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# **Throwing the Baby Out With the Bathwater: Why Child Sexual Abuse Accommodation Syndrome Should Be Allowed as a Rehabilitative Tool in the Florida Courts**

## **I. INTRODUCTION: A. THE CLASSIC CHILD ABUSE PROBLEM**

While living at the home of her grandparents, a teenage girl is sexually abused by her grandfather.<sup>1</sup> He takes her into the garage, bends her over the car, and inserts his finger, a dildo, and then his penis into her vagina.<sup>2</sup> She flees to the home of a cousin. Upset and crying, she tells the cousin that the grandfather has been pressuring her to have sex with him. She then relates the specific details of the abuse. The cousin allows the girl to move in with her. Over the course of the next few months, the girl repeats the details of the abuse several times. A social worker for child protective services visits the girl and finds her "very nervous," "agitated," and "weepy at times." The girl expresses concern that if she reports the abuse her family will not love her and tells the social worker that she does not want her grandfather to go to jail.<sup>3</sup> The girl tells her cousin that she had contact with her mother and the mother told the girl that she (the girl) was the reason her grandfather was in jail and that he would only be released if the girl tells the prosecutor that the accusations of abuse were made up.<sup>4</sup>

The girl relates the abuse to yet another social worker, this one works for child welfare services. After a juvenile court hearing determines that the girl should no longer live with her grandparents (where her mother resides), the girl becomes hysterical, saying she has lost her relationship with her mother. She tells the social worker that she is hurt by the loss of her family's support.<sup>5</sup>

A police officer assigned to investigate the girl's case interviews her and is told of the abuse. She tells him about pornographic videos that her grandfather forced her to watch. Upon searching the grandparents' home, the officer finds the pornographic videos and the dildo the girl had described to him.<sup>6</sup> During preparation for her grandfather's trial, the girl tells a court-appointed representative for abused children she is

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1. *People v. Housley*, 6 Cal. App. 4th 947, 951 (Cal. Ct. App. 1992).

2. *Id.* at 953.

3. *Id.*

4. *Id.* at 952.

5. *Id.*

6. *Id.*

afraid that she will be rejected by her family if she testifies against her grandfather.<sup>7</sup> The girl tells a social worker for the Department of Social Services that she wants to be with her mother and requests an unsupervised visit. A few days after the visit, the girl tells the social worker that she had lied about the molestation and requests that charges be dropped so no trial will take place.<sup>8</sup> At trial, the girl insists that none of the abusive events she had related earlier to the various social workers actually occurred and that she had made the whole story up so she could leave her grandfather's home to have more freedom.<sup>9</sup>

In response to the girl's recantation and a defense suggestion that the girl's delay in reporting the abuse supports her claim of fabrication, a psychologist testifies on behalf of the prosecution. The psychologist tells the court that it is uncommon for victims of sexual abuse to immediately report the abuse to authorities or other people. The psychologist explains that victims often delay reporting abuse because it forces the victim to relive the trauma of the abuse and cements in his mind the fact that the abuse actually happened. The psychologist also testifies that it is very common for victims of abuse to recant after first making a report. This is because they feel they may not be believed or may be removed from their home. Victims of abuse also fear the offender will suffer negative consequences from the reported abuse. The psychologist adds that victims of intrafamily abuse are more likely to recant since they suffer more pressure and feel more guilt in making the report.<sup>10</sup> Despite the girl's recantation, the girl's grandfather is convicted.

On appeal, the defendant challenges the admission of the psychologist's "syndrome" testimony. The appellate court finds the testimony proper for several reasons:

- 1) [The psychologist] plainly testified she had never met [the girl], was unfamiliar with the details of the case and had never read any reports associated with this matter. Thus, she was not offering an opinion on [the girl's] credibility.
- 2) The testimony was not used to suggest the molestation actually occurred. Instead, it was offered to "disabuse the jury of some widely held misconceptions . . . so that it may evaluate the evidence free of the constraints of popular myths."
- 3) The evidence was addressed to a specific "myth" or "misconception." In this case the testimony was clearly intended to help explain [the girl's] delay in reporting the abuse and her last minute recanta-

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7. *Id.* at 953-54.

8. *Id.* at 954.

9. *Id.* at 951.

10. *Id.* at 952.

tion of the charges.<sup>11</sup>

B. *The Problem Defined-Child Sexual Abuse  
Accommodation Syndrome*

This case illustrates one of the difficult questions facing courts who must determine innocence or guilt in child abuse prosecutions: the admissibility of Child Sexual Abuse Accommodation Syndrome ("CSAAS"). The stickiness in the issue of admissibility of CSAAS is magnified by the risk of an extremely injurious result of an incorrect verdict. If abuse actually occurred, failure to convict may result in more abuse and more victims of abuse. On the other hand, if no abuse occurred, a conviction maligns the accused as one of society's most hated criminals. The choice to convict or acquit is not a difficult one only because of its potential consequences on both the alleged victim and the defendant but also because the abuse often occurs in private, away from any potential eyewitnesses.<sup>12</sup> One appellate court has described the enormity of this task as follows:

In reaching our decision today, we acknowledge the inherent difficulties of proving sexual abuse. Usually, only two eyewitnesses exist, the victim and the accused, thus putting a premium on credibility. It is, therefore, often necessary for the prosecution to enlist the services of an expert to explain the victim's unusual behavior in delayed reporting, accommodation and like aberrations. However, we cannot abrogate time-tested and fundamental tenets of evidence because child sexual abuse is an increasingly prevalent problem.<sup>13</sup>

Because of the difficulty of procuring reliable evidence in a sexual abuse case, psychological findings such as CSAAS may be the best evidence that will ever be available.<sup>14</sup>

C. *Florida's Solution: Hadden v. State*

Had the above facts taken place in Florida instead of California, the Florida Supreme Court's holding in *Hadden v. State*<sup>15</sup> would have prevented the CSAAS evidence that proved so important in helping the jury understand the girl's behavior from being admitted. The jury would have been left with the conundrum of what to make of the girl's recanta-

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11. *Id.* at 954-55.

12. See Lisa R. Askowitz & Michael H. Graham, *The Reliability of Expert Psychological Testimony in Child Sexual Abuse Prosecutions*, 15 CARDOZO L. REV. 2027, 2033 (1994).

13. *Frenzel v. State*, 849 P.2d 741, 751 (Wyo. 1993).

14. See Chandra L. Holmes, Note, *Child Sexual Abuse Accommodation Syndrome: Curing the Effects of a Misdiagnosis in the Law of Evidence*, 25 TULSA L.J. 143, 160 (1989).

15. 690 So. 2d 573 (Fla. 1997).

tion in light of the testimony of several witnesses to whom she had related the abuse.

In *Hadden v. State*, the Florida Supreme Court addressed the inherent tension between the need for expert testimony to assist the jury in understanding the behavior of alleged victims and the standards for admissibility of evidence. The Florida Supreme Court was faced with two very different cases that had been consolidated on appeal.

