Brainerd") testified for the defendant on July 20, 2017; he holds a Ph.D. in experimental and developmental psychology, and teaches courses in law and memory at Cornell University.

Finally, Dr. Maggie Bruck, Ph.D. ("Bruck") testified for the defendant on July 21, 2017; she holds a Ph.D. in experimental psychology from McGill University, and conducts research on memory as a professor at Johns Hopkins University.

This opinion and order followed.

II.

A. What is CSAAS?

As an initial matter -- and perhaps the most glaring aspect supporting this decision -- a precise definition of CSAAS remains unclear. Ronald Summit, M.D., the original proponent of CSAAS, stated that CSAAS represents "a common denominator of the most frequently observed victim behaviors," and that his purpose in publishing his paper was "to provide a vehicle for more sensitive,

more therapeutic response to legitimate victims of child sexual abuse and to invite more active, more effective clinical advocacy for the child within the family and within the systems of child protection and criminal justice." Roland Summit, M.D., "The Child Sexual Abuse Accommodation Syndrome", 7 Child Abuse and Neglect 177, 179-80 (1983) ("Summit I"). To that end, Summit devised a list of factors "which were most characteristic of abuse and most provocative of rejection in the prevailing adult mythology about legitimate victims." Roland Summit, M.D., "Abuse of the Child Sexual Abuse Accommodation Syndrome", 1 J. Child Sexual Abuse 153, 154-55 (1992) ("Summit II").

According to Summit, CSAAS emerged "not as a laboratory hypothesis or as a designated study of a defined population," and that "[i]t should be understood without apology that the CSAAS is a clinical opinion, not a scientific instrument." Summit II, supra, at 155. Summit also acknowledged that "[h]ad [he] known the legal consequences of the word at the time, [he] might better have chosen a name like the Child Sexual Abuse Accommodation Pattern to avoid any pathological or diagnostic implications." Id. at 157.

Defendant argues that Summit proposed CSAAS as a "roadmap" and a "call to action" for clinicians to advocate for their patients in a therapeutic and courtroom setting. The State in opposition argues that CSAAS is an educative device used to educate

the fact-finder in respect of characteristics that exist in the disclosure process of children to dispel faulty conclusions or inferences. Some jurisdictions have described CSAAS as "unreliable" "psychodynamic formulation," criticizing CSAAS as "'post hoc' interpretive rationalization[] of behavior, not [an] explanation[] of it." State v. Foret, 628 So. 2d 1116, 1126 (La. 1993).

All parties seemingly agree that CSAAS cannot diagnose or predict child sexual abuse. As a result, although CSAAS is referred to by its "syndrome" moniker, all parties, including Summit himself, agree the term "syndrome" does not accurately describe CSAAS and is a misnomer. However, because the parties have not provided a more accurate alternative, one must continue, albeit reluctantly, to refer to CSAAS as a syndrome.

Following D'Urso's testimony, the following exchange occurred[2]:

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[2] To minimize confusion, the transcript numbering system set forth in defendant's brief is used, as follows:

1T: 7/3/14 (pre-trial)
2T: 12/3/14 vol. 1 (hearing)
3T: 12/3/14 vol. 2 (trial)
4T: 12/9/14 (trial)
5T: 12/10/14 vol. 1 (trial)
6T: 12/10/14 vol. 2 (trial)
7T: 12/11/14 (trial)
8T: 3/13/15 (sentencing)
9T: 4/19/17 (pre-hearing)
10T: 5/10/17 (pre-hearing
11T: 7/10/17 (pre-hearing)

> THE COURT: I have a question . . . . What is CSAAS? What does it refer to? I've been listening to your testimony, tell me what it is. I've heard what it's not, what is it?
>
> DR. D'URSO: It is a characterization presented in a conceptual paper of Dr. Roland Summit that outlined characteristics of the abuse process and how and why children disclose. The reason it was developed was because there were certain inherent differences between child sexual assault and adult sexual assault and the presentation of child victimization might be prejudiced by a presumption of adult presentation of sexual assault. And so inherently the idea was to create education to provide a backdrop, a landscape of the way in which the abuse process occurs and how it gets disclosed and to provide the jury – I can't use the word jury – to provide education so that faulty conclusions or inferences would not be made, could be explained for by something that somebody might have a bias for.
>
> [13T:49-24 to 50-18.]

