MICHIGAN SHOULD FURTHER RESTRICT EXPERT TESTIMONY ON CHILD SEXUAL ABUSE ACCOMMODATION SYNDROME (BUT NOT FOR THE REASON YOU MIGHT THINK)

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I. INTRODUCTION

In 2010, the Children's Bureau reported that 1,177 Michigan children were victims of sexual abuse.[1] In 2018, that body reported that 723 Michigan children were victims of sexual abuse.[2] Such a steep decline is

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1. CHILDREN'S HEALTH BUREAU, CHILD MALTREATMENT 50 (2010), https://www.acf.hhs.gov/sites/default/files/documents/cb/child_maltreatment_2010.pdf [http://web/20220207004748/https://www.acf.hhs.gov/sites/default/files/documents/cb/child_maltreatment_2010.pdf].

2. CHILDREN'S HEALTH BUREAU, CHILD MALTREATMENT 40 (2018), https://www.acf.hhs.gov/sites/default/files/documents/cb/cm2018.pdf [https://web.archive.org/web/20220207011105/https://www.acf.hhs.gov/sites/default/files/documents/cb/cm2018.pdf]. The

cause for celebration. However, the complexities and difficulties of child sexual abuse (CSA) cases are perennial, irrespective of prevalence. While a guilty verdict can serve to vindicate the abused child and the efforts of his or her advocates, it does not erase the impact of the abuse.[3] And not only that, a guilty verdict or plea can herald a lifetime of punishment (both legal and extra-judicial) for the perpetrator.[4] It is safe to say that there are weighty interests on both sides of every CSA case.

The state also faces a number of complicating issues in its quest to find the correct balance in such cases. Most saliently, there are often no witnesses besides the alleged victim, who is cognitively and verbally much different from the adults on the jury.[5] Moreover, medical evidence (not including testimony) is unavailable in more than ninety-five percent of cases.[6] Expert witnesses stand in this gap, testifying to the behavioral and psychological symptoms of sexually abused children.[7]

Experts may not explicitly vouch for the credibility of the alleged victim,[8] but they may unintentionally *implicitly* vouch when they testify in

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data for 2018 is listed as "sexual abuse only," but this decline is in keeping with national trends. *See* National Children's Advocacy Center, *Position Paper on Declining Rates of Child Sexual Abuse*, DARKNESS TO LIGHT (Feb. 22, 2017), https://www.d2l.org/the-national-childrens-advocacy-center-on-the-declining-rates-of-child-sexual-abuse/ [/web/20220207142628/https://www.d2l.org/the-national-childrens-advocacy-center-on-the-declining-rates-of-child-sexual-abuse/].

3. For example, a third of sexually abused children meet the full diagnostic criteria for post-traumatic stress disorder. John E.B. Myers, *Expert Testimony in Child Sexual Abuse Litigation: Consensus and Confusion*, 14 U.C. DAVIS J. JUV. L. & POL'Y 1, 26 (2010). And their problems do not end at adulthood: people who have high ACE (adverse childhood experience) scores tend to have higher rates of financial and health problems, and an ACE score of six corresponds to a 5000% increase of suicide attempts compared to an ACE score of zero. BESSEL VAN DER KOLK, THE BODY KEEPS THE SCORE: BRAIN, MIND, AND BODY IN THE HEALING OF TRAUMA 148–49 (2014).

4. *See generally* Rebecca Trammel & Scott Chenault, *"We Have To Take These Guys Out": Motivations for Assaulting Incarcerated Child Molesters*, 32 SYMBOLIC INTERACTION 334 (2009); Michael S. James, *Prison Is 'Living Hell' for Pedophiles*, ABC NEWS (Aug. 19, 2015, 2:45 PM), https://abcnews.go.com/US/prison–living–hell–pedophiles/story?id=90004 [/web/20220218174048/https://abcnews.go.com/US/prison%E2%80%93living%E2%80%93hell%E2%80%93pedophiles/story?id=90004]; Rebecca A. DiBennardo, *Ideal Victims and Monstrous Offenders: How the News Media Represent Sexual Predators*, 4 SOCIUS 1 (2018).

5. *See* Pennsylvania v. Ritchie, 480 U.S. 39, 60 (1987).

6. Stephanie D. Block & Linda M. Williams, *The Prosecution of Child Sexual Abuse: A Partnership to Improve Outcomes*, 1 (Feb. 2019), https://www.ncjrs.gov/pdffiles1/nij/grants/252768.pdf [https://web.archive.org//web/20220207142948/https://www.ojp.gov/pdffiles1/nij/grants/252768.pdf].

7. JOHN E.B. MYERS, MYERS ON EVIDENCE OF INTERPERSONAL VIOLENCE CHILD MALTREATMENT, INTIMATE PARTNER VIOLENCE, RAPE, STALKING, AND ELDER ABUSE § 6.09 (6th ed. 2020).

8. *See id.* at § 6.11.

certain ways—most notably by signaling their own confidence in the alleged victim's credibility to the jury.[9] This is problematic because jurors are looking to "hang their hats" on the experts' testimonies.[10] For a layperson, it can be difficult to distinguish between testimony which explains the counterintuitive behaviors of abused children—while leaving the jury to decide whether such a description fits the alleged victim—and testimony which implies that the accuser *is acting like an abused child* (and should therefore be believed). Jurors may thus assume that the expert has taken the case because she believes the alleged victim and wants to help the prosecution.[11] Couple this assumption with the fact that experts tend to believe that they can reliably distinguish between true and false allegations[12]—despite evidence to the contrary[13]—and the result is a recipe for unfair prejudice to the defendant.

The Michigan Supreme Court has attempted to mitigate the prejudicial effect of implicit vouching stemming from expert testimony on "child sexual abuse accommodation syndrome" (CSAAS) in a series of rulings culminating in 2019's *People v. Thorpe*.[14] In 2020, a narrow minority of justices dissented in *People v. Mejia*[15] after the court declined to hear an ineffective assistance of counsel claim in that CSA case.[16] The petitioner argued that his defense counsel should have challenged the prosecution's expert witness in a *Daubert* hearing.[17] The dissenting justices noted that courts around the country have "been grappling with troubling questions about the validity and reliability of [CSAAS] evidence,"[18] and proclaimed that the most recent Michigan case to address the issue—*Peterson*[19]—was

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9. *See* Arthur Best & Jennifer Middleton, *Winking at the Jury: "Implicit Vouching" Versus the Limits on Opinions About Credibility*, 55 ARIZ. L. REV. 265, 277 (2013).

10. People v. Peterson, 450 Mich. 349, 373, 537 N.W.2d 857, 868, *amended on denial of reh'g*, 450 Mich. 1212, 548 N.W.2d 625 (1995).

11. *See* Best & Middleton, *supra* note 9, at 278.

12. *See id.*

13. *See, e.g.,* Steve Herman & Tiffany R. Freitas, *Error Rates in Forensic Child Sexual Abuse Evaluations*, 3 PSYCH. INJ. & L. 133 (2010).

14. 504 Mich. 230, 934 N.W.2d 693 (2019). Though "culminating" is probably not the most apt description—*Thorpe* was decided twenty-four years after the last preceding case to change the operative law. *See Peterson*, 450 Mich. 349, 537 N.W.2d 857 (1995).

15. 505 Mich. 963, 937 N.W.2d 121(2020) (McCormack, C.J., dissenting) (mem.).

16. People v. Mejia, No. 339426, 2019 Mich. App. LEXIS 266 (Mich. Ct. App. Feb. 14, 2019).

17. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993). *See also Mejia*, 505 Mich. 963, 937 N.W.2d 121, *aff'g* No. 339426, 2019 Mich. App. LEXIS 266 (Mich. Ct. App. Feb. 14, 2019).

18. *Mejia*, 505 Mich. 963, 937 N.W.2d 121.

19. *Peterson*, 450 Mich. 349, 373, 537 N.W.2d 857, 868, *opinion amended on denial of reh'g*, 450 Mich. 1212, 548 N.W.2d 625 (1995).

"ripe for consideration."[20] It is likely only a matter of time until the next *Mejia* comes before the court.

This Note will argue that—contrary to the views of the dissenting justices in *Mejia*—the Michigan Supreme Court should not subject the so-called "child sexual abuse accommodation syndrome" to *Daubert* scrutiny. First, the court would have to reconsider not only *Peterson*, but also *People v. Beckley*,[21] which held that behavioral sciences are not subject to the same admissibility requirements as "hard" sciences.[22] Second, Michigan already has robust protections against prejudice resulting from CSAAS testimony, which only need minor refinements.[23]

II. BACKGROUND

At least three justices of the Michigan Supreme Court agree that expert testimony on CSAAS should be subjected to an admissibility analysis under *Daubert*.[24] In order to evaluate the positives and negatives of this course of action, this Part will lay out the necessary background. It proceeds in four sections. Section A offers a brief sketch of the assumptions and doctrines which form the foundation of the modern law on expert testimony.[25] Particularly, it describes the history and rationale for prohibiting "vouching," i.e., witness testimony offered to bolster the veracity of a party's claims. Section B[26] explains the rationale and purported function of CSAAS as introduced in *The Child Sexual Abuse Accommodation Syndrome*[27] and revised in the article *Abuse of the Child Sexual Abuse Accommodation Syndrome*.[28] Section C offers an overview of landmark child sexual abuse cases from the Michigan Supreme Court.[29] The cases highlight the court's long-running endeavor to limit expert

20. *Id.*

21. 434 Mich. 691, 456 N.W.2d 391 (1990).

22. *See infra* Section III.A.

23. *Id.*

24. With the election of Elizabeth Welch in November 2020, the Michigan Supreme Court will likely have a majority of justices who wish to clamp down on CSAAS testimony. *See* Paul Egan, *Partisan Make-Up of Michigan Supreme Court Flips from GOP to Dems After Tuesday Vote*, DETROIT FREE PRESS (Nov. 4, 2020, 8:06 AM), https://www.freep.com/story/news/politics/elections/2020/11/04/michigan-supreme-court-results/6158401002/ [https://web.archive.org/web/20210131173359if_/https://www.freep.com/story/news/politics/elections/2020/11/04/michigan-supremecourt-results/6158401002/].