The first of the two cases, also titled *Hadden v. State*,<sup>16</sup> arose from the First District Court of Appeal. During the course of trial in *Hadden*, the state proffered out of the jury's presence opinion testimony from Doug Jones, a veteran mental health counselor and school psychologist, concerning the symptoms and diagnostic criteria typically associated with sexually abused children. Although the defense accepted Jones as an expert in child abuse, the defense objected to his testimony. The defense argued the testimony lacked scientific reliability because Jones failed to identify enough diagnostic criteria to give an adequate description of the child's condition.<sup>17</sup>

The second of the consolidated cases, was appealed from the Fifth District Court of Appeal. In *Beaulieu v. State*,<sup>18</sup> a psychologist testified that based on his interviews with the child victim, the child's drawings, and other tests, the victim fit the child-abuse profile.<sup>19</sup> The court stated:

The factors that led to (or at least contributed to) the psychologist's opinion in our case that the boy met the child abuse profile were that he was significantly attached to his father and believed his mother was not protecting him; he had a feeling of helplessness and low self-esteem; and he had difficulty in dealing with emotionally charged situations. And . . . the psychologist determined these factors from the "house-tree-person" test in which the psychologist analyzes a child's drawings.<sup>20</sup>

After analyzing the drawing, the psychologist concluded:

[The victim] he used a lot of shading, not well thought out drawing shadings, but confused shadings. That's often a sign of anxiety. [His tree] was what we call barren. It was a nice full tree, but it didn't have a root system. It gave the appearance as barren. As far as parents doing something, there were only heads in the picture. He left off the bodies. Often when children leave off their bodies or other bodies, it's a sense of being out of control or somehow being dam-

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16. 670 So. 2d 77 (Fla. 1st DCA 1996).

17. *Id.* at 79.

18. 671 So. 2d 807 (Fla. 5th DCA 1996).

19. *Id.* at 811.

20. *Id.*

aged or victimized.<sup>21</sup>

After hearing the psychologist's testimony, the Florida Supreme Court banned "syndrome testimony."<sup>22</sup> It stated that syndrome testimony "may not be used in a criminal prosecution for child abuse."<sup>23</sup> In reaching its decision, the Florida Supreme Court made several crucial analytical mistakes. First, the court failed to distinguish between CSAAS and other, less reputable versions of "syndrome testimony."

Second, in condemning the use of CSAAS the Florida Supreme Court failed to recognize its importance in rehabilitating the credibility of an alleged victim when by her own behavior, such as long delays in reporting the alleged abuse or a recantation, is now in question. Third, in failing to recognize CSAAS as a rehabilitative tool, the Florida Supreme Court misconstrued the very case law upon which *Hadden* purported to be grounded. Finally, given the rehabilitative nature of CSAAS, the Florida Supreme Court failed to adequately justify its insistence on submitting the use of CSAAS to a *Frye*<sup>24</sup> test.

This Comment discusses the above points in detail, places the question of the admissibility of CSAAS into a national context, and calls upon the courts of Florida to clarify their stance by expressly acknowledging the utility of CSAAS as a rehabilitative tool.

## II. THE SYNDROMES DEFINED

### A. *Child Sexual Abuse Syndrome and Other Syndromes:*

While a large part of the *Hadden* opinion addresses CSAAS,<sup>25</sup> the broader language of the certified question before the court<sup>26</sup> and the holding<sup>27</sup> indicate that the admissibility of Child Sexual Abuse Syn-

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21. *Id.*

22. The Florida Supreme Court defined "syndrome testimony." "In such testimony, the expert (usually a psychologist by training) testifies on the basis of studies that children who have been sexually abused develop certain symptoms." *Hadden v. State*, 690 So. 2d 573, 575 (Fla. 1997).

23. *Id.*

24. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). The *Frye* test is designed to prevent scientific evidence that is not widely accepted within the relevant scientific community from being admitted.

25. *Hadden*, 690 So. 2d at 575.

26. The question certified was, "[i]n view of the [Florida] Supreme Court's holding in *Townsend v. State*, does *Flanagan v. State* require application of the *Frye* Standard of Admissibility to testimony by a qualified psychologist that the alleged victim in a sexual abuse case exhibits symptoms consistent with those of a child who has been sexually abused." *Id.* at 574.

27. "We hold that expert testimony offered to prove the alleged victim of sexual abuse exhibits symptoms consistent with one who has been sexually abused should not be admitted." *Id.* at 577.

In sum, we answer the certified question in the affirmative and hold that prior to the introduction of expert testimony offered to prove the alleged victim of sexual abuse

drome ("CSAS") was also at issue. This is especially true in light of the fact that neither of the two consolidated cases involved CSAAS testimony.

CSAS is actually rather difficult to define and little consensus exists amongst the courts and commentators as to what CSAS actually encompasses. Generally, it appears as a conglomeration of Dr. Roland Summit's<sup>28</sup> work on post-traumatic stress disorder and other observations of a particular practitioner, Dara Loren Steel. Steel describes CSAS as:

[I]t is an amalgam of the personal experience of a given expert combined with what the expert knows of empirical studies and explanatory theories [such as Dr. Summit's CSAAS]. CSAS is merely the label some courts and experts apply to the generalized laundry list of behaviors which are commonly observed in abuse victims.<sup>29</sup>

This "amalgam" of a "generalized laundry list" causes confusion for both the courts and the experts.<sup>30</sup> This murkiness has led some courts to refuse to even recognize the existence of CSAS.<sup>31</sup> Regardless if CSAS really exists, as long as it (or any other type of syndrome evidence) is offered in Florida for the purpose of proving that a child exhibits symptoms consistent with those of a child sexually abused, the evidence is governed by the rule of *Hadden v. State*.<sup>32</sup> This is because Florida has

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exhibits symptoms consistent with one who has been sexually abused, upon proper objection the trial court must find that the expert's testimony is admissible under the standard for admissibility of novel scientific evidence announced in *Frye v. United States*, 54 App.D.C. 46, 293 F. 1013 (D.C. Cir. 1923), and adopted in Florida. We further hold that currently this evidence does not pass a *Frye* test; consequently, this evidence may not be used in a criminal prosecution for child abuse.

*Id.* at 581.

28. See Roland Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 Child Abuse & Neglect 177 (1983).

29. Dara Loren Steele, Note, *Expert Testimony: Seeking an Appropriate Admissibility Standard for Behavioral Science in Child Sexual Abuse Prosecutions*, 48 DUKE L.J. 933, 944 (1999) (footnotes omitted).

30. Experts testifying in child sexual abuse prosecutions often fail to identify explanative theories by name. More importantly, they also often fail to articulate the theory or theories on which they are relying to form the bases of their opinions. Sometimes experts employ by name the "child sexual abuse syndrome" when relying on some combination of CSAAS, PTSD, and statement validation. In reality, the experts most often simply introduce their "whole package" of evidence bearing on the issue of whether the child has been sexually abused, without clearly delineating the basis for the testimony.

Askowitz & Graham, *supra* note 12, at 2063 (footnotes omitted).

31. See, e.g., *Duckett v. State*, 797 S.W.2d 906 (Tex. Crim. App. 1990) (Teague, J., dissenting) ("There is no recognized 'Child Sexual Abuse Syndrome' that contains consistent elements. Rather, the syndrome is whatever the particular experts wants it to be, based upon elements he himself has created or manufactured, or has plagiarized (sic) from other's works.") *Id.* at 926.

32. 690 So. 2d 573 (Fla. 1997).

not sought to distinguish the syndromes, but chose instead to focus on the purpose for which they are offered into evidence.