Given the difficulty in defining CSAAS, D'Urso's definition will serve as a rough overview. That said, the persistent confusion over the definition of CSAAS remains, and, tellingly, none of the State's experts defined the scope of CSAAS's applicability in terms of outer limits of ages, gender, or in what cases of sexual abuse it applies.

Furthermore, the principal parties vehemently disagree over the relevance of CSAAS's characteristics in abused and non-abused

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12T: 7/17/17 (hearing)
13T: 7/18/17 (hearing)
14T: 7/20/17 (hearing)
15T: 7/21/17 (hearing)

populations. The State suggests the rates of each characteristic defined in CSAAS are important only if the goal is to determine if the characteristic is more common among abused children than among non-abused children. As CSAAS is not a diagnostic tool, the State argues it is irrelevant to this discussion. Instead, the question is whether there is reliable evidence that CSAAS characteristics are not inconsistent with abuse.

The court disagrees. Courts consistently describe CSAAS as "a common denominator of the most frequently observed victim behaviors." State v. W.B., 205 N.J. 588, 610 (2011). The testimonial record is replete with references to CSAAS explaining typical child reactions to sexual abuse. "Typical" is defined as "combining or exhibiting essential characteristics of a group." "Typical", Merriam-Webster Online, https://www.merriam-webster.com/dictionary/typical (last visited Aug. 24, 2017). If the State's purpose in using CSAAS testimony is to educate jurors on children's "typical" reactions to sexual abuse, the prevalence of CSAAS's characteristics in abused and non-abused populations have significant relevance. At a minimum, CSAAS's symptoms should appear with some frequency among victims of child sexual abuse in order to have any value as an educative tool.

B. Rule 702 Analysis

N.J.R.E. 702 governs the admission of expert testimony. It provides that, "[i]f 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." N.J.R.E. 702. In effect, the Rule imposes three basic requirements on the admission of expert testimony:

> (1) the intended testimony must concern a subject matter that is beyond the ken of the average juror;
>
> (2) the subject of the testimony must be at a state of the art such that an expert's testimony could be sufficiently reliable; and
>
> (3) the witness must have sufficient expertise to explain the intended testimony.
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> [State v. Kelly, 97 N.J. 178, 208 (1984); see also N.J.R.E. 702 Supreme Court Committee Comment.]

In criminal cases, we continue to apply the general acceptance or Frye test for determining the scientific reliability of expert testimony. State v. Harvey, 151 N.J. 117, 168 (1997).

Frye explains that "while courts go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." Frye, supra, 293 F. at 1014. The Supreme Court of the United States has relaxed the general-acceptance standard under Frye for the admissibility of

scientific evidence. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Despite this relaxation, the test in New Jersey criminal cases remains whether the scientific community generally accepts the evidence. Harvey, supra, 151 N.J. at 117; State v. Spann, 130 N.J. 484, 509-10 (1993).

The proponent of a newly devised scientific technology can prove its general acceptance in three ways:

> (1) by expert testimony as to the general acceptance, among those in the profession, of the premises on which the proffered expert witness based his or her analysis;
>
> (2) by authoritative scientific and legal writings indicating that the scientific community accepts the premises underlying the proffered testimony; and
>
> (3) by judicial opinions that indicate the expert's premises have gained general acceptance.
>
> [State v. Kelly, supra, 97 N.J. at 208 (citing State v. Cavallo, 88 N.J. 508, 521 (1982)).]

The burden to "clearly establish" each of these methods is on the proponent. State v. Williams, 252 N.J. Super. 369, 376 (1991).

Determining general acceptance involves "strict application of the scientific method, which requires an extraordinarily high level of proof based on prolonged, controlled, consistent, and validated experience." Rubankick v. Witco Chem. Corp., 125 N.J. 421, 436 (1991). Essentially, a novel scientific technique achieves general acceptance only when it passes from the

experimental to the demonstrable state. Windmere, Inc. v. Int'l Ins. Co., 105 N.J. 373, 378 n.2 (1986). Put differently, "if the bottom line is general disagreement rather than general acceptance," then the standard is not satisfied. Spann, supra, 130 N.J. at 510.

