OPINION AND EXPERT TESTIMONY
(TEXAS RULES OF EVIDENCE – TITLE VII)

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APPLICABLE RULES FROM TEXAS RULES OF EVIDENCE TITLE VII

RULE 701. OPINION TESTIMONY BY LAY WITNESSES

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

RULE 702. TESTIMONY BY EXPERTS

If 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 for of an opinion or otherwise.

RULE 703. BASES OF OPINION TESTIMONY BY EXPERTS

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by, reviewed by, or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

RULE 704. OPINION ON ULTIMATE ISSUE

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

RULE 705. DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION

(a) **Disclosure of Facts or Date.** The expert may testify in terms of opinion or inference and give the expert's reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event disclose on direct-examination, or be required to disclose on cross-examination the underlying facts or data.

(b) **Voir dire**. Prior to the expert giving the expert's opinion or disclosing the underlying facts or data, a party against whom the opinion is offered upon request in a criminal case shall, or in a civil case may, be permitted to conduct a *voir dire* examination directed to the underlying facts or data upon which the opinion is based. This examination shall be conducted out of the hearing of the jury.

(c) **Admissibility of opinion**. If the court determines that the underlying facts or data do not

provide a sufficient basis for the expert's opinion under Rule 702 or 703, the opinion is inadmissible.

(d) Balancing test; limiting instructions. When the underlying facts or data would be inadmissible in evidence, the court shall exclude the underlying facts or data if the danger that they will be used for a purpose other than as explanation or support for the expert's opinion outweighs their value as explanation or support or are unfairly prejudicial. If otherwise inadmissible facts or data are disclosed before the jury, a limiting instruction by the court shall be given upon request.

I. EXPERT TESTIMONY UNDER THE RULES OF EVIDENCE

Adopted in 1986, the Rules of Criminal Evidence in many ways expanded the admissibility of evidence in criminal trials. Expert testimony, addressed in Article VII, was no exception. The general rule for admissibility is Rule 702, which reads:

> If 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.[1]

A. The "Early Days"

The first Court of Criminal Appeals case addressing admissibility under Rule 702 was the 1989 case of *Pierce v. State*.[2] *Pierce* considered the admissibility of psychological evidence questioning the validity of an eyewitness identification.[3] Drawing from the commentary of the Federal Rules of Evidence, the court set forth the test:

> The threshold determination for admitting expert testimony is whether the "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue ... ." ... "There is no more certain test for determining when experts may be used than the commonsense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute." When opinions are excluded, it is because they are unhelpful and therefore superfluous and a waste of time.[4]

The court held that expert testimony on eyewitness identification simply did not assist the trier of fact and therefore it was not an abuse of discretion for the trial court to exclude it.[5]

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[1] TEX. RULES CRIM. EVID. Rule 702.

[2] 777 S.W.2d 399 (Tex. Cr. App. 1989).

[3] *Id.* at 414.

[4] *Id.* (quoting TEX. RULES CRIM. EVID. Rule 702; FED. RULES EVID. Rule 702 advisory committe's note)(citations omitted).

[5] *Id.* at 415.

A year later, the Court of Criminal Appeals issued two seminal cases interpreting the Rules of Criminal Evidence: *Montgomery v. State*,[6] and *Duckett v. State*.[7] Both of these cases recognized that with the advent of the Rules, the presumptive *in*admissibility of evidence had been reversed. *Duckett*, which specifically addressed psychiatric expert testimony, expanded upon the observations in *Pierce* while at the same time incorporating the new rule of presumptive admissibility:

> The test [for admissibility of expert testimony] is whether the expert's testimony, if believed, will assist the untrained layman trier of fact to understand the evidence or determine a fact in issue and whether it is otherwise admissible under general rules of relevant admissibility. To the extent the evidence is relevant to a matter or issue in the case, our evidentiary rules now require the party opposing the proffered evidence not only demonstrate the negative attributes of the evidence but also show how these negative attributes substantially outweigh the probative value of the evidence.[8]

Thus, if an opinion would "assist the trier of fact" under Rule 702, the only real limits as to what expert opinions would be admissible under the Rules were relevance under Rule 401, and unfair prejudicial effect under Rule 403. The has proven to generally be the case, although it must be noted by all who are honest that where state's evidence is concerned, the courts have tended to err on the side of admissibility (testimony on future dangerousness, child sexual abuse accommodation syndrome), whereas the opposite is true where defense evidence is concerned (fallibility of eyewitness identification, coerced confessions).

B. The Rule 702 "Scientific Evidence"Analysis Begins to Take Shape

As the reader is no doubt aware, the Criminal and Civil Rules of Evidence were merged in 1998. Thus, at least theoretically, decisions of the Texas Supreme Court should carry roughly the same weight as those from the Texas Court of Criminal Appeals as pertains to evidentiary issues where the rules do not differentiate between civil and

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[6]810 S.W.2d 372 (Tex. Cr. App. 1991)(on rehearing).

[7]797 S.W.2d 906 (Tex. Cr. App. 1990).

[8]*Id.* 797 S.W.2d at 914 (emphasis in original).

criminal trials (such as Rule 702). This has not proven to be true.[9] Nonetheless, the following cases, some of which are civil cases, are cited enough by the Court of Criminal Appeals so that they can be considered authoritative. They trace the evolution of the treatment of expert testimony under the Rules of Evidence after *Duckett* and *Montgomery*.

***Kelly v. State*, 824 S.W.2d 568 (Tex. Cr. App. 1992).**

Kelly was the first case in Texas to evaluate DNA evidence under the Rules of Criminal Evidence. The Court of Criminal Appeals decided that Rule 702 has taken the place of (and rendered obsolete) the *Frye* "general acceptance" test.[10] Building upon the reasoning first discussed in *Pierce v. State*[11] and *Duckett v. State*,[12] the court reiterated that the admission of expert testimony will depend upon whether that testimony is "helpful" to the jury in its determination of a fact in issue.[13] In order for expert testimony to be helpful, the court declared, it must be both "reliable" and "relevant."[14] Additionally,

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[9]The inherent bias alluded to in the previous paragraph is reversed on the civil side, although it is perhaps not as pronounced as we see in the criminal cases. The court's analysis on the civil cases also tends to run much deeper, which may be a by-product of the deposition versus the 705(b) hearing and the state of the record made by each.

[10]*See Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

[11]777 S.W.2d 399 (Tex. Cr. App. 1989).

[12]797 S.W.2d 906, 910 (Tex. Cr. App. 1990). Prior to the Rules of Evidence, expert testimony had been presumed inadmissible unless its proponent could show that its probative value outweighed its prejudicial effects. *See, e.g.*, *Holloway v. State*, 613 S.W.2d 497, 500-01 (Tex. Cr. App. 1981). With the advent of the Rules of Evidence, this presumption was turned around. The *Duckett* court recognized this dramatic shift in the law. *See Duckett*, 797 S.W.2d at 914 ("To the extent the evidence is relevant to a matter or issue in the case, our evidentiary rules now require the party opposing the proffered evidence not only *demonstrate* the negative attributes of the evidence but also show how these negative attributes *substantially outweigh* the probative value of the evidence."). *Id.* (emphasis in original). The "assist the jury" requirement, though, existed in the case law prior to the enactment of the Rules. *See, e.g.*, *Holloway*, 613 S.W.2d at 501.

[13]*See Kelly*, 824 S.W.2d at 572.

[14]*See id.* The *Kelly* court spoke of relevance and reliability as though they were the same thing, with relevance being a natural consequence of reliability. Later cases separate these requirements a bit more, keeping the *Kelly* reasoning on reliability and giving relevance the same

the trial court should conduct a Rule 403 analysis on any testimony that would be otherwise admissible.[15]

The court then expanded upon the reliability requirement. "As a matter of common sense," the court declared, "evidence derived from a scientific theory, to be considered reliable, must satisfy three criterial in any particular case: (a) the underlying scientific theory must be valid; (b) the technique applying the theory must be valid; and (c) the technique must have been properly applied on the occasion in question."[16] The burden of proving these three factors *by clear and convincing evidence* would fall upon the proponent of the evidence.[17] The proof, however, may be presented to the trial court outside the presence of the jury.[18] The court then listed a non-exclusive set of factors to be considered by the trial court in determining reliability:

(1) the extent to which the underlying scientific theory and technique are accepted as valid by the relevant scientific community, if such a community can be ascertained;

(2) the qualifications of the expert(s) testifying;

(3) the existence of literature supporting or rejecting the underlying scientific theory and technique;

(4) the potential rate of error of the technique;

(5) the availability of other experts to test and evaluate the technique;

(6) the clarity with which the underlying scientific theory and technique can be explained to the court; and

(7) the experience and skill of the person(s) who applied the technique on the

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meaning as under Rule 401, et seq. *See, e.g.*,

[15]*See id.*

[16]*Id.* at 573 (citing P. GIANELLI & E. IMWINKELRIED, SCIENTIFIC EVIDENCE § 1-1 (1986)).

[17]*See id.*

[18]*See id.* (citing Rule 104(a) and (c)).

occasion in question.[19]

***Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993).**

The plaintiffs in this case were infants who had been born with birth defects, allegedly caused by their mothers' ingestion of Bendectin during pregnancy. They wanted to present expert testimony dependent partially upon reanalyses of epidemiological studies.[20] The studies themselves had been published, but the expert's reanalyses of them were not.[21]

In analyzing the proffered testimony in light of the Rules of Evidence, the Supreme Court set out a framework very similar to that which the Court of Criminal Appeals had set out the year before in *Kelly*.[22] *Daubert* went further than *Kelly*, however, in discussing the relevance analysis.[23] The Court noted that in order to be "helpful" to the jury, the evidence must not only be reliable but must be "sufficiently tied to the facts of the case that it will aid the jury in resolving [the] factual dispute."[24] This the Court referred to this as the "fit" of the evidence to the facts.[25] Essentially, not only must the evidence be reliable, it must be reliable for the *purpose to which it is directed*.[26] To illustrate, the Court gave the following example:

> The study of the phases of the moon ... may provide valid scientific 'knowledge' about whether a certain night was dark, and if darkness is a fact in issue, the knowledge will assist the trier of fact. However, (absent creditable

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[19]*Id.* (citing 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 702[03] (1991)).

[20]Explain what this is — is it a retrospective study of pre-existing data which is not a scientifically sound as a prospective study using clinical trials and controls?

[21]*See Daubert,* 509 U.S. at 583-584.

[22]*See id.* at 589-95 (especially Section II.C of the majority opinion, which discusses the "reliability" analysis).

[23]*See id.* at 591.

[24]*Id.* at 591 (quoting *United States v. Downing*, 753 F.2d 1224, 1242 (3rd Cir. 1985)).

[25]*See id.*

[26]*See id.* ("'Fit' is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes.").

> grounds supporting such a link), evidence that the moon was full on a certain night will not assist the trier of fact in determining whether an individual was unusually likely to have behaved irrationally on that night.[27]

"Rule 702's 'helpfulness' standard," the Court concluded, "requires a valid scientific connection to the pertinent inquiry *as a precondition to admissibility*."[28]

The Supreme Court remanded the case back to the Ninth Circuit, which in turn found that the expert testimony was not reliable.[29] Analyzing the reanalyses in light of the new Rule 702 framework, the court determined that the evidence was unreliable for two main reasons — first, the experts had conducted their research in anticipation of litigation, and second, there was no peer review or publication of the of the experts' research.[30] For these reasons, the experts' testimony was declared unreliable and hence unhelpful to the jury. In addition, the work was declared irrelevant because it actually, for scientific reasons (unreliability), did not support the proposition to which it was aimed — that Bendectin caused birth defects.[31]

***E.I. du Pont de Nemours & Co., Inc. v. Robinson*, 923 S.W.2d 549 (Tex. 1995).**

This was a warranty and DTPA case over a product ("Benlate" -- a fungicide for trees and plants) made by DuPont and which the Robinsons alleged damaged their pecan orchard.[32] The Robinsons produced an expert on causation, a Dr. Whitcomb, who conducted the following research on the Robinsons' orchard:

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[27]*Id.* at 591.

[28]*Id.* at 591-92 (emphasis added).

[29]*See Daubert v. Merrill Dow Pharmaceuticals, Inc*., 43 F.3d 1311, 1322 (9th Cir. 1995)(on remand).

[30]*See id.* at 1317-18 ("[T]he only review the plaintiffs' experts' work has received has been by judges and juries, and the only place their theories and studies have been published is in the pages of federal and state reporters.).

[31]*See id.* at 1322.

[32]*See Robinson,* 923 S.W.2d at 550-51.

(1) he inspected the orchard;[33]

(2) he visited the orchard and conducted an inspection that lasted 2 1/4 hours;

(3) he "visually scanned the orchard, which consists of about 200 trees;"

(4) he closely viewed forty to fifty trees;

(5) he took pictures.[34]

Dr. Whitcomb's opinion was that the Benlate was contaminated with certain substances, including "sulfonylurea herbicides" at the time it was manufactured by DuPont and that these substances are what damaged the Robinsons' trees.[35]

Dr. Whitcomb did not, however, do other procedures that the court seemed to think were important:

(1) he did no soil or tissue testing;

(2) he did not research relevant weather conditions;

(3) he did not test any of the Benlate still possessed by the Robinsons;

(4) he had not visited any other pecan orchards for the purpose of investigating possible Benlate damage;

(5) he admitted in his deposition that he did not know what levels of sulfonylurea herbicides it would take to harm pecan trees;

(6) he acknowledged in his deposition that there was no consistent pattern of damage to the trees.[36]

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[33]Done, the court pointed out, "at the request on their attorney." *Id.* at 551.

[34]*See id.* at 551.

[35]*See id.*

[36]*See id.* at 550-51.

Dr. Whitcomb's ultimate opinion that the Benlate had damaged the trees[37] was based on a method called "comparative symptomology" — "because the Robinsons' pecan trees exhibited symptoms common to other plants treated with allegedly contaminated Benlate under dissimilar growing conditions, Benlate, the only common factor among all the plants, caused the damage."[38]

The court also reviewed the research personally conducted by Dr. Whitcomb, finding it insufficient as well.[39] Dr. Whitcomb had conducted an experiment[40] in connection with suspected Benlate contamination in Florida.[41] The experiment was conducted on plants in an environment controlled to simulate Florida. He divided the plants in two, one experimental and one control, keeping all other conditions identical. Dr. Whitcomb discovered that the plants treated with Benlate had stunted growth and discolored leaves.[42] Based on this experiment, Dr. Whitcomb arrived at the opinion that it was the Benlate that caused the symptoms. Dr. Whitcomb had also previously sampled ten boxes of Benlate and found that the chemical makeup was not consistent across the samples (although the testing apparently did not reveal the presence of sulfonylurea herbicides). Dr. Whitcomb also conducted a review of the relevant literature and had reviewed internal DuPont documents concerning other Benlate claims.[43]

The trial court excluded the testimony on the grounds that it was not reliable and would not assist the trier of fact.[44] The court of appeals reversed, however, *holding that any weakness in the expert's methods was a matter of weight and credibility for the jury, not admissibility for the trial judge*.[45]

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[37]Which, the court again felt it necessary to note, was delivered to the Robinsons' attorney. *See id.*

[38]*Id.*

[39]*See id.*

[40]At the request of another attorney, as the court pointed out. *See id.*

[41]*See id.*

[42]*See id.*

[43]*See id.* at 551-52.