*State v. J.Q.*,<sup>33</sup> arising out of New Jersey, has been identified as a CSAS case using multiple explanative theories.<sup>34</sup> When the children in *State v. J.Q.* testified that they had failed to immediately disclose the abuse and that even after the abuse had begun, they continued to want to visit their father, the prosecutions psychologist used CSAAS to rehabilitate the children's credibility and explain their delayed disclosure.<sup>35</sup> Other behaviors of the children (such as crying, having nightmares, and declining grades) were explained using the Post-Traumatic Stress Disorder Theory.<sup>36</sup> The psychologist also compared the behavior of the children to that of other sexual abuse victims known to her.<sup>37</sup> As *State v. J.Q.* illustrates, it should be apparent that there are clear, definable differences between CSAS and CSAAS.

### B. *Child Sexual Abuse Accommodation Syndrome*

In 1983, concerned about societal reactions to the behavior of children who allege sexual abuse, Dr. Roland Summit described the Child Sexual Abuse Accommodation Syndrome.<sup>38</sup> This description of typical reactions of child victims of sexual abuse is composed of five categories: (1) secrecy;<sup>39</sup> (2) helplessness;<sup>40</sup> (3) entrapment and accommoda-

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33. 617 A.2d 1196 (N.J. 1993).

34. Askowitz & Graham, *supra*, note 12, at 2064.

35. *Id.* at 2066.

36. *Id.*

37. *Id.*

38. "Evaluation of the responses of normal children to sexual assault provides clear evidence that societal definitions of 'normal' victim behavior are inappropriate and procrustean, serving adults as mythic insulators against the child's pain." Summit, *supra* note 28, at 188.

39. The average child:

never asks and never tells. Contrary to the general expectation that the victim would normally seek help, the majority of the victims in retrospective surveys had never told anyone during their childhood. Respondents expressed fear that they would be blamed for what had happened or that a parent would not be able to protect them from retaliation. Many of those who sought help reported that parents became hysterical of punishing and pretended that nothing had happened.

*Id.* at 181.

40. This category can be described as:

Society allows the child one acceptable set of reactions to such an experience. Like the adult victim of rape, the child victim is expected to forcibly resist, to cry for help and to attempt to escape the intrusion. By that standard, almost every child fails . . . The normal reaction is to "play possum," that is to feign sleep, to shift position and to pull up the covers. Small creatures simply do not call on force to deal with overwhelming threat. When there is no place to run, they have no choice but to try to hide. Children generally learn to cope silently with terrors in the night. Bed covers take on magical powers against monsters, but they are no match for human intruders . . . Adults must be reminded that the wordless action or gesture of a parent



tion;<sup>41</sup> (4) delayed, unconvincing disclosure;<sup>42</sup> and (5) retraction.<sup>43</sup>

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is an absolutely compelling force for a dependent child and the threat of loss of love or loss of family security is more frightening to the child than any threat of violence.

*Id.* at 183.

41. These categories are described as:

If the child did not seek or did not receive immediate protective intervention, there is no further option to stop the abuse. The only healthy option left for the child is to learn to accept the situation and to survive. There is no way out, no place to run. The healthy, normal, emotionally resilient child will learn to accommodate to the reality of continuing sexual abuse. There is the challenge of accommodating not only to escalating sexual demands but to an increasing consciousness of betrayal and objectifications by someone who is ordinarily idealized as a protective, altruistic, loving parental figure. There is an inevitable splitting of conventional moral values. Maintaining a lie to keep the secret is the ultimate virtue, while telling the truth would be the greatest sin. A child thus victimized will appear to accept or to seek sexual contact without complaint.

*Id.* at 185.

42. Disclosure:

is an outgrowth either of overwhelming family conflict, incidental discovery by a third party, or sensitive outreach and community education by child protective agencies. . . If family conflict triggers disclosure, it is usually only after some years of continuing sexual abuse and an eventual breakdown of accommodation mechanisms. After an especially punishing family fight and a belittling showdown of authority by the father, the girl is finally driven by anger to let go of the secret. She seeks understanding and intervention at the very time she is least likely to find them. Authorities are alienated by the pattern of delinquency and rebellious anger expressed by the girl. Most adults confronted with such a history tend to identify with the problems of the parents in trying to cope with a rebellious teenager. They observe that the girl seems more angry about the immediate punishment than about the sexual atrocities she is alleging. They assume there is not truth to such a fantastic complaint, especially since the girl did not complain years ago when she claims she was forcibly molested. They assume she has invented the story in retaliation against the father's attempts to achieve reasonable control and discipline. The more unreasonable and abusive the triggering punishment, the more they assume the girl would do anything to get away, even to the point of falsely incriminating her father. Unless specifically trained and sensitized, average adults, including mothers, relatives, teachers, counselors, doctors, psychotherapists, investigators, prosecutors, defense attorneys, judges and jurors, cannot believe that a normal, truthful child would tolerate incest without immediately reporting or that an apparently normal father could be capable of repeated, unchallenged sexual molestation of his own daughter. The child of any age faces an unbelieving audience when she complains of ongoing sexual abuse. The troubled, angry adolescent risks not only disbelief, but scapegoating, humiliation and punishment as well.

*Id.* at 187.

43. Retraction:

Whatever a child says about sexual abuse, she is likely to reverse it. Beneath the anger of impulsive disclosure remains the ambivalence of guilt and the martyred obligation to preserve the family. In the chaotic aftermath of disclosure, the child discovers that the bedrock fears and threats underlying the secrecy are true. Her father abandons her and calls her a liar. *Her mother does not believe her of decompensates into hysteria and rage.* The family is fragmented, and all the children are placed in custody. Once again, the child bears the responsibility of either preserving or destroying the family. The role reversal continues with the

Summit has been quick to concede, both at the time the original article was published,<sup>44</sup> and in later commentaries addressing courts' responses to CSAAS,<sup>45</sup> that CSAAS is not a diagnostic tool to be used by practitioners or courts to prove the existence of sexual abuse. Rather, it is a clinical tool to understand the behavior of a child who has been sexually abused. Within the judicial system, it should only be used to explain seemingly inconsistent behavior and/or to rebut claims by the defense that abuse has not occurred based on the child's delayed and unconvincing disclosure, recantation, or other inconsistent behaviors.<sup>46</sup>

### III. NATIONAL PERSPECTIVES ON SYNDROME EVIDENCE

The various states have responded in greatly different ways to syndrome evidence. These decisions can be placed on a spectrum from the most liberal acceptance to the most restrictive. Some states have chosen to treat the admission of the various syndromes separately. Others focus only on the purpose for which they are offered into evidence.

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"bad" choice being to tell the truth and the "good" choice being to capitulate and restore a lie for the sake of the family. *Unless there is special support for the child and immediate intervention to force responsibility on the father, the girl will follow the normal course and retract her complaint.*

*Id.* at 188 (emphasis in original).

44. *Id.* at 179. "A syndrome should not be viewed as a procrustean bed which defines and dictates a narrow perception of something as complex as child sexual abuse. A child who seeks help immediately or who gains effective intervention should not be discarded as contradictory, any more than the syndrome should be discarded if it fails to include every possible variant. The syndrome represents a common denominator of the most frequently observed victim behaviors."

45. The distortion stems from misunderstanding of the word *syndrome*. In medical tradition it means a list, or pattern of otherwise unrelated factors which can alert the physician to the possibility of disorder. Such a pattern is not diagnostic. In court circles, syndrome seems to mean a diagnosis which an expert witness contrives to prove an injury. Syndrome evidence has become a generic term for diagnostic medical or psychological testimony which must be closely scrutinized for scientific reliability. Had I known the legal consequences of the word at the time, I might better have chosen a name like the Child Sexual Abuse Accommodation Pattern to avoid any pathological or diagnostic implications.