General acceptance however, does not require complete agreement over the accuracy of the test or the exclusion of the possibility of error. See Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, comment 4 to N.J.R.E. 702 (Gann 2017); State v. Johnson, 42 N.J. 146, 171 (1964). Neither is it necessary that acceptance within the scientific community be unanimous, as every scientific theory has detractors. State v. Tate, 102 N.J. 67, 83 (1986). The task is to evaluate the studies on which experts rely without substituting one's own assessment in the expert's place or sua sponte investigating the scientific community's views. In Re Accutane Litigation, ___ N.J. Super. ___, (App. Div. July 28, 2017) (slip op. at 56-57).

Despite defendant's arguments to the contrary, the court finds that the "relevant scientific community" includes clinicians. Courts already have noted that the relevant scientific community in CSAAS cases includes scientists who are "involved in the diagnosis, treatment, and care of" child abuse victims. State v. R.B., 183 N.J. 308, 326 (2005) (citing State v. R.W., 104 N.J. 14, 31 (1986)). This definition includes both clinical and

experimental psychologists.[3] Clinicians have sufficient qualifications to testify in respect of CSAAS's application in a therapeutic setting. Although defendant's concerns with clinicians' opinions on scientific evidence may have some underlying merit, those concerns address the weight of the clinicians' testimony rather than its admissibility.

The opinions of all four experts presented by the State and defendant have been considered with care. Brainerd is an expert in "experimental developmental psychology, child sexual abuse, and the scientific method." 14T:26-22 to 27-2, 31-5 to -10. Likewise, Bruck is qualified as an expert in "child sexual abuse and developmental psychology and memory. 15T:87-13 to 89-11. D'Urso is qualified as an expert in "the area of forensic psychology and child sexual abuse." 12T:45-8 to -11, 12T:69-20 to 71-18. And, Lyon is qualified as an expert regarding child psychology and child sexual abuse. 13T:26-22 to -24. Furthermore, the expert reports produced by these four experts, together with the expert report of Dr. William O'Donohue, Ph.D. ("O'Donohue"), were reviewed and examined with care.

Although D'Urso's testimony has been considered, concerns about the potential bias in D'Urso's testimony abound. If an

[3] Experimental psychologists are defined as psychologists who conduct research on human behavior under highly controlled conditions, in order to determine causation. 14T:10-3 to -24.

expert is the leading proponent of a scientific technique or theory, has a vested career interest in its acceptance, or has a long association with its development and/or promotion, his personal investment may not allow objective consideration of disagreements within the relevant scientific community. See State v. Zola, 112 N.J. 384, 448 (1988) (citing People v. Brown, 726 P.2d 516, 530 (Cal. 1985)), vacated and remanded on other grounds sub mon.; California v. Brown, 479 U.S. 538 (1987)); see also Windmere, supra, 105 N.J. at 380-81 (explaining that testimony of two experts affiliated with development of voice-print analysis did not establish general acceptance within scientific community and "was suspect because of 'potential bias'").

AHCH, where D'Urso serves as a Section Chief, receives part of its funding evaluating children and testifying as experts for the State. D'Urso has testified about CSAAS in some 250 cases, and wrote reports in roughly 500 cases. 12T:34-16 to -20, 57-18 to 58-10, 60-8 to 63-13, 123-12 to 124-4, 128-11 to 131-3. Although D'Urso's overwhelming qualifications in treating victims of childhood sexual abuse cannot be minimized, D'Urso's and AHCH's significant financial interest in ensuring the continued viability of CSAAS cannot be ignored.

As of this date, neither the parties nor the court is aware of any hearing conducted on the general acceptance of CSAAS. As a result, this analysis is restricted to expert testimony and

authoritative writings. Also, several jurisdictions -- after reviewing the scientific literature -- already prohibit the use of CSAAS testimony. See, e.g., Hadden v. State, 690 So.2d 573, 575 (Fla. 1997) ("[A] psychologist's opinion that a child exhibits symptoms consistent with what have come to be known as [CSAAS] has not been proven by a preponderance of scientific evidence to be generally accepted by a majority of experts in psychology."); Blount v. Commonwealth, 392 S.W.3d. 393, 395-96 (Ky. 2013) ("[W]e have 'consistently held that the symptoms, or signs, of the 'so called' [CSAAS] are not admissible,' because they 'lack[] scientific acceptance.'"). See also State v. Ballard, 855 S.W.2d 557, 562 (Tenn. 1993) (rejecting testimony regarding "'common symptoms' of sexually abused children," and taking issue with "the accuracy and reliability of expert testimony involving emotional and psychological characteristics of sexually abused children").