25. *See infra Section* II.A.

26. *See infra Section* II.B.

27. Roland C. Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 CHILD ABUSE & NEGLECT 177 (1983) [hereinafter Summit, *Syndrome*].

28. Roland C. Summit, *Abuse of the Child Sexual Abuse Accommodation Syndrome*, 1 J. CHILD SEXUAL ABUSE 153 (1992) [hereinafter Summit, *Abuse*].

29. *See infra Section* II.C.

vouching for the accusers in CSA cases, thereby minimizing prejudice to the defendants. It ends in Section D with a brief introduction to the *Daubert* test, which Michigan courts may soon bring to bear on CSAAS testimony.[30]

A. The Prohibition on Vouching

Judicial use of experts has a long and convoluted history. One of the earliest uses for experts was that of the "special jury"—a group of subject-matter experts chosen to serve as the jury itself.[31] Courts also retained experts to serve as advisors on technical matters, occasionally calling on them to testify.[32] Over time, the truth-finding role of the jury expanded, especially once criminal defendants were allowed to testify on their own behalf.[33] The "black box" of the everyman jury preserved the perceived legitimacy of the system while insulating verdicts from review.[34]

In the current age of the lie-detecting jury, the expert's role in litigation is not to determine veracity, but to assist the fact-finder.[35] This is a particularly fine distinction when psychological experts testify in CSA cases, which so often become "true credibility contest[s]."[36] Consider two similar hypothetical remarks an expert may make in such a case:

> A. "Young children who have been abused often describe sexual practices that are ordinarily unknown to young children who have not been abused. These descriptions are usually truthful."
>
> B. "The young child who is alleged to have been abused described sexual practices that are ordinarily unknown to young children who have not been abused. The child's description is likely to be truthful."[37]

Most courts would distinguish between Statement A ("pattern" testimony) and Statement B ("speaker-specific" testimony), and admit the former while excluding the latter.[38] Courts in Michigan, for example,

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30. *See infra* Section II.D.

31. DAVID H. KAYE, ET AL., THE NEW WIGMORE: A TREATISE ON EVIDENCE: EXPERT EVIDENCE § 1.3 (2nd ed. 2020).

32. *Id.*

33. Best & Middleton, *supra* note 9, at 284.

34. *Id.* at 285.

35. KAYE, *supra* note 31, at § 1.1.

36. People v. Thorpe, 504 Mich. 230, 260, 934 N.W.2d 693, 709 (2019).

37. Best & Middleton, *supra* note 9, at 279.

38. *Id.*

would probably hold that, while both remarks speak to the ultimate issue of the case (allowable under MRE 704),[39] the second remark is inadmissible because such opinions on credibility are not helpful under MRE 702.[40] However, even though Statement A does not reference the hypothetical accuser in question, it could be said to implicitly vouch for her veracity.[41] The next Section will explain Roland Summit's theory of the child sexual abuse accommodation syndrome, a clinical tool which, if invoked irresponsibly, can be a powerful source of implicit vouching.

B. Child Sexual Abuse Accommodation Syndrome

In 1983, Dr. Roland Summit published an article titled, *The Child Sexual Abuse Accommodation Syndrome*.[42] The article was intended to give a "common language" to the various groups of professionals who worked with sexually abused children, including psychologists, social workers, doctors, and lawyers.[43] That common language was necessary, in Summit's view, to "provide a vehicle for a more sensitive, more therapeutic response to legitimate victims of child sexual abuse and to invite more active, more effective clinical advocacy for the child within the family and within the systems of child protection and criminal justice."[44] Without it, the adult decision-makers charged with caring for these vulnerable children would remain aloof to their needs and substitute their self-protective cognitive biases for genuine empathy.[45]

In order to develop the common language of the CSAAS, Summit reviewed his clinical practice and pulled out the five factors he saw as most typical of sexually abused children and most prone to misunderstanding by adults.[46] Over the next four years, he "tested" the nascent theory.[47] The categories of the theory are broken down into two "preconditions"[48] which enable the sexual abuse of children, and three "sequential contingencies,"[49] or variable behaviors that children engage in to protect themselves from their abuser at the expense of alienating themselves from

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39. MICH. R. EVID. 704.

40. MICH. R. EVID. 702. *See also* People v. Peterson, 450 Mich. 349, 376, 537 N.W.2d 857, 869, *opinion amended on denial of reh'g*, 450 Mich. 1212, 548 N.W.2d 625 (1995*)*.

41. Best & Middleton *supra* note 9, at 279.

42. Summit, *Syndrome*, *supra* note 27, at 179–80.

43. *Id.* at 191.

44. *Id.* at 179–80.

45. *Id.* at 179.

46. Summit, *Abuse, supra* note 28, at 155. Summit mentions they are the first five of seven factors. Regrettably, he never explains what the other two factors are.

47. Summit, *Syndrome*, *supra* note 27, at 180.

48. *Id.* at 181.

49. *Id.*

society.[50] The preconditions are secrecy and helplessness.[51] The behaviors (for short) are entrapment and accommodation; delayed, conflicted, and unconvincing disclosure; and retraction.[52]

The precondition of secrecy includes both the family situation that enables the abuse to happen and the threats or disbelief that keep the child silent after the fact.[53] Helplessness refers to the frozen state abused children find themselves in when they cannot flee or fight off their abuser, and this helplessness conflicts with the adult society's sense of free-will.[54] Entrapment and accommodation refer to the abused child's existential quest to somehow achieve a sense of power and control. The child cannot safely conceptualize that a parent might be ruthless and self-serving; such a conclusion is tantamount to abandonment and annihilation. The only acceptable alternative for the child is to believe that she has provoked the painful encounters and to hope that by learning to be good she can earn love and acceptance.[55]

The child takes on responsibility for keeping the family together and submits to the abuser to keep the peace.[56] If the child cannot maintain the façade and lashes out, she predictably earns the opprobrium of the adult-centric society at large.[57]

Summit's view is that most ongoing sexual abuse is not disclosed and, when it is, that disclosure comes as an outgrowth of family tension or by coincidental discovery.[58] Disclosure usually comes late into the abuse because it is only possible once the child has established some independence and the abuser has responded with punishment.[59] Of course, this timing makes her story less believable to every adult audience—her other parent, lawyers, judges, juries, etc.[60]

Finally, Summit informs his readers that "*[w]hatever a child says about sexual abuse, she is likely to reverse it*."[61] The melodrama surrounding the disclosure, the vengeance of the abuser, and the disbelief from all sides is enough to make the child want to take back what she has

50. *Id.* at 180.
51. *Id.* at 181.
52. *Id.*
53. *Id.* at 181–82.
54. *Id.* at 183.
55. *Id.* at 184.
56. *Id.* at 185.
57. *Id.* at 186.
58. *Id.*
59. *Id.*
60. *Id.* at 187.
61. *Id.* at 188 (emphasis in original).

said to restore the status quo.[62] When she does, she confirms for the adults that children are liars and cannot be trusted.[63]

Over the next decade, CSAAS found its way into court rooms around the country as a key component to expert testimony.[64] At the same time, it came to be "both elevated as gospel and denounced as dangerous pseudoscience."[65] In 1993, Summit tried to clear the air around CSAAS and clarify its use in *Abuse of the Child Sexual Abuse Accommodation Syndrome*.[66] He explained that CSAAS was not conceived of "as a laboratory hypothesis or as a designated study of a defined population[,]" rather, "[i]t should be understood without apology that the CSAAS is a clinical opinion, not a scientific instrument."[67] He then went on to list several "abuses" of the theory, with examples from both sides of adversarial proceedings and the adjudicators themselves.[68] While prosecutors took CSAAS as proof that an inconsistent witness was credible[69] (or possibly to imply that an inconsistent witness is more truthful than a consistent one),[70] defense attorneys did not like that it called common-sense beliefs about victim behaviors into question.[71]

Summit opined that his choice of the word "syndrome" lay at the heart of the swirling confusion.[72] He pointed out that "syndrome" is a medical term of art which was ill-suited for his own non-diagnostic purposes[73] and was doubly inappropriate for legal usage, where the causal nature of "syndromes" have to be proven via reliable methodology.[74] He went on to lament that CSAAS was being used as substantive evidence,[75] despite the fact that "CSAAS is meaningless in court discussion unless there has been a disputed disclosure, and in that instance the ultimate issue of truth is the sole responsibility of the trier of fact."[76] He then put forth his view that

62. *Id.*
63. *Id.*
64. A Lexis+ search for "child sexual abuse accommodation syndrome," time-restricted to 1985–1995 yields 144 cases. There is at least one in every state, as well as two in the 8th Circuit and one in the 9th Circuit.
65. Summit, *Abuse*, *supra* note 28, at 153.
66. *Id.*
67. *Id.* at 156.
68. *Id.* at 156–62.
69. *Id.* at 157.
70. *Id.* at 160.
71. *Id.*
72. *Id.* at 157.
73. *Id.*
74. *Id.*
75. *Id.* at 159–60.
76. *Id.* at 158.

CSAAS should only be used in court to rebut myths surrounding delayed or inconsistent disclosure.[77]

Summit ended the article with a discussion of the "ultimate barrier to CSAAS testimony."[78] In his view, this was the practice of the courts to interpret CSAAS as a diagnostic theory, subjecting it to evidentiary hearings in which it cannot survive, by definition.[79] Further, courts have even interpreted anodyne statements such as "delayed disclosure is common in sexually abused children" as veiled references to CSAAS, excluding the expert's testimony on that ground.[80] The next Section will summarize Michigan's developing caselaw with respect to CSAAS testimony, paying special focus on the tension between admitting ostensibly neutral expert testimony and excluding testimony which implicitly vouches for the accuser.