Roland Summit, *Abuse of the Child Sexual Abuse Accommodation Syndrome*, 1(4) J. OF CHILD SEXUAL ABUSE 153, 157 (1992) (hereinafter Summit II) (emphasis in original).

46. The proper foundation for relevance of CSAAS testimony is the inference raised by the defense that an inconsistent pattern or disclosures by the child is indicative of deceit. An abstract presentation of the CSAAS by an expert who has never seen the child and knows virtually nothing about the case provides the jury with a demonstrably objective refutation. There is no possibility that such an expert has couched the testimony to buttress the credibility of percipient witnesses. Ideally, the jury will be allowed to understand what is normal and real for child victims as a class, even if courts persist in seeing such conditions as pathological.

*Id.* at 148; see also Arthur H. Garrison, *Child Sexual Abuse Accommodation Syndrome: Issues of Admissibility in Criminal Trials*, 10 Issues in Child Abuse Accusations 52 (1998).

### A. Syndrome Evidence as Proof of Abuse

Early decisions found syndrome or profile evidence useful and convincing and some courts even allowed such evidence as proof of abuse, permitting an expert to testify that because a child fits the expert's behavioral criteria for diagnosing abuse, the child therefore had been abused.<sup>47</sup> None of these decisions specifically mention CSAAS. Most states, however, that have addressed the issue found syndrome evidence inadmissible as proof of abuse, with some states even overturning earlier decisions to the contrary.<sup>48</sup> Roughly half of these decisions specifically address CSAAS. The others bar any syndrome evidence as proof of abuse.<sup>49</sup>

### B. Behavior or Statements Consistent with Abuse

Disagreement exists on the issue of the admissibility of syndrome evidence where the testifying expert merely describes certain behavioral characteristics of the child as being consistent with sexual abuse and then concludes, based on the child's behavior, statements, or both, that the child has likely been abused. An early anomaly was *State v. Kim*,<sup>50</sup> in which the Hawaii Supreme Court allowed an expert to testify that the child complainant's allegations of abuse were truthful. Numerous cases have ruled such implication evidence inadmissible as proof that an assault actually occurred,<sup>51</sup> but few have explicitly addressed CSAAS.<sup>52</sup> Other jurisdictions have ruled in favor of admissibility when the expert presents evidence of abuse through implication, but refrains from giving an explicit opinion on whether the abuse occurred.<sup>53</sup>

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47. See generally *Broderick v. King's Way Assembly of God Church*, 808 P.2d 1211 (Alaska 1991); *In Re Cheryl H.*, 200 Cal. Rptr. 789 (Cal. Ct. App. 1984), *overruled in part by* *People v. Brown*, 883 P.2d 949 (Cal. 1994); *State v. Hester*, 760 P.2d 27 (Idaho 1988); *State v. Geyman*, 729 P.2d 475 (Mont. 1986); *Townsend v. State*, 734 P.2d 705 (Nev. 1987); *State v. Timperio*, 528 N.E.2d 594 (Ohio Ct. App. 1987); *State v. Schumpert*, 435 S.E.2d 859 (S.C. 1993); *State v. Morgan*, 485 S.E.2d 112 (S.C. Ct. App. 1997); *State v. Edward Charles L.*, 398 S.E.2d 123 (W. Va. 1990).

48. See generally *State v. York*, 564 A.2d 389 (Me. 1989); *State v. Chamberlain*, 628 A.2d 704 (N.H. 1993); *State v. Schimpf*, 782 S.W.2d 186 (Tenn. Crim. App. 1989); *State v. Rimmasch*, 775 P.2d 388 (Utah 1989); *State v. Gokey* 574 A.2d 766 (Vt. 1990); *State v. Jones*, 863 P.2d 85 (Wash. Ct. App. 1993); *State v. Jensen*, 415 N.W.2d 519 (Wis. Ct. App. 1987).

49. See *People v. Bowker*, 249 Cal. Rptr. 886 (Cal. Ct. App. 1988); *State v. Leon*, 263 Cal. Rptr. 77 (Cal. Ct. App. 1989); *Lantrip v. Commonwealth*, 713 S.W.2d 816 (Ky. 1986); *State v. J.Q.*, 617 A.2d 1196 (N.J. 1992); *People v. Duell*, 558 N.Y.S.2d 395 (N.Y. App. Div. 1991).

50. 645 P.2d 1330 (Haw. 1982), *overruled by* *State v. Batangan*, 799 P.2d 48 (Haw. 1990).

51. See generally *State v. Moran* 728 P.2d 248 (Ariz. 1986); *Russell v. State*, 712 S.W.2d 916 (Ark. 1986); *People v. Jeff*, 251 Cal. Rptr. 135 (Cal. Ct. App. 1988); *State v. Michaels*, 625 A.2d 489 (N.J. 1992).

52. *State v. Foret*, 628 So. 2d 1116 (La. 1993); *People v. Beckley*, 456 N.W.2d 391 (Mich. 1990).

53. See generally *United States v. Bighead*, 128 F.3d 1329 (9th Cir. 1997); *United States v.*

C. *Rehabilitative or Rebuttal Use of Syndrome Evidence.*

The use of syndrome evidence to rebut claims by the defense that a child complainant's behavior, such as delays in reporting or retraction of allegations, is inconsistent with his claims of abuse has received "almost universal approval"<sup>54</sup> (of course excluding Florida). Roughly half of the cases surveyed specifically rule on the validity of use of CSAAS for such purposes.<sup>55</sup> The other half of the cases allow any rehabilitative or rebuttal testimony which seeks to define the behavior of the abused.<sup>56</sup>

To rationalize the use of CSAAS testimony to rehabilitate rather than as evidence that the child's behavior is "consistent with abuse," courts will allow CSAAS for double negative of "not inconsistent with abuse." Given the proper procedural safeguards, however, this distinction becomes less meaningful. Some courts require limiting instructions be given to the jury in the case of rebuttal CSAAS testimony, stating that such evidence is not to be used substantively as evidence that the victim is telling the truth.<sup>57</sup> Additionally, the California courts require

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St. Pierre, 812 F.2d 417 (8th Cir. 1987); *Rodriquez v. State*, 741 P.2d 1200 (Alaska Ct. App. 1987); *State v. Reser*, 767 P.2d 1277 (Kan. 1989); *State v. Edelman*, 593 N.W.2d 419, (S.D. 1999); *State v. Bachman*, 446 N.W.2d 271 (S.D. 1989); *State v. Gokey*, 574 A.2d 766. (Vt. 1990).

54. *State v. J.Q.*, 599 A.2d 172, 183 (N.J. Ct. App. 1991).

55. See generally *People v. Stark*, 261 Cal. Rptr. 479 (Cal. Ct. App., 1989); *People v. Bowker*, 249 Cal. Rptr. 886, 891 (Cal. Ct. App. 1988); *People v. Gray*, 231 Cal. Rptr. 658 (Cal. Ct. App. 1986); *People v. Dunnahoo*, 199 Cal. Rptr. 796 (Cal. Ct. App. 1984); *People v. Wasson*, 569 N.E.2d 1321 (Ill. 1991); *People v. Nelson*, 561 N.E.2d 439 (Ill. App. Ct. 1990); *Steward v. State*, 652 N.E.2d 490 (Ind. 1995); *Peterson*, 537 N.W.2d 857 (Mich. 1995); *People v. Beckley*, 456 N.W.2d 391 (Mich. 1990); *People v. Gallow*, 569 N.Y.S.2d 530 (N.Y. App. Div. 1991); *State v. Garfield*, 518 N.E.2d 568 (Ohio 1986). But see *Mitchell v. Commonwealth*, 777 S.W.2d 930 (Ky. 1989); *Hester v. Commonwealth*, 734 S.W.2d 457 (Ky. 1987); *Commonwealth v. Dunkle*, 602 A.2d 830 (Pa. 1992); *Commonwealth v. Garcia*, 588 A.2d 951 (Pa. Super. Ct. 1991).