C. Expert Testimony

In evaluating all of the expert testimony, the court finds that there is insufficient evidence of a consensus on the scientific reliability of CSAAS. On the contrary, the expert testimony suggests a level of controversy inconsistent with a general agreement on the validity of CSAAS. At a minimum, the State has failed to meet its burden to prove a general acceptance of CSAAS among clinical and research psychologists.

The expert testimony presented shows disagreement in defining the variables of CSAAS. For example, D'Urso defined "secrecy" as "a period of time that exists between the time of the first sexual act the time they tell, that's secrecy." 12T:98-24 to 99-7. This is noticeably different from Summit's original definition. See Summit I, supra, at 181.

Also, none of the testifying experts appear to agree on a definition of "recantation." Summit described "recantation" as, "[w]hatever a child says about the sexual abuse, she is likely to reverse it." Id. at 188. In contrast, Lyon refers to "recantation" as "a child denies abuse who has previously disclosed abuse" to anyone at any time. 13T:116-9 to -16.

Furthermore, neither of the State's experts agreed on a definition of "accommodation." D'Urso alleges "helplessness, entrapment and accommodation contribute to the period of secrecy," which he characterizes as "the pre-disclosure events that happened in child abuse." 12T:76-1 to -5. In contrast to Lyon, who characterized accommodation as encompassing the disclosure behaviors, D'Urso claimed entrapment and accommodation refer to the external dynamics beyond the child's control. 12T:16-20 to -21.

The expert testimony also lacks coherence on the temporal nature of CSAAS's factors. D'Urso stated neither he nor Summit say each factor leads to the next. 12T:163-1 to -15. However, in

previous reports, D'Urso stated that the purpose of CSAAS testimony was "to provide an understanding of the typical sequence of behaviors of children who have been abused engage in, and to describe typical emotional reactions of children that may have been abused."[4]

Expert testimony further points to a glaring lack of data supporting CSAAS. The State notes that psychology, as a social science, is not suited to exact laboratory testing as subjects displaying symptoms reflective in physical sciences. Instead, the State contends, researchers are limited in the quantity and quality of data to research child sexual abuse. Although the inherent limits in conducting controlled studies on child sexual abuse are readily apparent, that does not excuse or otherwise condone the unavailability of data. As a factual matter, D'Urso based most of his testimony on his clinical experience handling roughly 35,000 cases. 12T:244-25 to 251-22; 13T:34-19 to 35-2. Furthermore, AHCH provides an estimated 5,000 to 7,000 hours of service to child abuse victims and their families, the majority of referrals stemming from child sexual abuse cases. Ibid. Yet, D'Urso stated

[4] Expert Report of Dr. D'Urso, State v. Bell, October 7, 2010; Expert Report of Dr. D'Urso in State v. Miller, May 21, 2015; Expert Report of Dr. D'Urso in State v. Diggs, March 8, 2016; Expert Report of Dr. D'Urso in State v.Roll, October 14, 2016; Expert Report of Dr. D'Urso in State v. Klekovic, November, 14, 2016; Expert Report of Dr. D'Urso in State v. PromisGavel #15000685, March 31, 2017; Expert Report of Dr. D'Urso in State v. Hemlinger, August 3, 1995.

that he did not produce, maintain, or analyze any data or publish any findings from this massive amount of available clinical data.

The State seeks to correct this shortcoming by pointing to other psychological disorders that have similar evidentiary issues. However, the comparisons are wholly misplaced. As stated previously, one of the few points on which all parties appear to agree is that CSAAS is not a diagnostic tool and cannot predict sexual abuse. CSAAS also is not contained in the DSM and has not been accepted by the American Psychological Association, the American Psychiatric Association, or the American Psychological Society. Despite this, the State analogizes CSAAS's evidentiary issues with those found in other diagnosable adolescent disorders, such as childhood autism and childhood schizophrenia. In short, the State cannot compare CSAAS to other diagnosable disorders while simultaneously asserting it is not a diagnostic tool.

Even if such comparisons were permissible, CSAAS lacks the breadth of scientific support that characterizes the conditions contained in the DSM. For example, childhood autism and schizophrenia have volumes of research and data supporting their existence. Publication in the DSM requires that new disorders undergo thorough, consistent scientific research. Although there are syndromes -- like battered women's syndrome -- that are not contained in the DSM, the sheer quantity of scientific studies on battered women's syndrome dwarf the number that examine CSAAS.

