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SUPERIOR COURT OF NEW JERSEY  
MERCER COUNTY  
LAW DIVISION, CRIMINAL PART  
INDICTMENT 25-09-902-I  
PROSECUTOR'S FILE MER-25-1708

STATE OF NEW JERSEY,

Plaintiff,

v.

I.G.,

Defendant.

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Decided: April 2, 2026

LAURA KOTARBA, ESQ., assistant prosecutor (Office of the Mercer County Prosecutor), attorney for State of New Jersey.

MICHAEL DONAHER, ESQ., assistant deputy public defender (Office of the Public Defender), attorney for I.G.

OSTRER, J.A.D. (retired and temporarily assigned on recall):

The State moves under N.J.R.E. 803(c)(27) to introduce at trial then-ten-year-old S.W.'s ("Sohail")<sup>1</sup> video-recorded statement that his mother's boyfriend,

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<sup>1</sup> The court uses pseudonyms for ease of reading while assuring confidentiality.

defendant I.G., sexually assaulted him. Sohail made the statement during an interview by Mercer County Prosecutor's Office Detective Michael Staton.

The court grants the motion in part and denies it in part. Sohail's statements to the detective "relating to sexual misconduct committed with or against" him satisfy the hearsay exception under N.J.R.E. 803(c)(27). The State has demonstrated, by a slight preponderance of the evidence, that "on the basis of the time, content and circumstances of the statement there is a probability that the statement[s] [are] trustworthy." Ibid.

But the hearsay exception does not reach the child's statements made during the rapport-building part of the interview, statements explaining why his family members questioned him, why he complained when he did, statements about defendant's prior use of corporal punishment, and statements made regarding the possibility that defendant assaulted other children in the household. Those statements do not relate to the alleged sexual misconduct. Also, the child's statements explaining why his grandmother questioned him lack trustworthiness. In addition, the child's statements about his prior disclosures to his family members are double-hearsay and the State has not moved to introduce the hearsay-within-hearsay under N.J.R.E. 803(c)(27).

I.

This court previously reviewed the substance and circumstances of Sohail’s sexual assault complaint to his mother, grandmother and uncle on June 3, 2025. See March 18, 2026, Opinion on Fresh Complaint Motion (“Fresh Complaint Opinion”). The court assumes the reader’s familiarity with the court’s findings and will not repeat them at length here. In summary, Sohail’s initial complaint was far from spontaneous. He alleged defendant sexually assaulted him roughly five years earlier only after his mother, grandmother, and uncle confronted him about his poor hygiene. His grandmother was angry. She pressured him to explain why he did not wipe and clean himself properly. She suggestively asked if someone had touched him inappropriately and, after eliciting a positive response, suggestively asked if defendant was the perpetrator. Only then did Sohail allege that defendant assaulted him, stating that defendant once inserted his finger in Sohail’s anus. Sohail told his family members it never happened again. Defendant did not threaten Sohail to keep silent. But Sohail said he did not complain because he did not want to get defendant in trouble. He also said he was afraid of defendant.

Three days after Sohail’s complaint to his family, he appeared for a forensic interview with Det. Staton. His mother D.W. (“Denise”) accompanied him to the detective’s office. Det. Staton interviewed Denise<sup>2</sup> after Sohail. See Exh. S-2 of

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<sup>2</sup> As in the Fresh Complaint Opinion, the court uses first names for convenience and because of shared surnames. The court means no disrespect in doing so.

Fresh Complaint Hearing.<sup>3</sup> The State presented no evidence regarding discussions that Sohail may have had with his mother, grandmother, or anyone else during the time between his initial complaint and his interview.

Det. Staton began the interview by attempting to establish a rapport with Sohail. Exh. D-1 Evid. (transcript of recorded interview); Exh. S-1 (video-recording). The detective appeared relaxed and spoke in a casual, conversational tone. He asked general questions about Sohail's tee-shirt, his age, his recent birthday celebration, his pet cat, the members of his household, their respective bedrooms, Sohail's school, his favorite subjects, and his friends. Sohail was responsive and appeared at ease. Id. at 1-8.<sup>4</sup> Sohail did not hesitate to correct or clarify the facts he shared with the detective. Ibid.

