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RAPE TRAUMA SYNDROME AND CHILD SEXUAL ABUSE SYNDROME

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In recent years, prosecutors have attempted to introduce expert testimony concerning rape trauma syndrome in rape prosecutions. Similarly, they have offered evidence of child sexual abuse accommodation syndrome in child abuse cases. The use of both syndromes has been controversial. This article discusses the legal and scientific bases for this use of social science research.

RAPE TRAUMA SYNDROME

The phrase rape trauma syndrome (RTS) was coined by Burgess and Holmstrom to describe the behavioral, somatic, and psychological reactions of rape and attempted rape victims. Burgess & Holmstrom, "Rape Trauma Syndrome," 131 Am. J. Psychiatry 981 (1974). See also Burgess, "Rape Trauma Syndrome," 1 Behav. Sci. & Law 97 (Summer 1983). Based on interviews with 146 women, they found that victims usually progress through

a two-phase process — an acute phase and a long-term reorganization phase. Impact reactions in the acute phase involve either an "expressed style" in which fear, anger and anxiety are manifested, or a "controlled style" in which these feelings are masked by a composed or subdued behavior. Somatic reactions include physical trauma, skeletal muscle tension, gastrointestinal irritability, and genitourinary disturbance. In addition, a wide gamut of emotional reactions, ranging from fear, humiliation, and embarrassment to anger, revenge, and self-blame are exhibited.

The second phase, the reorganization phase, typically begins two to six weeks after the attack and is a period in which the victim attempts to re-establish her life. This period is characterized by activity, such as changing residences, changing telephone numbers, or visiting family members. Nightmares and dreams are common. Rape-related phobias, such as fear of being alone or fear

Dear colleagues,

It is with mixed emotions, a touch of sadness and a tinge of relief, that I write this last chapter of my tenure as Cuyahoga County Public Defender. But, alas, it seems as if it is time to do so.

On May 19, 1977, I was transformed from the role of 26 years as a prosecutor and selected to be the first Chief Public Defender of Cuyahoga County. (A true metamorphosis!). Since that date with one employee (myself) and 6000 square feet in the newly constructed Justice Center, we grew to 83 employees and 16,000 square feet in a beautifully renovated West Third, 100 Lakeside Place. Our offices are comprised of Felony, Juvenile, and Appellate Divisions with supporting staff of social workers, investigators, secretaries, and law clerks which handle approximately 10,000 cases per year.

The development of the Public Defender Office would not

happened without the support of the County Commissioners, Public Defender Commissioners, Judges, County Administrators, Office of Budget Management, State Public Defenders, Professor Paul Gianelli and the Defender Reporter, The Legal Aid Society, and many others.

I'll be retiring by August 1993, and my greatest thanks goes to my staff, past and present, for making this office what it is today. The greatest pride I have is watching young lawyers develop into accomplished litigators.

So thanks to all of you for what we all have accomplished.

Hy Friedman

P.S. I collect antique music boxes and mechanical banks which should keep me busy!

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of having people behind one, and difficulties in sexual relationships also are prominent.

Other studies elaborated on the initial research, sometimes confirming the earlier studies and sometimes providing additional insights. "Subsequent research, which is much more rigorous, conceptualizes rape trauma in terms of specific symptoms rather than more general stages of recovery." Frazier & Borgida, "Rape Trauma Syndrome: A Review of Case Law and Psychological Research," 16 Law & Hum. Behav. 293, 299 (1992).

Post-Traumatic Stress Disorder

RTS is now recognized as a type of post-traumatic stress disorder (PTSD), and such disorders are included in the most recent edition of the American Psychiatric Association's diagnostic manual. A.P.A. Diagnostic and Statistical Manual of Mental Disorder 247 (3d ed. rev. 1987) ("Post-traumatic Stress Disorder"). This approach to RTS, however, does not focus on the two-stage model of recovery posited by Burgess and Holmstrom but rather on specific symptoms.

Criticism

Critics have questioned the scientific basis for RTS evidence. After surveying the literature (1984), one commentator concluded that "definitional problems, biased research samples, and the inherent complexity of the phenomenon vitiate all attempts to establish empirically the causal relationship implicit in the concept of a rape trauma syndrome." Note, "Checking the Allure of Increased Conviction Rates: The Admissibility of Expert Testimony on Rape Trauma Syndrome in Criminal Proceedings," 70 Va. L. Rev. 1657, 1678 (1984). Some of the research problems included (1) unrepresentative samples, (2) the failure to distinguish between victims of rapes, attempted rapes, and molestation, and (3) the failure to account for individual idiosyncratic and incident-specific reactions. *Id.* at 1678-80. In 1989 a psychologist concluded that "research on the rape trauma syndrome is not probative on prior consent, prior trauma, nor the cause of the complainant's current behavior." Graham, "Rape Trauma Syndrome: Is It Probative of Lack of Consent?," 13 Law & Psych. Rev. 25, 41-42 (1989).