C. The Michigan Supreme Court Grapples with Vouching in CSA Cases

This Section will provide an overview of three landmark CSA cases: *Beckley*,[81] *Peterson*,[82] and *Thorpe*.[83] Taken together, these cases demonstrate that Michigan has nearly eliminated implicit vouching from expert testimony.

1. People v. Beckley

In 1990, the Michigan Supreme Court decided *People v. Beckley*.[84] The opinion offers a probing, multi-faceted analysis. The discussion of *Beckley* is divided into two subsections: one for the majority opinion and one for the dissent.[85]

a. Majority Opinion

In *Beckley*, the defendant was convicted of sexual crimes against his teenaged daughter.[86] The victim did not disclose the assault immediately,

77. *Id.* at 160.
78. *Id.* at 161.
79. *Id.*
80. *Id.* at 162.
81. People v. Beckley, 434 Mich. 691, 456 N.W.2d 391 (1990).
82. People v. Peterson, 450 Mich. 349, 537 N.W.2d 857, *opinion amended on denial of reh'g*, 450 Mich. 1212, 548 N.W.2d 625 (1995).
83. People v. Thorpe, 504 Mich. 230, 934 N.W.2d 693 (2019).
84. *Beckley*, 434 Mich. at 691, 456 N.W.2d at 391.
85. *Id.* at 734, 456 N.W.2d at 410 (Boyle, J. concurring) (noting that she instead would have adopted a more liberal rule).
86. *Id.* at 697, 456 N.W.2d at 393.

instead only remarking that her father had "made passes" at her to her mother and grandmother.[87] The assault was disclosed a year later when the victim wrote about it for a school assignment.[88] In the interim, she had told some of her friends about her father's behavior, but only revealed the actual assault to her boyfriend.[89] She also continued to visit her father during this time.[90] On cross-examination, the defense tried to call the victim's credibility into question by arguing that her behavior was inconsistent with a child who had been sexually assaulted based on (1) her delayed disclosure, (2) how she chose to disclose, (3) her desire to keep visiting her father, and (4) the fact that she initially denied abuse.[91]

At trial, the prosecution called a rape counselor as an expert witness.[92] The court instructed the expert to limit her testimony to any observed behaviors of the victim which would have been consistent with those of a sexually abused child.[93] It expressly disallowed vouching or a determination of whether abuse in fact occurred.[94] It allowed the counselor's testimony because the defendant was ready to attack the victim's credibility based on the four issues listed above.[95]

The expert testified that children who have been sexually abused display common patterns of behavior and commented on the four observed behaviors of the victim.[96] Specifically, she testified that all the behaviors were "typical behavioral characteristics of a victim of sexual abuse."[97] On cross-examination, the expert testified that the victim's memory loss pertaining to some conversations about the assault was not inconsistent with victimized child profile because the victim might have been attempting to minimize the event.[98] Defense counsel also tried to get the expert to explain the victim's allegations in light of other situational and behavioral factors, including that her parents had divorced on bad terms.[99] On redirect examination, the prosecutor invited the expert to describe situational factors and behavioral patterns of the victim that might support a finding of sexual abuse.[100] The expert listed five factors, including the

87. *Id.* at 698, 456 N.W.2d at 393.
88. *Id.*, 456 N.W.2d at 394.
89. *Id.*
90. *Id.*
91. *Id.* at 699, 456 N.W.2d at 394.
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* at 699–700, 456 N.W.2d at 394.
96. *Id.* at 700, 456 N.W.2d at 394.
97. *Id.*
98. *Id.*
99. *Id.* at 700, 456 N.W.2d at 395.
100. *Id.* at 701, 456 N.W.2d at 395.

victim's ability to give explicit details of the sexual activity.[101] At this point, the questioning was clearly no longer limited to the four behavioral issues the defendant raised.[102] The defendant moved to strike the testimony on this ground, but the trial court denied, finding that the defense widened the scope of the expert's testimony first by evoking further behavioral and situational factors such as the divorce.[103]

The companion case involved two experts' testimonies and will help to explain the fault lines between the majority and dissenting opinions. In that case, the prosecution first called a psychiatrist to the stand.[104] She testified about how victimized children behave generally and related that pattern to the victim in the case.[105] Defense counsel tried to elicit testimony that the victim was acting out as a result of being placed in foster care, or to get back at her mother and the defendant for breaking up.[106]

The court limited the prosecution's second witness—a doctor—to testifying only about the behavior patterns of sexually abused children.[107] However, it prohibited "syndrome type" testimony in accordance with Michigan precedent.[108] Such testimony suggests that the alleged victim has been diagnosed with a certain psychological malady based on associated behavioral characteristics.[109] For example, the statement "the child's behavior in school is consistent with child sexual abuse accommodation syndrome" implies that the child is acting like an abused child and is therefore a victim of abuse. Such language amounts to "an [inadmissible] opinion that abuse in fact occurred,"[110] or, in other words, implicit vouching.

The court of appeals held that each experts' testimony was admissible.[111] It reasoned that pattern testimony was admissible solely to rebut an inference that the victim's behavior after the alleged abuse did not line up with that of an actual victim.[112] It further found that the psychiatrist's testimony was not inadmissible because it did not amount to "syndrome" testimony.[113] There were three questions before the Michigan Supreme Court on appeal: (1) whether the experts' testimony was

101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.* at 702, 456 N.W.2d at 395.
105. *Id.* at 703, 456 N.W.2d at 396.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* n.11.
110. *Id.*
111. *Id.* at 704, 456 N.W.2d at 396.
112. *Id.* at 705, 456 N.W.2d at 396.
113. *Id.*, 456 N.W.2d at 397.

unreliable and therefore inadmissible under the *Davis/Frye* test,[114] (2) whether the experts impermissibly vouched for the alleged victim, and (3) whether the testimony prejudiced the defendant.[115]

The court began by analyzing how other jurisdictions evaluate "syndrome" evidence.[116] It explained that CSAAS was the most common "syndrome" advanced by the prosecution and briefly recounted the theory.[117] The court further noted that most jurisdictions only allowed *pattern* evidence, and only to rebut the prosecution or rehabilitate the alleged victim.[118] Such an approach would prohibit the prosecution from using bare syndrome testimony as proof of abuse. The court compared Hawaii's liberal approach and California's conservative approach and charted a course for the "middle ground" which would allow experts to testify about the general behavior patterns of sexually abused children that appeared to conflict with the preconceived behaviors of other crime victims.[119] Thus, it upheld the court of appeals, with the caveat that only behaviors at issue during trial may be explained via CSAAS testimony.[120] For example, if the alleged victim did not recant, CSAAS testimony relating to recantation would be inadmissible.

The court then began its analysis of MRE 702,[121] which sets out the three-part test for admissibility of expert testimony. The expert must be qualified, the evidence must help the trier of fact understand the evidence or determine a fact at issue, and finally, the evidence must be the product of a recognized discipline.[122] The court found that the experts were

114. The "*Davis/Frye*" test gets its name from Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) and the Michigan Supreme Court case—People v. Davis, 72 N.W.2d 269 (Mich. 1955)—which basically assimilated the former into Michigan law. Both cases hold that a scientific methodology or principle must obtain general acceptance amongst practitioners in the respective field before the results it produces may be admitted as evidence. *See also* Robert P. Mosteller, et al., McCormick on Evidence § 203.1 (8th ed. 2020).

115. *Beckley*, 434 Mich. at 705, 456 N.W.2d at 397.

116. *Id.* at 706, 456 N.W.2d at 397.

117. *Id.* n.15.

118. *Id.* at 707, 456 N.W.2d 397–98.

119. *Id.* at 707–10, 456 N.W.2d at 398–99.

120. *Id.* at 710, 456 N.W.2d at 399.

121. MICH. R. EVID. 702 ("If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.").

122. *Beckley*, 434 Mich. at 711, 456 N.W.2d at 399.

qualified because they had the relevant educational and experiential qualifications.[123]

As to the helpfulness requirement, the court reasoned that, given the unique behavioral responses of people who have been sexually assaulted, societal mistrust of rape accusers, and a panoply of popular misconceptions about children and sexual assault, the jury would benefit from expert testimony in such cases.[124] The court buttressed this conclusion by noting that there is often a lack of corroborating witnesses in CSA cases, and young children may not testify adequately for themselves, leading to a major credibility deficit.[125]

Finally, the court considered whether the experts' testimony "derived from a recognized scientific, technical, or other specialized knowledge."[126] The defendants argued that the court should adopt the *Davis/Frye* test to evaluate expert testimony on CSAAS, which would make the theory's reliability a threshold question to admissibility.[127] The court noted that the "*Davis/Frye* test ha[d] not been applied to behavioral sciences[,]"[128] and cited the "fundamental difference between techniques and procedures based on chemical, biological, or other physical sciences as contrasted with theories and assumptions that are based on the behavioral sciences."[129] Thus, the court held that the *Davis/Frye* test was inapplicable so long as the evidence was only offered to explain (not diagnose) certain behavior.[130]

The court then turned to the limitations of CSAAS testimony. The court noted that CSAAS is a therapeutic tool, not a diagnostic one.[131] Because there is no exhaustive set of behaviors which can be attributed to every sexually abused child, CSAAS is an unreliable indicator of that abuse.[132] Thus, CSAAS testimony should be limited to the specific behavior at issue in the trial.[133] Cross-examination and jury instructions can be used to dispel the conclusion that the expert is actually testifying that abuse has occurred when explaining the behaviors.[134] The limitation is also justified because the expert derives her expertise from the

