IN THE ARIZONA SUPREME COURT

STATE OF ARIZONA Appellee, v. MARTIN DAVID SALAZAR-MERCADO Appellant.	Supreme Court No. CR 13-0244-PR Court of Appeals No. 2 CA-CR 2012-0155 Department B Pima County Superior Court No. CR 20110221-001

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER/APPELLANT

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Interest of *Amicus Curiae*

Amicus curiae Arizona Attorneys for Criminal Justice ("AACJ") is a statewide not-for-profit membership association of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

Introduction

For years Arizona Courts have struggled with the admissibility of testimony from Dr. Wendy Dutton. This Court approved of the content of Dutton's standard testimony (dealing with Child Sexual Abuse Accommodation Syndrome) under the previous *Frye*[1] scheme in *State v. Lindsey*, 149 Ariz. 472, 720 P.2d 73 (1986). The present case, however, presents the first opportunity for this Court to review the propriety of Child Sexual Abuse Accommodation Syndrome testimony since the Rules of Evidence were modified to bring Arizona in line with the Federal Rules of Evidence and *Daubert*[2].

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[1] *Frye v. U.S.*, 293 F. 1013 (App. D.C. 1923).
[2] *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579 (1993).

Summary of Dutton's Testimony

Dr. Wendy Dutton is primarily called to testify regarding the Child Sexual Abuse Accommodation Syndrome (CSAAS). CSAAS was coined in 1983 by Dr. Roland Summit in his article of the same name. Roland Summit, "The Child Sexual Abuse Accommodation Syndrome," CHILD ABUSE & NEGLECT, Vol. 7, pp. 177-193 (1983) (Appendix A). Summit described five categories of a child's experience: 1) Secrecy; 2) Helplessness; 3) Entrapment and accommodation; 4) Delayed, conflicted and unconvincing disclosure; and 5) Retraction. *Id.* at 181. The first two categories were considered preconditions to the sexual abuse and the three remaining categories were "sequential contingencies which take on increasing variability and complexity." *Id.*

Summit noted that nearly all instances of molestation occur in a secret manner. *Id.* The secret nature of the act is affirmed by the assailant. *Id.* Because the assailant is often a trusted adult, "[t]he child is … entirely dependent upon the intruder for whatever reality is assigned to the experience." *Id.* Consistently, the importance of secrecy is communicated to the child. *Id.*

Second, a child often feels helpless in a molestation situation. *Id.* at 182. This is often underscored by a perpetrator's position of power and authority in relation to the child. *Id.* at 182-83. Summit noted that when children first face the assault, the common response of a child is to silently cope with the abuse. *Id.* at

183. This can include actions like "playing possum", pretending to sleep, or shifting positions. *Id.* The child's feeling of helplessness is opposed to an adult's general feeling of free will. *Id.*

Next, Summit points out that abuse by a close family member "is not typically a one-time occurrence." *Id.* at 184. Thus, children ultimately become trapped in a cycle of abuse and learn to accommodate the abuse. *Id.* Summit describes the relationship, noting that a child becomes saddled with the duty to protect the family by not disclosing the abuse. *Id.* at 185. Trapped in this fashion, a child will accommodate in any number of ways. *Id.* This can include behaviors consistent with acting out, *id.* at 184-85 (including problems such as pathological dependency, self-punishment, self-mutilation, selective restructuring of reality and multiple personalities, rage, aggression, depression, substance abuse, etc.), or behaviors consistent with normal achievement, *id.* at 186-87 (noting an accommodating child might "be unusually achieving and popular, eager to please both teachers and peers").

Disclosures can come at any time, if at all, and may be unconvincing, inconsistent, or conflicted. *Id.* at 186. The primary issue addressed by Summit is disclosure which comes in the wake of family dispute. *See id.* In such a circumstance, a child who has acted out may reveal the history of sexual abuse in response to an argument or punishment. *Id.* Such a disclosure might appear

incredible. *Id.* Summit posits that the role of a specialist "must help mobilize skeptical caretakers into a position of belief, acceptance, support and protection of the child." *Id.* at 188.