A 1992 review of the literature by Frazier and Borgida included a number of findings: Although victims experience a range of symptoms, only a few symptoms have been studied consistently — fear and anxiety, depression, social maladjustment, and sexual dysfunction. Recent studies also document symptoms identified for PTSD — recurrent nightmares, irritability, and hypervigilance. Frazier & Borgida, "Rape Trauma Syndrome: A Review of the Case Law and Psychological Research," 16 Law & Hum. Behav. 293, 300 (1992). They concluded:

In our opinion, although early studies were plagued by numerous methodological problems . . . , several studies have since been conducted that are much more sophisticated methodologically . . . These studies have assessed victim recovery at several points after the assault using standardized assessment measures and have employed carefully matched control groups. This research has established that rape victims experience more depression, anxiety, fear, and social adjustment and sexual problems than

women who have not been victimized. Research on PTSD among rape victims is more recent but consistently suggests that many victims experience PTSD symptoms following an assault. Initially high symptom levels generally abate by 3 to 4 months postassault, although significant levels of distress continue for many victims. *Id.* at 301.

The focus of much of the research was to understand the victim's reactions in order to provide assistance to the victim. The focus was not to evaluate a victim's reactions in order to establish the fact that a rape had occurred, which is how RTS evidence is sometimes used at trial. There is an accepted body of research concerning the aftereffects of rape. The critical issue, however, is how the research is used in court.

Frazier and Borgida also reviewed expert testimony in the reported cases. In several instances they found testimony that was unsupported by research. For example, in *Lessard v. State*, 719 P.2d 227, 233 (Wyo. 1986), the expert testified that it is "very common" for a victim to ask an assailant not to tell anyone about the assault. Frazier and Borgida concluded that "this particular behavior has not been documented in the research literature." Frazier & Borgida, *supra* at 304. Their conclusions concerning court testimony are noteworthy:

In sum, experts in recent cases have described a broad range of symptoms and behaviors as consistent with RTS, some of which do not appear to be based on research. Testimony that is not research based often seems to be prompted by a defendant's claims that a complainant's behavior was inconsistent with having been raped. If virtually any victim behavior is described as consistent with RTS, the term soon will have little meaning. Indeed, some critics have argued that this already is the case. . . . *Id.* at 304-05.

JURY STUDIES

Social scientists have also attempted to determine whether the typical jury is generally knowledgeable about the aftereffects of rape, and what the impact of expert testimony on this subject will have on a jury. In 1988 Frazier and Borgida administered an 18-item questionnaire on sexual assault to two professional groups: rape experts and PTSD experts. Frazier & Borgida, "Juror Common Understanding and the Admissibility of Rape Trauma Syndrome Evidence in Court," 12 Law & Hum. Behav. 101 (1988). The responses of the experts were then compared to those of two nonexpert groups (students and nonacademic university staff).

Significantly, the nonexperts were unaware of the behavioral changes a victim often experiences following a rape. *Id.* at 114. The nonexpert groups scored markedly lower on the questionnaire than did the experts — near chance levels (57% and 58% correct). *Id.* at 112. This study suggests that jurors often need to be informed about this subject in order to understand the evidence.

Other studies by Brekke and Boriga focus on the impact RTS testimony has on jurors. These experiments suggest that RTS testimony has a greater impact when introduced early in trial rather than later. "Expert testimony, when presented early in the trial, may serve as a powerful organizing theme or basis for a juror's initial impression

of the case. When presented later in the trial, by contrast, the expert testimony may be treated merely as additional information to be integrated into an existing, well-organized impression." Brekke & Borgida, "Expert Psychological Testimony in Rape Trials: A Social-Cognitive Analysis," 55 J. Personality & Soc. Psycho. 372, 383 (1988). See also Borgida & Brekke, "Psychological Research on Rape Trials," in Rape and Sexual Assault: A Research Handbook 313 (A. Burgess ed. 1985).

A second finding was that expert testimony had a greater impact if it was "concretized" through the use of a case-specific hypothetical question. The more general testimony consisted of an attempt to debunk many of the common myths about rape. The expert in the experiments testified that (a) few women falsely accuse men of rape, (b) rape is a highly underreported crime, (c) a large proportion of rapes involve casual acquaintance of the victim rather than strangers, (d) rape is a crime of violence rather than a crime of passion, and (e) it is often better for a woman to submit than to risk the additional violence that could result from ineffective resistance. When this testimony was followed by a hypothetical question incorporating the important features of the case, it had a greater impact. *Id.*

The studies also indicated that jurors did not automatically accept the expert's testimony, and that expert testimony was important in acquaintance rape and lack of physical resistance situations.

ADMISSIBILITY: LACK OF CONSENT

RTS evidence may be offered at trial for several different purposes: (1) to prove lack of consent by the alleged victim, and (2) to explain post-incident conduct by a victim that a jury might perceive as inconsistent with the claim of rape. The courts divide over the first use but generally accept the second use.

A number of courts permit RTS evidence to be introduced at trial to establish lack of consent, an element of the crime of rape. The inference may be stated as a syllogism: (1) Rape victims manifest certain characteristics known as RTS; (2) the alleged victim has these symptoms; and (3) therefore she has been raped.