Expert testimony also questions the prevalence of CSAAS's characteristics within the population of abused children as compared to non-abused children. D'Urso testified that one-third to one-half of sexually abused children do not develop psychiatric disorders or symptoms because "[accommodation] is a construct which prevents." 12T:196-15 to -10, 207-23 to 208-5, 209-19 to -25. D'Urso also admitted that children may engage in accommodation regardless of whether they were abused. 12T:171-19 to 173-8. D'Urso further testified that children of a particular age and stage are helpless and dependent on adults, whether or not they are abused. 12T:168-9 to 170-7. Lyons likewise admitted that "there's nothing in the literature that says that delay is more common among abused children than among non-abused children." 12T:181-22 to 182-2. Non-abused children also are more likely to deny abuse occurred and recant allegations of sexual abuse. 15T:51-16 to -25, 92-6 to 93-1, 92-14 to -19. Piecemeal disclosure too is a normal pattern in children and adults regardless of the topic. 12T:180-19 to 181-21. D'Urso testified that the behavioral traits of sexually abused children seen under the construct of "helplessness"[5] also are present in non-abused children. 12T:204-11 to 205-16.

[5] According to D'Urso, these behaviors include anxiety, bedwetting, inappropriate sexual play, general behavioral problems, acting out in school, poor grades, disciplinary, issues

In a similar vein, D'Urso suggested that children who suffered other types of trauma could exhibit the same attributes as CSAAS. He agreed that "there is no evidence indicat[ing] that [CSAAS] can discriminate [between] sexually abused children and those who have experienced other trauma." 13T:21-6. He testified that "[a]lthough clinical reports have indicated that many sexually abused children exhibit certain combinations of emotional and behavioral reactions, no evidence indicates that the combinations are not also present in groups of children experiencing other sorts of trauma," and that "some evidence indicates that the combinations are present in groups of children experiencing other sorts of trauma." 13T:21-17 to -18. The educative value of CSAAS is hopelessly lost if its core characteristics are potentially equally prevalent among non-abused children or children who have suffered other types of trauma.

Taken together, the expert testimony regarding CSAAS's "five" underlying factors paints a vague picture of the behavior CSAAS attempts to explain. D'Urso himself stated that there are, "many, many things that can be subsumed under the five categories." 12T:153-13 to 155-12, 193-4 to -23. He further testified that the "constructs" of CSAAS "overlap all the time." 13T:25-25 to 26-1.

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at home, lying to parents, lying to others outside the family, and sexually reactive behaviors.

D'Urso conceded that all five factors may not even appear in every case of child sexual abuse. 12T:119-2 to -6.

Even setting aside these issues within CSAAS's itself, expert testimony suggests that there is no consensus among the scientific community regarding the tenets of CSAAS. Brainerd pointed to two forms of scientific research, experimental and observational. 14T:24-8 to -11; 14T:53-21 to 54-15. Observational research, which informs most research on CSAAS, lacks the ability to control for "confounding" variables that may explain a study's results. 14T:57-6 to 58-1. This makes any consensus among the scientific community difficult, as scientists view CSAAS evidence as scientifically unreliable. 14T:72-2 to -10.

Bruck echoed many of Brainerd's concerns regarding consensus surrounding CSAAS. Bruck testified that scientific evidence does not support using CSAAS testimony to explain why sexually abused children might delay, deny, and recant. 15T:63-16 to 64-20. This lack of evidence leads to "a lot of skepticism and non-acceptance among the scientists in [the scientific] community" regarding CSAAS, and to the conclusion that its components are not scientifically reliable. 15T:87-13 to 89-11. Bruck clearly stated her own concerns with the reliability of CSAAS. 15T:90-25 to 91-7. After reviewing what little supporting literature exists, both Brainerd and Bruck noted a glaring lack of consensus among the

scientific community regarding CSAAS. 14T:79-9 to 80-2; 15T:96-21 to 97-12.