Finally, Summit argues that recantation is commonplace. *Id.* Summit carries through a hypothetical of a disclosure made during a heated family argument or punishment. *Id.* In the wake of a disclosure the child observes the threats previously lodged (that a family would fall apart, that nobody would believe the child) come to fruition. *Id.* The child, therefore, recants to restore the previous equilibrium. *Id.*

Dutton's testimony typically relates to CSAAS issues and will often incorporate the language of CSAAS. For example, in the present case Dutton testified regarding delayed disclosure (RT 3/15/2012, 109-10, 131; *cf.* Summit, 186-87); the impact on a child if the child is not believed at disclosure (RT 3/15/2012, 111; *cf.* Summit, pg. 178-79); piecemeal disclosure (RT 3/15/2012, 112, 135; *cf.* Summit, 186-188); child perceptions of abuse (RT 3/15/2012, 113; *cf.* Summit, 181); and methods of disclosure (RT 3/15/2012, 114, 136; *cf.* Summit, 186-88). Included in the attached appendices are other instances of Ms. Dutton's testimony. Ms. Dutton's testimony has consistently touched on CSAAS issues.[3]

[3] *See* Testimony from *State v. Garcia-Meza*, Maricopa County CR 2012-007431-001, 8/5/2013, (Appx. C) pg. 39-40 (testifying to helplessness and relationships between victim and abuser), 40-42 (discussing methods of accommodation), 43

Discussion

1. **The CSAAS should not be applied to the criminal justice system because its fundamental approach, that the alleged victim should be believed, is inconsistent with the presumption of innocence and creates a logically flawed system.**

When the Supreme Court announced *Daubert*, the Court focused on expert testimony which was based upon scientific knowledge. *Daubert v. Merrell Dow Pharmaceuticals, Inc*, 509 U.S. 579, 592-93, 113 S.Ct. 2786, 2796(1993). The Court focused on scientific knowledge because "Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed this methodology is what distinguishes science from other fields of human

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(helplessness), 44 (delayed disclosure), 44-45 (discussing entrapment through lens of delayed disclosure), 45-46 (incomplete disclosure), 46-47 (methods of disclosure), 60-62 (discussing accommodation by noting children may or may not change behavior). Dutton's testimony has regularly touched on CSAAS themes, as displayed by her testimony from three additional cases attached in the appendix: *State v. Beauchamp*, Maricopa County CR 97-01784 Testimony, 5/12/1998 (Appx. E); *State v. Uriarte*, Maricopa County CR 96-06636, 4/8/1997 (Appx. F); and *State v. Torrez*, Maricopa County CR 2003-015627-001 DT, 6/17/2004 (Appx. G). In these cases Dutton regularly testified on the topics of Delayed Disclosure (Appx. E, pg. 11; Appx. F, pg. 16; Appx. G, pg. 18); Secrecy (Appx. E, 10; Appx. F, 18; Appx. G, 13); Helplessness (Appx. E, 12; Appx. F, 16; Appx. G, 13); Helplessness, Accommodation and Entrapment through victim offender relationship (Appx. E, 22; Appx. F, 20; Appx. G, 15-16); Entrapment and Accommodation through victim not fighting back (Appx. E, 12-13; Appx. F, 22; Appx. G, 13); Accommodation through lack of symptomatic behaviors (Appx. E, 37; Appx. F, 28); Incomplete and Piecemeal Disclosure (Appx. F, 20); Accidental Disclosure (Appx. E, 18-19; Appx. G, 46); Unpersuasive Disclosure through difficulties pinpointing time (Appx. E, 21; Appx. F, 24).

inquiry." *Id.* The Fourth Circuit observed, "An opinion that defies testing, however defensible or deeply held, is not scientific." *U.S. v. Bynum*, 3 F.3d 769, 773 (4th Cir. 1993). CSAAS, however, is incapable of such testing because of the framework under which CSAAS was developed.

Because the goal of CSAAS was to increase the likelihood that adults would believe disclosing children, CSAAS assumes disclosing children have, in fact, been molested. *People v. Bowker*, 203 Cal.App.3d 385, 394, 249 Cal.Rptr. 886, 892 (Cal.App. 1988) ("CSAAS *assumes* a molestation has occurred and seeks to describe and explain common reactions of children to the experience." (emphasis original)); *Steward v. State*, 652 N.E.2d 490, 493 (Ind. 1995) (noting CSAAS "helps to explain reactions--such as recanting or delayed reporting--of children assumed to have experienced abuse"); *State v. Stallings*, 107 N.C.App. 241, 248, 419 S.E.2d 586, 591 (N.C.App. 1992) ("Rather, the [CSAAS] syndrome is founded on the premise that abuse has occurred and identifies behavior typical of sexually abused children."). While possibly reasonable in a therapeutic setting where the focus must be on helping a child and where there are no catastrophic consequences in supporting the disclosure, this creates a problem in a criminal trial setting when evaluating whether testimony should be permitted. Under this framework guilt is presumed and there is no way to apply the framework in a way that can adequately disprove a hypothesis of sexual assault.