In 1982 in *State v. Marks*, 231 Kan. 645, 647 P.2d 1292 (1982), the Kansas Supreme Court became the first state supreme court to uphold the admission of RTS evidence. A psychiatrist, who examined the victim two weeks after the attack, testified that the victim had suffered a "frightening assault" and was "suffering from the post-traumatic stress disorder known as rape trauma syndrome." *Id.* at 354, 647 P.2d at 1299. The Court concluded:

An examination of the literature clearly demonstrates that the so-called "rape trauma syndrome" is generally accepted to be a common reaction to sexual assault. . . . As such, qualified expert psychiatric testimony regarding the existence of rape trauma syndrome is relevant and admissible in a case such as this where the defense is consent. *Id.*

Other courts followed this precedent. *E.g.*, *State v. Huey*, 145 Ariz. 59, 64, 699 P.2d 1290, 1295 (1985); *State v. Gettier*, 438 N.W.2d 1, 6 (Iowa 1989); *State v. McQuillen*, 239 Kan. 590, 593, 721 P.2d 740, 741-42 (1986); *State v. McQuillen*, 236 Kan. 161, 171, 689 P.2d 822, 829 (1984); *State v. Allewalt*, 308 Md. 89, 109, 517

A.2d 741, 751 (1986); *State v. Liddell*, 211 Mont. 180, 186-89, 685 P.2d 918, 922-23 (1984); *State v. Whitman*, 16 Ohio App. 3d 246, 247, 475 N.E.2d 486, 488 (1984).

In addition, Illinois has enacted a statute that permits the admission of evidence of post-traumatic stress syndrome in illegal sex acts prosecutions. Ill. Ann. Stat. ch. 38, § 115-7.2 (Smith-Hurd 1990).

Limitations on Admissibility

Different courts have imposed a variety of limitations on this use of RTS evidence. Some courts permit the expert to testify that the victim's behavior was *consistent with* RTS but not that the victim had been raped. *State v. McCoy*, 179 W. Va. 223, 229-30, 366 S.E.2d 731, 737 (W. Va. 1988).

Other courts prohibit:

(1) comment on the credibility of the alleged victim, *State v. Brodniak*, 221 Mont. 212, 217-18, 718 P.2d 322, 326-29 (1986) (RTS evidence admissible but expert may not comment on victim's credibility);

(2) use of the term "rape trauma syndrome," *State v. Allewalt*, 308 Md. 89, 109, 517 A.2d 741, 751 (1986) (Avoiding the term RTS is "more than cosmetic");

(3) any reference to the accused, *State v. Huang*, 99 N.C. App. 658, 665-66, 394 S.E.2d 279, 284 (1990) (RTS evidence admissible, but expert's repeated implication of defendant was prejudicial error), rev. denied, 327 N.C. 639, 399 S.E.2d 127 (1990).

Courts Rejecting Admissibility

Courts rejecting RTS as proof of lack of consent dispute the scientific validity of the syndrome when offered for this purpose. In *State v. Saldana*, 324 N.W. 2d 127 (1990), the Minnesota Supreme Court ruled that "[r]ape trauma syndrome is not the type of scientific test that accurately and reliably determines whether a rape has occurred." *Id.* at 229. *Accord* *State v. McGee*, 324 N.W.2d 232, 233 (Minn. 1982).

Other courts exclude RTS evidence because it has not been generally accepted by the scientific community as required by the *Frye* test. See generally Giannelli, "The Admissibility of Novel Scientific Evidence: *Frye v. United States*, a Half-Century Later," 80 Colum. L. Rev. 1197 (1980).

For example, in *People v. Bledsoe*, 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1984), the California Supreme Court noted that "rape trauma syndrome was not devised to determine the 'truth' or 'accuracy' of a particular past event — i.e., whether, in fact, a rape in the legal sense occurred — but rather was developed by professional rape counselors as a therapeutic tool, to help identify, predict and treat emotional problems experienced by the counselors' clients or patients." *Id.* at 249-50, 681 P.2d at 300, 203 Cal. Rptr. at 459. Thus, according to the court, although generally accepted by the scientific community for a therapeutic purpose, expert testimony on RTS was not generally accepted "to prove that a rape, in fact, occurred." *Id.* at 251, 681 P.2d at 301, 203 Cal. Rptr. at 460. The court commented:

[A]s a rule, rape counselors do not probe inconsistencies in their clients' descriptions of the facts of the incident, nor do they conduct independent investigations to determine whether other evidence corroborates or

contradicts their clients' renditions. Because their function is to help their clients deal with the trauma they are experiencing, the historical accuracy of the client's descriptions of the details of the traumatizing events is not vital in their task. *Id.* at 250, 681 P.2d at 300, 203 Cal. Rptr. at 459.

See also *People v. Coleman*, 48 Cal. 3d 112, 142-44, 768 P.2d 32, 48-49, 255 Cal. Rptr. 813, 829-30 (1990) (reaffirming *Bledsoe*).