123. *Id.* at 713, 456 N.W.2d at 400.
124. *Id.* at 716, 456 N.W.2d at 401–02.
125. *Id.* at 717, 456 N.W.2d at 402.
126. *Id.* at 718, 456 N.W.2d at 402–03 (internal quotations omitted).
127. *Id.* 456 N.W.2d at 403.
128. *Id.* at 719–20, 456 N.W.2d at 404.
129. *Id.* at 721, 456 N.W.2d at 404.
130. *Id.*
131. *Id.* at 722, 456 N.W.2d at 405.
132. *Id.* at 724, 456 N.W.2d at 406.
133. *Id.* at 725, 456 N.W.2d at 406.
134. *Id.*

knowledge and experience gained from dealing with the abused population, not the particular victim.[135]

The court affirmed because the expert did not give the jury the impression that there was an exhaustive set of behaviors which can be attributed to all sexually abused children and her remarks about the victim's memory came on cross-examination.[136] In the consolidated case, the court reversed because the trial court did not restrict the experts' testimony to behaviors at issue in the case, nor did it consider whether the experts' testimonies would be helpful to rebut a prejudicial inference (because the experts testified in the case-in-chief).[137] The trial court allowed the expert to give testimony beyond what might have been necessary to impart to the jury to understand the victim's behavior.[138] The expert effectively gave the jury a substantive opinion that abuse occurred, thereby becoming an advocate as opposed to an educator.[139]

b. Dissent

Justice Archer would have reined in the expert testimony at issue. He argued that under the majority's rule, there was too much risk that the jury would infer that the expert's testimony amounts to a conclusion that the alleged victim had been abused.[140] In his view, the court failed to account for the fact that expert testimony about the specific alleged victim has marginal probative value, whereas it has the potential to drastically prejudice the defendant.[141] Further, curative jury instructions cannot undo the effect of the testimony.[142] Archer would have reversed because the prosecution could have undermined the misconceptions at issue without repeated references to the alleged victim or the particular facts of the case.[143]

135. *Id.* at 726–27, 456 N.W.2d at 407.
136. *Id.* at 729–32, 456 N.W.2d at 408–09.
137. *Id.* at 732–33, 456 N.W.2d at 409.
138. *Id.*
139. *Id.*
140. *Id.* at 747, 456 N.W.2d at 415 (Archer, J., dissenting).
141. *Id.* at 748, 456 N.W.2d at 416.
142. *Id.*
143. *Id.* at 751, 456 N.W.2d at 417.

2. People v. Peterson

Five years later, the Michigan Supreme Court decided *People v. Peterson*,[144] which "clarif[ied] [the] decision in *Beckley*"[145] and introduced two new points of law:

> (1) [A]n expert may testify in the prosecution's case in chief regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim, and (2) an expert may testify with regard to the consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim's credibility.[146]

The following subsections will outline the majority opinion and the dissent, respectively.

a. Majority Opinion

In *Peterson*, the defendant was convicted of first-degree criminal sexual misconduct against his daughter.[147] The victim testified at trial, describing the sexual acts her father forced upon her and saying she had reported him to her mother, but that her mother did not believe her.[148] She disclosed the abuse to her foster father after living with his family for about a month.[149]

The prosecution called five expert witnesses: two medical doctors and three mental health experts.[150] The first mental health expert, a social worker, testified about several studies indicating that around ninety-eight percent of children's accusations of sexual abuse were truthful, and that the alleged victim behaved in a way that was indicative of sexual abuse.[151] The second mental health expert, another social worker, testified that the alleged victim had been introduced to her *as a sexual abuse victim*.[152] She

144. 450 Mich. 349, 537 N.W.2d 857, *opinion amended on denial of reh'g*, 450 Mich. 1212, 548 N.W.2d 625 (1995).
145. *Id.* at 352, 537 N.W.2d at 859.
146. *Id.* at 352–53, 537 N.W.2d at 859.
147. *Id.* at 353, 537 N.W.2d at 859.
148. *Id.*
149. *Id.*
150. *Id.* at 354, 537 N.W.2d at 859–60.
151. *Id.* at 354–55, 537 N.W.2d at 860.
152. *Id.* at 355, 537 N.W.2d at 860.

also testified as to whether the alleged victim's behavior was in line with other sexually abused children.[153] The final mental health expert was the victim's foster father, who was also a clinical psychologist.[154] He testified that the alleged victim's behaviors and symptoms were in line with other sexually abused children.[155] He also testified that, based on the research he was familiar with, children's accusations of sexual abuse were truthful about eighty-five percent of the time.[156] The court of appeals remanded the case for a new trial pursuant to the ruling in *Beckley*.[157] On remand, the trial judge concluded that *Beckley* was not violated, and if it was, any error was harmless.[158] The court of appeals affirmed the decision, finding no error requiring reversal.[159]

The defendant appealed to the Michigan Supreme Court.[160] The court began its opinion by noting again that it "[did] not endorse or adopt the use of the term 'syndrome'[,]"[161] stressing that CSAAS testimony must be based in the behaviors at issue in the case.[162] It then surveyed the legal landscape contemplated by *Beckley* and offered this summary:

> Seven justices agreed that syndrome evidence is not admissible to demonstrate that abuse occurred and that an expert may not give an opinion whether the complainant is being truthful or whether the defendant is guilty. At least five justices agreed that where syndrome evidence is merely offered to explain certain behavior, the *Davis/Frye* test for recognizing admissible science is inapplicable. We continue to adhere to these holdings and reaffirm their application to child sexual abuse cases.[163]

The disagreements centered around the justifications for and limits of expert testimony.[164] Specifically, the question before the court was "whether the prosecution may present an expert witness in its case-in-chief to describe certain behavioral characteristics recognizable in victims of

153. *Id.*
154. *Id.*
155. *Id.* at 356, 537 N.W.2d at 860.
156. *Id.*
157. *Id.* at 357, 537 N.W.2d at 861.
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.* at 362–63, 537 N.W.2d at 863.
162. *Id.*
163. *Id.* at 369, 537 N.W.2d at 866.
164. *Id.*

child sexual abuse."[165] The court answered in the affirmative.[166] However, it explained that the prosecution can only introduce such testimony if the developing facts would cause the jury to conclude that the behaviors were inconsistent with those of sexually abused children.[167]

One powerful way to attack an alleged victim's credibility is to point out specific post-incident behaviors that fall within the rubric of CSAAS and argue that the presence of such behaviors renders the alleged victim incredible.[168] Thus, the court held that an expert may not testify that the alleged victim's behavior is consistent with those of sexually abused children unless the defendant highlights the post-incident behavior or otherwise attacks the alleged victim's credibility.[169] The court reasoned that:

> [T]he pertinent inquiry is not the timing of the admission, but rather the reason for the use of the evidence, the admission of expert testimony is not confined to the rebuttal stage of proofs and thus may be introduced, as limited by this opinion, in the prosecution's case in chief. When the credibility *of the particular victim* is attacked by a defendant, we think it is proper to allow an explanation by a qualified expert regarding the consistencies between the behavior of that victim and other victims of child sexual abuse.[170]

The court then applied its new rules and found the trial court erred in two areas.[171] First, the court allowed experts to improperly vouch for the victim.[172] Though the experts contradicted each other when testifying about the rate at which children lie about sexual abuse, the jury would have perceived them as impartial voices in the credibility contest and such references to veracity run afoul of MRE 702.[173] Second, the experts were allowed to testify that the victim exhibited behaviors consistent with sexual abuse even though the defense's argument did not rely on whether or not the alleged victim's behavior was inconsistent with a victim of child sexual abuse, and did not challenge the prosecution on that ground.[174] The

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165. *Id.* at 373, 537 N.W.2d at 868.
166. *Id.*
167. *Id.* n.12.
168. *Id.* at 374 n.13, 537 N.W.2d at 868 n.13.
169. *Id.* at 373–74, 537 N.W.2d at 868.
170. *Id.* at 375, 537 N.W.2d at 868–69 (emphasis added).
171. *Id.*, 537 N.W.2d at 869.
172. *Id.* at 375–76, 537 N.W.2d at 869.
173. *Id.*
174. *Id.* at 376–77, 537 N.W.2d at 869.

court held that the errors were harmless, however, in light of the overwhelming evidence against the defendant.[175]

b. Dissent

Justice Cavanagh would adhere to a rebuttal limitation on behavioral testimony and also preclude such a testifying expert from making any reference to the alleged victim or the defendant.[176] He began his dissent by distinguishing between behaviors which are particular to sexual abuse and those which might also arise from other traumatic events.[177] In the former category, he would include "age-inappropriate sexual knowledge; sexual play; precocious behavior; excessive masturbation; preoccupation with genitals."[178] However, he noted that there was no behavior exclusively related with sexual abuse which could serve as a standardized detector of sexual abuse under a *Davis/Frye* test.[179] Thus, he limited his discussion to expert testimony concerning behaviors that were not exclusive to sexual abuse.[180]

Justice Cavanagh then noted that CSAAS was designed to give various groups of professionals a common language.[181] Rather than giving a list of symptoms, CSAAS starts with a known victim of sexual abuse and explains that child's behavioral responses to the abuse.[182] Those explanations form the vocabulary of the inter-disciplinary language.[183] Moreover, because the CSAAS behaviors may be caused by other traumatic events, the behaviors themselves are not necessarily indicative of sexual abuse.[184] Further, Justice Cavanaugh explained:

> [T]here is no material distinction between express testimony that the child has been sexually abused, and implicit testimony that outlines the unreliable behavioral reactions found with sexually abused victims, followed by a list of the complainant's own behavioral reactions, that points out that the two are consistent, and then invites the jury to add up the points to conclude that the child has been sexually abused. The majority is asking this type of

175. *Id.* at 377, 537 N.W.2d at 869.
176. *Id.* at 381, 537 N.W.2d at 871 (Cavanagh, J., dissenting).
177. *Id.* at 382, 537 N.W.2d at 872.
178. *Id.* n.2.
179. *Id.* at 382–83, 537 N.W.2d at 872.
180. *Id.* at 383, 537 N.W.2d at 872.
181. *Id.* at 384, 537 N.W.2d at 873.
182. *Id.*
183. *See generally* Summit, *Syndrome*, *supra* note 27.
184. *Peterson*, 450 Mich. at 384–85, 537 N.W.2d at 873 (Cavanagh, J., dissenting).