[44]*See id.* at 552.

[45]*See id.*

The Texas Supreme Court disagreed. Like the United States Supreme Court and the Texas Court of Criminal Appeals before it, the court held that in order for expert testimony to be *admissible*, it must be "relevant" and "reliable."[46] In setting up its own analytical framework, the court basically adopted the relevance analysis from *Daubert*[47] and incorporated the reliability analysis of *Kelly*.[48] The inquiry should be directed toward

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[46]*See id.* at 556. "[W]e hold that in addition to showing that an expert witness is qualified, Rule 702 also requires the proponent to show that the expert's testimony is relevant to the issues in the case and is based upon a reliable foundation. The trial court is responsible for making the preliminary determination of whether the proffered testimony meets the standards set forth today. ... Rule 702 contains three requirements for the admission of expert testimony: (1) the witness must be qualified; (2) the proposed testimony must be 'scientific ... knowledge'; (3) the testimony must 'assist the trier of fact to understand the evidence or to determine a fact in issue.'" *Id.*

[47]"The requirement that the proposed testimony be relevant incorporates traditional relevancy analysis under Rules 401 and 402 of the Texas Rules of Civil Evidence. To be relevant, the proposed testimony must be 'sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute. Evidence that has no relationship to any of the issues in the case is irrelevant and does not satisfy Rule 702's requirement that the testimony be of assistance to the jury. It is thus inadmissible under Rule 702 as well as under Rules 401 and 402." *Id.* at 556 (citations omitted).

[48]"In addition to being relevant, the underlying scientific technique or principle must be reliable. Scientific evidence which is not grounded 'in the methods and procedures of science' is no more than 'subjective belief or unsupported speculation.' Unreliable evidence is of no assistance to the trier of fact and is therefore inadmissible under Rule 702.

There are many factors that a trial court may consider in making the threshold determination of admissibility under Rule 702. These factors include, but are not limited to:

(1) the extent to which the theory has been or can be tested;

(2) the extent to which the technique relies upon the subjective interpretation of the expert;

(3) whether the theory has been subjected to peer review and/or publication;

(4) the technique's potential rate of error;

(5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and

(6) the non-judicial uses which have been made of the theory or technique.

the "underlying principles and methodology" of the expert's testimony, not the conclusions he has reached.[49] The burden of satisfying the requirements of Rule 702 falls upon the proponent of the evidence.[50] Once the Rule 702 requirements are met, the trial court must then conduct a Rule 403 analysis.[51] The trial court's decision whether to admit the evidence or not is reviewed for abuse of discretion.[52]

The supreme court held that in this case, the trial court did not abuse its discretion and reversed the court of appeals' decision. The testimony failed the reliability prong of Rule 702. In arriving at its determination, the court went through a list of deficiencies that fell into three major areas: (1) Dr. Whitcomb did not rule out other possible causes for the damage to the trees;[53] (2) Dr. Whitcomb's analysis was faulty and result-oriented;[54] (3) Dr. Whitcomb was retained in anticipation of litigation;[55] and (4) there was

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Id. at 557.

[49]"The trial court's role is not to determine the truth or falsity of the expert's opinion. Rather, the trial court's role is to make the initial determination whether the expert's opinion is relevant and whether the methods and research upon which it is based are reliable. There is a difference between the reliability of the underlying theory or technique and the credibility of the witness who proposes to testify about it. An expert witness may be very believable, but his or her conclusions may be based upon unreliable methodology. As DuPont points out, a person with a degree should not be allowed to testify that the world is flat, that the moon is made of green cheese, or that the Earth is the center of the solar system." *Id.* at 558.

[50]*See id.*

[51]*See id.* at 557.

[52]*See id.* at 558.

[53]"Dr. Whitcomb conducted no testing to exclude other possible causes of the damage to the Robinsons' pecan orchard, even though he admitted in his deposition that many of the symptoms could be caused by something other than Benlate. For instance, Dr. Whitcomb stated in his deposition that any number of things, including root rot, could have caused chlorosis, a yellowing of the leaves, on the Robinsons' trees. An expert who is trying to find a cause of something should carefully consider alternative causes. *Dr. Whitcomb's failure to rule out other causes of the damage renders his opinion little more than speculation.*" *Id.* at 558-59 (emphasis added)(citations omitted).

[54]*See id.* "Dr. Whitcomb's testimony is also problematic because of his methodology. Scientists may form initial hypotheses. *However, 'coming to a firm conclusion first and then doing research to support it is the antithesis of this [scientific] method.' ...* In this case, Dr. Whitcomb had no proof that the Robinsons' Benlate was contaminated with [sulfonylurea

no proof that "comparative symptomology" was an "appropriate and reliable method to determine chemical contamination."[56]

As to this final reason, the court drew a distinction between a conclusion and the method used for reaching that conclusion.[57] The court found that the method of comparative symptomology had not been subjected to peer review or publication, had not been subjected to a rate of error analysis, and there was no evidence that it had been generally accepted by members of the relevant scientific community.[58] Importantly, the court refused to consider as sufficient evidence Dr. Whitcomb's *assertions* that the technique was generally accepted and relied upon by other experts in his field.[59]

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herbicides], and no knowledge as to what amount or concentration of [sulfonylurea herbicides] would damage pecan trees. *Nonetheless, he determined, without any testing to exclude other causes, that because the Robinsons applied Benlate to their trees, and the trees showed signs of damage, the Benlate must have been contaminated.*" *Id.* at 559 (emphasis added)(citations omitted).

[55]*See id.* "The fact that an opinion was formed solely for the purposes of litigation does not automatically render it unreliable. However, 'when an expert prepares reports and findings before being hired as a witness, that record will limit the degree to which he can tailor his testimony to serve a party's interests.' On the other hand, opinions formed solely for the purpose of testifying are more likely to be biased toward a particular result." *Id.* (citations omitted).

[56]*See id.*

[57]*See id.* "[A statistician] found that there was a ninety-nine percent probability that Dr. Whitcomb's conclusion that Benlate damaged the plants in Dr. Whitcomb's study was correct. However, the approach we adopt today inquires whether the particular *technique or methodology* has been subjected to a rate of error analysis." *Id.* (emphasis added).

[58]*See id.* At the end of his analysis, Justice Gonzalez almost casually throws in the observation that "[a]lso not sufficient to show general acceptance of Dr. Whitcomb's theory or technique is the fact that other organizations were *studying* the effects of Benlate on plant life." *Id.* (emphasis in original). Should this be taken to mean that *all* the research on a topic must be *complete* before Rule 702 can be satisfied?

[59]*See id.* "Dr. Whitcomb's self-serving statements that his methodology was generally accepted and reasonably relied upon by other experts in the field are not sufficient to establish the reliability of the technique and theory underlying his opinion." *Id.* (citing *Daubert*, 43 F.3d at 1316 (upon remand)(stating that an "expert's bald assurance of validity is not enough"). Should this be taken to mean that the Rule 702 predicate cannot be made through the testimony of the expert? Is testimony plus journal articles enough? Assuming this rule is uniformly and evenly applied, this has some interesting implications for criminal trials.

***Jordan v. State*, 928 S.W.2d 550 (Tex. Cr. App. 1996).**

This case represented a further exploration by the Court of Criminal Appeals into the subject of relevance for purposes of Rule 702. The expert evidence at issue was testimony regarding the fallibility of eyewitness identification — testimony that, because of prior rulings of the court, was as a practical matter impossible to get admitted at trial.[60]

The reason for the difficulty in getting this type of evidence admitted was always that the testimony could not be sufficiently shown to "fit" the facts of the case.[61] Usually, the expert had not interviewed the eyewitness(es),[62] had failed to take into account a sufficient number of conditions at the scene[63] or had failed to review certain pieces of evidence possessed by the state.[64] In fact in *Jordan*, the court of appeals observed that the expert did not consider "*all* of the factors affecting the reliability of the eyewitness' identification ... ."[65] The expert did not consider the length of time the witnesses saw the defendant, the lighting conditions under which they saw him, or the physical descriptions given by the witnesses to the police before the photo lineups were given to those witnesses. The expert also did not interview the witnesses or examine the original photo

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[60]*See Pierce v. State*, 777 S.W.2d 399, 414 (Tex. Cr. App. 1989); *Rousseau v. State*, 855 S.W.2d 666, 685-86 (Tex. Cr. App. 1993); *and see also Jordan v. State*, 877 S.W.2d 902, 905-06 (Tex. App. — Fort Worth), *reversed*, 928 S.W.2d 550 (Tex. Cr. App. 1996)(the court of appeals analysis in light of *Pierce* and *Rousseau*). The court of appeals pointed out that "[t]he *Pierce* court ... was not saying that this type of testimony should be excluded in all cases." *Jordan*, 877 S.W.2d at 905 (citing *Pierce*, 777 S.W.2d at 416 n.5). The simple fact is, though, that in light of the analysis of *Pierce* and *Rousseau*, it would have been virtually impossible to show that this type of testimony "fit" the facts of the case. The first Jordan opinion out of the court of appeals is a good case in point. *See Jordan*, 877 S.W.2d at 905 ("However, Dr. Finn's testimony did not consider all of the factors affecting the reliability of the eyewitness' identification ... ."). The rub, of course, is that the "factors" any expert could consider are virtually innumerable.

[61]*See Pierce*, 777 S.W.2d at 414-16; *Rousseau*, 855 S.W.2d at 668.

[62]*See e.g.*, *Rousseau*, 855 S.W.2d at 686.

[63]*See Jordan*, 877 S.W.2d at 905.

[64]*See id.*

[65]*Id.* (emphasis added).

lineup used by the witnesses in making the identification.[66] The court of appeals held that the trial court had not abused its discretion in disallowing the testimony.

The Court of Criminal Appeals refused to hold Jordan to such a high burden. In a 7-2 opinion, the court held that the court of appeals had erred, stating that the expert's testimony was "sufficiently tied to the facts to meet the simple requirement that it be 'helpful' to the jury on the issue of eye witness reliability,"even though he did not interview the witnesses or examine certain pieces of evidence, and even though he "did not testify to *every conceivable factor* that might affect the reliability of the eyewitness identification."[67] The requirement that the evidence "fit" the facts of the case, the court continued, should not be so strict that the expert is required to "address every foreseeable issue pertinent to his testimony that might be raised by the relevant facts ... ." This, the court held, is more than Rule 702 requires.[68] "The expert must make an effort to tie pertinent facts of the case to the scientific principles which are the subject of his testimony[, but] [e]stablishing this connection is not so much a matter of proof ... as a matter of application."[69] It was apparent that relevance was not to be as difficult to show as reliability. The court remanded the case to the court of appeals to consider that "more difficult question."[70]

On remand, Jordan argued that this type of expert testimony should be "subjected to less scrutiny because the psychological sciences are not susceptible to the measurable results often associated with 'hard science.'"[71] The Fort Worth Court of Appeals applied the straight *Kelly*/*Daubert*/*Robinson* "scientific evidence" analysis, interpreting the Court of Criminal Appeals' remand to determine whether the testimony was "scientifically

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[66]*See id.*

[67]*Jordan*, 928 S.W.2d at 555-56.

[68]*See id.* ("The question under Rule 702 is not whether there are some facts in the case that the expert failed to take into account, but whether the expert's testimony took into account enough of the pertinent facts to be of assistance to the trier of fact on a fact in issue. That some facts were not taken into account by the expert is a matter of weight and credibility, not admissibility.").

[69]*Id.*

[70]*See id.*

[71]*Jordan v. State*, 950 S.W.2d 210, 211-12 (Tex. App. — Fort Worth, 1997, pet. ref'd).

reliable" as a mandate to do so.[72] Jordan failed to carry his burden.

In keeping with the "scientific evidence" analysis, the court's stated reasons for declaring the evidence unreliable were:

(1) the failure by Jordan to prove the "validity of the scientific theories underlying [the expert's] opinion;"

(2) Jordan's failure to prove "the validity of the techniques used to apply the theories;"

(3) the expert's work has never been subjected to peer review;

(4) the expert had never himself conducted any experiments to test the validity of the scientific theory; and

(5) there was no evidence of rate of error.[73]

The court of appeals agreed with the trial court that, because the evidence was not reliable, *it was not admissible*.[74] Jordan's petition for discretionary review to the Court of Criminal Appeals was refused on January 28, 1998.

C. The Problem of "Non-Scientific" Expert Testimony

It should be obvious that testimony such as that offered in *Jordan* could never satisfy the standard developed in the *Kelly*, *Daubert* and *Robinson* cases. As was the case with *Kelly*, *Daubert* limited its own application to "scientific" evidence.[75] Expressly limiting its discussion (and the scope of the opinion) to scientific knowledge, the United States Supreme Court spent a considerable amount of time discussing what "scientific knowledge" is and finally concluded that it is knowledge derived from "the methods and

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[72]*See id.*

[73]*See id*. at 212.

[74]*See id*. at 212-13.

[75]*Kelly* actually characterized and analyzed DNA as "novel scientific evidence." *See id.* at 573. The Court of Criminal Appeals, in *Hartman v. State*, 946 S.W.2d 60 (Tex. Crim. App. 1997), however, held that the analytical framework would apply to "all scientific evidence," thus ending any debate as to whether the analysis would only apply to "novel" scientific evidence. *See id.* at 62-63.

procedures of science" — literally that the expert's opinions must have been derived by the scientific method.[76] This, the Court held, is a *condition of admissibility*.[77] *Robinson* also expressly dealt with "scientific evidence."

Later cases would be faced with this and other perceived limitations to the *Kelly* analytical framework, not the least of which was the question of whether *Kelly* applied at all to expert testimony other than that which could be classified as "scientific." Not surprisingly, the courts would ultimately hold that such non-scientific expert knowledge could be judged by a test that is more suited for that type of field. In Texas, also not surprisingly, that decision would come in a case where the state of offering the evidence.

D. *Nenno, Gammill* & *Kumho Tire*: Soft Science Arrives.

Just as was the case with *Kelly*, the Texas Court of Criminal Appeals, in *Nenno v. State*,[78] delivered an opinion on "soft science" expert testimony before the United States Supreme Court did. Shortly thereafter, the Texas Supreme Court spoke to the issue in *Gammill v. Jack Williams Chevrolet, Inc*.,[79] And just was in the case with *Kelly*, *Robinson* and *Daubert, Nenno*, *Gammill* and *Kumho Tire Co., v. Carmichael*,[80] the Supreme Court's statement on the matter, are substantially the same, at least as the law goes.

Nenno v. State, 970 S.W.2d 549 (Tex. Crim. App. 1998).[81]

In *Nenno* the defendant contended the trial court erred in admitting expert testimony in the punishment stage of his death penalty trial from Kenneth Lanning, a Special Agent in the Behavioral Science Unit of the FBI who specialized in studying the

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[76]*Id.* at 589-90, n.8.

[77]*See id.*

[78]970 S.W.2d 549 (Tex. Crim. App. 1998), *overruled on other grounds, State v. Terrazas*, 4 S.W.3d 720 (Tex. Crim. App. 1999).

[79]972 S.W.2d 713 (Tex. 1998).