After several minutes, Det. Staton turned to the subject of the assault. Det. Staton first invited Sohail to "feel free to correct me or add anything that I might miss." Sohail agreed. Id. at 8.

Then Det. Staton secured Sohail's promise to tell the truth, but he did so without first establishing that Sohail knew the difference between the truth and a lie, and understood that telling a lie subjects a person to punishment. The detective said,

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<sup>3</sup> The court notified counsel on the record that it intended to consider the evidence presented at the Fresh Complaint hearing in deciding this motion. Neither party objected to the court doing so.

<sup>4</sup> For convenience, the court omits parallel citations to the video-recording.

“I just want to make sure you understand [that]<sup>5</sup> you [can] speak the truth, that’s what we want you to do here, so I’m gonna just ask you today, do you promise to tell the truth?” Sohail said, “Yes.” Ibid.

The detective then asked Sohail, “[D]o you know why we’re here?” Id. at 9. Sohail appeared relaxed. His demeanor did not noticeably change. He did not appear to dissemble. Continuing to look directly at the detective, he answered, “[T]he problem I had with my stepdad.” Ibid. Notably, he did not immediately disclose details, as one might expect if he had rehearsed his accusation.

Det. Staton followed up, “[W]hat happened with . . . you and your stepdad?” Ibid. Sohail answered, “I was like five, I was five or probably like six . . . before my mom, not before my mom, wait, not before, after my mom had my little sister Irhiana, I was in the living room, and he was in the living room, and he [been touching] . . . my butt, and put his finger in it.” Ibid. Sohail looked slightly to his left as he disclosed the assault itself, then resumed facing the detective.

The detective elicited additional details: Sohail was on a “couch-bed” in the living room, it was at night, and he was not watching television. Id. at 9-10. Asked if he remembered what he was wearing, Sohail admitted he did not, but then

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<sup>5</sup> The court finds, based on its review of the video-recording, that Det. Staton used the words “that” and “can” as indicated, although the transcript omits them. In subsequent quotations, the court has corrected the transcript to conform to what it finds was actually said during the interview.

speculated, with his intonation rising as if questioning himself. “Uhh, no. Probably had like red shirt, a red shirt with light blue pants.” Ibid. Asked why he thought he was wearing those, Sohail answered, “I don’t know, we probably just came I probably just came in the house.” Ibid.

With some difficulty, the detective elicited Sohail’s statement that he was already on the couch-bed when defendant entered the room, laid down beside him, and put his hand under Sohail’s underwear. Id. at 11-13. Sohail repeated his initial claim, substituting “rubbing” for “touching”: “He was rubbing it at first and put it in there . . . only the finger.” Id. at 12. Asked to clarify “in there,” Sohail answered, “Like just put it in my hole.” Ibid. The detective asked, “And what did he do with his finger when he did that?” Ibid. Sohail answered, “He just put it.” Ibid. He said it only happened once. Ibid. He experienced “pain, a little bit.” Id. at 13. He identified his buttocks on a simplified drawing of a male child’s anatomy. Id. at 19-20; Exh. S-3(A). The drawing did not depict the anus.

Sohail said nothing to defendant, and defendant said nothing to Sohail during or after the alleged assault. Id. at 13-14. Sohail asserted, “I didn’t say nothing, cause I was scared, I was young.” Id. at 14. He also said he “[t]hought it was going to be my, my mistake,” but he could not explain why. Id. at 21-22. Sohail denied that defendant ever gave him “any other reason to be scared of him.” Id. at 14. Aside from one incident when defendant resorted to corporal punishment – after Sohail

played with a razor and cut himself – Sohail could recall no other time when defendant touched or physically punished him. Id. at 14-16. Sohail concurred that defendant “never brought it up again” and “never tried to do anything like that . . . again.” Id. at 19. The detective later elicited that Sohail’s mother was in her bedroom when the alleged assault occurred. Id. at 21.

Asked to explain what “made him want to start talking about [the assault] now,” several years after the event, Sohail referred to the interrogation by his mother, grandmother, and uncle. Id. at 16. As he did so, Sohail looked away, bending over, and rubbing his ankle.