> evidence to perform a task that it cannot do. More importantly, the foundation of such testimony does not become more reliable simply because it is offered *after* an attack on credibility by the defendant and not *before*.[185]

Thus, like a physician who says that the x-ray of a broken leg is "consistent with" a multi-story fall, expert testimony that a child's behavior is "consistent with" sexual abuse is an affirmative statement which must be backed up by reliable science.[186]

Justice Cavanagh, therefore, would limit the expert's testimony to saying that a child's behavior is "not inconsistent with" sexual abuse, after the prosecution "pose[d] a hypothetical question . . . paralleling the facts of the case."[187] In his view, that testimony would tell the jury everything they needed to know to evaluate the child's credibility.[188] Moreover, because "[t]he expert has offered no diagnostic evidence . . . *Davis/Frye* remains inapplicable."[189] This testimonial format would also make sure that the expert appeared disinterested, which could be reinforced by a limiting instruction.[190] Such a limiting instruction might go as follows: "consider CSAAS testimony only for the limited purpose of showing, if it did, that the alleged victim's reactions as demonstrated by the evidence were not inconsistent with her having been molested."[191]

Justice Cavanagh agreed with the majority that experts should be allowed to testify in the prosecution's case-in-chief but would

> [M]aintain the *Beckley* course that this testimony should be used solely for rehabilitative purposes . . . the majority's wake will make expert testimony a matter of course in child sexual abuse cases and, if the defendant presents any kind of defense, then the expert can offer diagnosis testimony that is inherently unreliable.[192]

Finally, Justice Cavanagh gave reasons for not allowing an expert to testify about the alleged victim. He reiterated that the "not inconsistent" answer gave the jury all the information needed to determine the alleged

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185. *Id.* at 386, 537 N.W.2d at 873 (emphasis in original).
186. *Id.* at 386–87, 537 N.W.2d at 874.
187. *Id.* at 388–89, 537 N.W.2d at 874–75.
188. *Id.*
189. *Id.* at 389, 537 N.W.2d at 875.
190. *Id.*
191. *Id.* n.12 (quoting People v. Patino, 32 Cal.Rptr.2d 345 (Cal. Ct. App. 1994)).
192. *Id.* at 390, 537 N.W.2d at 875.

victim's credibility.[193] Moreover, allowing the expert to testify about the alleged victim could make the jury think that the expert knows more than he is letting on—that he must believe the alleged victim or else he would not testify.[194]

Applying his proposed rules to the case, Justice Cavanagh would remand for a new trial.[195] The defense was not allowed to call its own experts, or even exculpatory witnesses, even though its theory was to concede the point of sexual abuse, but deny that the defendant was responsible, making the trial a true credibility contest.[196] Instead, the jury heard from three unopposed experts that the alleged victim was sexually abused.[197] When combined with other prejudicial testimony about the defendant's character, it was impossible for Justice Cavanagh to agree that the errors were harmless.[198]

3. People v. Thorpe

The next case to address implicit vouching in CSA cases came in 2019, when the Michigan Supreme Court decided *People v. Thorpe*.[199] The court held that expert witnesses may not testify about the supposed overwhelming rates of veracity in CSA accusations because to do so is to impermissibly vouch for the alleged victim's credibility.[200]

After expounding the facts of the case, the court turned to the events at trial. The prosecution's expert witness was Thomas Cottrell, a social worker, who did not examine the alleged victim or receive specific facts from the case.[201] He testified to the various behavioral responses sexually abused children might exhibit, including the factors they weigh in considering whether to disclose and reasons for delayed disclosure.[202] He also testified that children may lie about sexual abuse when they have a sibling who was abused (because they want to be with them) or when the defendant has abused the other parent (because the child is trying to call attention to it).[203]

193. *Id.* at 391, 537 N.W.2d at 875.
194. *Id.*, 537 N.W.2d at 876.
195. *Id.* at 398, 537 N.W.2d at 878.
196. *Id.* at 394, 537 N.W.2d at 877.
197. *Id.* at 396, 537 N.W.2d at 878.
198. *Id.* at 397, 537 N.W.2d at 878.
199. 504 Mich. 230, 934 N.W.2d 693 (2019).
200. *Id.* at 235, 934 N.W.2d at 696.
201. *Id.* at 239, 934 N.W.2d at 698.
202. *Id.*
203. *Id.*

On cross-examination, defense counsel asked Cottrell if children could lie and manipulate.[204] He answered in the affirmative.[205] On redirect, the prosecutor asked Cottrell whether he knew how often children lie about sexual abuse.[206] He answered that they lied around two percent of the time.[207]

The Michigan Supreme Court first found that defense counsel's question was too general to have opened the door to his specific comment about the veracity of CSA accusations.[208] The court then summarized the caselaw through *Peterson* and applied the rules to the case. It reasoned that Cottrell's testimony that two-to-four percent of children lie about sexual abuse was "nearly identical" to the vouching testimony in *Peterson*.[209] Not only that, but Cottrell's identification of the scenarios in which children lie about sexual abuse might lead one to reasonably conclude that there was no chance the alleged victim was lying.[210] Based on this prejudice and the lack of exculpatory witnesses, the court found that the defendant had shown that Cottrell's testimony on this point was admitted in error.[211]

At oral argument, Chief Justice McCormack asked the defendant's attorney why trial courts were not employing *Daubert* hearings to test the admissibility of CSAAS-related expert testimony.[212] The Chief Justice admitted that the issue did not arise in *Thorpe*,[213] but her open curiosity signaled that the court might have been inclined to review a future case on that ground. The court passed on that chance in *People v. Mejia*,[214] where a narrow majority of Michigan Supreme Court justices denied review for a CSA defendant who claimed he had ineffective assistance of counsel at trial. The defendant argued that his counsel ought to have challenged the prosecution's witness in a *Daubert* hearing or call a counter-expert.[215] The court of appeals had found that the CSAAS testimony was not relevant to the defendant's strategy in the case, so defense counsel's decision to

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204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.* at 240, 934 N.W.2d at 698.
208. *Id.* at 254, 934 N.W.2d at 706.
209. *Id.* at 259, 934 N.W.2d at 708–09.
210. *Id.*, 934 N.W.2d at 709.
211. *Id.* at 260, 934 N.W.2d at 709.
212. Michigan Supreme Court, *156777 People of MI v Joshua Lee Thorpe*, YOUTUBE (Apr. 12, 2019), *https*://www.youtube.com/watch?v=ayfUnrFglsk [https://web.archive.org/web/20210131192302/https://www.youtube.com/watch?v=ayfUnrFglsk].
213. *Id.*
214. 505 Mich. 963, 937 N.W.2d 121 (2020) (McCormack, C.J., dissenting).
215. People v. Mejia, No. 339426, 2019 Mich. App. LEXIS 266, *3 (Mich. Ct. App. Feb. 14, 2019).

neither challenge nor rebut the testimony was not objectively unreasonable.[216]

Chief Justice McCormack, joined by Justices Bernstein and Cavanagh, dissented from the denial.[217] They would have granted the appeal to review the admissibility of CSAAS evidence under *Daubert* and reconsider *Peterson*.[218] They approvingly cited a New Jersey Supreme Court case, *State v. JLG*,[219] which categorically limited CSAAS testimony to discussion of delayed disclosure. [220] That case further noted that "CSAAS is not recognized in the Diagnostic and Statistical Manual of Mental Disorders and has not been accepted by the American Psychiatric Association, the American Psychological Association, or the American Psychological Society."[221] The justices concluded by remarking that they thought Michigan should join the judicial discussion around CSAAS.[222] Before we can assess the benefits and drawbacks of requiring *Daubert* hearings on CSAAS testimony, however, we need to know what *Daubert* says.

D. The Daubert Ruling and its Acceptance in Michigan Courts

In *Daubert*, the United States Supreme Court overruled *Frye* and replaced the "general acceptance" test with a non-exhaustive list of factors for trial courts to apply instead (including general acceptance).[223] The Court based its reasoning on its view that the Federal Rules of Evidence had superseded the *Frye* ruling,[224] but also pointed out that the *Frye* ruling itself was controversial.[225] As opposed to a rigid, binary judgment between "accepted" and "not accepted," the Court instead envisioned a "flexible"[226] inquiry, in which trial judges would bring any number of factors to bear on the question of a method's reliability.[227] The Court listed several

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216. *Id.* at *10–12.
217. *Mejia*, 505 Mich. 963, 937 N.W.2d 121 (2020) (McCormack, C.J., dissenting).
218. *Id.* at 963, 937 N.W.2d at 122.
219. 190 A.3d 442 (N.J. Sup. Ct. 2018).
220. *Id.* at 446.
221. *Id.* at 458.
222. *Mejia*, 505 Mich. at 964, 937 N.W.2d at 122 (McCormack, C.J., dissenting).
223. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 592–94 (1993). *See supra* note 114, for the introduction to the general acceptance test.
224. *Daubert*, 509 U.S. at 587 (noting that FED R. EVID. 702 superseded the *Frye* holding).
225. *Id.* at 586.
226. *Id.* at 594.
227. *Id.*

candidates: whether the method had been (or could be) tested,[228] whether it had been subject to peer review or publication,[229] its known or potential error rate,[230] and its "general acceptance"[231] in the relevant scientific community.

Daubert was not explicitly adopted by Michigan courts until 2004, when MRE 702 was amended to reflect its federal counterpart.[232] This is why it did not come up in the CSA cases listed above. However, the Michigan Supreme Court has never overturned *Beckley*, which held that the *Davis/Frye* test was not applicable to non-diagnostic behavioral science. The question now becomes whether *Daubert* should apply.