[80]526 U.S. 137 (1999).

[81]*overruled on other grounds, State v. Terrazas*, 4 S.W.3d 720 (Tex. Crim. App. 1999).

sexual victimization of children, regarding the defendant's future dangerousness.[82] He argued that Lanning's testimony was inadmissible under Rule 702 because it failed to meet the *Kelly* test.[83] In language far different from that of the court of appeals in *Jordan*, the Court of Criminal Appeals observed:

> Courts must keep in mind the statement in *Daubert* that the inquiry is "a flexible one." The general approach of the Federal Rules--and by inference, the state rules that were patterned upon them--was to "relax[ ] the traditional barriers to opinion testimony." The Supreme Court, while setting out four factors relevant to scientific reliability, cautioned that "we do not presume to set out a definitive checklist or test." The factors listed were based upon "general observations" about the nature of scientific evidence. And, the standard of evidentiary reliability set forth was derived from Rule 702's requirement that the expert's testimony pertain to "*scientific* knowledge." While various federal circuits may sometimes purport to disagree with each other, a close examination of the cases shows a general agreement about two important propositions: (1) *Daubert*'s prescription that trial judges act as gatekeepers" in determining the reliability of expert evidence applies to all forms of expert testimony, and (2) the four factors listed in *Daubert* do not necessarily apply outside of the hard science context; instead methods of proving reliability will vary, depending upon the field of expertise.
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> ...
>
> When addressing fields of study aside from the hard sciences, such as the social sciences or fields that are based primarily upon experience and training as opposed to the scientific method, *Kelly* 's requirement of reliability applies but with less rigor than to the hard sciences. To speak of the validity of a "theory" or "technique" in these fields may be roughly accurate but somewhat misleading.
>
> The appropriate questions are:
>
> (1) whether the field of expertise is a legitimate one,
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> (2) whether the subject matter of the expert's testimony is within the scope of that field, and
>
> (3) whether the expert's testimony properly relies upon and/or utilizes the

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[82]*See id.*, 970 S.W.2d at 562.

[83]*See id.* at 560.

principles involved in the field.

> These questions are merely an appropriately tailored translation of the *Kelly* test to areas outside of hard science. And, hard science methods of validation, such as assessing the potential rate of error or subjecting a theory to peer review, may often be inappropriate for testing the reliability of fields of expertise outside the hard sciences.[84]

In a footnote the paragraph immediately above, the Court of Criminal Appeals rather ominously observed, "We do not categorically rule out employing such factors in an appropriate case."[85]

***Gammill v. Jack Williams Chevrolet, Inc*., 972 S.W.2d 713, 726 (Tex.1998).**

The Texas Supreme Court followed similar reasoning in concluding that nonscientific expert testimony must meet the reliability standards required in *Daubert/Robinson*, but recognized the specific *Daubert/Robinson* factors for assessing the reliability of scientific evidence "cannot always be used with other kinds of expert testimony."[86] The court stated:

> We conclude that whether an expert's testimony is based on "scientific, technical or other specialized knowledge," *Daubert* and Rule 702 demand that the district court evaluate the methods, analysis, and principles relied upon in reaching the opinion. The court should ensure that the opinion comports with applicable professional standards outside the courtroom and that it "will have a reliable basis in the knowledge and experience of [the] discipline."
>
> Rule 702' s fundamental requirements of reliability and relevance are applicable to all expert testimony offered under that rule. Nothing in the language of the rule suggests that opinions based on scientific knowledge should be treated any differently than opinions based on technical or other specialized knowledge.
>
> That said, it is equally clear that the considerations listed in *Daubert* and

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[84] *Id.* at 561 (citations omitted).

[85] *Id.* at 561 n.9.

[86] *Id.* at 726.

in *Robinson* for assessing the reliability of scientific evidence cannot always be used with other kinds of expert testimony. To borrow [another] court's analogy, a beekeeper need not have published his findings that bees take off into the wind in a journal for peer review, or made an elaborate test of his hypotheses. Observations of enough bees in various circumstances to show a pattern would be enough to support his opinion. But there must be some basis for the opinion offered to show its reliability. Experience alone may provide a sufficient basis for an expert's testimony in some cases, but it cannot do so in every case. A more experienced expert may offer unreliable opinions, and a lesser experienced expert's opinions may have solid footing. The court in discharging its duty as gatekeeper must determine how the reliability of particular testimony is to be assessed. As the United States Supreme Court recently stated [], "[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.[87]

***Kumho Tire Co., LTD. v. Carmichael*, 526 U.S. 137 (1999).**

In *Kumho Tire*, the United States Supreme Court was confronted with the testimony of an expert in "tire failure analysis."[88] The trial court excluded the testimony on the grounds that it did not pass the Daubert reliability test, although it noted that the testimony could more accurately be described as "technical" rather than "scientific."[89]

Engineering testimony rests upon scientific foundations, the reliability of which will be at issue in some cases. In other cases, the relevant reliability concerns may focus upon personal knowledge or experience. As the Solicitor General points out, there are many different kinds of experts, and many different kinds of expertise. See Brief for United States as *Amicus Curiae* 18-19, and n. 5 (citing cases involving experts in drug terms, handwriting analysis, criminal *modus operandi*, land valuation, agricultural practices, railroad procedures, attorney's fee valuation, and others). Our emphasis on the word "may" thus reflects *Daubert*'s description of the Rule 702 inquiry as "a flexible one." *Daubert* makes clear that the factors it mentions do *not* constitute a "definitive

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[87]*Id.* at 725-26.

[88]*See Kumho Tire Co., LTD. v. Carmichael*, 526 U.S. 137, 142 (1999).

[89]*See id.* at 145.

checklist or test." And *Daubert* adds that the gatekeeping inquiry must be "tied to the facts" of a particular "case." We agree with the Solicitor General that "[t]he factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony." Brief for United States as *Amicus Curiae* 19. The conclusion, in our view, is that we can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert*, nor can we now do so for subsets of cases categorized by category of expert or by kind of evidence. Too much depends upon the particular circumstances of the particular case at issue.

Daubert itself is not to the contrary. It made clear that its list of factors was meant to be helpful, not definitive. Indeed, those factors do not all necessarily apply even in every instance in which the reliability of scientific testimony is challenged. It might not be surprising in a particular case, for example, that a claim made by a scientific witness has never been the subject of peer review, for the particular application at issue may never previously have interested any scientist. Nor, on the other hand, does the presence of *Daubert*'s general acceptance factor help show that an expert's testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy.[90]

[90] *Id.* at 150-51 (citations omitted).

II. THE INCONSISTENT ANALYSIS OF "SOFT" SCIENCE

With the advent of the *Nenno* soft science framework, creativity in offering expert testimony has certainly flourished. Specialities like "play therapy" and "art therapy" have been given serious consideration by the courts. Unfortunately, the latitude provided the gate-keeper, along with the much relaxed soft science standards has bred much inconsistency as well, which becomes institutional once cases are affirmed on appeal under the abuse of discretion standard. For a period of time, while play therapy was being considered by juries, eyewitness identification testimony, which seems much more scientifically grounded, was constantly excluded under a nearly impossible requirement that it "fit" the facts of the case to the point where the expert would have almost had to be at the incident (*ala Pierce*, 777 S.W.2d 399 (Tex. Crim. App. 1989) *supra*, Section I). At least as to eyewitness identification testimony, the times are a-changin' somewhat. *See, e.g., Stephenson v. State*, 226 S.W.3d 622, 625-27 (Tex. App. -- Amarillo 2007, no pet.). More and more courts are giving a favorable review to this type of testimony. A hundred or so exonerations from death row based on bad eyewitness IDs probably hasn't hurt the cause. Nonetheless, inconsistency persists in this area and, given the amorphous standards, it probably will from now on.

A. Early Application of the Soft Science Standard

Nenno, *Gammill* and *Kumho Tire* all say essentially the same thing. What is amazing is how the different courts apply the same analysis and achieve seemingly impossibly inconsistent results. A comparison of the facts and analysis of *Nenno* and *Gammill* will demonstrate this point.

In *Gammill*, one of the issues was whether the rear seat belt system in the plaintiff's car had been defectively designed.[91] To address this issue, the plaintiff presented two expert witnesses, Ronald Huston and David Lowry.[92]

Huston's qualifications, investigation and conclusions were:

> [He was] a licensed professional engineer with a bachelor's, master's, and doctoral degree in mechanical engineering from the University of Pennsylvania, [and] has been a professor of mechanical engineering at the University of Cincinnati since 1962. He has conducted research in mechanics, dynamics,

[91] *See id.*, 972 S.W.2d at 715.

[92] *See id.* at 716.

biomechanics, vehicle occupant kinematics, and vehicle occupant restraint systems. Huston has had occasion to examine and test many vehicle restraint systems. His tests on restraint systems have focused on retractor locking dynamics, buckle integrity, premature buckle release, and belt positioning on occupants. Huston has written over 100 journal articles, 125 conference papers, 45 technical reports, and two books summarizing the results of his research. Since 1975, he has worked as a consultant in litigation matters, testifying as an expert in over 325 depositions and more than 145 trials.

Huston has previously tested seat belts like those in the Gammills' vehicle, and at their instance, he inspected the rear seat belt in their vehicle that Jaime was alleged to have been wearing. Huston also reviewed accident photographs, the police report, Jaime's x-rays and medical records, her shirt, the depositions taken in the case, and defendants' experts' affidavits.

Based on this information, Huston concluded in his affidavit that: Deborah "was wearing her seat belt, but this did not prevent her incapacitating injuries from the impact and occupant compartment intrusion"; Jaime "received [a] fatal head injury from striking the right rear corner of the driver's seat back" where Huston found a dent, a tear in the seat cover material, and blood; Jaime "was wearing her seat belt at the beginning of the accident as evidenced by gliding abrasions found on her body, markings on the shirt she was wearing, apparent shirt fibers observed in the seat belt webbing, marks on the seat belt webbing, and the impact location on the driver's seat back"; Jaime's "seat belt prematurely released during the impact of the accident"; "[a] properly fitting and secure lap and shoulder seat belt system (three-point system) would have prevented Jaime Gammill's fatal injuries"; "[t]he webbing loop at the buckle of the right rear seat belt allowed the webbing to flow through the loop in turn allowing looseness to occur in the webbing"; "the use of a side push button buckle release on the right rear seat belt and with the buckle positioned approximately 5 inches away from the seat bottom/back rest crease created a configuration ideally suited for premature release upon impact"; and "[t]he use of the webbing loop and buckle release ... were design defects allowing the fatal injuries of Jaime Gammill to occur."[93]

Lowry's qualifications, investigation and conclusions were:

[He was a] licensed professional engineer with a bachelor's and master's degree in mechanical engineering from Texas A & M University, is employed by

[93] *Id.* at 716-17.

Lockheed Martin Tactical Aircraft, where he is responsible for incorporating design details in the F-22 fighter plane's construction. He has previously worked on a high speed anti-radiation missile for Texas Instruments and on the F-111 fighter plane for General Dynamics. Lowry also owns his own consulting firm, Forensic & Analysis Consulting Technologies, Inc. While pursuing his master's degree, Lowry worked as an automobile mechanic, installing cruise controls, replacing rear ends and transmissions, and repairing brakes, water pumps, cylinder heads, engine mounts, electrical shorts, and universal joints. He has previously served as an expert in other automotive products liability cases.

Lowry inspected the vehicle three separate times and reviewed the police reports, Jaime's medical records, the autopsy report and photographs, and the affidavits of defendants' experts. ... Regarding the rear seat belt, Lowry's affidavit states the following in a paragraph headed "Theories":

"Based on my inspections and the materials of the accident I have reviewed to date, my theory is that Jaime Gammill was wearing her seat belt at the time of the initial impact of the vehicle with fixed objects. I believe the seat belt served as a pivot about which Jaime rotated as her body was carried forward. She was released from the seat belt restraint and then struck the back of her mother's front seat. This movement is evidenced by a relatively low impact on the seat back approximately 10 inches above the height of the rear seat bottom. If she had not been belted, Jaime would have impacted the front windshield and possibly gone through it, or in any event would have struck the rear of the front seat backs much higher than markings of the seat show. Had the seat belt functioned properly, it would have been heavily loaded and it would have saved Jaime's life. The restraining force of the seat belt was equivalent to the force required to produce the dislocated hip, bruised pelvis, and bruised chest that Jaime incurred immediately prior to her head injuries resulting in her death. The seat belt caused injuries to the young girl, and was defective in that it failed to keep her restrained but released her to impact."[94]

The trial court excluded the testimony of both of these experts, holding that "they were not qualified to testify about the matters in their affidavits and that their opinions were not scientifically reliable."[95] The Texas Supreme Court, though calling the issue "a close

[94] *Id.* at 717.

[95] *Id.* at 718.

one", held that the trial court did not abuse its discretion.[96]

Compare that with the Court of Criminal Appeals' analysis in *Nenno*. In that case, the issue was the future dangerousness of the defendant facing the death penalty.[97] The expert was Kenneth Lanning. His qualifications, investigation and conclusions were as follows:

> Kenneth Lanning was a Supervisory Special Agent in the Behavioral Science unit of the FBI who specialized in studying the sexual victimization of children. Lanning had been studying the sexual victimization of children for fifteen years full-time and eight years part-time prior to that. He had been with the FBI for over twenty-five years, and had been assigned to the Behavioral Science Unit of the FBI Academy in Quantico, Virginia for fifteen years. Lanning testified that his analysis was based upon his experience studying cases. He did not contend that he had a particular methodology for determining future dangerousness. ... Lanning testified that he studied in excess of a thousand cases that concerned the issue of future dangerousness in some fashion. His research involved studying solved cases to attempt to understand the dynamics of what occurred. This research included personal interviews with inmates convicted of child sex offenses, examining the inmates' psychological records, and examining the facts of the offenses involved.
>
> From information given about appellant, Lanning concluded that appellant was a pedophile. Lanning testified that such a person was difficult to rehabilitate. After being given a lengthy hypothetical matching the facts shown by the evidence, Lanning testified that an individual matching the hypothetical "would be an extreme threat to society and especially children within his age preference."[98]

The Court of Criminal Appeals found "the reliability of Lanning's testimony to be sufficiently established under Rule 702,"[99] observing,

> Research concerning the behavior of offenders who sexually victimize children appears to be a legitimate field of expertise. Through interviews, case studies, and statistical research, a person may acquire, as a result of such experience,

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[96] *Id.* at 728.

[97] *See* 970 S.W.2d 549 at 552.

[98] *Id.* at 552, 562.

[99] *Id.* at 562.

> superior knowledge concerning the behavior of such offenders. Moreover, Lanning's testimony shows that future dangerousness is a subject that often surfaces during the course of research in this field. ... Appellant complains about the lack of peer review. But the absence of peer review does not necessarily undercut the reliability of the testimony presented here. To the extent that a factfinder could decide that the absence of peer review cast doubt on the credibility of the testimony, such affects the weight of the evidence rather than its admissibility.[100]

It is difficult to come away with the impression that the *Gammill* court could have turned around and decided *Nenno* the same way the Court of Criminal Appeals did. Indeed, it is hard to imagine that a civil plaintiff (or, for that matter, a criminal defendant) could get away with offering the type of expert or the quality of testimony found in *Nenno*. This mysterious inconsistency is no doubt explained by the observation the court made up front in *Nenno*, "The facts of the present offense were egregious."[101]

In *Henderson v. State*, 77 S.W.3d 321, 324-25 (Tex. App. – Fort Worth 2002, no pet.), the court held that the testimony of a board-certified pediatric neurosurgeon and a board-certified pediatric neurologist testifying about pediatric head injuries were testifying on a "soft" science and therefore the "softer" *Nenno* standard for reliability applied. The court's reasoning: the matters about which these two doctors testified were not derived by the scientific method, but by their experience. *See id.* at 325.