Other courts accept this reasoning. *E.g.*, *Spencer v. General Elec. Co.*, 688 F. Supp. 1072, 1075-77 (E.D. Va. 1988); *People v. Taylor*, 75 N.Y.2d 277, 293, 552 N.E.2d 131, 138, 552 N.Y.S.2d 883, 890 (1990) (RTS "is inadmissible when it inescapably bears solely on proving that a rape occurred"); *State v. Hall*, 330 N.C. 808, 821, 412 S.E.2d 883, 890 (1992); *People v. Pullins*, 145 Mich. App. 414, 421-22, 378 N.W.2d 502, 505 (1985) (RTS fails Frye test); *State v. Taylor*, 663 S.W.2d 235, 240 (Mo. 1984); *State v. Ogle*, 668 S.W.2d 138, 143-44 (Mo. App.), cert. denied, 469 U.S. 845 (1984); *State v. Black*, 109 Wash. 2d 336, 346-49, 745 P.2d 12, 15-18 (1987) (RTS fails Frye test).

ADMISSIBILITY: EXPLAINING BEHAVIOR

As noted above, the California Supreme Court rejected RTS evidence when offered to prove lack of consent. The court, however, approved the admissibility of RTS evidence where the defendant suggests to the jury that the conduct of the victim after the incident is inconsistent with the claim of rape. In this situation, the court wrote, "expert testimony on rape trauma syndrome may play a particularly useful role by disabusing the jury of some widely held misconceptions about rape and rape victims, so that it may evaluate the evidence free of popular myths." 36 Cal. 3d at 247-48, 681 P.2d at 298, 203 Cal. Rptr. at 457.

Most courts accept this position. For example, expert testimony has been admitted to explain a victim's:

(1) passive resistance during a rape, *Perez v. State*, 653 S.W.2d 878, 882 (Tex. App. 1983) (in rebuttal, expert explained alleged victim's passive resistance during rape);

(2) delay in reporting the crime, *United States v. Peel*, 29 M.J. 235, 241 (C.M.A. 1989) (RTS evidence admitted to explain postattack behavior — delay in reporting and attempts to normalize life), cert. denied, 493 U.S. 1025 (1990); *People v. Hampton*, 746 P.2d 947, 951-52 (Colo. 1987) (RTS evidence admissible to explain delay in reporting); and

(3) calm demeanor after an attack, *People v. Taylor*, 75 N.Y.2d 277, 293, 552 N.E.2d 131, 138, 552 N.Y.S.2d 883, 890 (1990) ("[H]alf of all women who have been forcibly raped are controlled and subdued following the attack"); *State v. Robinson*, 146 Wis. 2d 315, 333-35, 431 N.W.2d 165, 172 (1988) (many victims are "emotionally flat" immediately after assault).

RTS evidence has also been introduced to explain that "in the context of a trust relationship, such as a doctor-patient relationship, some victims may return to the trust relationship for further contact with the perpetrator of the assault." *Commonwealth v. Mamay*, 407 Mass. 412, 421, 553 N.E.2d 945, 951 (1990).

See also *United States v. Hammond*, 17 M.J. 218 (C.M.A. 1984) (RTS evidence admitted for sentencing

purposes); *People v. Mathews*, 91 Cal. App. 3d 1018, 1025, 154 Cal. Rptr. 628, 632 (1979) (RTS admitted to support self-defense and diminished capacity claim).

ADMISSIBILITY: OFFERED BY THE DEFENSE

In *Henson v. State*, 535 N.E.2d 1189 (Ind. 1989), the Indiana Supreme Court held that a defendant may offer RTS evidence to show that the victim had not been raped. The alleged victim claimed that she had been raped at knifepoint after leaving a bar. She returned to the same bar the next evening for two hours and a drink. The defendant offered the testimony of an expert to comment on her postattack conduct.

The trial court excluded the evidence, but the Supreme Court reversed: "Here, Dr. Gover's testimony would have tended to prove that J.O.'s behavior after the incident was inconsistent with that of a victim who had suffered a traumatic rape such as that J.O. recounted. The evidence therefore would have a tendency to make it less probable that a rape in fact occurred. . . ." *Id.* at 1191. See generally Note, "Defense Expert Testimony on Rape Trauma Syndrome: Implications for the Stoic Victim," 42 *Hastings L.J.* 1143 (1991).

CHILD SEXUAL ABUSE ACCOMMODATION SYNDROME

Frequently, child sexual abuse cases are difficult to prosecute. One commentator summarized the problems as follows:

The sexual offender is often a relative or a trusted adult with whom the child spends time alone. Eyewitnesses to the molestation are therefore rare. In addition, sexual abuse is typically a nonviolent crime. Children who are abused by a trusted adult usually are manipulated psychologically and do not resist their abusers. Physical injury can provide valuable medical evidence of the sexual abuse, but this evidence often is lacking because the abuse is committed without force. Furthermore, the sexual abuse may involve an act other than penetration of the vagina or anus. Crimes such as petting, fondling or oral copulation usually do not involve forceful physical contact and do not leave physical scars. A lapse of time between the sexual abuse and disclosure may also contribute to the lack of medical evidence. Note, "The Admissibility of 'Child Sexual Abuse Accommodation Syndrome' in California Criminal Courts," 17 *Pac. L.J.* 1361, 1368-69 (1986).

In cases where there is no independent evidence of the abuse, the credibility of the child complainant and the defendant often becomes determinative. However, the typical responses of child sexual abuse victims are counter-intuitive in many respects. Delayed disclosure, conflicting testimony, and retraction suggest fabrication by the complainant unless an explanation is offered for this anomalous behavior.