The next Section will argue that, while CSAAS testimony has the potential to be drastically prejudicial to the defendant, Michigan courts can limit that potential by tweaking the rules on expert testimony and without holding *Daubert* hearings.[233] Moreover, it will argue that if the Michigan Supreme Court reverses the course from *Beckley* and *Peterson* and rules that CSAAS testimony should pass *Daubert* muster, the Court should take an expert-specific approach rather than the categorical approach found in *J.L.G.*[234]

III. ANALYSIS

In order to properly weigh the benefits and drawbacks to subjecting CSAAS testimony to *Daubert* review, the threshold question must be asked: why apply *Daubert* in the first place? That will be the topic of Part A.[235] Part B will address lingering doubts about the prejudicial impact of CSAAS testimony and offer further refinements to the law to minimize prejudice.[236] This Note will argue that Michigan courts have already minimized much of the potential prejudice such testimony might engender and can make minor refinements to the law to all but eliminate the prejudicial effect.[237]

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228. *Id.* at 593. Note that the Court ran together a couple of concepts which are properly distinct. Namely, it confused testability with falsifiability. *See generally* Susan Haack, *Federal Philosophy of Science: A Deconstruction—And a Reconstruction*, 5 N.Y.U. J. L. & LIBERTY 394 (2010).

229. *Id.*

230. *Id.* at 594.

231. *Id.*

232. Gilbert v. DaimlerChrysler Corp., 470 Mich. 749, 780, 685 N.W.2d 391, 408. (2004).

233. *See infra* Section III.A.

234. *See infra* Section III.B.

235. *See infra* Section III.A.

236. *See infra* Section III.B.

237. *Id.*

A. Reconstructing Beckley

This Part will reconstruct the holding of *Beckley* and explain how the notion of epistemic contextualism dooms any *Daubertian* inquiry into the reliability of CSAAS. Recall that *Beckley* distinguished between behavioral sciences, such as psychology, and "hard" sciences such as chemistry or biology.[238] The court explained: "[p]sychologists, when called as experts, do not talk about things or objects; they talk about people. They do not dehumanize people with whom they deal by treating them as objects composed of interacting biological systems. Rather, they speak of the whole person."[239] The court noted that it had previously admitted "unreliable" psychological testimony pertaining to a criminal defendant's insanity without subjecting it to the *Davis/Frye* test.[240] It then noted that "syndrome" evidence is based on clinical observations of individual people,[241] implicitly contrasting such observations with more rigorous observations of non-human phenomena.

The court went on to reason that psychological experts do not testify about highly technical details, but rather focus on "probable responses to traumatic events."[242] And inconsistency and unpredictability are the familiar hallmarks of human behavior,[243] unlike more deterministic phenomena. At this point the court made a telling distinction between the "techniques and procedures" of the hard sciences and the "theories and assumptions" of behavioral sciences.[244] The justices certainly understood that biologists employ theories and assumptions just as much as psychologists employ techniques and procedures. Thus, when the court held that explanatory psychological testimony was not subject to the *Davis/Frye* test,[245] it was best understood as saying that non-human things are knowable in a singular, rigorous way. Human beings, on the other hand, have agency and their motives can be explained in any number of reasonable, though conflicting, ways.

The epistemic distinction the court made in *Beckley* roughly corresponds to the divide between *epistemic contextualism* and

238. *See supra* Section II.C.2. *See also* People v. Beckley, 434 Mich. 691, 720, 456 N.W.2d 391, 404 (1990).

239. *Beckley*, 434 Mich. at 720, 456 N.W.2d at 404.

240. *Id.* (citing People v. Martin, 386 Mich. 407, 192 N.W.2d 215 (Mich. 1971), *superseded by statute*, 1975 Mich. Pub. Acts 180 *as recognized in*, People v. Carpenter, 464 Mich. 223, 627 N.W.2d 276 (2001)).

241. *Id.* at 721, 456 N.W.2d at 404.

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

invariantism. Invariantism is the view that propositions expressed by a subject's knowledge sentences ("I know that . . . ") do not change their truth values in different contexts.[246] Contextualism, on the other hand, is the view that the truth value of knowledge sentences depends partially on the context in which the speaker expresses them.[247] So, for example, a person might know that their Volvo is parked in Unit B when they remember driving into the structure, taking a ticket, and walking next door to work. That same person may not know that their car is parked in Unit B when they hear that a notorious Volvo thief is on the loose nearby. The changed circumstance has defeated the person's justifications for knowledge.

Beckley, properly understood, recognizes that what a psychotherapist knows in a clinical context can be different from what they know as an expert witness in a CSA case. We can use some of the *Daubert* factors to illustrate. Take peer review: many experts testifying in CSA cases are forensic psychologists[248] or experimental psychologists[249] and some are clinical therapists.[250] Each one of these groups is going to have a very different relationship to the extant literature, giving different weight to the results gleaned from it. This is because each group uses different methods to achieve different goals. Whereas experimental psychologists use empirical methods to classify and study human behavior on a broad level,[251] forensic psychologists employ their craft to determine the veracity of abuse allegations,[252] and clinical therapists employ a more subjective

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246. *See* Alexander Dinges, *Epistemic Invariantism and Contextualist Intuitions*, 13 EPISTEME 219 (2016). Note that Dinges defends invariantism as an epistemological position in this article. This Note will not delve into the philosophical dispute between contextualism and invariantism. Rather, it will show how the ruling in *Beckley* can be understood on contextualist grounds which, in turn, elucidate Summit's motivations in propounding CSAAS. This judicial-clinical synchronicity explains why CSAAS testimony should not be subjected to *Daubert* review. In other words, we will assume contextualism, contextually.

247. Patrick Rysiew, *Epistemic Contextualism*, STAN. ENCYCLOPEDIA PHIL. ARCHIVE, (Winter 2020), https://plato.stanford.edu/archives/win2020/entries/contextualism-epistemology [https://web.archive.org/web/20210227225929/https://plato.stanford.edu/archives/win2020/entries/contextualism-epistemology/].

248. *See generally* Sarah F. Shelton, *Evaluating the Evaluation: Reliance Upon Mental Health Assessments in Cases of Alleged Child Sexual Abuse*, 15 NEV. L.J. 566 (2015).

249. *See generally* Julie A. Buck, et al., *Expert Testimony Regarding Child Witnesses: Does It Sensitize Jurors to Forensic Interview Quality?*, 35 L. & HUM. BEHAV. 152 (2011).

250. *See generally* MYERS, *supra* note 7.

251. *See Experimental Psychology Studies Humans and Animals*, AM. PSYCH. ASS'N (2014), https://www.apa.org/action/science/experimental [https://web.archive.org/web/20210406003312/https://www.apa.org/action/science/experimental].

252. *See* Shelton, *supra* note 248, at 568.

approach to help their clients with distressing matters.[253] So we can imagine that an experimental psychologist whose study has been critiqued by a peer will feel a sense of professional responsibility to retract (no matter how promising his results seemed initially) whereas a clinical psychologist who has stumbled upon an unorthodox technique will hesitate to give it up if his client is benefitting.

Falsifiability plays out much the same way. Forensic and experimental psychologists live and die by the null hypothesis. A clinical therapist, on the other hand, will have no problem accepting that "this child is acting out because he was abused" and "this child is withdrawn and morose because he was abused" can both be true at different times. Subtle patterns of behavior on an individual level don't lend themselves well to "falsifiability" analyses.

There are related problems with testability. For example, CSAAS puts forth the idea that child victims live in a secretive environment. How could an experimental psychologist test that hypothesis? Presumably, by finding a family with a sexually abused child and surveying the child (and/or the family) about certain family dynamics. However, then there is the difficulty of defining secretive conditions in such a way that meta-analysis would be possible. And there would be little reason to believe that the family would give reliable answers, much less reason to think that the child could articulate a high-level understanding of his or her situation.

Hence the limitation in Michigan caselaw that *explanatory*, i.e., non-diagnostic testimony, need not be subjected to a stricter reliability review. Such a limitation brings parity to the clinical and testimonial settings by eschewing talk of causal mechanisms. In a clinical setting, the psychotherapist may know that the child client is acting in a way that allows them to bear their sexual abuse without knowing any verifiable facts about that abuse. So it is in the judicial setting, where an expert may testify about those trauma responses without testifying that abuse occurred. This cross-contextual parity is surely what Summit had in mind when he proposed the common language unfortunately named "the child sexual abuse accommodation syndrome"—though he probably envisioned too much cross-talk amongst therapists, experimental psychologists, and legal actors.

While the inclined justices on the Michigan Supreme Court have recognized that overhauling the law on CSAAS testimony will require reconsidering *Peterson*,[254] they have apparently not considered the import of *Beckley*. Indeed, the language in the *Mejia* dissent elides the distinction between hard and soft sciences, and the difference between diagnostic and

253. *See id.*
254. *See supra* Section II.C.5.

non-diagnostic theories.[255] This is perhaps due to the fact that Michigan is solidly in the post-*Daubert* era, where judges have been tasked with (and grown comfortable with) probing inquiries into the bases of scientific testimony. Yet, the reliance on the Diagnostical and Statistical Manual of Mental Disorders is troubling since, according to a preeminent scholar, "[t]there is no psychological test that detects sexual abuse" and "[t]here is no Sexually Abused Child Syndrome" because "[m]any sexually abused children demonstrate no outward behavioral manifestations of abuse."[256]

However, it must be reiterated that CSAAS testimony is problematic and has the potential to engender grave prejudice. The next Part will explain the potential for prejudice and offer some refinements to expert testimony rules the Michigan Supreme Court might adopt to minimize it.