On its face this reasoning is logical enough. After all, probably nobody has really examined head injuries using the scientific method since the fall of the Third Reich. But what this case demonstrates is the inconsistency in how scientific testimony is treated by the appellate courts. With the addition of *Nenno*, the appellate courts are now free to be as result-oriented as they want to be.

Comparing opinions such as those above, one would have to agree that the Texas Supreme Court and the Texas Court of Criminal Appeals have different visions as to what constitutes admissible soft science testimony. While the Rules of Evidence are now consolidated, the ways in which the two highest courts analyze soft experts is anything but. It is pretty obvious that if only the Texas Supreme Court did the analyzing, then there would be entire categories of evidence that we often see that would never be heard from again. Thus, it was interesting to read *Vela v. State*, 209 S.W.3d 128 (Tex. Crim. App. 2006).

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[100] *Id.* (emphasis added).

[101] *Id.* at 552.

In *Vela*, a rape case, the defense offered the testimony of an expert, a certified nurse consultant, who would say that in the absence of physical evidence, then no rape occurred. *See id.* at 129-130. The trial judge excluded the testimony, but the court of appeals reversed.

The Court of Criminal Appeals directed its analysis at the expert's qualifications rather than to the "soft science." In doing so, the court enlisted a little help from Texas Supreme Court precedent:

> Qualification is distinct from reliability and relevance and, therefore, should be evaluated independently. Although this Court has touched on the qualification analysis in prior cases, we have never discussed it in depth. We therefore look to Texas Supreme Court opinions for additional guidance. As that Court recognized in *Broders v. Heise*, the mere fact that a witness "'possess[es] knowledge and skill not possessed by people generally ...' does not in and of itself mean that such expertise will assist the trier of fact regarding the issue before the court." And because a witness will not always qualify as an expert merely by virtue of a general background, qualification is a two-step inquiry. A witness must first have a sufficient background in a particular field, but a trial judge must then determine whether that background "goes to the very matter on which [the witness] is to give an opinion."

Id. at 131 (quoting *Broders v. Heise*, 924 S.W.2d 148, 153 (Tex. 1996); and citing *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 719 (Tex. 1998)). *Gammill* was cited for the proposition that "Just as not every physician is qualified to testify as an expert in every medical malpractice case, not every mechanical engineer is qualified to testify as an expert in every products liability case." *Id.* at n.14 (quoting *Gammill*, 972 S.W.2d at 719).

The Court of Criminal Appeals went on to set out the reasoning from *Broders* (a medical negligence case) that "there is no validity ... to the notion that every licensed medical doctor should be automatically qualified to testify as an expert on every medical question." *Id.* at 132 (quoting *Broders*, 924 S.W.2d at 152). The court went on to also give the *Gammill* facts a good run through (see above).

To cap off this new qualifications analysis, the Court of Criminal Appeals said the following:

> The focus, then, is on the "fit" between the subject matter at issue and the expert's familiarity therewith, and not on a comparison of the expert's title or specialty with that of the defendant or a competing expert. We discussed the "fit" requirement in *Jordan v. State* and explained that the issue under the

> reliability and relevance conditions "is whether the expert's testimony took into account enough of the pertinent facts to be of assistance to the trier of fact on a fact in issue."
>
> But "fit" is not just a component of reliability and relevance - it is also a component of the qualification inquiry. Just as the subject matter of an expert's testimony should be tailored to the facts of a case, the expert's background must be tailored to the specific area of expertise in which the expert desires to testify.

Id., 209 S.W.3d at 133 (quoting *Broders*, 924 S.W.2d at 153; *Jordan v. State*, 928 S.W.2d 550, 556 (Tex. Crim. App. 1996).

Amazingly, one of the cases cited for this analysis was *Rodgers v. State*, 205 S.W.3d 525 (Tex. Crim. App. 2006). *Rodgers* dealt with an expert offered by the state to prove up tire and shoe print comparisons. Problem was, the expert was actually a latent fingerprint examiner. The court's analysis went something like this:

> In the present case, the State established, on direct examination, that Mr. Jumper is a latent print examiner for the Dallas County Southwestern Institute of Forensic Sciences (SWIFS). His qualifications as an expert latent print examiner included: training in the physical evidence section of the Dallas County Sheriff's Office; an apprenticeship with a certified print examiner; classes and courses on the matching of shoe and tire imprints at the Dallas County Sheriff's Office and at the University of North Texas; a shoe and tire imprint training class with a former FBI expert; and a tire imprint training class at an FBI conference.
>
> When asked if he was "able then to take a, not just fingerprints but a tire print or shoe print and make comparisons between an item from a crime scene and some other item or known item that you later located," Mr. Jumper replied that he could. He also stated that he had testified "[o]ver 150 times" in Texas courts. Appellant then took Mr. Jumper on voir dire "to test his qualifications under 702." That voir dire revealed, among other things, that Mr. Jumper had never graduated from college, had never written articles on tire prints, had only a few days of class work specific to the matching of shoe and tire imprints, and had testified only twice before regarding tire-print comparisons. When asked, "Is most of your job fingerprints?" Mr. Jumper answered, "That's the bulk of it."

Id., 205 S.W.3d at 529. Needless to say, there was not much of a "fit" between Jumper's qualifications and his testimony about tire and shoe prints. But he was still allowed to testify because his opinions were really soft and mushy:

> Mr. Jumper testified: "I can't exclude this shoe and I can't state ... as a fact that this shoe made that imprint. It has similar characteristics and design as you can see in the, the photograph...." Asked if he could "say for sure" that appellant's tires made the tracks found at the scene, he answered "No sir, I can't say that those are the only tires that could have made those tracks.... I can tell you that there is a similarity in the physical shape and design as I pointed out...."

Id. at 529-530. Here is how the court explained its reasoning:

> Appellate courts may consider several criteria in assessing whether a trial court has clearly abused its discretion in ruling on an expert's qualifications. First, is the field of expertise complex? The degree of education, training, or experience that a witness should have before he can qualify as an expert is directly related to the complexity of the field about which he proposes to testify. If the expert evidence is close to the jury's common understanding, the witness's qualifications are less important than when the evidence is well outside the jury's own experience. For example, DNA profiling is scientifically complex; latent-print comparison (whether of fingerprints, tires, or shoes) is not. Second, how conclusive is the expert's opinion? The more conclusive the expert's opinion, the more important is his degree of expertise. Testimony that "a given profile occurred one time in 2.578 sextillion (2.578 followed by 21 zeroes), a number larger than the number of known stars in the universe (estimated at one sextillion)" requires a much higher degree of scientific expertise than testimony "that the defendant's tennis shoe could have made the bloody shoe print found on a piece of paper in the victim's apartment." And third, how central is the area of expertise to the resolution of the lawsuit? The more dispositive it is of the disputed issues, the more important the expert's qualifications are. If DNA is the only thing tying the defendant to the crime, the reliability of the expertise and the witness's qualifications to give his opinion are more crucial than if eyewitnesses and a confession also connect the defendant to the crime.

Id. at 528 (citations omitted)(emphasis added). This obviously sets out some kind of a sliding scale for soft science testimony. Taking this to its logical extreme, you could say that an expert in a field which is barely helpful to the jury may testify to matters that are barely relevant just as long as he doesn't act like he's too sure of his opinions. Wow.

Finally, consider the breathtaking opinion in *Malone v. State*, 163 S.W.3d 785 (Tex. App. -- Texarkana 2005, pet. ref'd). In this case, the state put up an expert, Jamie English, who was the director of the local children's advocacy center. *See id.* at 791-92. English had a bachelor's degree in social work and was working on her master's. She was licensed by the "American Professional Society on the Abuse of Children." *See id.* at 792. She had completed more than 600 forensic interviews of children and had gone to "several" week-long training seminars dealing with child abuse and family violence. She had also gone to seminars for interviewing children. While she had testified in other cases, she had never been qualified as an expert. *See id.*

The state proposed to put her on to testify about:

> the types - the different types of pedophilia versus situational offender and narcissistic personality disorder." After defense objections were overruled, she testified to the jury that, "in general, some individuals turn to children as sexual partners because those individuals may have personality defects. Relying on the [DSM-IV], she described the characteristics of narcissistic personality disorder and explained that this is one type of personality who may commit incest. She also provided general testimony about child abuse victims. She did not specifically diagnose Malone as an incest perpetrator.

Id. at 792. In preparing to testify, she reviewed the police report and several "scholarly articles" concerning "incest, situational offenders versus pedophilia, and narcissistic personality disorder." *Id.*

The court of appeals began its analysis with the proposition that "[a] degree alone is not enough to qualify a purported expert to give an opinion, as the case may be, on every conceivable medical question, legal question, or psychological question. *Id.* at 793 (citing *Roise v. State*, 7 S.W.3d 225, 234 (Tex. App. -- Austin 1999, pet. ref'd). The court cited *Broders v. Heise* (see supra), pointing out that "[t]he inquiry must be into the actual qualification. That is, there must be a 'fit' between the subject matter at issue and the expert's familiarity therewith. The proponent must establish that the expert has knowledge, skill, experience, training, or education regarding the specific issue before the trial court which would qualify the expert to give an opinion on that particular subject." *Id.* (citing *Broders*, 924 S.W.2d at 153).

So then the court of appeals sustained the defendant's point of error and reversed, right? Wrong. Check out the lengths the court went to to affirm this conviction:

> The “fit” between English's expertise and her testimony on the types of incest

> offenders is less comfortable [than the "fit" between her expertise and her testimony regarding behaviors of child sexual abuse victims]. First, to the extent her testimony was based on the DSM-IV, Malone waived any error when he affirmatively did not object to the admission of the portion of the DSM-IV on the topic of narcissistic personality disorder. When the State offered the excerpt from the manual, Malone stated that he "[has] no objection as to a summary of her testimony." As to the remainder of English's testimony on offender profiles, that which she based largely on articles from the internet, the question is whether English testified within the scope of her expertise by incorporating as her own those opinions expressed in the reviewed articles. She did have advanced education and training in a behavioral sciences field, had significant experience dealing with the victims of abuse, and had attended training conferences on child abuse and family violence. Her testimony seems to lie in a more specialized field, one relating to psychological profiles of the sexually deviant and one probably better suited to one in that specific field. While such a situation may easily run afoul of the *Nenno* standard and we urge caution in this scenario, here we have a unique set of circumstances. English had extensive experience in dealing with sexually abused victims. Considering her experience and her education in the behavioral sciences in general and in the area of child abuse more specifically, she is in a position in which she would be able to evaluate, interpret, and incorporate research articles on topics of personality types with the tendency to commit incest. While we may not have made the same determination as the trial court on this matter, we cannot conclude the trial court's decision fell outside the zone of reasonable disagreement. Considering English's education, training, and experience, the trial court did not act arbitrarily or unreasonably in overruling Malone's objection to English's expert testimony on the basis of her qualifications.

Id. at 794 (citations and footnotes omitted). After reading this paragraph, one can easily see why the court was not "comfortable" with the "fit" between English's "expertise" and her testimony about offender profiles. Basically, there wasn't any fit. Sometimes I am amazed they write stuff like this down.

B. The Gatekeeper Challenge: You're the Gate-Keeper – Make the Call!

In this section a number of cases where expert testimony was offered are examined to demonstrate how the courts use the Rule 702 analysis. All of these cases are "soft science" cases, dealing with "specialized" rather than "scientific" knowledge. One can see that the way the testimony is treated is anything but consistent. Note that to keep from having to distill the facts from all these cases, I have cut and pasted large portions of each.

The reader should assume that all of this section represents quoted language from the cases.

***Willits v. State*, 2001 WL 58652 at **2-3 (Tex. App. – Austin, Jan. 25, 2001, pet. ref'd).**

In this case a youth pastor was charged with sexually abusing a boy at the church.

Kenneth Lanning,[102] a Supervisory Special Agent with the Federal Bureau of Investigation testified. For the past twenty years, Lanning has been assigned to the National Center for the Analysis of Violent Crime, where he specializes in the study of sexual victimization of children. Lanning testified that his studies and experience have led him to classify persons who sexually victimize children into two broad categories: (1) situational offenders, who victimize children because they are weak or available; and (2) preferential offenders, who have a true sexual preference for children. Among preferential offenders, the most common behavioral pattern is the seduction type. According to Lanning, a seduction type preferential offender seduces, or grooms, his child victim in the same manner a man might seduce a woman. After finding a child to whom he is attracted, the offender will shower the child with attention and affection, while gradually seeking to lower the child's inhibitions and manipulating the child into sexual activity. Lanning believes that boys between the ages of ten and sixteen are the most susceptible to such seduction.

Lanning testified that seduction type offenders usually have very good interpersonal skills, particularly with children, and often choose a hobby or occupation that will put them in contact with children who fit their age and gender preference. Such offenders tend to be of above average intelligence and from higher socioeconomic backgrounds. It is not uncommon for them to be married. Their sexual preference for children reveals little about their personality, and they rarely fit the stereotype our society has of child sexual abusers.

The trial court let it in. Abuse of discretion?[103]

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[102]The same expert who testified in *Nenno*, by the way.

[103]No. In an ironic twist, the court of appeals actually used the words from *Jordan v. State*, 928 S.W.2d 550, 555 (Tex. Crim. App. 1996) as support: "While jurors might have their own notions about the reliability of eyewitness identification, that does not mean they would not be aided by the studies and findings of trained psychologists on the issue. If the scientific basis of [the expert's] testimony is sound (an issue not now before us and one we do not now decide), it could have aided the jury by either validating or calling into question their own inclinations. If a juror's "gut" or common sense beliefs about certain factors were to be called into question by [the expert's] testimony on the issue, the juror would be prompted to reconsider preconceived notions

***Roise v. State*, 7 S.W.3d 225, 236-238 (Tex. App. – Austin 1999, pet. ref'd), *cert. denied*, 531 U.S. 895 (2000).**

This was a possession of child pornography case.

The state offered the testimony of Dr. Matthew Ferrera, a clinical psychologist who specializes in forensic psychology. Ferrera had obtained his bachelor's degree and his Ph.D. degree in psychology. He had interned and completed his residency at different hospitals. At the time of the trial he had been in private practice for seven years dealing almost exclusively with probationers, parolees, and jail and prison inmates. Previously, he had served as Chief of Counseling with the Texas Youth Council and later was Chief Psychologist with the Texas Department of Corrections as it was then known. Dr. Ferrera had also authored a book on group counseling with juvenile delinquents.