A prime example can be seen in how Dr. Summit evaluates the vast scope of accommodation techniques. Summit argues, "[w]hether the child is delinquent, hypersexual, countersexual, suicidal, hysterical, psychotic, or perfectly well-adjusted, and whether the child is angry, evasive or serene, the immediate affect and the adjustment pattern of the child will be interpreted by adults to invalidate the child's complaint." Summit, at 187. Where the focus is to increase the acceptance of molestation accusations, such reasoning might be appropriate. The vast array of accommodation techniques would support the conclusion that treating professionals and parents should not dismiss a complaint merely because a child has accommodated a certain way. However, applying this sort of rationale to a legal proceeding is problematic. The State posits that a child has been abused and notes that children can accommodate in inconsistent, indefinite, and infinite ways. In effect, CSAAS gives the prosecution a syllogism which can never be defeated. Whereas most cases are relegated to the standard "if A, then B" syllogism, child sexual abuse cases, guided by CSAAS testimony, have the additional benefit of "if not A, then B." According to Summit and Dutton, any possible set of behaviors means that the child is "accommodating" the prior assault. A defendant is rendered powerless in such a situation because there is no way to question, test, or disprove the State's hypothesis. If a child is acting out, then the child was abused; if the child is not acting out, then the child was abused. The same is true of nearly

every category. If a child immediately discloses, the child was abused; if a child does not immediately disclose, the child was abused. If the child provided a clear and specific description of the abuse, then the child was abused; if the child provided an inconsistent and vague description, then the child was abused. If the child never recanted the allegation, then the child was abused; if the child recanted the allegation, then the child was abused. The CSAAS sets up a system in which the hypothesis of abuse can never be disproved, nor even doubted.

Because the underlying advocacy of CSAAS is that alleged victims should be believed, CSAAS testimony creates an inequitable system wherein CSAAS testimony can only be used in a unidirectional manner. CSAAS testimony can only be used if offered to bolster the credibility of alleged victims. Because any deviation from normal behavior, and indeed normal behavior itself, falls under the umbrella of a child's reaction to sexual abuse, CSAAS always operates to support the preferred conclusion: sexual abuse occurred. A defendant, conversely, will never be able to overcome this presumption which is fundamental to CSAAS. This is best illustrated through recantation. If a child does not recant the State's case is inherently stronger because there is never inconsistency in the accusation. However, where a child recants the accusation CSAAS accommodates the

weakness in the State's case. CSAAS steps in to explain that recantation is "normal" behavior for victims of sexual abuse.[4]

This also creates a legally inequitable system. The CSAAS may be used to bolster the State's argument but cannot logically be used to attack the State's evidence. Discussing the conceptually related rape trauma syndrome, the Montana Supreme Court held:

> Scheffelman maintains that he should have been able to utilize the records to show absence of rape trauma syndrome. He argues that if the records contained no reference to the symptoms of this syndrome, he could use this as evidence that no abuse occurred. We reject this argument. The absence of evidence of psychological trauma logically does not prove that the offense did not occur.

State v. Scheffelman, 250 Mont. 334, 344, 820 P.2d 1293, 1299 (Mont. 1991). Here, Summit's position has never been that a disclosure which is immediate, clear, and not recanted is proof that abuse did not occur. Summit's proposition operates in one direction: disclosures are reliable whether immediate or delayed, clear or unclear, recanted or not. To this extent, CSAAS testimony is unidirectional in nature and can only logically be used to bolster the credibility of victims. Because the system which results is inequitable and cannot be subjected

[4] This conclusion, however, does not have empirical support. *See* Kamala London, et. al, "Disclosure of Child Sexual Abuse: What Does the Research Tell Us About the Ways that Children Tell?" 11 PSYCHOL. PUB. POL'Y & L. 194, 220 (2005) (Appendix B), discussed in Section 2 below.

to scientific testing, it should not be passed as "evidence" and should not have the endorsement of "expert witnesses" vouching for its application.