So my mom-mom [grandmother] , . . . [she uhh], she was talking to me and she said, ‘did anybody touch you?’ Because I was lying and I was saying no. But my uncle came and he said, ‘tell the truth did did he touch you?’ I said yes. And mom-mom said, ‘Did he touch you for-real?’ And I said the truth.

[Ibid.].

Asked why his grandmother inquired if anybody had touched him, Sohail said, “Because I had a problem in the bed [when] I was young.” Ibid. Notably, Sohail referred not to his odor after school that day, but to overnight accidents in bed. Compare id. at 16-17 with Fresh Complaint Opinion at 5 (“Denise noticed that Sohail smelled of feces when she picked him up from school.”) And, incongruously, he attributed his grandmother’s inquiries to accidents that occurred when he was “young” – presumably years earlier -- although his current condition is what

prompted his grandmother's inquiries. Fresh Complaint Opinion at 5. As he discussed his bedwetting and defecating in bed, Sohail again looked away, touching his ankle and looking uncomfortable.

At the end of the interview, Det. Staton asked Sohail if he believed defendant had touched his half-siblings, or if he had "seen anything that looked weird." Id. at 22. Sohail said no. Ibid. Det. Staton elicited Sohail's assurance that everything he said was the truth. Ibid. And he thanked Sohail for coming in. Id. at 23.

The detective gave Sohail no gifts or rewards. Overall, he had encouraged Sohail to feel comfortable and appeared non-judgmental and accepting when Sohail discussed the embarrassing topic of his accidents in bed. But the detective did not directly approve or praise Sohail's claims.

The detective testified that his goal in interviewing Sohail was to find the truth. Although the court finds that Det. Staton was a credible witness, the court concludes, based on his testimony at the hearing and the nature of his questions during the interview, that Det. Staton's main goal was simply to elicit Sohail's complaint. The detective did not really test the veracity of Sohail's allegations. Assuming that was the detective's goal, it would have made more sense to interview Denise first, so he would be aware of any inconsistencies between Denise's recollection of Sohail's initial complaint, and Sohail's own version of what he told his family. The detective also did not explain persuasively why law enforcement

allowed three days to pass after Sohail's initial disclosure to conduct a forensic interview. Notably, the detective did not inquire about any conversations Sohail may have had with family members, which might have affected his version of events.

## II.

The court must determine if Sohail's statements about the alleged assault are admissible under the so-called "Tender Years Exception" to the hearsay rule. N.J.R.E. 803(c)(27) provides that "[a] statement by a child under the age of [twelve] relating to sexual misconduct . . . is admissible in a criminal . . . case" so long as (1) opposing counsel receives notice that the statement will be used, (2) the court holds an N.J.R.E. 104(a) hearing to determine, "on the basis of the time, content and circumstances of the statement there is a probability that the statement is trustworthy[,]" and (3) the defendant's constitutional right to confrontation is assured. N.J.R.E. 803(c)(27); see also State v. D.G. 157 N.J. 112, 128 (1999).

A court may consider five nonexclusive factors in assessing trustworthiness under N.J.R.E. 803(c)(27): "(1) the circumstances under which the same statement was made to [the parent]; (2) its spontaneity; (3) the mental state of the declarant; (4) the terminology attributed to the declarant; and (5) the declarant's lack of motive to fabricate." State v. Delgado, 327 N.J. Super. 137, 147 (App. Div. 2000) (quoting State ex. rel. S.M., 284 N.J. Super. 611, 621 (App. Div. 1995)). Additional factors include "consistency of repetition, [and] . . . interrogation, and manipulation by

adults.” D.G., 157 N.J. at 125-26 (stating and adopting for purposes of N.J.R.E. 803(c)(27), factors for analyzing trustworthiness of hearsay established in Idaho v. Wright, 497 U.S. 805, 821-22 (1990)).