56. See, e.g., *Ex parte Hill*, 553 So. 2d 1138 (Ala. 1989); *Nelson v. State*, 782 P.2d 290 (Alaska Ct. App. 1989); *Bostic v. State*, 772 P.2d 1089 (Alaska Ct. App. 1989), *rev'd on other grounds*, *Bostic v. State*, 805 P.2d 344 (Alaska 1991); *State v. Moran*, 728 P.2d 248, 252 (Ariz. 1986); *State v. Lindsey*, 720 P.2d 73 (Ariz. 1986); *People v. Harlan*, 271 Cal. Rptr. 653 (Cal. Ct. App. 1990); *People v. Hampton*, 746 P.2d 947 (Colo. 1987); *State v. Spigarolo*, 556 A.2d 112 (Conn. 1989); *Wheat v. State*, 527 A.2d 269 (Del. 1987); *Hicks v. State*, 396 S.E.2d 60 (Ga. 1990); *State v. Batangan*, 799 P.2d 48 (Haw. 1990); *State v. Preston*, 581 A.2d 404 (Me. 1990); *State v. Black*, 537 A.2d 1154 (Me. 1988); *People v. Matlock*, 395 N.W.2d 274, (Mich. Ct. App. 1986); *State v. Sandberg*, 406 N.W.2d 506 (Minn. 1987); *State v. Hall*, 406 N.W.2d 503 (Minn. 1987); *State v. Myers*, 359 N.W.2d 604 (Minn. 1984); *State v. Davis*, 422 N.W.2d 296 (Minn. Ct. App. 1988); *Hosford v. State*, 560 So. 2d 163 (Miss. 1990); *Smith v. State*, 688 P.2d 326 (Nev. 1984); *People v. Benjamin R.*, 481 N.Y.S.2d 827, (N.Y. App. Div. 1984); *State v. Timperio*, 528 N.E.2d 594 (Ohio 1987); *State v. Middleton*, 657 P.2d 1215 (Or. 1983); *State v. Pettit*, 675 P.2d 183, 185 (Or. Ct. App. 1984); *State v. Rogers*, 362 S.E.2d 7 (S.C. 1987); *State v. Gokey*, 574 A.2d 766 (Vt. 1990); *State v. Hicks*, 535 A.2d 776 (Vt. 1987); *State v. Petrich*, 683 P.2d 173 (Wash. 1984); *State v. Cleveland*, 794 P.2d 546 (Wash. App. Ct. 1990); *State v. Madison*, 770 P.2d 662 (Wash. Ct. App. 1989); *State v. Jensen*, 432 N.W.2d 913 (Wis. 1988); *Gale v. State*, 792 P.2d 570 (Wyo. 1990); *Scadden v. State*, 732 P.2d 1036 (Wyo. 1987).

57. See generally *People v. Housley*, 8 Cal. Rptr. 2d 431, 438 (Cal. Ct. App. 1992); *Davenport v. State*, 806 P.2d 655, 660 (Okla. 1991).

that the evidence be targeted at a specific misconception.<sup>58</sup> The trend in courts is moving towards allowing an expert to testify only to the general attributes of an abused child not as to whether or not the alleged victim exhibits those attributes. This allows the jury to make the determination of the child's veracity and the defendant's guilt or innocence. To help ensure that the expert does not comment on the particular child alleging abuse, some states require that the expert not meet or examine the child.<sup>59</sup> But even an expert with no familiarity with the child or his specific behavior can be of great help to the jury in understanding unusual behaviors.<sup>60</sup> Finally, some courts have imposed a procedural restriction on the presentation of syndrome evidence, allowing it only after the defense has specifically attacked the credibility of the child.<sup>61</sup>

#### D. *Syndrome Evidence Inadmissible for any Purpose*

On the extreme end of the spectrum are the states, Florida being among them, that have deemed syndrome evidence inadmissible for any purpose.<sup>62</sup> These courts conclude that syndrome evidence is not a generally accepted medical concept, fails to discriminate between abused and non-abused children, and has no relevance to the issue of the alleged abuser's guilt or innocence.<sup>63</sup> Those concerns, however, are misplaced and invalid as CSAAS is an attempt to explain behavior that is seemingly inconsistent with being a victim of sexual abuse and not a diagnostic tool.

### IV. THE HISTORY OF SYNDROME EVIDENCE IN FLORIDA

The opinions of the Florida courts have ranged the spectrum from

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58. *People v. Bowker* 203 Cal. App. 3d 385, 393-94 (Cal. Ct. App. 1988).

59. *See State v. Edelman*, 593 N.W.2d 419 (S.D. 1999); *People v. Housley*, 6 Cal. App. 4th 947 (Cal. Ct. App. 1992).

60. Rosemary L. Flint, Note: *Child Sexual Abuse Accommodation Syndrome: Admissibility Requirements*, 23 AM. J. CRIM. L. 171, 192 (1995).

61. *See People v. Bowker*, 203 Cal. App. 3d 385, 393 (Cal. Ct. App. 1988); *People v. Nelson*, 561 N.W.2d 439 (Ill. App. Ct. 1990); *Davenport v. State*, 806 P.2d 655, 659 (Okla. Crim. App. 1991).

62. *See Hester v. Commonwealth*, 734 S.W.2d 457 (Ky. 1987); *Commonwealth v. Dunkle*, 602 A.2d 830 (Pa. 1992).

63. The child sexual abuse accommodation syndrome is not like a fingerprint in that it can clearly identify the perpetrator of a crime. Even if all of the children of the appellant exhibited some or all of the symptoms of the syndrome, it would not follow that the appellant was conclusively, or even probably, guilty of child abuse. The testimony about the child abuse syndrome, even had it been offered by a psychiatrist or psychologist, and even if it were shown to be a medically accepted concept, was for the most part irrelevant to the issue of the guilt or innocence of the appellant.

*Mitchell v. Commonwealth*, 777 S.W.2d 930, 932-33 (Ky. 1989).

lenient admission of syndrome evidence to the eventual outright ban enacted through the *Hadden* case.

### A. CSAS in Florida

In *Ward v. State*,<sup>64</sup> Florida's first encounter with syndrome evidence,<sup>65</sup> the First District Court of Appeal held that a qualified expert should be allowed to render an opinion that a child displayed behavioral symptoms consistent with those displayed by children who have been sexually abused.<sup>66</sup> The 1988 *Ward* decision was grounded in section 90.702, *Florida Statutes*, which provides:

TESTIMONY BY EXPERTS. If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.<sup>67</sup>

The *Ward* court looked to two earlier decisions for guidance,<sup>68</sup> one ratifying the use of the battered wife syndrome,<sup>69</sup> the other finding the use of post-traumatic stress syndrome evidence admissible in a child sexual

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64. 519 So. 2d 1082 (Fla. 1st DCA 1988).