2. The conclusions of the CSAAS have been undermined by subsequent research.

In 2005 several doctors conducted a meta-analysis of CSAAS. Kamala London, et. al, "Disclosure of Child Sexual Abuse: What Does the Research Tell Us About the Ways that Children Tell?" 11 PSYCHOL. PUB. POL'Y & L. 194 (2005) (Appendix B). As a result of the analysis, London found strong empirical support for the secrecy prong of CSAAS. *Id.* at 203.

The review of other studies revealed a different answer, however, as to disclosure rates and recantation. *Id.* at 197. London noted that disclosure rates in previous studies usually tracked the certainty of abuse. *Id.* at 210-11. Where there was a higher certainty of the abuse (more evidence to support the conclusion that the abuse actually occurred), there was a higher disclosure rate. *Id.* Conversely, where there was a lower certainty of the abuse, there was a lower disclosure rate. *Id.* Similarly, London observed that the highest rates of recantation were present in studies which evaluated cases with lower rates of certainty of abuse. *Id.* at 216. Regarding recantation, London concluded "the results of this analysis show that recantation is uncommon among sexually abused children" and actually shows "only a small percentage of children in these studies recant." *Id.* at 217. Applying CSAAS to the *Daubert* standard, London concluded, "According to these

testimonial standards, the only component of the CSAAS that has empirical support is that delay of abuse disclosure is very common." *Id.* at 220. However, the probative value of delayed disclosure was called into question in light of the fact that the general public commonly believe that delayed disclosure is common. *Id.* Regarding denial and recantations, "there is no convincing evidence that CSAAS testimony on denial or recantation provides relevant or reliable assistance to the fact finder to assess allegations of [child sexual abuse]." *Id.*

Dutton's testimony regarding recantation becomes particularly troublesome through this lens. In this case the State relied upon Dr. Dutton's testimony regarding piecemeal disclosure and recantation to argue that the behavior of one of the victims was consistent with what is to be expected of an abuse victim. RT 3/20/2012, 59. However, the conclusions regarding disclosure and recantation are precisely the conclusions which lack evidentiary support according to London.

Because Dutton's testimony is largely focused upon CSAAS, Dutton's testimony is improper. While there may be social and therapeutic reasons to use CSAAS, Courts are an improper place to permit the use of a theory which lacks evidentiary validation. The only prong of CSAAS that London found possessed evidentiary support was delayed disclosure, a concept well within the grasp of a normal juror.

3. Dutton's testimony inevitably leads to an improper use of CSAAS.

The other difficulty with Dr. Dutton's testimony is the inherent consequence of her testimony. This Court clearly articulated that an expert witness may not use CSAAS and offer an opinion as to an alleged victim's truthfulness. *State v. Moran*, 151 Ariz. 378, 385, 728 P.2d 248, 255 (1986). However, even if Dr. Dutton does not present an opinion regarding whether an alleged victim was abused or is telling truth during her testimony, Dutton's testimony sets forth what appears to be—and is misused as—a diagnostic tool: a method by which jurors or prosecutors can connect the dots which were intentionally left unconnected. This case demonstrates the misuse of Dutton's testimony which has become commonplace. During closing arguments the State argued:

> And you heard Dr. Dutton tell you, you know, especially when a child -- if a child does disclose and says this is what happened to me, if they are not met with belief, if that person that they disclose to tells, no matter what kind of disclosure it is, once that disclosure comes out, if that isn't supported with belief, the abuse happens again, probably not going to tell anybody about it. That's exactly what happened with one victim.

RT 3/20/2012, 59;

> You know, again, the type of things the Dr. Dutton was talking about when she said the closeness of the relationship between the person doing the abusing and the victim, it has an effect. Not has an effect on how you perceive the trauma, it has an effect on what you do about it, and also that disclosure, when that happens, when if you disclose, how is that -- how is it received, what happens, that all has an effect.

> So, the couple of times that [one victim] did tell somebody, nothing happened. There is no police report. Nothing like that. That is certainly going to have an effect.