Because of these problems, prosecutors have sought other types of evidence to substantiate sex abuse claims. Syndrome evidence is an example. Dr. Roland Summit coined the phrase "Child Sexual Abuse Accommodation Syndrome" (CSAAS) in 1983 to describe five categories of reactions typical of victims of child sexual abuse. Summit, "The Child Sexual Abuse Accommodation Syndrome," 7 *Child Abuse & Neglect* 177 (1983). The first two categories are preconditions to child sexual abuse;

the last three are "sequential contingencies" that vary in both form and degree. The categories are:

(1) *Secrecy*: The child receives the message, either explicitly through threats or admonishments or implicitly, that the subject is to be kept secret. An aura of danger and secrecy surrounds the incidents. *Id.* at 181.

(2) *Helplessness*: The imbalance of power that exists between child and adult makes the child feel powerless to resist. The feeling of helplessness is increased when the abuser is a trusted friend or family member. *Id.* at 182-83.

(3) *Entrapment and Accommodation*: The child who does not seek or receive intervention learns to live with the sexual abuse in order to survive. In addition to submission, other survival mechanisms include turning to imaginary friends, developing multiple personalities, taking refuge in altered states of consciousness or substance abuse, running away, promiscuity, hysterical phenomena, delinquency, sociopathy, projection of rage, and self-mutilation. *Id.* at 184-86.

(4) *Delayed, Conflicting and Unconvincing Disclosure*: Rarely will the child report incidents of sexual abuse immediately upon their occurrence. Because of the time lapse before report occurs and the emotional upheaval experienced by the child, the disclosure is likely to contain contradictions and misstatements. Often the disclosure is greeted by disbelief. *Id.* at 186.

(5) *Retraction*: "Whatever a child says about sexual abuse, she is likely to reverse it." *Id.* at 188. Particularly if the abuser is a family member, the child will attempt to undo the disintegration of the family caused by the disclosure. *Id.*

Dr. Summit developed the syndrome to assist professionals in treating abused children. The syndrome is not a diagnostic tool. "The syndrome does not detect sexual abuse. Rather, it assumes the presence of abuse, and explains the child's reactions to it. Thus, [CSAAS] is not the sexual abuse analogue of battered child syndrome, which is diagnostic of physical abuse." Myers, Bays, Becker, Berliner, Corwin & Saywitz, "Expert Testimony in Child Sexual Abuse Litigation," 68 Neb. L. Rev. 1, 67 (1989) [hereinafter cited as Myers]. Consequently, the use of the term "syndrome" in court should be avoided.

Nevertheless, sexually abused children do react to the abuse. Anxiety, depression, nightmares, enuresis, regression, and acting out are some of the reactions. Many of these responses, however, are associated with other psychological problems that are unrelated to sex abuse. In addition, apparently 20% of abused children show no observable reactions. *Id.* at 64. Some reactions are strongly suggestive of abuse: "Examples of behaviors that have greater specificity for sexual abuse include age-inappropriate knowledge of sexual acts or anatomy, sexualization of play and behavior in young children, the appearance of genitalia in young children's drawings, and sexually explicit play with anatomically detailed dolls." *Id.* at 62-63.

ADMISSIBILITY

Expert testimony on child sexual abuse may be offered at trial for several distinct purposes: (1) as substantive evidence to prove that the child has been abused; (2) to explain conduct of the child that a jury might perceive as

inconsistent with a claim of abuse; or (3) to bolster or impeach the child's credibility.

In addition to these purposes, the form of the testimony may vary. For example, expert testimony offered to establish abuse could take three different forms: (1) general testimony about the behavioral characteristics of abused children; (2) testimony that a particular child's behavior is consistent with that of abused children; or (3) an opinion that a particular child has been abused.

Characteristics of Abused Children

Some courts permit expert testimony "regarding the behavioral and emotional indicia of child sexual abuse victims" as well as testimony that "an alleged victim exhibits behavior consistent with such a profile." *State v. Charles L.*, 183 W. Va. 641, 659, 398 S.E.2d 123, 141 (W. Va. 1990). *Accord State v. Myers*, 359 N.W.2d 604, 609-10 (Minn. 1984).

Other courts prohibit "consistent with" testimony. For example, the Arizona Supreme Court has ruled: "Once the jury has learned the victim's behavior from the evidence and has heard experts explaining why sexual abuse may cause delayed reporting, inconsistency, or recantation, we do not believe the jury needs an expert to explain that the victim's behavior is consistent or inconsistent with the crime having occurred." *State v. Moran*, 151 Ariz. 378, 385, 728 P.2d 248, 255 (1986).

Still other courts reject the substantive use of expert testimony to prove the fact of abuse. In adopting this position, the Utah Supreme Court questioned the scientific basis of this type of evidence.

[T]he child abuse profile consists of a long list of vague and sometimes conflicting psychological characteristics that are relied upon to establish the fact of injury in a specific case as well as the cause. . . .

Not only is there lack of any consensus about the ability of the profile to determine abuse, but the scientific literature raises serious doubts as to the reliability of profile testimony when used for forensic purposes to demonstrate abuse actually occurred. *State v. Rimmasch*, 775 P.2d 388, 401 (Utah 1989).