During a voir dire examination in the jury's absence, Ferrera testified that he had worked with adults and children who had been victims of sexual abuse and had studied extensively in the area of criminal sexual offenses and sexually related material. When the prosecutor asked about the specific steps in sexual arousal, Ferrera responded that there was a four-step process. Impulse, he explained, was the first step, which is recognizing another individual as a sexual being, and rating or thinking of that individual in sexual terms. Fantasy, the second step, follows when a person puts himself into a mental picture with the other individual and imagines having sexual contact. The third step is planning to bring the fantasy into being. The last step is action which means actually meeting the other individual, talking, kissing, "and making love."

Without any showing of expertise with photographs, Dr. Ferrera, when asked his

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that he might otherwise have been unaware of when reviewing the facts of the case. On the other hand, if a juror's preconceived notions were confirmed by [the expert's] testimony on the issue, the juror could proceed with greater confidence on that issue."
Id.

Jordan was an eyewitness identification case, and the law up to that point was that experts were not necessary because the science behind eyewitness identification was something everybody knew anyway, so you don't need an expert. Further, it had up to that point been impossible for a defense-sponsored eyewitness identification expert to make his testimony "fit" the facts of the case. The court in this case held that the expert's testimony "fit" the case just fine. *See id.* at *4.

opinion of the photographs involved in the case, replied that: “these photographs do promote sexual impulses and sexual fantasies.” He added that the "particular" children in "these" photographs would be affected later in life with regard to their sexual identity and sexual relationship with others. Ferrera stated that harm would come to children so photographed because they would have disrupted development resulting in psychopathology at a later time, and that society is harmed in turn.

On cross-examination, Dr. Ferrera testified the photographs in question "would absolutely result in abnormal development," but that not all nude photographs of children would cause such harm, just *these* "nude photographs." Ferrera was unable to say whether the individuals portrayed in the photographs "grew up to have sexual pathologies" because he did not think that he had a way of finding out. The record shows that some of the photographs were 40 to 50 years old and others were 75 to 100 years old or older.

Appellant objected to all of Ferrera's testimony based on lack of qualifications, lack of research as to the individuals in the photographs, and that he was being paid by the State to say the individuals were sexually traumatized without any basis in fact. The objection was overruled.

Abuse of discretion?[104]

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[104]Yes. The court stated:

> There must be a "fit" between the subject matter and the expert's familiarity therewith. Degrees, experience, and training do not qualify an expert to answer every conceivable question about psychology. There was no inquiry into Ferrera's qualification in interpreting photographs and determining therefrom the later health problems of those portrayed. It is obvious from Ferrera's testimony that he had not investigated the health or mental problems of those individuals who appeared in the age-old photographs in question. There was no showing that Ferrera was medically trained and qualified to express medical opinions. Yet he testified that those in the photographs were harmed, and that their appearance in the pictures absolutely resulted in abnormal development. His testimony was a subjective belief or unsupported speculation not relying upon the principles involved in the field of his claimed expertise. The fact that an opinion was formed solely for the purpose of litigation does not automatically render it unreliable. However, opinions formed for the purpose of testifying are more likely to be biased toward a particular result.
>
> It is true as the State argues that the purpose of section 43.26(a) is the protection of the individual child from exploitation, but that purpose does not authorize the "harm to children" testimony presented in this case. The "purpose" is not an essential element

***Green v. State*, 55 S.W.3d 633 (Tex. App. – Tyler 2001, pet. ref'd).**

In this case, the defendant sought to introduce testimony by an expert on the subject of "false confessions." The witness, Thomas Alle, Ph.D., was a psychologist with a doctorate from East Texas State University. The case, in pertinent part, proceeds as follows:

Allen testified that in psychology, there is a concept wherein people who have not committed a crime will nevertheless confess. He testified that the concept of false confessions is scientifically accepted and has been the subject of "extensive and long-time" literature, studies and reports. He indicated that there had been references in literature as early as 1905. Allen also testified that there are studies in "statement analysis," an applied technique for scientifically determining whether or not a confession is valid. He stated that he has studied "quite a bit" but not all of the literature on "statement analysis."

Allen testified that there are three types of false confessions: (1) the internalized confession, (2) the coerced confession, and (3) the voluntary false confession. After studying Appellant's written and taped statements, as well as the statement of Melinda Green, Appellant's ex-wife, Allen stated that he had eliminated the first category and most of the second and had instead focused on the third. Allen stated that he believes voluntary false confessions are usually given by persons who are mentally ill, have a personality disorder, have an "attention seeking" motivation, or seek to cover some other crime or protect some other person.

Allen then testified to the criteria involved in statement analysis or, as it is also known, statement reality analysis. He stated that there are approximately eighteen criteria involved in such analysis. According to Allen, the first five criteria, coherence, spontaneous reproduction, sufficient detail, contextual embedding, and description of interactions, are the most important. If all five are present, one is probably getting a statement that is reliable and accurate. The presence or absence of the remaining criteria refine the analysis of reliability and accuracy. In applying the major criteria to Appellant, Allen found significant problems in Appellant's statement, indicating that it was not reliable and further found problems in at

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> of the offense of possession of child pornography. The evidence, in addition to being unreliable as presented, was not relevant. The trial court abused its discretion in admitting Ferrera's testimony as to the sexual arousal analysis and the "harm to the particular children and to society" testimony.

Id. at 237-38. The court then held that, because the jury acquitted on two counts and convicted on only one, the error was harmless. *See id.* at 238.

least six of the remaining criteria. He classified Appellant's statement as a false confession based on the criteria.

On cross-examination by the State, Allen stated that he had never before testified as an expert in false confessions. He stated he was not aware of any other psychologists who had testified as such but knew of experts who had researched and written about it. He stated that there is no formal organization of psychologists with experience in false confessions but many are members of the American Psychological Association's division of law and human behavior. When asked what scientific authorities accept the techniques of statement analysis, Allen named several researchers in the field. He admitted that the application of the criteria is a semi-objective technique by which another person who is familiar with confessions, with the research literature and has clinical experience could reproduce the results. Allen however admitted that he had not spoken with investigators or the polygraph operators who took the statements; he had only reviewed the transcripts of Appellant's statements and may have listened to the audiotapes.

The court refused to let him testify. Abuse of discretion?[105]

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[105]Nope. The court held as follows:

"In the instant case, the trial court, expressly and implicitly, found the answers to the three questions set forth in *Nenno* to be in the negative. We agree. As to the inquiries whether the field of false confession expertise is a legitimate one, whether the subject matter of Allen's testimony was within the scope of the field, and whether Allen's testimony properly relied upon the principles involved in the field, our review of the record reveals that when Allen was questioned by Appellant's counsel, he testified that research on the phenomenon of false confessions had spanned many years, but he did not name any authorities in the field. Though Allen testified that there had been books and articles published in the field, he did not name any book, article, or publication of any type. Without further explanation, Allen then launched into a discussion of the principles of the field and how they applied, in his opinion, to Appellant. Given the fact that Allen did not provide the trial court with any actual publications and authorities supporting his analysis, the trial court would have had to assume that the subject matter of Allen's testimony was within the scope of the field to so find. When he was cross- examined by the prosecutor, Allen did provide the names of three "authorities" in the field of false confessions. However, Allen did not testify at any time that he had relied upon or utilized the research or techniques of those same "authorities" when drawing his conclusions about Appellant's confession. After the court's ruling, Appellant offered four documents involving interrogation and interviewing and their application to statement analysis. It appears from the record that the trial court did not consider these articles. The documents appear to be photocopies of pages of some textbook or treatise, but no author, title of the publication, or date of the publication is provided in the record. Furthermore, there was no indication that Allen had relied upon or utilized the research or techniques described in these documents when drawing his

***Weatherred v. State*, 15 S.W.3d 540, 541-43 (Tex. Crim. App. 2000).**

The case – capital murder. The expert – eyewitness identification expert. You probably have an idea already of how this is going to go. Nonetheless, here are the facts:

The expert was named Kenneth Deffenbacher, Ph.D., "a psychologist who claimed to be an expert on the reliability (or unreliability) of eyewitness identifications." *Id*. at 541. "At that hearing, Deffenbacher testified, in relevant part, that (1) he had a doctoral degree in psychology and was chairman of the department of psychology at the University of Nebraska at Omaha; (2) he had done extensive research in the field of human visual perception and memory; (3) he had written "about 35 articles, ten or twelve chapters in edited books, and a textbook" on human visual perception and memory; (4) he and other psychologists had identified, through generally-accepted experimental research, numerous "variables" affecting the reliability of eyewitness identifications; and (5) three of those variables--"photo bias," the "forgetting of a stranger's face," and the lack of a relationship between eyewitness confidence and eyewitness accuracy--were applicable to the eyewitness identifications in the instant case." *Id.*

The trial court excluded the testimony. Abuse of discretion?[106]

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conclusions about Appellant's confession. Therefore, these documents were rendered useless for purposes of a *Nenno* analysis." *Id.* at *4. Notice the difference between the level of scrutiny applied in this case and that applied by the court of appeals in *Willits.* For an extremely soft-gloved analysis of a state's expert, *see Puderbaugh v. State*, 31 S.W.3d 683, 686 (Tex. App. – Beaumont 2000, pet. ref'd)(pointing out with approval that the expert "has puppets and stuffed animals in the room, which he uses in conversations with younger children ... .").

[106]No! Check out the following analysis by our Court of Criminal Appeals and compare it to the analysis in *Willits*:

"When appellant proffered Deffenbacher's expert testimony to the trial court, appellant had the burden of proving by clear and convincing evidence that the testimony was relevant and reliable and not mere "junk science." Appellant attempted to carry that considerable burden, at that critical time, by simply offering Deffenbacher's testimony and nothing else. Furthermore, a close examination of Deffenbacher's testimony reveals that, although he claimed that he and others had carried out extensive research on the reliability of eyewitness identifications and that he himself had written much on that subject, he failed to produce or even name *any* of the studies, researchers, or writings in question. The trial court did not state its reason for excluding Deffenbacher's testimony, but, given what the trial court had before it at the time it ruled, it *could* have reasonably concluded that appellant failed to carry his burden of showing that the proffered expert testimony was scientifically reliable." If this "scorched earth" level of scrutiny were

***Hardin v. State*, 20 S.W.3d 84, 90-92 (Tex. App. – Beaumont 2000, pet. ref'd).**

In this case state brought an expert, San Thomason, a Bowie County probation officer who supervises sex offenders, to testify about recidivism rates for sex offenders and whether sex offenders on probation remain a danger to society. She would also be called upon to testify that the defendant "fit the profile of a child molester." Here were the expert's qualifications:

"Thomason has been employed with Bowie County Community Supervision for twelve years; that before working for Bowie County, she worked for the Texas Department of Human Services for eight years; that her job with Bowie County has been to supervise sex offenders who are on probation; that her job with the Department of Human Services was to investigate cases of child abuse and neglect, focusing specifically on cases involving sex offenders; that she has a bachelor of science degree in psychology and sociology and twenty-one hours toward her master's degree as a psychological associate; that she receives at least forty hours per year of training in the subject of sexual deviancy; that she has received this training for the past twenty years; that she recently received training about sex offenders at the National Institution of Corrections, Department of Justice Academy and has been chosen to receive training from the United States Marshals about sex offenders and the internet; that she has testified as an expert over 400 times in her twenty-year career; that she has conducted studies of recidivism rates of sex offenders in Bowie County, but has not conducted any national studies; that her training has covered national recidivism statistics provided by the Department of Justice and other agencies; and that experts in her field use those statistics to make assessments and determinations."

The court allowed to testimony, including the opinion that the defendant "fit the profile of a child molester." Abuse of discretion?[107]

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applied to the Child Sexual Abuse Accommodation Syndrome we wouldn't be hearing much of that in our courts anymore.

[107]No. "In the present case, Thomason was qualified to testify as an expert on the issue of whether a convicted sex offender poses a continuing threat to society. It is true that Thomason testified to conducting only limited research in the area of recidivism rates. However, her twenty years' experience investigating and supervising sex offenders, and her extensive and continuous training qualified her to testify as an expert under the "tailored" standards of *Nenno*. Hardin's fifth point of error is overruled." *Id*. at 92. Notice that the court did not make her name the authors and articles upon which she relied.

***Castillo v. State*, 2000 WL 38764 at *1 (Tex. App. – Houston [1st Dist.], Jan. 20, 2000, no pet.)(nfp).**

In this case, the complainant testified that the defendant (a psychologist and a *curandero*) told her that a past boyfriend had given her a curse during sex and that the only way to get rid of it was for him to have sex with her. *See id.* I guess it sounds reasonable enough, because she went for it. At the subsequent sexual assault trial, the state sought to put on an expert, Marie Teresa Hernandez, a cultural anthropologist. Here is how her testimony went outside the presence of the jury:

"Ms. Hernandez testified that she was in her second year as a doctoral student in cultural anthropology at Rice University. The dissertation for her doctorate focused on North Mexico, South Texas, and "the imaginary," an anthropological term for forces in cultures that people cannot see, but which still have power. In the two and a half years preceding her testimony, she had made eight trips to northern Mexico and had interviewed several *curanderos* and their clients. Ms. Hernandez testified that a *curandero* might be able to help people with physical illnesses, emotional depression, and stress. She had heard of *curanderos* using sexual rituals to cure their patients, but stated that it was not an acceptable practice. On appeal, the State indicates it introduced Ms. Hernandez' testimony in order to help the jury understand why impressionable young people like the complainant might feel compelled to comply with the prescriptions of a *curandero.*"

The trial court let her do it. Abuse of discretion?[108]

***McColloch v. State*, 1999 WL 371609 at **3-4 (Tex. App. – Dallas, June 9, 1999, pet. ref'd)(nfp).**

In this aggravated sexual assault of a child case, the detective had run a search warrant on the defendant's home and found some pictures of young girls. In his testimony, the

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[108]Nope. "Ms. Hernandez' field of expertise was cultural anthropology. She was in her sixth semester of teaching at University of Houston and had taught courses in Mexican American culture covering religion, art, family relationships, politics, and gender. For the two and a half years preceding her testimony, she had been interviewing people regularly about practices such as those involving *curanderos.* Her research also included reading books written on similar phenomena from around the world. We cannot conclude that the trial court abused its discretion in admitting Ms. Hernandez' testimony." *Id.*

Well, what the hell type of credentials would YOU come up with for a *curandero* expert?

detective testified as follows:

Q. Now, Detective, in your experience and all your training and--and all the interviews and the work you've done in the child exploitation unit, is it usual or unusual for there to be pictures of children in a man's apartment?
A. It--it's usual for a suspect in this type of offense to have pictures of children.
Q. In your opinion, with your experience, do people normally keep these pictures for a long time?
A. In my opinion, yes, people accused of this type of crime do keep these photos. It's a trophy of the offense. They capture that child at an age where they will never change. The child in the mind of the suspect will always be that little child years later, and they relive the moment through those photographs.

Of course defense counsel objected, but the court let it in. Abuse of discretion?[109]

***Campos v. State*, 977 S.W.2d 458, 463-64 (Tex. App. – Waco 1998, no pet.).**

In this case a "licensed play therapist" was presented to testify regarding her relationship with the complainant and opinions derived therefrom. This was an outcry-recant-late outcry case.