The State's principal expert further supports the controversy surrounding CSAAS among the scientific community. D'Urso admitted that "many prominent researchers in the scientific community" have "questioned" CSAAS as a general principle. 12T:134-13 to 135-7. He also agreed that Dr. Kamala London's study critical of CSAAS is a "substantial scientific contribution to the literature regarding child sexual abuse," and recognized that Bruck and Dr. London "are authorities in the field of child sexual abuse . . . in terms of studies." 12T:239-24 to 240-3. The testimony also suggests a lack of general acceptance in the clinical community on CSAAS: D'Urso admitted that CSAAS is not universally accepted among clinicians and, in fact, some are critical of CSAAS. 13T:12-21 to 13-12, 14-6 to 15-15, 16-19 to 17-4.

D. Authoritative Writings

Coupled with expert testimony, a review of the scientific literature presented also highlights the glaring lack of consensus on the scientific reliability of CSAAS. Instead, it characterizes CSAAS's framework as vague and its supporting scientific evidence as unreliable.

Some of the scientific writings presented question whether the adult misconceptions regarding child sexual abuse -- a foundational component of CSAAS -- even exist. One study, which

reviewed nine other studies, found that between 69% and 78% of non-offending parents believed their children's allegations of sexual abuse at least in part. William O'Donohue & Lorraine Benuto, "Problems with the CSA Accommodation Syndrome", 9 Sci. Rev. Mental Health Practice 20, 25 (2012) (citing Ann N. Elliot & Connie Carnes, "Reactions of Nonoffending Parents to the Sexual Abuse of their Children: A Review of the Literature", 6 Child Maltreatment 314 (2001)). This stands in direct conflict with Summit's claims that non-abusing parents do not believe their children's allegations of sexual abuse. Nor does Summit's work present any evidence to support the average adult misconceptions underpinning the entire motivation for CSAAS's creation. It is axiomatic that a theory must fail at its inception if its premises are not reliable in and of themselves.

Turning to CSAAS itself, Summit's original paper proposes symptom definitions that are unclear and ill defined. Lyon offers no direct definition of "secrecy," instead only suggesting that sexual abuse is conducted in secret and that the perpetrator induces the child to keep it secret. Expert Report of Dr. Lyon at 3, State v. J.L.G., No. 12-11-1994 (May 19, 2017). In contrast, D'Urso's expert report defines secrecy as the time between when a child is first abused to the time the child discloses the abuse. Expert Report of Dr. D'Urso at 2, State v. J.L.G., No. 12-11-1994 (May 19, 2017). Furthermore, Summit uses the term "secrecy" both

as a precondition to abuse and as the child keeping abuse a secret after it has occurred. See Summit I, supra, at 181.

The literature also poses different meanings for the term "helplessness." In that same paper, Summit defines helplessness as "playing possum" while also asserting, "the more illogical and incredible the initiation scene might seem to adults, the more likely it is that the child's plaintive description is valid." Summit I, supra, at 183. D'Urso disagrees with this assertion, and defines "helplessness" as "the internal psychological attributes of the child that inhibit disclosure." Expert Report of Dr. D'Urso, supra, at 3. Lyons offers yet a third definition of "helplessness": "how the child's inability to report the first acts of abuse guarantees future victimization and leads the child to blame herself for the abuse." Expert Report of Dr. Lyon, supra, at 3.

Summit states that "entrapment" is the feeling of being trapped by repeated abuse: "[i]f the child did not seek or did not receive immediate protective intervention, there is no further option to stop the abuse." Summit I, supra, at 184. D'Urso outlines "entrapment" as "external factors that surround the child [that] also create a climate that inhibits disclosure; primarily a 'grooming process' or 'mechanism' in which pedophiles engage children in repetitive sexual abuse." Expert Report of Dr. D'Urso, supra, at 3.

Summit defines "accommodation" as the psychological mechanisms that a child undertakes to "somehow achieve a sense of power and control" because she "cannot safely conceptualize" that a parent might be ruthless and self-serving; such a conclusion is tantamount to abandonment and annihilation." Summit I, supra, at 184. D'Urso describes "accommodation" as "the only healthy alternative to an inescapable solution," and argues that "[p]rofessional literature documents the absences of diagnosable psychiatric conditions in children who experience abuse." Expert Report of Dr. D'Urso, supra, at 3. D'Urso further testified that children who develop psychiatric symptoms failed to "accommodate." 12T:201-17 to -20. Bruck, noting these conflicting definitions, had difficulty defining "accommodation." As she noted, "everybody has their own words about what accommodation is. . . . I don't really have a definition, because it's such a wobbly term. . . . I just see it as a collection of symptoms." 15T:126-23 to 127-6.