B. Simple Solutions to Serious Problems

Recall that psychological experts in Michigan may testify about the behaviors of sexually abused children in the prosecution's case-in-chief, in order to rebut misconceptions the jurors may hold.[257] Additionally, they may testify that the alleged victim is acting consistently with the general population of sexually abused children in order to rebut an attack on the credibility of the alleged victim based on those behaviors.[258] On the other hand, Michigan limits prejudice to the defendant by disallowing overt references to "syndromes."[259] Yet, while "syndrome" language is intensely prejudicial, because it implies an etiology which cannot be proven by CSAAS, allowing the expert to testify "offensively" in the case-in-chief is also prejudicial.

The problem arises with the assumption that jurors hold certain misconceptions at all. In a 670-participant college study, McGuire and London found that "[m]any participants (42.9%) believed victims never tell. For those believing victims do disclose, 31.8% believed disclosure

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255. *See* People v. Mejia, 505 Mich. 963, 937 N.W.2d 121, 122 (2020) (McCormack, C.J., dissenting).

256. *See* MYERS, *supra* note 7. *See also*, Katherine McGuire & Kamala London, *Common Beliefs About Child Sexual Abuse and Disclosure: A College Sample*, 26 J. CHILD SEXUAL ABUSE 175, 179 (2017) ("According to Bruck, Ceci, and Principe (2006), most children who are sexually abused actually are behaviorally asymptomatic. In addition, behavioral characteristics lack specificity in diagnosing sexual abuse in that many nonabused children show similar characteristics (Kellogg & the Committee on Child Abuse and Neglect, 2005)").

257. *See generally* People v. Peterson, 450 Mich. 349, 537 N.W.2d 857, *opinion amended on denial of reh'g*, 450 Mich. 1212, 548 N.W.2d 625 (1995).

258. *Id.*

259. People v. Beckley, 434 Mich. 691, 703, 456 N.W.2d 391, 396 (1990).

would not take place until the victim reached adulthood."[260] The authors continued:

> When participants were asked to indicate their beliefs regarding denial of CSA, 86.1% reported they believed that most sexually abused children would deny abuse occurred if someone asked them about it directly. Participants were also asked about the possibility of recanting allegations of CSA. The majority of participants (64.6%) believed that most sexually abused children will recant their allegations of abuse later. Similarly, 65.9% of participants believed that most victims would recant their allegations of abuse if asked directly by a formal authority.[261]

When asked to give reasons why some children would not disclose, participants cited embarrassment, lack of understanding, fear of harm, thinking they will not be believed, and not wanting to get the abuser in trouble.[262] There was no similar study available in 1983, when Summit first theorized CSAAS, but even assuming he was right about how adult society viewed child accusers then, his assessments seem off the mark now. Indeed, one might imagine that Summit's article is now required reading on campus.[263] Of course, lay people do not have an intuitive knowledge of all things CSA.[264] But experts testify in order to help jurors understand things they do not already know.[265] And having an unnecessary confirmation of their beliefs will likely implicitly vouch for the alleged victims, especially if those alleged victims testify about their motivations to delay or recant disclosure. This form of expert testimony is not beneficial and should not be allowed.

The notion that evidence rules should change with cultural and social conditions is not farfetched. For example, in *Lannan v. State*, Indiana retired its "depraved sexual instinct" exception, which allowed other putative child victims to bolster the testimony of the accuser by describing

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260. McGuire & London, *supra* note 256, at 184. While the study had limitations—the authors note that the psychological profession does not understand laypeople's decision-making process well, and the participants were receiving college credit (*see id.* at 187–88)—it should be noted that these limitations likely pale in comparison to the limitations faced by researchers studying CSA itself.

261. *Id.*

262. *Id.* at 184–85.

263. *See id.* at 182 ("Participants' age ranged from 18 to 49 years old with many participants (82.7%) under the age of 21 ($M = 19.46$ years, $SD = 2.39$ years)."). It is possible that the participants' young median age had an effect on their opinions, in addition to the stated limitations of the study.

264. *See id.* at 186–87 for examples of what the participants got wrong.

265. *See* MICH. R. EVID. 704.

the acts the defendant allegedly inflicted on them.[266] The court noted that the exception was developed in a less jaded age.[267] The idea of powerful men abusing their status in society to prey upon children was too scandalous to entertain without damning evidence.[268] Ironically, once crimes against children became more well-known, the rationale behind the exception carried less weight.[269]

Turning back to our issue, the Michigan Supreme Court should further limit expert testimony on rebuttal to the effect that an alleged victim's behavior is "not inconsistent with" behaviors normally associated with sexually abused children. Myers identifies three problems with "consistent with" testimony. First, it is the "functional equivalent of a direct opinion on abuse," because "'[c]onsistent with' is the 'customary cautious professional jargon' for causation."[270] The second problem is that "many symptoms that are consistent with sexual abuse are also consistent with nonabuse."[271] Myers gives the example of nightmares, which are perfectly consistent with normal child development.[272] Testimony about such overlapping symptoms could exaggerate their probative value.[273] Finally, the third problem is that it obscures the "twin issues of symptom frequency and population sizes."[274] In order to have any idea how probative a given symptom is, fact-finders must know how often the symptom is found in abused and non-abused populations, and how large those populations are in proportion to each other.[275] The results of these meticulous inquiries can be counterintuitive.[276] I cannot improve upon Myers' illustration:

> Consider the imaginary city of Dillville. Ten thousand female children between 3 and 10 years of age live in Dillville. Twenty percent of Dillville's girls are sexually abused—a number that finds support in the literature. There are 2,000 sexually abused 3- to 10-year-old girls in Dillville, and 8,000 nonabused girls. A 5-year-old Dillville girl starts wetting the bed at night, and medical reasons for the bed wetting are ruled out. Sexual abuse causes

266. Lannan v. State, 600 N.E.2d 1334 (Ind. 1992).
267. *Id.* at 1338.
268. *Id.*
269. *Id.*
270. MYERS, *supra* note 7, at § 6.11 (quoting *United States v*. Denoyer, 811 F.2d 436 (8th Cir. 1987).
271. *Id*.
272. *Id.*
273. *Id.*
274. *Id.*
275. *Id.*
276. *Id.* at § 6.10.

> some potty-trained children to wet the bed. Does this child's bed wetting tend to prove sexual abuse? Assume bed wetting in toilet trained children is observed in 20 percent of sexually abused children and 5 percent of nonabused children. We would expect to find 400 sexually abused bed wetters among Dillville girls. Yet, because 5 percent of nonabused children wet the bed, and because there are many more nonabused than abused children, we find an equal number of bed wetter—400—among the nonabused Dillvillers. If all we know about a child is that she wets the bed, she is as likely to be nonabused as abused.
>
> Tinkering with the numbers reinforces the point that psychological symptoms seen in abused as well as nonabused children say little about sexual abuse. Suppose 10 percent of sexually abused and 5 percent of the nonabused girls wet the bed. Now 200 sexually abused girls wet the bed and 400 nonabused girls do so. A bed-wetter is twice as likely to be nonabused as abused.[277]

Much of the foregoing discussion should sound familiar, since it is remarkably similar to many of the points Justice Cavanagh made in his dissent in *Peterson*. Perhaps the only missing piece is Justice Cavanagh's observation that, unlike "consistent with" testimony, "not inconsistent with" testimony is rebuttal language.[278] It does not attest to what *is* true, but what *might* be true.[279]

Finally, we should consider the case that has engendered "reliability envy" amongst the justices of our supreme court. In her *Mejia* dissent, Chief Justice McCormack approvingly cites *State v. J.L.G.*,[280] to justify

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277. *Id.*

278. People v. Peterson, 450 Mich. 349, 388, 537 N.W.2d 857, 874, *opinion amended on denial of reh'g*, 450 Mich. 1212, 548 N.W.2d 625 (1995) (Cavanagh, J., dissenting).

279. *Id.* Recall that Justice Cavanagh would limit expert testimony to sexually abused children in general, and forbid testimony about the alleged victim in particular. I believe that adopting this stricture would be unnecessary given the other refinements I discuss in this section. Moreover, the idea that a prosecutor could "pose a hypothetical question to the expert paralleling the facts of the case and ask whether such testimony is 'inconsistent with' sexual abuse behavioral reactions," *id.* at 874–75, seems to have the exact same problem as "consistent with" testimony, albeit to a lesser extent. In this context, and depending on how close the parallel is, such testimony could very well amount to a substantive opinion. Forbidding the expert from testifying about the alleged victim in particular does not change the fact that the case is about the particular alleged victim, nor the fact that the jury will be constantly drawing analogies to the particular alleged victim.

280. 190 A.3d 442 (N.J. 2018).

her desire to apply *Daubert* to CSAAS testimony.[281] In that case, the defendant had been convicted, lost on appeal, and petitioned for certification before the New Jersey Supreme Court.[282] The petition was granted to determine whether CSAAS testimony should have been excluded on the grounds that it was unduly prejudicial to the defendant and that it was not reliable.[283] The supreme court remanded the case to the trial court to hold a hearing determine the admissibility of CSAAS testimony under N.J.R.E. 702 and in light of scientific studies.[284] Before we discuss the mechanics of the hearing in that case, however, it will be beneficial to contrast the model jury instructions from that case with the model jury instructions in Michigan.

The then-current jury instructions in *J.L.G.* begin with a statement that "[t]he law recognizes that stereotypes about sexual assault complaints may lead some of you to question [complainant's] credibility" based on a delayed disclosure.[285] This arguably primes the jury to take counterintuitive facts as substantive evidence. Another example of unwitting priming comes towards the end, where the instructions give an illustration to help jurors understand their charge. The jury is invited to consider the case of a person who does not report property theft for several years.[286] They are reminded that their "common sense" might lead them to believe the property owner was lying.[287] And in that type of case, "no expert would be offered to explain the conduct of the victim, because that conduct is within the common experience and knowledge of most jurors."[288] Setting aside the empirical question of how many potential jurors are actually personally acquainted with property theft, this illustration goes too far. By implicitly contrasting the alleged victim with the late-disclosing property owner, the instructions send the message to the jury that the less they understand the delayed disclosure, the more likely it is to be true. Recall that this was one of Summit's observed "abuses" of CSAAS.[289]

Moreover, the juries given the instructions were probably confused, since the court seemed to be telling them that CSAAS was both diagnostic

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281. People v. Mejia, 505 Mich. 963, 937 N.W.2d 121 (McCormack, C.J., dissenting). New Jersey is a *Frye* state, but the mechanics of the hearing would likely be similar, since the primary concern is reliability in both cases.