Rafaleides testified outside the presence of the jury regarding her qualifications. She testified that her education includes a bachelor's degree in education, a master's degree in both Spanish and counseling, and training to become a licensed professional counselor and a "registered play therapist." She explained that her training included study, passing an

[109]No. The court did take a look at the detective's qualifications and observed as follows: "Charnota testified that he had been a detective for nine years and had been working in the child exploitation unit for over two years. In his two years with the child exploitation unit, Charnota had been investigating incidents involving sexual abuse of children. Charnota testified that he had received specialized training in interviewing children and suspects who sexually abuse children. Charnota stated that he had investigated many child abuse cases and handled about twenty cases a month. In light of Charnota's testimony about his experience in the area of child exploitation, we cannot conclude that the trial court abused its discretion in allowing Charnota's testimony about the pictures." *Id.* at *4.

Charnota's testimony was not even expert testimony. It simply was not relevant. The court should not have allowed it in under Rule 401 and 403 and never even reached Rule 702. But the facts of the case were really bad.

examination, and 2,000 hours of supervised "clock hours." She testified that her training and work under supervision was done at the University of North Texas. Rafaleides testified that she began working as a school counselor in 1983, but that she was a teacher before that. She then moved to working part time with Family Services in Fort Worth. She testified that she also worked at the Johnson County Juvenile Detention Center working with offenders and their parents. At the time of trial, Rafaleides was working with children at Head Start. She testified that she has counseled possibly thousands, but certainly hundreds of children, approximately seventy-five percent of whom were victims of child abuse. She testified that she has been using play therapy since 1992 and that, in her opinion, it is accepted within the counseling community as a legitimate form of counseling. When asked whether she had some specialized knowledge beyond that which the jurors would know, Rafaleides responded that she did because she has been trained to interpret the actions of children. Rafaleides testified that she has not written any articles or been published in any way, but that she has lectured and testified on at least three occasions prior to this one.

Judge let it in. Abuse of discretion?[110]

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[110]No. In fact, the court of appeals engaged in a fairly extensive analysis, which tells us that the trial judge (and the lawyers) made an extensive record in the Rule 705(b) hearing:

"Rafaleides thoroughly explained the methodology regarding play therapy. She testified that her office is filled with specific toys and activities which are chosen specifically to encourage children to express their feelings. She testified that she has thoroughly studied the behavior of abused children, and has been trained to recognize that behavior. Her testimony dealt specifically with her knowledge regarding the usual behavior of abused children and whether A.Y. demonstrated that behavior."

"In the jury's presence, Rafaleides testified that she met with A.Y. ten times over a period of eight months. She testified that A.Y. drew several pictures, including a picture of a tree and of a house. Rafaleides testified that she had "studied a lot of art therapy," and that abused children generally draw "X's" in the houses and holes in the trees. She testified that A.Y.'s pictures contained these symbols. Rafaleides testified that A.Y. always chose to play in the sandbox, where her play always ended with the male doll "gone" or "dead." Finally, Rafaleides testified that sexually abused children often feel guilty, sad, frustrated, confused, and angry. She testified that she had observed all of these feelings in A.Y." *Id.* at 463-64 n.5.

Say what you will about the value of art and play therapy, with a record like this, the only attack you could really make in this case is that it was not reliable – a subject which was not really touched on in this 705(b) hearing. I think it fails the first prong of *Nenno* – that the field of expertise must be a legitimate one. Could you image a criminal defendant proposing to prove or disprove anything through something along the lines of "play therapy" or "art therapy"? Kind of

***Hernandez v. State*, 53 S.W.3d 742 (Tex. App. – Houston [1st Dist.] 2001, pet. ref'd).**

This was a aggravated sexual assault of a child case involving a seven-year-old.

During the guilt-innocence phase of the trial, the State presented, as its final witness, Trudy Davis, Executive Director of the Advocacy Center for Children in Galveston County, a non-profit organization that works with governmental agencies to evaluate child abuse cases. After describing the physical facilities and the role and function of the Advocacy Center, Davis testified to her background and duties. She has three years experience as the Executive Director of the Advocacy Center and holds a bachelor's degree in criminal justice and sociology. She was a case worker and supervisor at Galveston County CPS for 18 years and an investigator for the Galveston County District Attorney's office for two years. Twelve of her 18 years at CPS were dedicated to sexual abuse cases and she was a supervisor for 11 of those years. Davis's career has focused on the abuse and neglect of children, primarily in the area of sexual abuse, and she has worked on thousands of cases involving the sexual abuse of children. Davis conducted and supervised investigations, videotaped interviews of abused children, and received training in sexual abuse at various workshops and conferences. She has testified as an expert on many occasions and is well versed in the "dynamics and common characteristics of a sexually abused child."

The state sought to have Davis testify about the "Child Sexual Abuse Accommodation Syndrome." She stated there are "common characteristics and dynamics" observed in child sexual abuse cases, including "[s]ecrecy, helplessness, entrapment or accommodation, delayed or conflicted disclosure, and recantation...." Davis explained under question and answer each of these characteristics. Essentially, she spoke about the great extent of the manipulation of sexually abused children. She discussed the trust the victim has in the perpetrator and the enormous amount of strain on child sexual abuse victims, which may lead to delayed disclosures and false recantations. She spoke about the fact that such victims feel a tremendous amount of guilt and responsibility for the relationship going on. They feel humiliated because they haven't been able to tell. So, they're just going to tell you a little bit and then tell you more as time goes on, seeing that you are listening and not condemning them in any way. [A]fter they disclose and see the response to their disclosure, they say it didn't happen; I dreamed it; I made it up.... The family is in turmoil. It rips their family apart and, again, they want their family to be together. They feel responsible for that. They would rather say it didn't happen and go back to the way things were.

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makes coerced confessions as a field of expertise sound rather staid and mundane, doesn't it?

Over defendant's objection, the trial court let her testify. Abuse of discretion?[111]

III. OBJECTIONS, STANDARD OF REVIEW & HARM ANALYSIS

Like virtually every other evidentiary issue at trial, complaints regarding expert testimony must be properly preserved for review and review will be subject to harmless error analysis.

A. The Objection

"To preserve error, an objection to the admission of evidence must state the specific ground for the objection if the specific ground is not apparent from the context.[112] For example, an objection to an improper predicate that fails to inform the trial court exactly how

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[111]Figure the odds. In fact, not only did the court hold this was not an abuse of discretion, the court appeared to come very close to saying that such testimony was per se reliable *ala Emerson v. State*, 880 S.W.2d 759, 764 (Tex. Crim. App. 1994), cert. denied, 513 U.S. 931 (1994)(taking judicial notice that the Horizontal Gaze Nystagmus test is reliable):

> Davis's field of expertise is certainly legitimate, as recognized by the Court of Criminal Appeals in *Duckett,* and, as with the expert who testified in *Nenno,* Davis's opinions regarding the characteristics and dynamics of sexually abused children were based on her extensive experience observing children in thousands of cases. Due to her superior knowledge concerning the behavior of children who have suffered sexual abuse, "Child [Sexual] Abuse Accommodation Syndrome" and the common characteristics and dynamics of sexually abused children are matters within the scope of her expertise. Also, Davis's unimpeached testimony elicited on voir dire underscored the fact that her data and opinions were recognized by the general community of psychology and psychiatry, demonstrating the proper reliance on accepted principles in her field.
>
> Because of Davis's extensive experience with child sexual assault victims and because Child [Sexual] Abuse Accommodation Syndrome and the common characteristics and dynamics of sexually abused children are within the scope of her expertise, we hold these factors alone sufficiently demonstrate the reliability of her expert testimony.

Hernandez, 2001 WL 869354 at **8-9.

[112]*Hernandez v. State*, 53 S.W.3d 742 (Tex. App.– Houston [1st Dist.] 2001, pet. ref'd).(citing TEX.R. EVID. 103(a); TEX.R.APP. PRO. 33.1; *Bird v. State*, 692 S.W.2d 65, 70 (Tex.Crim.App.1985)).

the predicate is deficient will not preserve error."[113]

In *Hernandez v. State*,[114] the court undertook the following analysis of the appellant's objection:

> We first address appellant's objection to the testimony of Davis on the grounds she did not meet the "qualifications of the Texas Rules of Evidence 702, 703, and, in particular, *Daubert.*" Appellant's objection was made after counsel's voir dire of Davis using questions patterned from the *Kelly* reliability factors. He also structures his appellate argument on these reliability factors.
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> The Texarkana Court of Appeals has twice held that objections similar to appellant's objection in this case are not specific enough to preserve error. In *Chisum v. State*, 988 S.W.2d 244, 250-51 (Tex.App.--Texarkana 1998, pet. ref'd), defense counsel objected to the admission of an expert's opinions, but did not specify any particular deficiency in the expert's qualifications or the reliability of her opinions. Thus, the court held no error was preserved for review. *Chisum*, 988 S.W.2d at 251. Similarly, in *Scherl v. State*, 7 S.W.3d 650, 652 (Tex.App.--Texarkana 1999, pet. ref'd), defense counsel objected to admission of intoxilyzer evidence because it was inadmissible "under Rule 702, *Daubert, Kelly*, and *Hartman.*" The court noted Rule 702 and these cases cover numerous requirements and guidelines for the admission of expert testimony and held the objection did not adequately inform the trial court of a specific complaint upon which to rule. *Scherl*, 7 S.W.3d at 652.
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> Appellant's objection to Davis's testimony on the grounds that she did not meet the "qualifications of the Texas Rules of Evidence 702, 703, and, in particular, *Daubert*" is a general objection. However, given the context of the voir dire questioning, appellant was clearly attacking the reliability of Davis's opinions based on her not performing any studies, not publishing any articles, and not knowing the potential rate of error of her opinion. Thus, the objection adequately informed the trial court of the complaint upon which to rule. *See* TEX.R. EVID. 103(a); TEX.R.APP. P. 33.1; *Bird*, 692 S.W.2d at 70.[115]

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[113] *Id.* (citing *Bird*, 692 S.W.2d at 70).

[114] *Hernandez*, supra, note 112.

[115] *Id*. at *3.

It is never a good thing to have the appellate court examining your objections to see whether they are sufficient (although the state almost invariably says they are not, thereby forcing the court to do so). Just be sure to articulate on the record why the expert's testimony is not relevant or reliable.

B. The Standard of Review

The trial court's decision is reviewed for abuse of discretion.[116]

C. Harm Analysis

Error in admitting or wrongly excluding expert testimony is subject to harm review under the "non-constitutional error" standard of Tex. R. App. Pro. 44.2(b)(errors not affecting substantial rights will be disregarded).

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[116] *See Roise v. State*, 7 S.W.3d 225, 236-238 (Tex. App. – Austin 1999, pet. ref'd), *cert. denied*, 531 U.S. 895 (2000). The test for determining whether an abuse of discretion occurred is not whether the facts present an appropriate case for the trial court's action; rather, the test is whether the trial court acted without reference to any guiding rules and principles, or in other words, acted in an arbitrary and unreasonable manner. *See Downer v. Aquamarine Operators, Inc*., 701 S.W.2d 238, 241-42 (Tex.1985), *cert. denied*, 476 U.S. 1159 (1986). A reviewing court cannot conclude that a trial court abused its discretion if, in the same circumstances, it would have ruled differently or if the trial court committed a mere error in judgment. *Robinson*, 923 S.W.2d at 558. Thus, a trial court enjoys wide latitude in determining whether expert testimony is admissible. Judge Harvey Brown, *Procedural Issues Under* Daubert, 36 HOUS.L.REV. 1133, 1159 (1999).

IV. JUDICIAL NOTICE

Once a scientific principle has been sufficiently proven in court, it can be subject to judicial notice. Once this happens, then the proponent is relieved of the necessity to prove reliability by the *Kelly* factors (or "whether the field of expertise is a legitimate one" in *Nenno*-speak). A seminal Texas judicial notice case is *Hernandez v. State*, 116 S.W.3d 26 (Tex. Crim. App. 2003). At issue in that case was a machine that tests urine for controlled substances. The tech who testified really didn't know how the machine worked and the defense objected, but the trial judge let it in. *See id.* at 27-28. The court of appeals reversed and the Court of Criminal Appeals affirmed the court of appeals.

The state had asked the Court of Criminal Appeals to decide whether the proponent of scientific evidence must always satisfy the *Kelly* test. The Court of Criminal Appeals said no, that there are situations where a scientific principle can be judicially noticed. Here is the operative language, which contains the test:

> A party seeking to introduce evidence of a scientific principle need not always present expert testimony, treatises, or other scientific material to satisfy the *Kelly* test. It is only at the dawn of judicial consideration of a particular type of forensic scientific evidence that trial courts must conduct full-blown "gatekeeping" hearings under *Kelly*. Once a scientific principle is generally accepted in the pertinent professional community and has been accepted in a sufficient number of trial courts through adversarial *Daubert/Kelly* hearings, subsequent courts may take judicial notice of the scientific validity (or invalidity) of that scientific theory based upon the process, materials, and evidence produced in those prior hearings.
> ...
>
> [O]nce some courts have, through a *Daubert/Kelly* "gatekeeping" hearing, determined the scientific reliability and validity of a specific methodology to implement or test the particular scientific theory, other courts may take judicial notice of the reliability (or unreliability) of that particular methodology. Trial courts are not required to re-invent the scientific wheel in every trial. However, some trial court must actually examine and assess the reliability of the particular scientific wheel before other courts may ride along behind. Some court, somewhere, has to conduct an adversarial gatekeeping hearing to determine the reliability of the given scientific theory and its methodology.
> ...
>
> The fact that a trial court has allowed some type of scientific testimony by a

> particular witness before (perhaps without objection) does not mean that the witness' testimony is, ipso facto, scientifically reliable in this case. Nor does the fact that the trial court has allowed this witness to testify to these procedures before explain how or why the ADx machine is a scientifically reliable one for determining the presence of a controlled substance. It may well be scientifically reliable, but the trial court's statement that he has allowed this testimony before does not make it so.

Id. at 28-30. This case bears a careful reading. The Court of Criminal Appeals gives plenty of guidance on how to do a *Kelly* hearing and what sort of previous and subsequent showings it takes to get judicial notice. In addition, Judges Hervey and Keller wrote a concurrence that is basically a how-to.

In *Russeau v. State*, 171 S.W.3d 871 (Tex. Crim. App. 2003) the Court of Criminal Appeals affirmed the trial court's taking judicial notice of the science of forensic fingerprint analysis. *See id.* at 881-83. Note that the Court of Criminal Appeals used a *Kelly* analysis - thus implicitly considering fingerprint analysis to be a "hard science." *See id.* at 882.

V. PRETRIAL DISCLOSURE

The 1999 legislature enacted Senate Bill 557, which was signed by the governor and became effective September 1, 1999. The bill amended Art. 39.14 CCP, the general discovery rule ("you don't get jack") by adding the following language:

> (b) On motion of a party and on notice to the other parties, the court in which an action is pending may order one or more of the other parties to disclose to the party making the motion the name and address of each person the other party may use at trial to present evidence under Rules 702, 703, and 705, Texas Rules of Evidence. The court shall specify in the order the time and manner in which the other party must make the disclosure to the moving party, but in specifying the time in which the other party shall make disclosure the court shall require the other party to make the disclosure not later than the 20th day before the date the trial begins.