The Pennsylvania Supreme Court reached the same conclusion: "According to the literature on the subject, there is no one classical or typical personality profile for abused children. The difficulty with identifying a set of behaviors exhibited by abused children is that abused children react in a myriad of ways that . . . may be the very same behaviors as children exhibit who are not abused." *Commonwealth v. Dunkle*, 602 A.2d 830, 832 (Pa. 1992) (CASAS evidence is not generally accepted by the scientific community).

See also *Lantrip v. Commonwealth*, 713 S.W.2d 816, 817 (Ky. 1986); *State v. York*, 564 A.2d 389, 391 (Me. 1989) (no empirical research supports reliability of diagnosing sex abuse based on subsequent behavior); *Goodson v. State*, 566 So. 2d 1142, 1146-47 (Miss. 1990); *State v. Hudnall*, 293 S.C. 97, 99-100, 359 S.E.2d 59, 61-62 (1987).

Explaining Behavior

Virtually all courts admit evidence derived from research on child sexual abuse when offered in response to a defense suggestion that specific behavior is incon-

sistent with a claim of abuse. For example, courts have admitted expert testimony to explain why a sexually abused child:

- (1) would delay making an accusation, *Wheat v. State*, 527 A.2d 269, 273 (Del. 1987); *State v. Myers*, 359 N.W.2d 604, 610 (Minn. 1984); *State v. Carlson*, 360 N.W.2d 442, 442-43 (Minn. App. 1985); *Smith v. State*, 100 Nev. 570, 572-73, 688 P.2d 326, 327 (Nev. 1984);
- (2) retract an accusation, *State v. Moran*, 151 Ariz. 378, 384, 728 P.2d 248, 254 (1986) (factors that lead a victim to recant and attempt to return home are admissible); *People v. Reid*, 123 Misc. 2d 1084, 1085-86, 475 N.Y.S.2d 741, 741-42 (Crim. Ct. 1984); *State v. Middleton*, 294 Or. 427, 437-38, 657 P.2d 1215, 1220-21 (1983);
- (3) make inconsistent statements, *Duckett v. State*, 797 S.W.2d 906, 915-17 (Tex. Crim. App. 1990) (numerous inconsistencies and delayed reporting are elements of CSAAS);
- (4) remain with the offender. *Griego v. State*, 761 P.2d 973, 978 (Wyo. 1988) (expert testified that "it was common for adolescent victims to remain in the area of the offender"); or
- (5) appear calm after an incident, *State v. Jensen*, 147 Wis. 2d 240, 252, 432 N.W.2d 913, 918 (1988) (expert testimony that it is common for sexual assault victims to be emotionally flat admitted when defense suggested such conduct was inconsistent with assault claim).

Commentators have pointed out that such "expert testimony is needed to disabuse jurors of commonly held misconceptions about child sexual abuse, and to explain the emotional antecedents of abused children's seemingly self-impeaching behavior." *Myers, supra*, at 89.

Expert testimony that would explain why a mother would refrain from reporting sex abuse of her child to the police is also admissible. *People v. McAlpin*, 53 Cal. 3d 1289, 1302, 812 P.2d 563, 283 Cal. Rptr. 382, 389 (1991).

Credibility

Several courts have admitted expert testimony on credibility in this context. For example, the Montana Supreme Court has held that expert testimony is admissible "for the purpose of helping the jury to assess the credibility of a child sexual assault victim." *State v. Geyman*, 224 Mont. 194, 200, 729 P.2d 475, 479 (1986). This rule includes testimony that a particular child is telling the truth. See *State v. Hall*, 244 Mont. 161, 172-74, 797 P.2d 183, 190-91 (1990); *State v. French*, 233 Mont. 364, 368, 760 P.2d 86, 88-89 (1988).

Most courts, however, prohibit this type of expert testimony. The Arizona Supreme Court concluded:

Thus, even where expert testimony on behavioral characteristics that affect credibility or accuracy of observation is allowed, experts should not be allowed to give their opinion of the accuracy, reliability or credibility of a particular witness in the case being tried. . . .

Opinion evidence on who is telling the truth in cases such as this is nothing more than the expert's opinion on how the case should be decided. . . . [S]uch testimony is inadmissible, both because it usurps the jury's

traditional functions and roles and because, when given insight into the behavioral sciences, the jury needs nothing further from the expert. *State v. Lindsey*, 149 Ariz. 472, 475, 720 P.2d 73, 76 (1986).

Accord Lickey v. State, 108 Nev. 191, 827 P.2d 824, 826 (1992) (psychologist may not testify about veracity of a victim); *Commonwealth v. Seese*, 512 Pa. 439, 444, 517 A.2d 920, 922 (1986) (pediatrician may not testify concerning credibility of alleged 8-year old victim).

Federal Evidence Rule 608, which governs the impeachment use of character evidence, has sometimes played a role in the cases. Rule 608(a) permits opinion and reputation evidence concerning the truthful character of a witness after that witness has been impeached. In *State v. Kim*, 64 Hawaii 598, 645 P.2d 1330 (1982), the Hawaii Supreme Court concluded that an expert's testimony that he found the complaining witness "believable" was admissible under Hawaii Rule 608(a), which is patterned after the federal rule:

While [the expert's] opinion was not couched in terms of character, its function and effect were indistinguishable from traditional character evidence. . . . Essentially, the difference between an opinion as to character for truthfulness and an opinion as to the believability of a witness' statements is the difference between 'I think X is believable' and 'X's statement is believable.' We feel the admissibility of either statement should turn not on niceties of phraseology but on the probative value of the testimony. *Id.* at 610 n. 14, 645 P.2d at 1339 n. 14.