Id. at 71;

> Is there any evidence to support a theory that really this is all a product of Velia and Jose wanting to go live in California so they figured they'd make up allegations like this? No.
>
> In fact, Dr. Dutton told you that's not typically when we see falls (sic) allegations. Now, it's not limited to the situation she described to you where you have an older adolescent, usually adolescent female who is trying to mask consensual sexual behavior, and in younger kids where there is a heated divorce and custody battle. It's not limited to those particular situations where you might see false allegations. But those are the most common times you see false allegations. Neither one of those types of situations called happy, don't have any evidence to suggest that [the victims] made up allegations in order to go live in California. They enjoyed going to California. They like going out there. They had fun. They liked seeing their family. But this isn't a case at all about wanting to go live in California, making up allegations.

Id. at 72-73;

> She was confused about when she was touched. She was confused when she was touched. Well, yeah. I mean, she was six or seven years old. This is her cousin. Dr. Dutton told you usually younger kids like that, they don't know, either they think -- either they don't know that it's wrong or they think this happens in all the houses, in everybody's house. This is just kind of normal. And they might not realize it's wrong until later on, once they start realizing that no, this isn't right.
>
> She told you, I was confused about this.

Id. at 73-74. In this case the prosecutor made the precise connection which is not permitted: the prosecutor used the information derived from CSAAS to argue that the victims' behavior in this case conformed to what is expected of child victims of

sex abuse.[5] Even if the prosecutor had not gone so far as to connect the dots for the jury, Dutton's testimony inherently offers itself to such misuse.

A juror who has listened to the facts of this case and then listened to Dutton's testimony—artfully tailored by the prosecutor's questions—will have no trouble reasoning: Dr. Dutton said legitimate victims delay their disclosure, the disclosure was delayed here, therefore this victim was likely legitimately victimized. The Supreme Court of Indiana confronted this precise issue in *Steward v. State*, 652 N.E.2d 490, 499 (Ind. 1995). The Court refused to judicially differentiate expert testimony which reached a conclusion "and that which merely uses syndrome evidence to imply the occurrence of abuse." *Id.* A jury that has received evidence of an alleged victim's behaviors and expert testimony on CSAAS, "the invited inference—that the child was sexually abused because he or she fits the syndrome profile—will be as potentially misleading and equally unreliable as expert testimony applying the syndrome to the facts of the case and

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[5] Such prosecutorial comment is not uncommon. Attached as Appendix D is the Closing Argument from *State v. Julio Garcia-Meza*, CR 2012-007431-001, 8/12/2013. Again, the prosecutor directly referenced Dr. Dutton's testimony and used Dutton's testimony as a framework to match with the alleged victim's behaviors. Appx. D, pg. 28. In *Garcia-Meza* the prosecutor briefly recounted Dutton's testimony and then applied Dutton's testimony to the facts of the case. *See id.* at pg. 29-30 (applying helplessness to the facts of the case), 30-31 (applying secrecy, delayed disclosure, and helplessness), 31-32 (applying testimony about the nature of the relationship), 32 (applying testimony about methods of disclosure). The prosecutor also used Dutton's testimony regarding memory issues and the process of victimization as an outline for the argument. *Id.* at pg. 33-35.

stating outright the conclusion that a given child was abused." *Id.* The Court concluded that the risk of misapplication was the same regardless of whether the product of an expressed expert opinion or a jury conclusion. *Id.*

CONCLUSION

CSAAS was designed from a perspective which is inconsistent with the criminal justice system; CSAAS was designed from the perspective that a victim should be presumed to have truthfully disclosed. However, such a presumption does not fit with the necessary legal presumption of innocence. When this framework is then forcefully thrust into the courtroom the result is unfair. The State can present a theory of abuse which cannot be disproved by a defendant.

The clinical and therapeutic background in CSAAS also has an impact upon the reliability of its conclusions. Subsequent analysis of CSAAS and related studies indicates that much of CSAAS does not have empirical support. The only aspect of CSAAS which carries empirical support is delayed disclosure, a concept well within the grasp of the normal person without the assistance of an expert.

Finally, the manner of Dutton's testimony regularly guides prosecutors and jurors to misapply her testimony and improperly reach conclusions about the credibility of alleged victims.

RESPECTFULLY SUBMITTED this day of October, 2025.

By /s/ Mikel Steinfeld
MIKEL STEINFELD

By /s/ Amy Kalman
AMY KALMAN