The test for deciding if a child's out-of-court statement satisfies N.J.R.E. 803(c)(27) overlaps with the test under State v. Michaels, 136 N.J. 299 (1994) for deciding if a child's out-of-court statement and in-court testimony are sufficiently reliable. Consequently, a trial court's analysis under N.J.R.E. 803(c)(27) may be informed by Michaels principles and the related social science regarding the suggestibility of child victims.<sup>6</sup>

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<sup>6</sup> Michaels established the standard and procedure for deciding if a trial court should exclude an alleged child victim's out-of-court statement and in-court testimony due to the suggestiveness of "pretrial events" and "the investigatory interviews and interrogations." 136 N.J. at 320. The defendant bears the initial burden to trigger a "Michaels hearing" by showing "'some evidence' that the victim's statements were the product of suggestive or coercive interview techniques." Ibid. The proffered evidence must be sufficient "to support a finding that the interrogations created a substantial risk that the statements and anticipated testimony are unreliable, and therefore justify a taint hearing." Id. at 321. Only after the defendant "establishes that sufficient evidence of unreliability exists" does the burden shift to the State to prove reliability by clear and convincing evidence. Ibid. The issue then becomes whether, "despite the presence of some suggestive or coercive interview techniques, when considering the totality of the circumstances surrounding the interviews, the statements or testimony retain a degree of reliability sufficient to outweigh the effects of the improper interview techniques." Ibid. The alleged child victims in Michaels faced an array of coercive or suggestive practices, including: "the absence of spontaneous recall, interviewer bias, repeated leading questions, multiple interviews, incessant questioning, vilification of defendant, ongoing contact with peers and references to their statements, and the use of threats, bribes and cajoling, as well as the failure to videotape or otherwise document the initial interview sessions[.]" Ibid. The Court recognized that where a child's statements or testimony

Applying N.J.R.E. 803(c)(27), the Court in State v. P.S., 202 N.J. 232, 250 (2010) found several factors in Michaels relevant “to determine whether an interview technique has the requisite indicia of reliability.” Those factors are: “lack of investigatory independence, the pursuit by the interviewer of a preconceived notion of what happened to the child, the use of leading questions, and a lack of control for outside influences on the child's statements[.]” Ibid. (quoting Michaels, 136 N.J. at 309).

In D.G., 157 N.J. at 130-34, the Court applied Michaels principles in determining that a videotaped statement was not sufficiently reliable to be admitted under N.J.R.E. 803(c)(27). The Court concluded that the investigator “simply assumed that [the child’s] earlier statement to [her aunt] was accurate and continued the interview until [the child] eventually repeated it to her satisfaction.” Id. at 131.

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retain sufficient reliability, it is left to the jury to consider the interviewing techniques’ impact on the child-witness's credibility. See id. at 323. Although the Michaels analysis and an N.J.R.E. 803(c)(27) analysis overlap, they are distinct. In Michaels, the defendant bears the initial burden of persuasion, and, if met, the State must meet a clear-and-convincing standard of proof. Under N.J.R.E. 803(c)(27), the burden rests only with the State, but it must meet the lesser preponderance-of-the-evidence standard of proof. Notably, defendant here did not move to exclude Sohail’s out-of-court statement or his in-court testimony based on Michaels. Also, in this case, family members, not State investigators, were the ones who used suggestive questioning. Cf. Michaels, 136 N.J. at 306 (noting the focus of the case “is on the matter in which the State conducted its investigatory interviews”); id. at 309 (referring to crucial role of the “investigative interview”). Therefore, this court only considers the State’s application under N.J.R.E. 803(c)(27), albeit informed by Michaels principles.

The investigator engaged in “persistent questioning”; and, when the child did not provide the incriminating statement the investigator sought, the investigator interrupted the interview allowing the aunt to speak to the child and offer her a “surprise for telling the truth, i.e. repeating her previous account.” Id. at 133. The Court concluded that “any spontaneity in [the child’s] answers was obliterated by the impact of ‘prior interrogation, prompting, or manipulation by adults.’” Ibid. (quoting Wright, 497 U.S. at 826-27).

A trial judge must also consider "the totality of the circumstances" in which the statement was made. See State v. P.S., 202 N.J. 232, 249 (2010) (cleaned up). A “court may not point to corroborating evidence in an attempt to demonstrate the trustworthiness of the hearsay statement.” D.G., 157 N.J. at 125.