Summit never defined the term "piecemeal" nor did Lyon address "piecemeal disclosure" at all. D'Urso referred to the concept as one of the "two supportive concepts" of delayed disclosure. D'Urso also adds "unconvincing disclosure" as the second supportive concept underpinning delayed disclosure; he defines "unconvincing disclosure" as "the many ways in which children tell about the abuse, i.e., child [sic] may tell about their bodies to the pediatrician while evidencing concern over family or friends to

child protection workers." Expert Report of Dr. D'Urso, supra, at 3. Neither Summit nor Lyon discuss either of these supportive concepts when referring to delayed disclosure.

Summit also contradicts himself in defining the symptoms of CSAAS. Initially, Summit claims that CSAAS describes the "typical reactions" of child victims of sexual abuse, but then writes that the first two "categories" are external preconditions to the child. Summit I, supra, at 177. Common logic tells us that a "precondition" cannot be, and is the antithesis of, a "reaction," which is something performed or experienced in reaction to something else.

Taken in totality, the literature paints a vague picture of CSAAS's "five"-factor construct as well as the temporal relationship between the factors. Summit conceded that "[t]here are infinite behavioral variations which can be subsumed under the five categories of the CSAAS." Id. at 162. Based on these vague definitions, CSAAS can encompass almost any reaction a child has to external events including, but not limited to, sexual abuse. In fact, Summit even posited that the exact opposite of the prototypical child sexual abuse case was entirely plausible under CSAAS. Id. at 186-87. According to Summit, any set of adolescent behaviors is consistent with sexual abuse, "[w]hether the child is delinquent, hypersexual, countersexual, suicidal, hysterical, psychotic, or perfectly well-adjusted[.]" Id. at 187.

Furthermore, the reliability of some of the science underpinning the support for CSAAS has been questioned. The scientific method is defined as a "method of procedure that has characterized natural science since the 17th century, consisting in systemic observations, measurement, and experiment, and the formulation, testing, and modification of hypothesis." The New Oxford American Dictionary 1526 (2001). The hallmarks of a scientific theory are that it is evidence-based and it seeks to explain why well-replicated facts are as they are. Expert Report of Dr. Brainerd at 4, State v. J.L.G., No. 12-11-1994 (May 19, 2017). The danger posed by evidence that appears to be scientific without being scientifically reliable is patent: it entails "the implicit misrepresentation of a commonsense moral and legal judgement as a clinical or scientific decision." State v. J.Q., 252 N.J. Super. 11, 40 (App. Div. 1991) aff'd 130 N.J. 554 (1993) (quoting Gary B. Melton & Susan Limber, "Psychologists' Involvement in Cases of Child Maltreatment", 44 Amer. Psychol. 1225, 1230 (Sept. 1989)).

It is telling that Summit did not publish his original article in a peer-reviewed journal, but rather in a special issue of Child Abuse and Neglect; that article skirted the rigors of the peer-review process. Moreover, Summit states that some of his main sources include "personal discussion with . . . national visionaries" including Kee McFarlane, who was the interviewer in

one of the since-discredited, major ritual abuse cases of the 1990s. Summit II, supra, at 154-55. Summit also had little experience treating children and did not rely on child interviews in his paper. Instead, he gleaned his observations from his work with adult female psychiatric patients who recalled childhood sexual abuse during psychotherapy sessions with Summit. Expert Report of Dr. Bruck at 3, State v. J.L.G., No. 12-11-1994 (June 17, 2017). D'Urso once referred to Summit's article as "the product of his clinical impressions." Testimony of Dr. D'Urso in State v. Donohue, at 51-52. In fact, Summit provides no statistical validation for any of his assertions, despite claiming the very same statistical validation as support for CSAAS. Summit I, supra, at 180.