The rationale behind the amendment was to give the state a mechanism whereby they could discover defense experts. However, the rule obviously goes both ways. A motion must be filed and the rule demands a court order to be effective. The new provision does not set out a particular sanction for disobeying the court's order, but exclusion of the expert testimony no doubt will be sought.

In *Osbourn v. State*, 59 S.W.3d 809, 816 (Tex. App. – Austin 2001), affirmed, the court of appeals made the important point that testimony under Rule 701 (lay expert testimony) does not fall within the mandate of Article 39.14(b) – even where an order is in place to disclose experts, there is no requirement that a party disclose witnesses who will give "lay" expert opinions. *See id.* at 813 n.4, 814. "Lay" expert testimony can be more extensive and "expert" than one might think – in this case it was a cop testifying from his experience that he recognized the smell of marijuana.

The state definitely did not disclose the cop, and the court poured the appellant on the ground stated above. Nonetheless, the court went on to consider what the appropriate sanction would be if the cop was a Rule 702 expert. The court adopted the pre-Art. 39.14(b) analysis: that in order to show abuse of discretion, the aggrieved party must essentially show bad faith on the part of the state and surprise on the part of the defendant. *See id.* at 816. Needless to say, if you don't request a continuance upon learning of the new expert, you are pretty much toast on the surprise prong.

Violation of a discovery order is grounds for exclusion of the evidence. *Hollowell v. State*, 571 S.W.2d 179, 180 (Tex. Crim. App. 1978); *State v. LaRue*, 108 S.W.3d 431, 443

(Tex. App. – Beaumont 2003, pet. ref'd)(citing *Hollowell* for this proposition). This rule, however, has been tempered. Osbourn, as well as several other cases, require a showing of bad faith on the part of the state before the "extreme sanction" of exclusion becomes appropriate. *See Osbourn*, 59 S.W.3d at 816; *Saldivar v. State*, 980 S.W.2d 475, 497 (Tex. App. – Houston [14th Dist. 1998, pet. ref'd); *Pena v. State*, 864 S.W.2d 147, 149 (Tex. App. – Waco 1993, no pet.).

VI. VOIR DIRE UNDER RULE 705

Texas Rules of Evidence 705(b) provides that before an expert may testify about his opinions or underlying facts or data, that the opposing party shall be permitted, if a request is timely made, to conduct a voir dire outside the hearing of the jury. This voir dire is limited to determining the underlying facts or data upon which the opinion is based under Rule 705 (b). However, many courts will utilize this voir dire as an excellent opportunity to also challenge the qualifications of the witness or relevance of the opinions expressed. This *Daubert* challenge should usually be made pre-trial or at least before the witness is allowed to testify. If the trial court has not conducted a *Daubert* test analysis, rule provides a potential opportunity for such analysis prior to the opinion being expressed before the jury.

In *Alba vs. State*,[117] a death penalty case, the state called a psychiatric expert to testify on the issue of future dangerousness based on a hypothetical question. A request for the Rule 705 voir dire was made after the state had asked a thirteen page hypothetical question and then asked his opinion on the issue of future dangerousness. The trial judge overruled the objection and did not allow the voir dire. The Court of Criminal Appeals held that the trial court did not abuse its discretion in denying the request on the rationale that the jury had all the facts and data before it upon which the expert was to express an opinion. If any error was established, it was harmless.

Along the way, the court declared that Rule 705 (b) provides an undeniable right, upon timely request, to conduct a voir dire examination, outside the presence of the jury, as to what underlying facts or data the expert's opinions will be based. This provides a proper forum for the eliciting of potentially damaging and inadmissible evidence.[118]

Rule 705 (b) is mandatory and therefore a denial of such voir dire is error. But the request for voir dire must be timely. Request it before the expert takes the stand and make the state list its expert witnesses and give you notice of all opinions anybody is going to render!!

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[117]905 SW2d 581 (Tex.Crim.App. 1995).

[118]*See also Goss vs. State*, 826 SW2d 162 (Tex.Crim.App. 1992), *cert. denied*, 509 U.S. 922 (1993). *But see Jenkins vs. State*, 912 SW2d 793 (Tex.Crim.App. 1993) which held that the trial court did not violate Rule 705 (b) by failing to allow voir dire of expert witness since the request was not made to explore underlying facts or data of the opinion but for other purposes.

Erroneous denial of a timely and proper request for a 705(b) hearing is subject to harm review under TEX. R. APP. PRO. 44.2(b)(error must affect substantial rights).[119] To affect substantial rights, the court's refusal to conduct the hearing must result in the admission of unreliable evidence.[120]

[119]*See Jackson v. State*, 17 S.W.3d 664, 670-72 (Tex. Crim. App. 2000).

[120]*See id.* at 672 (citing *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997)).

VII. SPECIFIC APPLICATION TO DIFFERENT TYPES OF TESTIMONY

DNA:

Finding that the scientific principle was valid, that the technique used was valid and that it was properly applied in that case, the Court of Criminal Appeals upheld the admission of RFLP, DNA profiling. *Kelly v. State***,** 824 S.W.2d 568 (Tex.Crim.App. 1992).

A couple of later unpublished opinions show the courts treating some of the more recent DNA testing methods. *Fanniel v. State*, 2002 Tex. App. LEXIS 2260 (Tex. App. – Houston [1st Dist.], March 28, 2002, no pet.)(nfp) covers STR (short tandem repeats) analysis. *Sheckells v. State*, 2001 Tex. App. LEXIS 6730 at **8-12 (Tex. App. – Dallas, Oct. 8, 2001, no pet.)(nfp) covers mitochondrial DNA analysis. Needless to say, it was held properly admitted in both cases. They are good examples of the analysis, however.

REPRESSED MEMORIES:

The Texas Supreme Court has held that evidence of repressed memories is inadmissible. *S.V. v. R.V.*, 933 S.W.2d 1 (Tex. 1996).

> "...In short, the preconceptions of the therapist, the suggestibility of the patient, the aleatory[121] nature of memory recall, and the need to find a clear culprit for a diffuse set of symptoms may lead to false memories. Or they may not. Even assuming the reliability of all the studies and reports on the theory and techniques underlying recovered memory, the possibility of confabulation still exists. But it does not always occur. The point is this: The scientific community has not reached consensus on how to gauge the truth or falsity of 'recovered' memories." *S.V. v. R.V.*, 933 S.W.2d 1 (Tex. 1996).

PLAY THERAPY:

Campos v. State, 977 S.W.2d 458 (Tex. App. – Waco 1998, no pet.).

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[121](Of or pertaining to gambling.)

IMMERSION BURNS & HOW CHILD GOT THEM:

In re D.S., 19 S.W.3d 525 (Tex. App. – Fort Worth 2000, no pet.).

PROFILING:

From time to time, psychiatric testimony has been offered in a Texas courtroom to prove either that the Defendant is or is not a pedophile.[122] This type of testimony differs from all those discussed above in that the focus is not on the complainant, but on the defendant. While psychiatric testimony focusing on the defendant is certainly not unheard of in Texas law,[123] it has generally not met with much success in the area of child sexual abuse. In the vernacular of sexual abuse cases, testimony focusing on the defendant usually is "profile" evidence. The question of its admissibility has generally been different depending upon whether it is offered by the state (to prove that the defendant matches the "profile") or by the defendant himself (to prove that he does not).

While the courts have, in almost all cases, held such evidence inadmissible regardless of who offered it,[124] their reasoning has been anything but consistent. For instance, in the

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[122]Cases where psychiatric testimony was offered by state to prove that defendant is a perpetrator: *Brewington v. State*, 802 S.W.2d 691 (Tex. Cr. App. 1991); *Perryman v. State*, 798 S.W.2d 326 (Tex. App. -- Dallas 1990, no pet.); *Slayton v. State*, 633 S.W.2d 934 (Tex. App. -- Fort Worth 1982, no pet.); cases where psychiatric testimony was offered by defendant to prove he is not: *Williams v. State*, 895 S.W.2d 363 (Tex. Cr. App. 1994); *Nolte v. State*, 854 S.W.2d 304 (Tex. App. -- Austin 1993, pet. ref'd); *Cox v. State*, 843 S.W.2d 750 (Tex. App. -- El Paso 1992, pet. ref'd); *Dorsett v. State*, 761 S.W.2d 432 (Tex. App. -- Houston [14th Dist.] 1988, pet. ref'd); *Allen v. State*, 658 S.W.2d 642 (Tex. App. -- Amarillo 1983, no pet.); *Williams v. State*, 649 S.W.2d 693 (Tex. App. -- Amarillo 1983, no pet.).

[123]The author presents for support the interesting career of one James P. Grigson, MD, (a/k/a "Doctor Death") a psychiatrist from the University of Texas Southwestern Medical School who specialized in rendering opinions in capital cases regarding the future dangerousness of the defendant.

[124]Exactly two cases have held "profile" evidence to be admissible: *Nolte v. State*, 854 S.W.2d 304 (Tex. App. -- Austin 1993, pet. ref'd)(offered by the defense, error to exclude); *Slayton v. State*, 633 S.W.2d 934 (Tex. App. -- Fort Worth 1982, no pet.)(offered by the state, not error to admit).

1982 case of *Dean v. State*,[125] the trial court's refusal to admit a defense-offered psychiatrist's opinion regarding defendant's inclination to engage in deviate sexual behavior was upheld with the court merely citing to cases holding that an expert may not render an opinion pertaining to defendant's intent at the time of the offense.[126] Handed down exactly one day before *Dean*, however, was *Slayton v. State*,[127] which reached the opposite result. In *Slayton*, an indecency with a child case, the trial court admitted state-offered psychiatric opinion testimony that the defendant was "a type of person who might expose himself to a child."[128] The court's reasoning, in its entirety, reads, "It is not error for a psychiatrist to express his expert opinion that an accused is capable of forming an intent to perform the act with which he is charged."[129]

The next year, *Williams v. State*[130] presented a different approach. In this indecency case, the defense sought admission of psychiatric opinion testimony, based upon testing and interviewing, that defendant lacked any of the character disorders almost always found in child molesters and that the statistical probability for someone like defendant to molest a child was extremely low.[131] Defendant's theory of admissibility was that the testimony was "direct evidence of [defendant's] character traits."[132] In holding that exclusion was proper, the court merely cited the long-standing common law rule that, unless the state opened the door or the trait was material to the offense, character traits may not be proven through personal opinion or specific acts.[133] The court held that the psychiatrist's opinion, even though it was based upon scientific testing and research, was still just a personal opinion regarding the defendant's character. The court also held this evidence to be excludable as

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[125]636 S.W.2d 8 (Tex. App. -- Corpus Christi 1982, no pet.).

[126]*Id*. at 9 (citing *Jackson v. State*, 548 S.W.2d 685, 692 (Tex. Cr. App. 1977); *Winegarner v. State*, 505 S.W.2d 303, 305 (Tex. Cr. App. 1974)).

[127]633 S.W.2d 934 (Tex. App. -- Fort Worth 1982, no pet.).

[128]*Id*. at 936.

[129]*Id*.

[130]649 S.W.2d 693 (Tex. App. -- Amarillo 1983, no pet.).

[131]*Id*. at 694-95.

[132]*Id*. at 695.

[133]*Id*.; This common law rule was eradicated by TEX. RULES CRIM. EVID. Rule 404(a)(1).

an opinion pertaining to defendant's state of mind at the time of the offense.[134] *Brewington v. State*,[135] decided in 1991, presented the opposite scenario. In this case, the state presented, and the trial court allowed, an expert psychiatric opinion that the defendant was a "fixated pedophile."[136] The Court of Criminal Appeals observed in this case that the state sought introduction of this evidence solely to prove defendant's propensity to molest children and that he acted in conformity therewith when he committed the offense.[137] Such testimony, the court observed, was forbidden both at common law and under the new Rules of Criminal Evidence (which were not yet effective when this case had been tried).[138]

Unfortunately, the adoption of the Rules has done little to clear up the law surrounding profile evidence. *Dorsett v. State*,[139] which presented the identical situation found in *Williams*, was the first case decided in reliance upon the Rules. The trial court had excluded defendant's offered profile evidence based on *Williams*.[140] The appellate court affirmed, but not in reliance upon *Williams*. In fact, the court expressly questioned the continued viability of *Williams* in light of the Rules of Criminal Evidence.[141] However, without giving so much as a hint as to its reasoning, the court merely stated that it could not find an abuse of discretion that would require reversal.[142] *Perryman v. State*[143] presented another instance wherein the state did the profiling and sought to offer the testimony. In this case, however, the trial court allowed testimony from a police officer who was trained "in the development and use of psychological profiles of suspects" that the defendant was a "power reassurance

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[134]*Id*. at 695-96.

[135]802 S.W.2d 691 (Tex. Cr. App. 1991).

[136]*Id*. at 691-92.

[137]*Id*. at 692.

[138]*Id*.

[139]761 S.W.2d 432 (Tex. App. -- Houston [14th Dist.] 1988, pet. ref'd).

[140]*Id*. at 433.

[141]*See* TEX. RULES CRIM. EVID. Rule 404(a)(1).

[142]*Williams*, 761 S.W.2d at 433.

[143]798 S.W.2d 326 (Tex. App. -- Dallas 1990, no pet.).

rapist."[144] The court of appeals disagreed, holding that the testimony was not of a type that would assist the trier of fact as required under Rule 702 and, largely as a result, the probative value of the testimony was substantially outweighed by the danger of unfair prejudice under Rule 403.[145] Finding harm, the court reversed.[146]

Marking a significant shift from precedent, the 1993 case of *Nolte v. State*[147] held that a trial court abused its discretion by disallowing the defendant's expert to render an opinion based on profiling. *Nolte* presented another *Williams*-type situation: the defense sought to present testimony from an psychiatrist that defendant did not fit the profile of a pedophile.[148] This opinion was based on a three-hour interview, evaluation of MMPI test scores, and a review of defendant's military records. The trial court held that the testimony was, as least in part, admissible under the Rules. Specifically, the trial court allowed the expert to testify about the psychological profile of abusers in general, but ruled that the expert could not state his opinion that the defendant did not fit that profile.[149] The trial court based its reasoning on the requirement of Rule 405(a), that, before a witness can render an opinion regarding the character of the accused, the witness must have been familiar with his character before the day of the offense.[150]

The court of appeals, however, held that Rule 405(a) was not a valid basis for excluding the proffered testimony because this was not "character evidence:"

> Appellant did not propose to ask [the expert] if, in his opinion, appellant was disposed to commit the alleged offenses. Instead, the proffered testimony would have compared appellant's psychological profile with that of the typical sexual abuser as described by [the expert]. We do not believe that it was necessary for [the expert to] know

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[144]*Id*. at 328-29.

[145]*Id*. at 330.

[146]*Id*. at 331.

[147]854 S.W.2d 304 (Tex. App. -- Austin 1993, pet. ref'd).

[148]*Id*. at 308-09.

[149]*Id*.

[150]*Id*. at 309.

> or be familiar with appellant before the offenses were committed in order for him to be qualified to give this testimony.[151]

The court, rather, compared the testimony in this case to that admitted and approved in *Duckett* and basically agreed with the appellant that they were pretty much the same. The court of appeals therefore held that the trial court abused its discretion by disallowing the opinion on Rule 405(a) grounds. The error, however, was harmless.[152]

The Court of Criminal Appeals had an opportunity the following year to clear up the law surrounding profile evidence in *Williams v. State*.[153] However, of the things that *Williams* may have done, clearing up the law as it relates to profile evidence was not one of them.