As with any hearsay exception, the hearsay proponent – here, the State – bears the burden to establish that the proffered out-of-court statement satisfies the hearsay exception’s requisites. See State v. Miller, 170 N.J. 417, 426 (2002) (stating that “the party proffering such [hearsay] evidence must show that it . . . falls within a firmly rooted hearsay exception”); State v. Stubbs, 433 N.J. Super. 273, 286 (App. Div. 2013) (holding that State as proponent of adoptive admission hearsay had burden of persuasion). The standard of proof is preponderance of the evidence. Ibid (applying standard of proof to adoptive admission hearsay exception); State v. James, 346 N.J.

Super. 441, 457 (App. Div. 2002) (applying standard of proof to co-conspirator hearsay exception).

Furthermore, a court must exercise “a heightened caution” in deciding whether a statement satisfies N.J.R.E. 803(c)(27), because of the harsh consequences of conviction of an offense involving sexual misconduct against a child. Delgado, 327 N.J. Super. at 147 (stating “we believe a heightened caution is needed in these cases”).

### III.

#### A.

Before applying these principles, the court addresses defendant’s threshold argument that the court should defer ruling on the State’s motion until Sohail testifies at trial. The court agrees in part. The court is persuaded that the decision on ultimate admissibility should await Sohail’s testimony at trial; but the court’s determination of trustworthiness is appropriate now.

Defendant contends that if the court waits, the court would know for certain if the pressures of the courtroom setting so interfered with Sohail’s ability to recollect and convey details of the alleged assault that introduction of the prior statement was justified. Defendant’s Brief at 25. If Sohail demonstrates he is capable of testifying in court, then, defendant argues, Sohail’s recorded statement should be excluded as “repetitive corroborating hearsay.” Ibid. (quoting D.G., 157

N.J. at 128). Defendant relies on N.J.R.E. 403 for excluding such corroborating testimony. Ibid. N.J.R.E. 403 states a court may exclude relevant evidence if its “probative value is substantially outweighed by the risk of . . . undue prejudice, confusion of issues, misleading the jury, . . . undue delay, waste of time, or needless presentation of cumulative evidence.” Defendant also invokes State v. Smith, 158 N.J. 376, 388 (1999), where the Court affirmed the trial court’s decision to admit a child’s out-of-court statement, noting that “the court waited until after hearing [the child’s] trial testimony before deciding whether to admit the videotape as evidence.”

Although this court has the discretion to postpone an admissibility decision, the court does not believe it should postpone a trustworthiness decision. First, the plain language of the evidence rule contemplates a finding on trustworthiness after an N.J.R.E. 104(a) hearing. The hearsay exception states that before a child’s statement relating to sexual misconduct may be admitted, the court must preliminarily “find, in a hearing conducted pursuant to Rule 104(a) that . . . there is a probability that the statement is trustworthy.” N.J.R.E. 803(c)(27). The court has already held such a hearing. It would be inefficient to postpone a decision on the trustworthiness issue until some uncertain date in the future.

The court recognizes that the Tender Years Exception was designed to remedy problems of a child testifying in court:

[T]he reliability of in-court testimony of a young child victimized by a sexual assault is often affected by the

stress of the courtroom experience, the presence of the defendant, and the prosecutor's need to resort to leading questions. . . . The lapse of time between the sexual assault and the trial can affect the child's ability to recall the incident. In cases where the accused is a member of the child's family or household, the victim may be urged or coerced to recant. In general, the courtroom setting is intimidating to children and often affects adversely their ability to testify credibly.

[State v. D.R., 109 N.J. 348, 360 (1988)].

But a statement's reliability under N.J.R.E. 803(c)(27) does not depend on a case-specific showing of necessity. The Court in D.R. and the Rule's drafters decided that general considerations of necessity, as well as general considerations regarding the reliability of out-of-court statements, justified the rule that out-of-court statements should lie outside the hearsay bar provided there is a probability they are trustworthy. The Court noted:

[A] child victim's spontaneous out-of-court account of an act of sexual abuse may be highly credible because of its content and the surrounding circumstances. Young children, having no sexual orientation, do not necessarily regard a sexual encounter as shocking or unpleasant, and frequently relate such incidents to a parent or relative in a matter-of-fact manner. . . . Several commentators have observed that child victim accounts of incidents of sexual abuse are highly reliable.