65. After testifying to having studied symptoms of children who have been sexually abused, the expert outlined three general types of symptoms displayed and testified that in her opinion the child displayed the symptoms typically seen in children who have been sexually abused. The three types of symptoms were referred to as: sexual behavior (suggestions of sexual activities, e.g. sexual play with toys); behavioral reactions (extreme passiveness or aggressiveness, changes in eating, underachievement); and emotional reactions (sleep disturbances, physical and depressive reactions). *Id.* at 1083.

66. Myers tells us that most courts addressing the issue in the first years after Summit's announcement of CSAAS found syndrome evidence admissible due to the perceived relationship to Battered Child Syndrome. See John E.B. Myers, *The Tendency of the Legal System to Distort Scientific and Clinical Innovations: Facilitated Communication as a Case Study*, 18 J. OF CHILD ABUSE & NEGLECT 505 (1994).

[Courts] quickly and correctly accepted expert testimony on battered child syndrome to prove physical child abuse. By 1983 the legal community had become accustomed to syndrome evidence to prove *physical* abuse. When child sexual abuse accommodation appeared on the scene, some attorneys made the mistake of comparing the accommodation syndrome to battered child syndrome, concluding—erroneously—that the accommodation syndrome, like battered child syndrome, is a diagnostic tool. Laboring under this misconception, some prosecutors used the accommodation syndrome as evidence of abuse. Of course, the accommodation syndrome is not a diagnostic device, and the misuses of the accommodation syndrome led to confusion that persists to this day.

*Id.* at 508 (emphasis in original). Florida accepted the use of Battered Child Syndrome in *Albritten v. State*, 221 So. 2d 192 (Fla. 2d DCA 1969).

67. *Ward*, 519 So. 2d at 1084.

68. *Id.*

69. *Hawthorne v. State*, 408 So. 2d 801 (Fla. 1st DCA 1982).

assault case.<sup>70</sup> Among the factors listed in those cases to help courts determine whether expert testimony should be admitted are: (1) the qualifications of the expert to give an opinion on the subject matter;<sup>71</sup> (2) whether the state of the scientific knowledge permits a reasonable opinion to be given by the expert;<sup>72</sup> (3) whether the subject matter of the expert opinion is so related to some science, profession, business, or occupation as to be beyond the understanding of the average layman;<sup>73</sup> and (4) relevance under section 90.403, *Florida Statutes*, which asks whether the proffered testimony is more probative or prejudicial.<sup>74</sup> Using these criteria and focusing mainly on the relevance of the testimony offered the *Ward* court found the "child abuse syndrome" research to be an area sufficiently developed to permit an expert to testify that the symptoms observed in the evaluated child were consistent with those displayed by victims of child abuse.<sup>75</sup>

Shortly thereafter, in *Brown v. State*,<sup>76</sup> a Department of Health and Rehabilitative Services counselor was allowed to testify not only to the fact that the child exhibited the signs she generally looked for to determine abuse, but that in the counselor's opinion, the child was in fact abused.<sup>77</sup> The First District Court of Appeal upheld the conviction and noted only that it may have been more appropriate for the witness to testify that the child's behavior was "consistent with" a child who had been sexually battered or abused, rather than testifying that the child was sexually abused, as a jury would be likely to misconstrue the expert's opinion.<sup>78</sup>

The issue of what constitutes proper testimony came before the Supreme Court of Florida in *Glendening v. State*,<sup>79</sup> where the trial court had allowed an expert to render an opinion "within a reasonable degree of professional certainty as to whether or not [the child] had been sexually abused."<sup>80</sup> Basing its opinion on the analysis of the admissibility of expert testimony established by *Ward* and *Kruse*, the court held that "[a] qualified expert may express an opinion as to whether a child has been the victim of sexual abuse."<sup>81</sup>

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70. *Kruse v. State*, 483 So. 2d 1383 (Fla. 4th DCA 1986).

71. *Hawthorne*, 408 So. 2d at 805.

72. *Id.*

73. *Id.*

74. *Kruse*, 483 So. 2d at 1384-85.

75. *See Ward v. State*, 519 So. 2d 1082 (Fla. 1st DCA 1988).

76. 523 So. 2d 729 (Fla. 1st DCA 1998).

77. *Id.* at 730.

78. *Id.*

79. 536 So. 2d 212 (Fla. 1988).

80. *Id.* at 220.

81. *Id.* at 220-21.

Two years later in *Flanagan v. State*<sup>82</sup> the First District Court of Appeal addressed the admissibility of testimony related to studies which identify certain shared characteristics of persons who commit child sexual abuse and the home settings in which child sexual abuse frequently occurs.<sup>83</sup> The use of offender profile testimony was found inadmissible as substantive evidence to prove the guilt of a defendant charged with child sexual abuse, but admissible as background information to promote juror understanding of a phenomenon which is "not so understandable that people know as much about it as a qualified expert with the requisite skill and exposure to numerous studies in the field."<sup>84</sup>

In a lengthy dissenting opinion, Judge Ervin declared, "I consider that novel psychological syndrome or profile evidence, when offered for a non-rehabilitative purpose . . . cannot survive a *Frye* test," and he called for the *Kruse/Ward* line of cases to be reconsidered.<sup>85</sup> He reviewed a large number of cases from other jurisdictions that have rejected the use of such expert psychological evidence to prove child sexual abuse,<sup>86</sup> as well as the current legal and professional literature and concluded:

Even among those scholars who believe there are typical symptoms and behaviors that result from sexual abuse, there is a lack of consensus regarding the ability of an expert to determine whether a particular child with such traits or symptoms has, in fact, been abused. Perhaps even more pronounced is the lack of agreement among the experts as to the reliability of such profiles.<sup>87</sup>

In an important caveat to his opinion, and despite his strong denunciation of novel syndrome/profile evidence, Judge Ervin took great pains to emphasize that the type of evidence that was inadmissible for purposes of proving that abuse had happened could be admitted for rehabilitative purposes.<sup>88</sup> Guidelines for the admission of this evidence were sug-

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82. 586 So. 2d 1085 (Fla. 1st DCA 1991).

83. *Id.* at 1099.

84. *Id.* at 1100.

85. *Id.* at 1113-14.

86. Judge Ervin did not confine his discussion to the sex offender profile at issue, but included in his discussion techniques as varied as the Minnesota Multiphasic Personality Inventory, penile plethysmograph testing, rape trauma syndrome, CSAAS, child molest syndrome, use of anatomically correct dolls, and psychological profiling of typical child victims of sexual abuse. *Id.* at 1113-14. It appears that the blurring of the lines between CSAS and CSAAS begins here, although Judge Ervin can hardly be faulted for his attempt to examine the issue in a national context.

87. *Id.* at 1116.

88. "If, however, the defense has attacked a witness's credibility, the courts often permit profile or syndrome evidence for the purpose only of rehabilitating the witness by showing that such apparently inconsistent conduct is in fact consistent with the syndrome or characteristics of a sexually assaulted victim." *Id.* at 1114 (citations omitted). It was also noted that:



gested based on the decisions of the California courts.<sup>89</sup>

On appeal, the Florida Supreme Court resoundingly denounced the decision of the district court of appeal and called Judge Ervin's dissent "an excellent and thorough discussion of this issue."<sup>90</sup> The Florida Supreme Court held the use of profile testimony as background information is prohibited because it is highly prejudicial,<sup>91</sup> irrelevant to the outcome of a case,<sup>92</sup> and "completely inappropriate as substantive evidence of guilt."<sup>93</sup> Unlike in Judge Ervin's opinion, the Florida Supreme Court's opinion made no mention of the potential use of profile evidence to rehabilitate a witness's credibility after it has been attacked.