282. *J.L.G.*, 190 A.3d at 449.

283. *Id.*

284. *Id*.

285. *Id*. at 454.

286. *Id.* at 455.

287. *Id.*

288. *Id.*

289. *See supra* Section II.B.

and non-diagnostic. Despite the fact that the instructions repeatedly admonish the jury to not take expert testimony as substantive evidence that abuse did (or did not) occur, the word "syndrome" is repeated numerous times, including in the phrase "[t]he Accommodation Syndrome, *if proven* . . . ."[290] As Summit lamented, CSAAS is not actually a "syndrome,"[291] and non-diagnostic theories are simply not proven, in the legal sense of the term.[292]

There are a few other confounding factors to note. First, keep in mind that these instructions span nearly two full pages in the Atlantic Reporter (when block-quoted).[293] And the borderline hypnotic effect of the repetitious phrases, "you may consider . . . you may not consider . . ." certainly did not help with their digestibility. Finally, the instructions provide that the judge summarize the testimony of any experts who have testified.[294] Not being psychologists, judges might (understandably) add a judicial gloss to such testimony that could easily be prejudicial to the defendant.

Now consider Michigan's model jury instructions:

> Limiting Instruction on Expert Testimony (in Child Criminal Sexual Conduct Cases)
>
> > (1) You have heard [name expert]'s opinion about the behavior of sexually abused children.
> >
> > (2) You should consider that evidence only for the limited purpose of deciding whether [name complainant]'s acts and words after the alleged crime were consistent with those of sexually abused children.
> >
> > (3) That evidence cannot be used to show that the crime charged here was committed or that the defendant committed it. Nor can it be considered an opinion by [name expert] that [name complainant] is telling the truth.

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290. *J.L.G.*, 190 A.3d at 455 (emphasis added).

291. *Id.*

292. *See* MYERS, *supra* note 7, at § 6.16 ("The purpose of nondiagnostic syndromes is *not* to establish etiology, but to describe reactions to *known* events." (emphasis in original)).

293. *J.L.G.*, 190 A.3d at 454–55.

294. *Id.*

Use Note

> This instruction is intended for use where expert testimony is offered to rebut an inference that a child complainant's behavior is inconsistent with that of actual victims of child sexual abuse. *People v Beckley*, 434 Mich 691, 725, 456 NW2d 391 (1990).[295]

It is easy to see that these instructions are elegant in comparison, besides being more understandable and neutral. The word "syndrome" does not appear in the instructions. Neither are jurors primed to accept counterintuitive facts as substantive evidence. And the judge does not summarize the experts' testimony—whatever juries draw from the testimony is theirs to interpret.

So, while the Michigan Supreme Court may be tempted to follow New Jersey's lead and apply stricter evidentiary scrutiny to CSAAS testimony, it should recognize the vastly different situation it finds itself in compared to its sister court. Michigan does not have to overcome such egregious jury instructions. Now let us consider the *J.L.G.* evidentiary hearing itself.

On remand from the New Jersey Supreme Court, the trial court heard testimony from experts on both sides for four days.[296] In its opinion reviewing the evidence, the supreme court divided the testimony into seven areas: CSAAS in general, the five components of CSAAS, and denial, which the court analyzed on its own.[297] A full analysis of the court's findings is beyond the scope of this Note. For our purposes, it will be sufficient to note that the court only found delayed disclosure to be reliable enough to be admissible under N.J.R.E. 702.[298] The mountain of evidence was substantial, with the only counterpoints being that the studies often rely on retrospective memory and that the research does not show that CSA causes delayed disclosure.[299]

The Michigan Supreme Court should keep in mind the words of one of the defense's expert witnesses, Dr. Maggie Bruck: "[r]elying on questionable statistics from difficult-to-conduct surveys will not solve the

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295. LIMITING INSTRUCTION ON EXPERT TESTIMONY (IN CHILD CRIMINAL SEXUAL CONDUCT CASES) § 20.29 (MICH. SUP. CT. COMM. ON MODEL CRIM. JURY INSTRUCTIONS 2014)

296. *J.L.G.*, 190 A.3d at 449.

297. *Id.* at 457–62.

298. *Id.* at 463.

299. *Id.* at 460.

problem [of assessing the veracity of CSA claims]."[300] Rather, the court can supplement its new rule on the inadmissibility of "consistent with" testimony by restricting experts to only testifying about cases within their own practice or organization. Such a limitation would cut down on the "battle of the experts," which would have a couple of benefits. The first is that the admissibility of expert testimony will not be pegged to an ever-changing field of study. Admittedly, that is a problem for every form of scientific testimony. But *at this moment* the issue seems uniquely prevalent in CSA-related experimental psychology. For example, a Google Scholar search for "flavor preferences" yields 162,000 results.[301] The same search

300. Kamala London et al., *Analyzing the Scientific Foundation of Child Sexual Abuse Accommodation Syndrome: A Reply to Lyon et al.*, 38 BEHAV. SCI. & L., 648, 652 (2020). The authors' suggestions to the psychological community apply equally well to the legal community, and deserve to be reproduced in full:

> There is no doubt that patterns of disclosure, denial and recantation are not easily and accurately captured by extant data. There remains, however, a major question about the degree to which these results shed light on particular cases in court. In our view, they do not permit experts to proclaim that abused children "always" delay disclosure or "never" report immediately. The fact is that children may not disclose abuse until a forensic interview, or they may deny previous disclosures, or they may recant all previous disclosures. Resorting to the literature on whether these patterns are frequent is not sufficient and may be misleading. Rather, the details of the case need to be presented within an established scientific framework. For instance, if there is explicit evidence that a child was pushed to disclose (either explicitly or implicitly through a variety of other suggestive techniques), then the disclosure is simply "unreliable." Likewise, when a child recants, it is important to determine how the disclosure came about in the first place. If the child "spontaneously" claimed abuse and then recanted it, one must determine if there were any extraneous circumstances that led to either the original disclosure or the subsequent recantation. Relying on questionable statistics from difficult-to-conduct surveys will not solve the problem.
>
> At the same time, there is a significant scientific database on factors that promote true and false disclosures that allows the expert to propose scientifically based hypotheses for why children may remain silent or change their testimony, and then to rule these hypotheses in or out based on the facts of the case. It is clear that although there are a number of improvements in design, definitions and inference to be implemented in issues of patterns of disclosure, the literature on external factors that silence children or that provoke statements is blooming. This is where we should be concentrating when we draw conclusions about children's abuse status.

301. GOOGLE SCHOLAR (last searched Apr. 5, 2021), https://scholar.google.com/scholar?hl=en&as_sdt=0%2C23&q=flavor+preferences [https://web.archive.org/web/20220421201720/https://scholar.google.com/scholar?hl=en&as_sdt=0%2C23&q=flavor+preferences].

for "sleep deprivation" yields 799,000 results.[302] "Child sexual abuse" yields 2,240,000 results[303]—even beating out "addiction" at 2,150,000 results.[304] And keep in mind that a clinical therapist is not charged with designing, implementing, or analyzing these studies, and could be giving a slanted view to the jury, which is primed to see him or her as an expert.

The other benefit of the limitation is that it will increase the quality of cross-examination. For example, suppose that the defense counsel has suggested the victim lacks credibility based on an initial recantation. The expert might then opine that victims frequently recant. In turn, defense counsel might ask how many cases the expert remembers where an alleged victim recanted, and how many of those cases were substantiated. Such a discussion is certain to give the jury a more complete understanding of the expert's basis for his testimony and allow them to weigh it effectively. In this manner, the attack may be rebutted without a reference to the wider world of research, and the question can be defined in such a way as to maximize relevance to the case. Consider the fact that it is unlikely that every study cited for a proposition at trial defines "delayed disclosure," "denial," or "recantation" the same way. Limiting the expert to testifying about her own experience will allow for case-specific questioning of these behaviors ("Have you ever heard of a child disclosing to the mail man?"), which will help the jury understand the particular case at bar.

IV. CONCLUSION

In conclusion, the Michigan Supreme Court should further limit CSAAS testimony, but not for the reason you might think. It should not limit the testimony because the theory is unreliable (such an assessment is analytically misguided given the non-diagnostic nature of the theory). Rather, it should adopt the analysis of Justice Cavanagh's dissent in *Peterson* and shore up the rebuttal limitation by eliminating "consistent with" testimony. Further, it should limit experts to testifying from their

302. GOOGLE SCHOLAR (last searched Apr. 5, 2021), https://scholar.google.com/scholar?hl=en&as_sdt=0%2C23&q=sleep+deprivation [https://web.archive.org/web/20220421201821/https://scholar.google.com/scholar?hl=en&as_sdt=0%2C23&q=sleep+deprivation.

303. GOOGLE SCHOLAR (last searched Apr. 5, 2021), https://scholar.google.com/scholar?hl=en&as_sdt=0%2C23&q=child+sexual+abuse [https://web.archive.org/web/20220421201830/https://scholar.google.com/scholar?hl=en&as_sdt=0%2C23&q=child+sexual+abuse].

304. GOOGLE SCHOLAR (last searched Apr. 5, 2021), https://scholar.google.com/scholar?hl=en&as_sdt=0%2C23&q=addiction&btnG= [https://web.archive.org/web/20220421201855/https://scholar.google.com/scholar?hl=en&as_sdt=0%2C23&q=addiction&btnG=.

own (or their organization's) experience, as opposed to citing general experimental studies.