[D.R., 109 N.J. at 359-60].

Considering the reliability of out-of-court statements and the problems often attendant in-court statements, the Court was persuaded that a hearsay exception was

justified, concluding that “the unique limitations on the availability of evidence” in a child sex assault case, “as well as the demonstrated reliability of sex abuse complaints by child victims, justify recognition of such a modification of the hearsay rule.” Id. at 362.

But this court’s decision is limited to determining that Sohail’s statement meets the reliability standard in N.J.R.E. 803(c)(27). The decision about admissibility is a separate matter that should await trial and Sohail’s testimony. There are two reasons our courts have identified for awaiting an alleged victim’s trial testimony: (1) to determine if the out-of-court statement is consistent and (2) to determine if it is needed. “In order to ensure a statement is needed or that it is consistent, a judge should also listen to the juvenile and compare the testimony to the statement before admitting it.” Delgado, 327 N.J. Super. at 147. The latter reason – need – warrants waiting in this case.

In Smith, preventing admission of repetitive corroborative hearsay – defendant’s goal here – was not the trial court’s evident goal. The trial court waited to decide admissibility because it apparently was not sure the out-of-court statement was consistent with the in-court testimony – that is, whether it was reliable. Once the child testified – which “enable[d] [the] court to make a comparison” with the out-of-court statement – the court was convinced the out-of-court statement satisfied the rule, and admitted it. Smith, 158 N.J. at 389. The court did so even though it

corroborated the in-court testimony.

On the other hand, in Delgado, the trial court decided to admit a child's recorded out-of-court statement only after it determined that the child suffered "trauma-induced memory problems" in the courtroom and "admission of [her] recorded statement was the only available method by which this evidence could be presented to the jury." 327 N.J. Super. at 148. In other words, the court waited to decide if the hearsay statement was needed. Following the dictates of the Delgado, this court should await Sohail's testimony, and consider all other evidence offered at trial, before deciding whether to admit his statement to Det. Staton.

Waiting is also consistent with the direction in D.G., 157 N.J. at 128 that a trial court should "be cognizant" of its power to exclude evidence under N.J.R.E. 403. The Court noted that "several repetitive corroborative statements under the tender years exception" were admitted into evidence. Ibid. A trial court is empowered to prevent that. A statement that satisfies N.J.R.E. 803(c)(27) may still be excluded under N.J.R.E. 403. See State v. Vargas, 463 N.J. Super. 598, 610 (App. Div. 2020) (stating that "admissible hearsay must avoid the exclusions found in Article IV of our Rules of Evidence"). And an N.J.R.E. 403 determination is usually best left to the trial court to make in light of the evidence presented at trial. See State v. Cordero, 438 N.J. Super. 472, 484 (App. Div. 2014) (noting "most evidence problems are best and most expeditiously settled in the atmosphere and context of

the trial”) (quoting State v. Hawthorne, 49 N.J. 130, 143 (1967)).

Of course, the trial judge – who will not be this judge – may also revisit this in limine ruling in light of the trial evidence. “[T]he trial court must be sensitive to the need to revisit its pre-trial rulings in light of the developing record at trial.” State v. Jones, 308 N.J. Super. 15, 46 (App. Div. 1998). That is because “[t]he record developed at trial may differ from the record developed below on the parties’ motions, perhaps substantially.” State v. Crumb, 277 N.J. Super. 311, 321 (App. Div. 1994).<sup>7</sup>

In sum, this court shall decide that Sohail’s statement satisfies the hearsay exception. But the decision whether to admit the statement should await trial and the trial court’s decision, informed by the evidence presented, whether it is “needed” and consistent, and whether it passes muster under N.J.R.E. 403.

## B.

Applying the relevant factors governing trustworthiness, the court concludes that Sohail’s statement relating to the alleged sexual assault by defendant satisfies the Tender Years Exception under N.J.R.E. 803(c)(27). There are several significant reasons to doubt the trustworthiness of Sohail’s complaint. But Sohail’s demeanor

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<sup>7</sup> For example, evidence may come to light – such as evidence found in the records of the D.C.P.P. investigation that have been produced for the court’s in camera review – that may raise new questions about the trustworthiness of Sohail’s statements, or that may bolster his statements’ reliability.

in his interview and his independent description of details that no family member evidently suggested tip the balance slightly in favor of finding his complaint sufficiently trustworthy under N.J.R.E. 803(c)(27).