The Florida Supreme Court's decision in *Flanagan* seemed to have invalidated the premise of *Kruse* on which *Glendening* had been based. As a result of *Flanagan*, it appeared that Florida now required general acceptance by the relevant scientific community as a predicate for the introduction of profile evidence of any kind. In addition, it appeared

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None of the courts that permitted admission of such testimony for rehabilitation purposes discussed whether such expert testimony complies with the *Frye* general acceptance standard. Nevertheless, as one commentator explains: "There probably is general acceptance of CSAAS or of its typical characteristics for the purpose of explaining a child's delay in reporting or retracting." In other words, the relevant scientific community would probably agree that a particular child's conduct is consistent with characteristics common to the syndrome, but would not agree that such traits are necessarily predictive of sexual abuse.

*Id.* at 1118 (citation omitted). This was exactly the type of courtroom usage of CSAAS that Summit had intended. See Summit II, *supra* note 45.

89. Before such evidence should be introduced for such limited purpose, the government should be required to identify the misconception which the evidence was designed to rebut. Furthermore, once it is identified, the jury must be instructed simply and directly that the expert's testimony is not intended and should not be used to determine whether the victim's molestation claim is true. . . The evidence is admissible solely for the purpose of showing that the victims reactions as demonstrated by the evidence are not inconsistent with having been molested.

*Flanagan*, 586 So. 2d at 1118 (citing *People v. Bowker*, 249 Cal. Rptr. 886 (Cal Ct. App. 1988)).

90. *Flanagan v. State*, 625 So. 2d 827, 828 (Fla. 1993).

91. Profile testimony . . . by its nature necessarily relies on some scientific principle or test which implies an infallibility not found in pure opinion testimony. The jury will naturally assume that the scientific principles underlying the expert's conclusion are valid. Accordingly, this type of testimony must meet the *Frye* test, designed to ensure that the jury will not be misled by experimental scientific methods which may ultimately prove to be unsound.

*Id.* at 828.

92. Inexplicably, the majority opinion below held that this evidence was admissible without meeting *Frye* because it was introduced as "background information." We are somewhat confused by this holding. If the evidence was not admitted as substantive evidence of guilt, then it was irrelevant. The courtroom is not a classroom to be used to educate a jury on an entire field only tangentially related to the issues at trial.

*Id.* at 829.

93. *Id.*

likely that the Florida Supreme Court was ready to re-examine the use of any such evidence in Florida courts.<sup>94</sup> The stage was set for the *Hadden* decision.

### B. CSAAS in the Florida Courts

Compared to CSAS, CSAAS has received relatively little attention in Florida. All of the Florida decisions prior to *Hadden* approve of the use of CSAAS to some degree. In *Flanagan v. State*, Judge Ervin declared it useful for rehabilitative purposes.<sup>95</sup> In *M.B. v. Dept. of Health and Rehabilitative Services*,<sup>96</sup> CSAAS was offered to explain a child's recantation of her previous allegations of abuse by her stepfather. In *Jones v. State*,<sup>97</sup> it was declared to be "widely respected on a psychological and sociological level"<sup>98</sup> and even potentially useful in the criminal context.<sup>99</sup> This sense of approval in the case law makes the decision in *Hadden* that much more surprising.

## V. THE SHORTCOMINGS OF THE *HADDEN* DECISION

The *Hadden* court addressed "the introduction of a psychologist's expert testimony offered to prove the alleged victim of sexual abuse exhibits symptoms consistent with one who has been sexually abused" and required that such testimony be subjected to a *Frye* test.<sup>100</sup>

### A. *Hadden's* Failure to Distinguish Between CSAAS and CSAS

CSAS and CSAAS are two very different approaches to syndrome evidence. The origins of CSAAS can be traced,<sup>101</sup> while those of CSAS cannot.<sup>102</sup> Although the testimony offered in the trials at issue in *Hadden* could not be construed as CSAAS testimony, the *Hadden* court's discussion centered on the admissibility of CSAAS. There is an argu-

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94. *See Toro v. State*, 642 So. 2d 78, 82 (Fla. 5th DCA 1994).

95. 586 So. 2d 1085, 1100-14.

96. 21 FLA. L. WEEKLY 1817 (Fla. 1st DCA Aug. 13, 1996).

97. 640 So. 2d 1084 (Fla. 1994) (holding that, despite Florida's recognition of the right of a minor to an abortion, no right to sexual intercourse exists for minors, thus, consent is not a defense to a charge of sexual battery where the alleged victim is a minor).

98. *Id.* at 1090 (Kogan, J., concurring) (discussing, in the context of CSAAS, the potential for sexual exploitation of young people and the gross error of believing that they have "consented").

99. I recognize that child sexual abuse accommodation syndrome has been controversial in other states when used to help prove child sexual exploitation in a criminal context. However, the controversy stems in part from the unusually severe burden of proof the state must shoulder in a prosecution or from the strict procedural rules of a criminal trial, which may differ from Florida's.

*Id.* (citations omitted).

100. *Hadden v. State*, 690 So. 2d 573, 574 (Fla. 1997).

101. *See infra* Section II.B.

102. *Duckett v. State*, 797 S.W.2d 906 (Tex. Crim. App. 1990).

ment, based on the wording of the certified question, that the Florida Supreme Court sought only to address the use of CSAAS when offered as actual proof that the abuse occurred,<sup>103</sup> but given that no such attempts had been made in the courts below, it is unclear why this was found necessary to the discussion. None of the Florida cases discussing CSAAS indicate any attempts to use it in such a manner.<sup>104</sup> By incorrectly including CSAAS in their discussion of syndrome evidence that might be offered as proof of abuse, the Florida Supreme Court placed it in a negative light and may have had a chilling effect on its use even for appropriate purposes.<sup>105</sup>

B. *Hadden's Failure to Correctly Interpret Applicable Case Law*

I. THE CALIFORNIA CASES

In *Hadden*, the California case of *People v. Gray*<sup>106</sup> is cited for the proposition that CSAAS as a means of predicting sexual abuse, has been the subject of considerable criticism.<sup>107</sup> While that is concededly true, the ultimate holding in the *Gray* decision is drastically different than that of *Hadden*. In *Gray*, the expert testimony was not admitted as a means of proving that abuse had occurred, but to point out that delayed reporting and inconsistency are not unusual with victims of child molestation.<sup>108</sup> The *Gray* court allowed the testimony "since the expert did not make a diagnosis of molestation, nor did he rely on a detailed analysis of the facts in the case at hand."<sup>109</sup> The opinion acknowledged that rebuttal through expert testimony may play a particularly useful role by disabusing the jury of some widely held misconceptions about abuse and abuse victims, thus allowing the jury to evaluate the evidence free of the constraints of popular myths.<sup>110</sup> Additionally, the court deemed the *Frye* test inapplicable. The testimony was "admissible as bona fide rebuttal" since it was not introduced—and did not purport—to prove the molestation occurred.<sup>111</sup>

For the same proposition (that CSAAS has been criticized as a method of predicting sexual abuse) the *Hadden* court cited *In re Sara*

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103. See *supra* note 24.