The scientific literature also doubts the frequency of CSAAS symptoms among abused children as compared with non-abused children. Lyon states that "the exact frequency of accommodation symptoms is unknown." Thomas D. Lyon, "Scientific Support for Expert Testimony on Child Sexual Abuse Accommodation", Critical Issues in Child Sexual Abuse (J. R. Conte ed. 2002). Non-abused children also are more likely to deny that abuse occurred. Expert Report of Dr. Bruck, supra, at 5-6 (citing Stephen J. Ceci, et al., "Repeatedly Thinking About a Non-Event: Source Misattributions Among Preschoolers", Consciousness and Cognition, Sept. 1994, at 388; Stephen Ceci, et al., "The Effects of

Stereotypes and Suggestions on Preschoolers' Reports", Developmental Psychology, 1995, at 568; Debra Ann Poole & D. Stephen Lindsay, "Reducing Witnesses' False Reports of Misinformation From Parents", Journal of Experimental Child Psychology, Feb. 2002, at 117). Recantation too is more common among non-abused children. Ibid. The literature also suggests piecemeal disclosure is common among adults and children regardless of the topic. Expert Report of Dr. Bruck, supra, at 12.

Even if one overlooks these obvious flaws within CSAAS's framework, there clearly is great controversy within the scientific community regarding the tenets of CSAAS. Research has challenged the hypothesis that the severity of sexual abuse relates to disclosure rates among children. See Kamala London, Maggie Bruck, Stephen J. Ceci, & Daniel W. Shuman, "Disclosure of Child Sexual Abuse: What Does the Research Tell Us About the Ways that Children Tell?", 11 Psychol. Pub. Pol'y & L. 194, 202-203 (2005); Kamala London, Maggie Bruck, Daniel B. Wright & Stephen J. Ceci, "Review of the Contemporary Literature on how Children Report Sexual Abuse to Others: Findings, Methodological Issues, and Implications for Forensic Interviews", 16 Memory 29, 33 (2008). Similar research also suggests that neither a victim's relationship to the perpetrator nor threats impede disclosure. Review of Contemporary Literature, supra, at 33.

There is significant evidence pointing to a lack of acceptance among the scientific community of CSAAS in general. A wide body of work exists which forcefully suggests no consensus among clinicians regarding CSAAS. See Cara Gitlin, "Expert Testimony on the Child Sexual Abuse Accommodation Syndrome: How Proper Screening Should Severely Limit Its Admission", 26 Quinnipiac L. Rev. 497 (2008); Stephen J. Cecci and Maggie Bruck, Jeopardy in the Courtoom: A Scientific Analysis of Children's Testimony (1995); Jeffery J. Hugaard & N. Dickon Repucci, The Sexual Abuse of Children, A Comprehensive Guide to Current Knowledge and Intervention Strategies (1988). Lyon -- one of the State's experts -- notes the serious challenge posed by CSAAS detractors. Thomas Lyon, "Scientific Support for Expert Testimony on Child Sexual Abuse Accommodation", Critical Issues in Child Sexual Abuse (J.R. Conte ed. 2002) at 111.

III.

Conclusion

For the reasons cited above, the court finds as a fact that the State has failed to provide sufficient evidence to prove a general acceptance of CSAAS among clinical and research psychologists. Given the inherently sensitive nature of child sexual abuse cases, this ruling is not made lightly. And, as the State correctly has noted, the significant majority of

jurisdictions, including New Jersey, currently permit the use of CSAAS testimony, often in a limited fashion.

The finding that CSAAS lacks general acceptance in the scientific community is not intended as an indictment of CSAAS as a tool for academic discussion. All parties agree that at least some aspects of CSAAS, namely delayed disclosure, are generally accepted among the scientific community. See London, et al., Review of the Contemporary Literature, supra. Given the complex nature of childhood sexual abuse, CSAAS may provide an excellent tool to frame academic discussions of clinical research. New Jersey already recognizes the sensitive nature of child sexual abuse cases and has gone farther than many other jurisdictions in accommodating victims of this heinous crime.

However, when gauged against the heightened evidentiary scrutiny of our Rules, CSAAS falls woefully short in proving general acceptance among the clinicians and psychologists studying child sexual abuse. It is the Judiciary's duty to uphold constitutional rights and ensure a fair trial for both victims as well as those accused of criminal activity. To that end, "[n]o matter how defenseless the child, or how strong the policy of protecting victims of abuse, justice is not served by 'proving' sexual abuse through misleading and unreliable testimony." "The Unreliability of Expert Testimony on the Typical Characteristics of Sexual Abuse Victims", 74 Geo. L.J. 429, 451 (1985).

Based on the evidence presented in this record, the court (a) finds as a fact that clinical and research psychologists do not generally accept the scientific reliability of CSAAS, and (b) thus concludes that CSAAS does not meet the Frye standards for admissibility and should no longer be used in child sexual abuse cases.

An appropriate order follows