1.

The suggestiveness and pressure used to elicit Sohail's initial complaint casts a shadow over his statement to Det. Staton. Unlike in Delgado, where the child made an unprompted statement to her mother and then told a similar story to an investigating officer, 327 N.J. Super. at 148, Sohail's statement to his mother, grandmother and uncle that he was touched and defendant did the touching was far from unprompted or spontaneous. As noted, his grandmother was angry and she pressured Sohail to explain why he practiced poor hygiene. Sohail was put on the spot to explain his behavior. Then his grandmother suggested an explanation – someone had touched him inappropriately. That gave Sohail a motive to fabricate and shift responsibility for his poor hygiene to another. In addition, the State presented no evidence to dispel the possibility that family members validated and reinforced Sohail's allegation in the days leading up to his interview by Det. Staton. As the Court explained in Michaels, improper interrogation can distort a child's memory, and the problem may be irremediable. Michaels, 136 N.J. at 310. All these factors disfavor a finding that Sohail's later, albeit consistent statement to Det. Staton, was trustworthy.

Although Det. Staton secured Sohail's promise to tell the truth, he failed to establish that Sohail understood the difference between the truth and a lie, and that a person who tells lies may be punished. Cf. State v. Bueso, 225 N.J. 193, 207 (2016) (holding that a trial court's task, before deeming a child witness competent, "is to determine whether the child appreciates the distinction between truth and lies and comprehends his or her duty to tell the truth"). Det. Staton also did not really test Sohail's allegations by interviewing Denise first and then exploring inconsistencies.

And, although the essence of Sohail's allegation to the detective was consistent with his statements to family members, his recounting of what prompted his disclosure was not consistent. Sohail incredibly said his accidents in bed when he was young prompted his family's inquiries, but it was his poor hygiene in the middle of the day just three days earlier that prompted them. But this inconsistency was just as likely an effort by Sohail to minimize his embarrassment. And it did not affect the substance of his allegation of sexual misconduct.

Also notable was Sohail's incredible statement about what he was wearing when the assault occurred. Sohail first answered, "Uh, no," when asked if he remembered what he was wearing. Then he said, betraying his uncertainty, that he "probably" was wearing a red shirt and light blue pants. The interchange reflected that Sohail was capable of inventing answers if he believed that is what the adult wanted.

2.

However, other factors shift the balance ever so slightly in favor of a finding that Sohail's statement to Det. Staton bears "a probability of trustworthiness." Critically, one important aspect of Sohail's statement was unprompted: his allegation of how defendant touched him. Using terminology typical of a child his age, Sohail told his family members and Det. Staton that defendant inserted his finger in his butt or his hole. The court does not dismiss the possibility that Sohail invented that detail. It is within a ten-year-old's imagination. Notably, his account lacks any additional detail reflecting defendant's sexual gratification. On the other hand, he may simply have been oblivious to such detail or failed to remember it. On balance, the court finds that Sohail's independent description of how defendant allegedly touched him is a positive sign that his statement is trustworthy.

Other factors contribute to a finding of probable trustworthiness. Det. Staton generally avoided leading questions, although they are not always unacceptable. See Smith, 158 N.J. at 390 (stating "the use of leading questions to facilitate an examination of child witnesses who are hesitant, evasive or reluctant is not improper"). He created a rapport with Sohail and established an accepting atmosphere. When he asked Sohail to explain why he was there at the interview, Sohail did not immediately allege all the details of the alleged assault, which would have indicated that he was rehearsed. Sohail's demeanor during the interview

reflected well on his credibility. He averted his eyes sometimes, but the court concludes that this was most likely due to a sense of embarrassment, as opposed to an effort to deceive.