104. See *supra* notes 93-95.

105. Since *Hadden*, only *Irving v. State*, 705 So. 2d 1021 (Fla. 1st DCA 1998), and *Correia v. State*, 695 So. 2d 461 (Fla. 4th DCA 1997), mention CSAAS in the context of child abuse prosecutions.

106. 231 Cal. Rptr. 658 (Cal. Ct. App. 1987).

107. *Hadden v. State*, 690 So. 2d 573, 575 (Fla. 1997).

108. See *Gray*, 231 Cal. Rptr. at 663.

109. *Id.*

110. *Id.*

111. *Id.* at 664.

M.<sup>112</sup> This was especially remarkable in that the syndrome at issue in the case was the "child molest [sic] syndrome."<sup>113</sup> No mention of CSAAS is even made. The *Bowker* and *Housley* cases already discussed more accurately reflect the stance of the California courts on CSAAS. California courts are allowing CSAAS testimony to be used for rehabilitation, with some safeguards to protect against its misapplication.

II. *HADDEN'S FAILURE TO RECOGNIZE CSAAS AS A VALUABLE REHABILITATIVE TOOL (AS ESTABLISHED IN FLORIDA CASELAW AND THE CASE LAW OF OTHER STATES)*

The *Hadden* decision states "we found helpful Judge Ervin's concurring and dissenting opinion [in *Flanagan*]."<sup>114</sup> Yet, while Judge Ervin's *Flanagan* opinion had gone to great lengths to endorse CSAAS as a rehabilitative tool, no such attempt was made by the *Hadden* court.

Courts<sup>115</sup> and scholars alike have ratified the use of CSAAS for rehabilitative purposes. For example, John Myers, a noted scholar, tells us:

The accommodation syndrome has a place in the courtroom. The syndrome helps explain why many sexually abused children delay reporting their abuse, and why many children recant allegations of abuse and deny that anything occurred. If use of the syndrome is confined to these rehabilitative functions, the confusion clears, and the accommodation syndrome serves a useful forensic purpose.<sup>116</sup>

In light of this almost universal acceptance, it is difficult to understand why the *Hadden* court failed to clarify their stance.

D. *Hadden's Failure to Explain Why CSAAS, As a Rehabilitative Tool, Should Be Submitted to a Frye Test:*

According to *Hadden*, "syndrome testimony in child-abuse prosecutions must be subjected to a *Frye* test. . ."<sup>117</sup> where it will fail as "such evidence has not to date been found to be generally accepted in the relevant scientific community."<sup>118</sup> The underlying theory for Florida's adherence to *Frye*<sup>119</sup> is that "a courtroom is not a laboratory, and as such

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112. *In re Sara M.*, 239 Cal. Rptr. 605 (Cal. Ct. App. 1987).

113. *Id.* at 607.

114. *Hadden v. State*, 690 So.2d 573, 577 (Fla. 1997).

115. See *supra* notes 51-53.

116. John E.B. Myers et. al., *Expert Testimony in Child Sexual Abuse Litigation* 1989, 68 NEB. L. REV. 1, 64 (1989).

117. *Id.*

118. *Hadden*, 690 So. 2d at 577.

119. Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle or discovery, the thing from which

it is not the place to conduct scientific experiments. If the scientific community considers a procedure or process unreliable for its own purposes, then the procedure must be considered less reliable for courtroom use."<sup>120</sup>

Since CSAAS does not purport to be a diagnostic tool, the "laboratory" concern would seem to be unwarranted. Nor does the fact that CSAAS is not in the *Diagnostic and Statistical Manual of Mental Disorders IV*, a diagnostic manual widely recognized by the industry, seem probative of this issue.<sup>121</sup> As a non-diagnostic tool, CSAAS would have no real place there. It is generally recognized that when CSAAS is used for rehabilitative purposes, no *Frye* test is needed.<sup>122</sup> Even if the test were applied, CSAAS should pass if used for rehabilitative purposes.<sup>123</sup>

### CONCLUSION

One can only speculate why the *Hadden* court based so much of their opinion on CSAAS given that the admissibility of CSAAS had not been the issue before either of the trial courts in this consolidated case and CSAAS, and its proper courtroom usage as articulated by Summitt, in no way match the type of evidence the certified question seeks to analyze. Perhaps the Florida Supreme Court saw the case as an opportunity to clarify the use of syndrome evidence in the Florida courts. However, they failed on several counts. To truly clarify the current situation, several steps must be taken:

- 1) A clear demarcation between CSAS and CSAAS must be established.<sup>124</sup>
- 2) It must be recognized that the proper use of CSAAS is for the rehabilitation of the child's credibility.
- 3) Rehabilitation should be allowed both as a rebuttal, where the defense has called specific aspects of the child's behavior into question, and as an "anticipatory rebuttal" where the child's behavior aligns with a specific aspect of the CSAAS, such as lengthy delay before disclosure or a recantation.<sup>125</sup>

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the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

*Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

120. *Hadden*, 690 So. 2d at 577 (citing *Stokes v. State*, 548 So. 2d 188 (Fla. 1989)).

121. AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS IV* (1994).

122. See *People v. Gray*, 231 Cal. Rptr. 658, 664 (Cal. Ct. App. 1987).

123. *Flanagan v. State*, 586 So. 2d 1085, 1100 (Fla. 1st DCA 1991).

124. Clearly, there is a difference between pointing out that a child has recanted and this is not unusual for victims of sexual abuse and saying that because a boy drew a tree without roots and human figures without bodies, he has probably been abused. See *Beaulieu v. State*, 671 So. 2d 807 (Fla. 5th DCA 1996).

125. *People v. Patino*, 32 Cal. Rptr. 2d 345, 349 (Cal. Ct. App. 1994).

4) It must be determined what if any limiting instructions should be given to a jury presented with CSAAS for rehabilitative purposes.<sup>126</sup>

In conclusion, the Fifth District Court of Appeal of Florida elaborated on the balance between admission of syndrome testimony and the rules of evidence as follows:

Due to the extraordinary difficulty of proving child sexual abuse cases, because of the environment in which they occur, courts should welcome reliable evidence that will aid the jury in understanding this awful crime; on the other hand, our justifiably zealous urge to punish those who commit such appalling acts ought not entice us to use evidence that can have an impact on the minds of the jury far disproportionate to its foundation in science.<sup>127</sup>

CSAAS is the "reliable evidence that will aid the jury in understanding." Only after the above-mentioned issues are resolved will the true balance sought by the Florida courts exist.

MICHAEL D. STANGER\*

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Denying the prosecution the opportunity to introduce [syndrome] testimony as part of its case-in-chief rather than in rebuttal could lead to absurd results . . . It would be natural for a jury to wonder why the molestation was not immediately reported if it had really occurred. . . If it were a requirement of admissibility for the defense to identify and focus on the paradoxical behavior, the defense would simply wait until closing argument before accentuating the juror's misconceptions regarding the behavior. To eliminate the potential for such results, the prosecution should be permitted to introduce properly limited credibility evidence if the issue of a specific misconception is suggested by the evidence.

*Id.*

126. Here, the approach of the California courts seems quite sensible. "First, to be admissible on a misconception theory, the evidence must be targeted to a specifically identified misconception and narrowly limited to address only that misconception. Second, the jury should be instructed that it is not to use such testimony for the purpose of demonstrating that the victim was sexually abused." *People v. Bowker*, 203 Cal. App. 3d 385, 393-94 (Cal. Ct. App. 1988).

127. *Toro v. State*, 642 So. 2d 78, 83 (Fla. 5th DCA 1994).

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