Most courts, however, reject this view. The Utah Supreme Court concluded that the distinction rejected in *Kim* "represents an important policy choice" that prevents trials from being turned into contests between what would amount to modern oath-helpers who would largely usurp the fact-finding function of judge or jury." *State v. Rimmasch*, 775 P.2d 388, 392 (Utah 1989). The court went on to embrace the position of the majority of courts that have "rejected *Kim*" and bar such testimony under Rule 608. *Id. Accord United States v. Azure*, 801 F.2d 336, 341 (8th Cir. 1986); *United States v. Binder*, 769 F.2d 595, 602 (9th Cir. 1985), cert. denied, 484 U.S. 1073 (1988).

Indeed, the Hawaii Supreme Court subsequently overruled *Kim*. *State v. Batangan*, 71 Haw. 552, 563, 799 P.2d 48, 54 (1990) (Expert may not that testify child is "believable" and *Kim* is overruled).

PROFILE OF ABUSERS

A related issue involves expert testimony that focuses on the defendant rather than the child. Most courts exclude evidence of an abuser profile. For example, in *United States v. Gillespie*, 852 F.2d 475 (9th Cir. 1988), the prosecution in rebuttal called an expert who testified about the characteristics of a typical child molester. These include "an early disruption in the family environment, often with one parent missing; a relationship with the parent of the opposite sex who is dominant; unsuccessful relationships with women; a poor self-concept; and general instability in the background." *Id.* at 480. The Ninth Circuit ruled this testimony inadmissible. The defendant had not offered any character evidence, and thus rebuttal on this score was impermissible. The court also commented that "testimony of criminal profiles is

highly undesirable as substantive evidence because it is of low probativity and inherently prejudicial." *Id.* See also *Hall v. State*, 15 Ark. App. 309, 316-17, 692 S.W.2d 769, 773 (1985); Myers, *supra* at 144 ("The relevant scientific literature does not support the conclusion that there is a reliable profile of a 'typical' sex offender").

In *People v. McAlpin*, 53 Cal. 3d 1289, 1302-04, 812 P.2d 563, 569-72, 283 Cal. Rptr. 382, 389-90 (1991), the California Supreme Court upheld the admission of expert testimony concerning child abusers. The expert testified that there was no profile of a typical abuser. Then he proceeded to testify that a child molester can be from any social or financial status, race, age, occupation, geographic origin, or religious group. They can also be persons of impeccable reputations. The court held this testimony was helpful to the jury because it debunked common myths about abusers: that abusers are strangers, old, gay, alcoholic, or retarded.

Profiles Offered by Defense

Most courts prohibit defense evidence offered to show that the accused does not fit the sex abuser profile. For example, the Iowa Supreme Court has ruled that a trial judge did not abuse his discretion in excluding such evidence on the grounds that it would not assist the jury. *State v. Hulbert*, 481 N.W.2d 329, 332 (Iowa 1992). *Accord* *United States v. St. Pierre*, 812 F.2d 417, 420 (8th Cir. 1987) (sex offender profile not generally accepted in the scientific community); *State v. Tucker*, 165 Ariz. 340, 346, 798 P.2d 1349, 1353-55 (App. 1990); *State v. Pulizzano*, 155 Wis. 2d 633, 657, 456 N.W.2d 325, 355 (1990) (error for prosecutor to argue that the accused's history as a victim of child sexual abuse increased likelihood that she committed the alleged acts).

In *People v. Stoll*, 49 Cal. 3d 1136, 1152-53, 783 P.2d 698, 707-08, 265 Cal. Rptr. 111, 120-21 (1989), the California Supreme Court adopted a minority position. The court held that a defendant charged with child molesting may introduce expert character evidence establishing that he is not a deviant. See also *People v. McAlpin*, 53 Cal. 3d 1289, 1304, 812 P.2d 563, 576-78, 283 Cal. Rptr. 382, 391-95 (1991); *People v. Ruiz*, 222 Cal. App. 3d 1241, 1243, 272 Cal. Rptr. 368, 370 (1990) (scientific community has not developed a standard pedophile profile).

"ANATOMICALLY CORRECT" DOLLS

A number of courts have considered expert testimony based on the use of "anatomically correct" dolls. In *United States v. Gillespie*, 852 F.2d 475 (9th Cir. 1988), an expert (child therapist) testified that "the child's behavior with anatomically correct dolls showed she had been abused by a man using his penis and not by a woman." *Id.* at 480. The Ninth Circuit ruled that this use of the dolls failed to satisfy the *Frye* general acceptance test and was thus inadmissible. *Id.* at 481. *Accord* *In re Amber B.*, 191 Cal. App. 3d 682, 690-91, 236 Cal. Rptr. 623, 629 (1987).