The five-year delay in Sohail's disclosure, standing alone, does not disfavor a trustworthiness finding. It is common for child victims to delay disclosing sexual assault for a variety of reasons. See State v. J.L.G., 234 N.J. 265, 272 (2018) (stating that "scientists generally accept that a significant percentage of children delay reporting sexual abuse").

In sum, the court concludes that the State has established by a preponderance of the evidence that "there is a probability that [Sohail's] statement [to Det. Staton] is trustworthy" "considering the time, content and circumstances of the statement." N.J.R.E. 803(c)(27).

### C.

Although Sohail's statements relating to the alleged sexual assault satisfy the hearsay exception, his statements on other subjects do not. Before the recording may be presented at trial, those unrelated statements must be redacted.

The hearsay exception applies only to statements "relating to sexual misconduct committed with or against" the child whose statement is being offered. N.J.R.E. 803(c)(27). Thus, by its plain language, Sohail's statements about whether defendant assaulted other children fall outside the scope of the rule. Also, Sohail's

statements about defendant's use of corporal punishment in general, and specifically when Sohail played with the razor, fall outside the rule, because they do not relate to sexual misconduct. Certainly, as well, Sohail's statements to Det. Staton during the rapport-building section of the interview, see Exh. D-1 at 1-8, are not statements relating to sexual misconduct.

A closer call is presented by Sohail's statements about whether defendant threatened him into silence, and Sohail's explanations of what prompted him to disclose the alleged assault. These statements do not describe the sexual misconduct, but they indirectly relate to the sexual misconduct.

The court must interpret the phrase "relating to" in the rule. A dictionary definition is hardly decisive. See Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383 (1992) (stating "relating to" means "to stand in some relation, to have bearing or concern,; to pertain; refer; to bring into association with or connection with") (quoting Black's Law Dictionary 1158 (5<sup>th</sup> ed. 1979)). "No less than legislated statutes, rules of evidence must be interpreted to avoid injustice and to conform to the spirit and intention of the drafters." M.P. v. Wee Care Day Nursery, 250 N.J. Super. 119, 122 (App. Div. 1991). As the court would with a question of statutory interpretation, the court must consider the rule's "purpose, legislative history, and statutory context." Aponte-Correa v. Allstate Ins. Co., 162 N.J. 318, 323

(2000). The court is also mindful that it must exercise “heightened caution” in applying the rule.

As set out in D.R., and discussed above, the Tender Years Exception is based on the notion that out-of-court allegations of assault may be inherently reliable, and in-court testimony about an assault may be problematic because of the courtroom setting and fading memory. Those concerns pertain to the statements that directly describe or closely relate to the assault. The court concludes that statements regarding threats are sufficiently connected to the alleged assault to fall within the exception. A child may have as much emotional difficulty conveying threats of retaliation as he or she would describing the assaults themselves.

But statements regarding what prompted Sohail to disclose fall into a different category, at least in this case. Those statements do not involve accusing the perpetrator of wrongdoing. The court concludes those statements are not sufficiently connected to the alleged sexual misconduct to fall within the exception. Furthermore, for reasons already stated, Sohail’s explanation of what prompted his family members to question him – his accidents overnight when he was young as opposed to his hygiene during the middle of the day three days earlier – lack trustworthiness.

Finally, Sohail’s statements to Det. Staton about what he stated to his family are double-hearsay. Each level of hearsay-within-hearsay “requires a separate basis

for admission into evidence.” Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 375 n.1 (2010). Even assuming for argument’s sake that Sohail’s statement to Det. Staton about his conversation with his family satisfies N.J.R.E. 803(c)(27), Sohail’s statements to his family members must also satisfy N.J.R.E. 803(c)(27) or some other hearsay exception. But the State has not moved to admit Sohail’s statements to his family members under N.J.R.E. 803(c)(27) and subjected those statements to scrutiny in a N.J.R.E. 104 hearing as the Tender Years Exception requires. The State’s fresh complaint motion is not a substitute.

#### IV.

For the reasons stated, the court grants the State’s motion to the extent it finds that there is a probability that Sohail’s statements to Det. Staton relating to defendant’s alleged sexual misconduct are trustworthy. The admissibility of those statements shall await Sohail’s testimony at trial. Counsel shall confer to prepare redactions consistent with this opinion.