Similarly, the Eighth Circuit has cautioned that the "empirical literature clearly reflects a concern that repeated use of the dolls can be highly suggestive." *United States v. Spotted War Bonnet*, 882 F.2d 1360, 1370 (8th Cir. 1989), vacated on other grounds, 110 S. Ct. 3267 (1990).

Other courts disagree. In *Reyna v. State*, 797 S.W.2d 189 (Tex. App. 1990), a Texas appellate court ruled that

the dolls were "not used as a scientific method of proof, but merely as a tool to aid the jury with the witness' testimony." *Id.* at 193. Accordingly, their use was permissible. See also *Stevens v. People*, 796 P.2d 946, 955 (Col. 1990) (dolls provide corroboration for admissibility of child hearsay statements); *State v. Oslund*, 469 N.W.2d 489, 494-95 (Minn. App. 1991).

The commentators are also divided. Many believe that the "danger in the use of the dolls is that they will stimulate fantasy and not recall, and plant a falsified memory of fantasy to be recalled later as truth." Christiansen, "The Testimony of Child Witnesses: Fact, Fantasy, and the Influence of Pretrial Interviews," 62 Wash. L. Rev. 705, 711 (1987). See also Levy, "Using 'Scientific' Testimony to Prove Child Sexual Abuse," 23 Fam. L.Q. 148 (1989) ("[T]estimony about anatomically correct dolls should be inadmissible"); Sagatun, "Expert Witnesses in Child Abuse Cases," 9 Behav. Sci. & L. 201, 210-12 (Spring 1991) ("little scientific" literature on subject); J. Myers, *Child Witness Law and Practice* § 4.17L (1992 Supp.) (discussing literature on use of dolls).

In contrast, others opine that "[r]ecent research indicates that the dolls can be helpful in evaluating suspected abuse." Myers, *supra* at 63 n. 259.

EXAMINATION OF THE ALLEGED VICTIM

Several cases discuss a defendant's right to an involuntary physical or psychological examination of alleged rape or child abuse victims.

Physical Examinations

The courts have adopted several approaches to the issue as applied to physical examinations. Comment, "A Fourth Amendment Approach to Compulsory Physical Examinations of Sex Offense Victims," 57 U. Chi. L. Rev. 873 (1990).

Some courts recognize a due process right to such an examination. "In these circumstances and limited to the facts of this case, we hold that appellant, as a matter of due process and fairness, was entitled at least to have the alleged victim examined by an independent gynecologist in preparation for trial." *Turner v. Commonwealth*, 767 S.W.2d 557, 559 (Ky. 1988), cert. denied, 493 U.S. 901 (1989).

Other courts allow the trial judge to order a physical examination of an alleged child abuse victim if the defendant can demonstrate a compelling need. For example, the New Jersey Supreme Court recognized a trial court's inherent power to order a physical examination, but only when there is such a need:

[C]ourts may order the physical examination of a child sex-abuse victim only when satisfied that the defendant has made a sufficient showing that such an examination can produce competent evidence that has substantial probative worth, and if admitted and believed by the trier of fact, that evidence could refute or neutralize incriminating evidence or impugn the credibility of prosecution witnesses. Further, the court must be satisfied that the defendant's need clearly outweighs the possible harmful consequences to the alleged victim. *State v. D.R.H.*, 127 N.J. 249, 604 A.2d 89, 95 (1992).

Accord *People v. Chard*, 808 P.2d 351, 353-54 (Colo. 1991), cert. denied, 112 S. Ct. 186 (1991).

Still other courts refuse to recognize such a right under any conditions because the "order requiring complainant to submit to a physical examination was clearly outside the scope of discovery authorized by the statute [and thus] the judge had no authority to issue that order and it is void." *E.g.*, *State ex rel. Wade v. Stephens*, 724 S.W.2d 141, 144-45 (Tex. Crim. App. 1987).

Psychological Examinations

A similar diversity of opinion exists concerning involuntary psychological or psychiatric examinations. See Annot., "Necessity or Permissibility of Mental Examination to Determine Competency or Credibility of Complainant in Sexual Offense Prosecutions," 45 A.L.R.4th 310 (1986).

Some courts hold that trial courts lack the authority to order such examinations. *State v. Gabrielson*, 464 N.W.2d 434, 436 (Iowa 1990). Others use a "substantial need" test. *Virgin Islands v. Leonard A.*, 922 F.2d 1141, 1143-44 (3d Cir. 1991); *State v. R.W.*, 104 N.J. 14, 21, 514 A.2d 1287, 1291 (1986).

Defendants have challenged a refusal to order an examination on constitutional grounds. The Ninth Circuit, however, has ruled that a trial court's refusal to order a psychiatric examination of two young sexual assault victims to determine whether they exhibited signs of Rape Trauma Syndrome did not violate due process. *Gilpin v. McCormick*, 921 F.2d 928, 931 (9th Cir. 1990).

A different issue may be presented, however, if the state uses an expert. The Nevada Supreme Court has held: "[U]nless competent evidence presents a compelling reason to protect the victim, it is error to deny a defendant the assistance of a defense psychologist or psychiatrist to examine the child-victim and testify at trial when the State is provided such assistance." *Lickey v. State*, 827 P.2d 824, 826 (Nev. 1992).

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