Williams was actually a misdemeanor telephone harassment case.[154] However, the defense retained a clinical psychologist, who interviewed the defendant and administered a battery of tests, including the MMPI, Rorschach, Shipley's Scale (IQ test), Mooney Problem Checklist, Firo-B, and others.[155] At trial, the expert was called upon to testify. The state objected and the trial court excluded the testimony. In a bill, the expert testified regarding the general profile of a person who makes harassing telephone calls as well as the personality of defendant, knowledge about which he gained through the extensive psychological testing.

As to the general profile of a telephone harasser, the expert testified that the person

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[151]*Id*. at 309-10.

[152]*Id*. at 310-11. If one reads between the lines of *Nolte*, it appears that if the trial court had ruled the other way (excluded all of the evidence), that would not have been an abuse of discretion either. *See id*. at 310. The abuse occurred because the trial court based its decision on Rule 405(a) to the exclusion of all other possible bases. *See id.* The trial court had determined that the evidence was relevant, that it would assist the jury, and that its probative value was not outweighed by unfair prejudice. The court of appeals simply deferred to the trial court's findings in this regard. The implication is clear that if the trial court had excluded on one of these grounds rather than Rule 405(a), there would have been no abuse of discretion. Query whether expert opinion focusing on the child receives the same offhand treatment? One senses a measure of ambivalence on the part of the court regarding profile evidence.

[153]895 S.W.2d 363 (Tex. Cr. App. 1994).

[154]*Id*. at 364.

[155]*Id*. at 368.

is likely to: (1) have conflicts about aggression; (2) be typically passive in the face of open conflict; (3) have conflicts about his own sexuality; (4) be a basically hostile person with a history of impaired relationships with other people; and (5) compulsively make harassing phone calls -- not just one.[156] Through his testing of defendant, the expert was able to discern that: (1) he is an overachiever; (2) he is very rule bound -- concerned about doing things the right way; (3) he is extremely concerned about how he looks to other people and the kind of impression he makes; (4) he is extremely moralistic; and (5) if anything, he is "too uptight."[157] The expert was then asked whether any of these characteristics are consistent with the type of person who typically makes harassing phone calls, to which the expert rendered an opinion that a person with a personality like defendant's was "almost the opposite" of the kind of person who would do so.[158] The state was successful in keeping this testimony out of evidence. The court of appeals affirmed, as did the Court of Criminal Appeals. The court based its reasoning on two basic grounds: (1) that the expert did not apply his profile to the facts of the case; and (2) that the testimony did not "assist the trier of fact" as required by Rule 702.[159]

As to the first ground, the court reasoned as follows:

> In the instant case, we note that the proffered testimony provided by [the expert] was potentially helpful under Rule 702, pursuant to *Duckett*. Such testimony, concerning the psychological profile of an offender who makes harassing telephone calls of a sexual nature, might assist the jury in determining a fact in issue, i.e., whether appellant made the telephone calls ... . However, to be helpful, such testimony must be applied, or connected to the facts of the individual case. ... In the instant case ... [the expert] did not connect his generic testimony concerning the psychological profile of such an offender to the facts of the case.[160]

The court then compared this evidence to that which the defense sought to admit in *Pierce v. State*[161] regarding eyewitness identification and, noting that the failure of the defense to

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[156]*Id*. at 367-69.

[157]*Id*.

[158]*Id*. at 369.

[159]*Id*. at 366.

[160]*Id*.

[161]777 S.W.2d 399 (Tex. Cr. App. 1989).

apply the abstract testimony to the facts in that case, held the evidence to be inadmissible in this case for the same reason.[162]

Along the way, the court found that this "connecting up" is required by *Duckett v. State*[163] and *Cohn v. State*[164] before psychiatric testimony becomes admissible.[165] In both *Duckett* and *Cohn*, the abstract testimony regarding behaviors observed in molested children *was* applied to the facts.[166] In *Duckett*, the expert himself applied them. In *Cohn*, the application was done through the expert and other witnesses. However, neither *Duckett* nor *Cohn* addresses this step as a requirement. In fact, *Duckett*, after holding that general background testimony regarding the Child Sexual Abuse Accommodation Syndrome was clearly helpful to the jury, states that the application of that theory to the facts of the case "presents a closer question" in regard to admissibility.[167] Hence, rather than the latter being a requirement for the admissibility of the former, it is clear that the former was analyzed independently by the court.[168] *Cohn*, likewise, does not refer to this "connecting up" as a requirement for admissibility, even though it happened in that case.[169]

In citing *Pierce*, the court expressly relied upon the portion of that opinion dealing with expert testimony on the unreliability of eyewitness identification.[170] In *Pierce*, however, the court held that the testimony was properly excluded, first and foremost, because it was not helpful to the trier of fact under Rule 702, and, almost as an aside, because it was not connected to the facts of the case.[171] This fact only further supported the conclusion that the proffered testimony did not "assist the trier of fact." The *Pierce* court's basis for excluding

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[162]*Williams*, 895 S.W.2d at 366 (citing *Pierce*, 777 S.W.2d at 415-16).

[163]797 S.W.2d 906 (Tex. Cr. App. 1990).

[164]849 S.W.2d 817 (Tex. Cr. App. 1993).

[165]*Williams*, 895 S.W.2d at 365-66.

[166]*See Duckett*, 797 S.W.2d at 908-09; *Cohn*, 849 S.W.2d at 817-18.

[167]*Duckett*, 797 S.W.2d at 920.

[168]*See id.*

[169]*Cohn*, 849 S.W.2d at 817-18.

[170]*Williams*, 895 S.W.2d at 366 (citing *Pierce*, 777 S.W.2d at 415-16).

[171]*Pierce*, 777 S.W.2d at 415.

the testimony was that problems with eyewitness identification and memory are not beyond the knowledge of lay jurors.[172]

The author believes that *Williams* can really only be logically explained as a relevance case. Clearly, the general profile of a person who would commit telephone harassment is "information on a topic not of general knowledge to the average layperson," and thus "helpful" as that term has heretofore been applied to Rule 702, if "it will assist the trier of fact to understand the evidence or to determine a fact in issue."[173] However, if, as was the case in *Williams*, the expert's testimony is not tied to the facts of the case, then it is irrelevant and, thus, unhelpful. Arguably, this breaks no new conceptual ground -- relevance has always been a requirement, and there are other cases disallowing expert testimony because it is not sufficiently tied to the facts of the case.[174] In fact, Rule 702 can be read to have its

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[172]*Id.* The *Williams* court continued:

> "As we stated in *Duckett*, 'the use of expert testimony must be limited to situations in which the expert's knowledge and experience on a relevant issue are beyond that of an average juror.' It is not sufficient that the expert merely testify in a conclusory manner, as in the instant case, that the defendant is not the type of person who would make obscene, threatening telephone calls. The substance of [the expert's] proffered testimony in the instant case, that appellant was basically a moral person, was not outside the knowledge and experience of the average juror."

Williams, 895 S.W.2d at 366.

Needless to say, this reasoning can be assailed at several levels. First of all, the second and third sentences are a *non sequitur*. The expert's opinions do not define whether or not his knowledge and experience are beyond that of the average juror. Neither the expert's credentials nor the empirical foundation of his opinions were questioned in the trial court. *Id*. at 369. Secondly, it *is* sufficient under the Rules for the expert to give conclusory opinions. This is allowed in Rule 705(a), and is the reason for Rules 705(b) and 705(c). The problem with the third sentence is that the fact that defendant is a "moral person" was not all to which the expert testified.

[173]TEX. RULES EVID. Rule 702; *see also Duckett*, 797 S.W.2d at 920.

[174]*See Duckett*, 797 S.W.2d at 913 ("As a basic premise, the [psychiatric] evidence must be relevant to an issue in the case."); *Werner v. State*, 711 S.W.2d 639, 643-45 (Tex. Cr. App. 1986)(the "Holocaust syndrome" theory not sufficiently tied to facts of case and defendant's actions to become admissible); *Allen v. State*, 658 S.W.2d 642, 645 (Tex. App. -- Amarillo1983, no pet.)(expert did not tie abstract theory to facts of the case, no abuse of discretion to disallow

own built-in relevance requirement.[175] The rub is that *Duckett* and *Cohn* can fairly be read to allow an expert for the state to testify generally about background information concerning the behavior of abused children, without tying those concepts to the facts of the case. Not so, in light of *Williams*. Because *Duckett* and *Cohn* were cited in *Williams* for its main proposition, the author believes they are now limited by it, and no longer may the state present an expert to give "helpful background information" about the behavior of victims of child sexual abuse without tying that information to the facts of the case.[176]

On the other hand, it stands to reason that if profile evidence is sufficiently "connected up," then there should not be a Rule 702 problem. Nor, it follows, should there be a Rule 705(c) problem as regards the underlying *facts*. There may still be a problem with the *data* aspect of Rule 705(c), however. Many in the psychiatric community believe that while there are some personality traits that are common among a majority of perpetrators, there is no inclusive "profile" of the sexual offender.[177] But this does not mean that an expert's testimony fails under Rule 702 -- it means that it *may* be subject to attack under Rule 705(c). The state in *Williams* did not attack the expert under Rule 705(c) -- even though it appears very likely that the expert did not have a sufficient factual basis for his opinion. That is unfortunate. It would have been a much more sound basis for the court's decision than the tortured reasoning it came up with.

And another, more ominous question is not answered in *Williams*: what about the state offering profile evidence? In actuality, profiling would be more scientifically sound if used by the state than by the defense, since profiling itself was designed more as a tool for

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the evidence); *but see Vasquez v. State*, 819 S.W.2d 932, 935 (Tex. App. -- Corpus Christi 1991, no pet.)("In a child abuse case such as this one, where the child waited some five years to report the alleged assault, the credibility of the child is a fact directly at issue. Therefore, [the expert's] testimony regarding symptoms of child abuse victims in general, including the frequent existence of the delayed outcry, tends to make the existence of a fact of consequence to the determination of the action more probable: that is, that the victim is telling the truth.")(citations omitted); *Lopez v. State*, 815 S.W.2d 846, 850 (Tex. App. -- Corpus Christi 1991, no pet.)(evidence o.k. where expert gave only background information regarding behavior of children who have been abused); *Key v. State*, 765 S.W.2d 848, 850 (Tex. App. -- Dallas 1989, pet. ref'd)(same).

[175]Will the expert's knowledge "assist the trier of fact *to understand the evidence* or *to determine a fact in issue[?]*"

[176]In reality, the information will be tied to the case anyway, as it is obviously more effective that way.

[177]*See, e.g.*, Myers, *supra* note 29 at 128-35; *Nolte*, 854 S.W.2d at 311.

inclusion rather than *exclusion*. If the state sufficiently ties general testimony about a profile to the facts of the case, should it be allowed to sponsor an opinion that the defendant fits the profile of a "sexual predator," for instance? The automatic response from the defense attorney is a mortified "No!" citing Rule 404(a). But if 404(a) is effective at keeping the state from putting on this evidence, should Rule 405(a) not also be effective, thereby requiring the expert to have known the defendant before the date of the offense before he can render his opinion? Can the two Rules operate independantly *vis-a-vis* the same type of evidence? And if profile evidence is not character evidence at all, then what stops the state from offering such evidence, subject to the other requirements of expert testimony, in its case in chief? *Williams* did not even address the concept of profile evidence as character evidence, even though this was the ground upon which the state preserved error.[178]

One other thought is that Child Sexual Abuse Accommodation Syndrome testimony is nothing more than profiling evidence – the witness is testifying to the "profile" of an abused child and how this child fits that profile. Be vigilant about making sure the state has connected such testimony up with the facts – use the Court of Criminal Appeals' *Williams* opinion as support.

Some more recent cases where profiling was used:

Reed v. State, 48 S.W.3d 856 (Tex. App. – Texarkana 2001, no pet.)
Kessler v. State, 2001 WL 474402 (Tex. App. – Dallas, May 7, 2001, pet. filed)(nfp)
Lara v. State, 2001 WL 421240 (Tex. App. – Hous. [14th Dist.], April 26, 2001, no pet)(nfp)
In re J.M.B., 2001 WL 170977 (Tex. App. Hous. [1st Dist.], Feb. 22, 2001, no writ)(nfp)
Smith v. State, 2000 WL 1638207 (Tex.App.–Hous. [14th Dist.], Nov. 2, 2000, pet ref'd)(nfp)
Hardin v. State, 20 S.W.3d 84 (Tex. App. – Texarkana 2000, pet. ref'd)
Kennedy v. State, 2000 WL 35964 (Tex. App. – San Antonio, Jan. 19, 2000, no pet.)(nfp)
Roe v. State, 1999 WL 699766 (Tex. App. – Austin, Sept. 10, 1999, no pet.)(nfp)
Estrada v. State, 1999 WL 682620 (Tex.App.–Hous. [1st Dist.], Sept. 2, 1999, pet. ref'd)(nfp)
Wyatt v. State, 23 S.W.3d 18 (Tex. Crim. App. 2000)
Malone v. State, 163 S.W.3d 785 (Tex. App. – Texarkana 2004, pet. ref'd)

CHILD SEXUAL ABUSE ACCOMMODATION SYNDROME:

An expert witness may testify regarding the behavior characteristics of a child abuse victim and to the Child Sexual Abuse Accommodation Syndrome. *Duckett v. State*, 791 S.W.2d 906, 914-15 (Tex.Crim.App. 1990); *see also Cohn v. State*, 849 S.W.2d 817 (Tex.

[178] *Williams*, 895 S.W.2d at 369 (Clinton, J., dissenting).

Crim. App. 1993)(state may do so in its case in chief).

In the past, the complaint regarding this type of testimony was always that it constituted "improper bolstering."[179] *Duckett v. State*[180] covered extensively the manner in which "bolstering" was going to be treated under the Rules of Criminal Evidence.[181] *Duckett* divided such testimony into "direct" and "indirect" bolstering.[182] Direct bolstering was a direct opinion that the child was telling the truth.[183] Indirect bolstering, on the other hand, was testimony that, while not rendering a direct opinion that the child was telling the truth, had the same effect, albeit indirectly, by shoring up the child's testimony.[184] As a general matter, both direct and indirect bolstering were forbidden as invading the province of the jury.[185] This changed with *Duckett*.

In *Duckett*, the court observed that an expert's testimony regarding the Child Sexual Abuse Accomodation Syndrome and how the complainant's behavior fit into its parameters "indirectly" bolstered the child's credibility.[186] Applying the new Rules, however, *Duckett* held that while direct bolstering would still be disallowed, such "indirect" bolstering was no longer proscribed.[187] Indirect bolstering, the court reasoned, merely "embraces" an ultimate fact, it does not decide the fact for the jury as does direct bolstering.[188]

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[179]*See, e.g., Duckett*, 797 S.W.2d at 915. The "bolstering" objection may no longer have any effect. *Cohn*, 849 S.W.2d at 819-20 & 821 (Campbell, J., concurring). The proper objection should probably be that such testimony violates Rule 702 because it is of no assistance to the trier of fact.

[180]797 S.W.2d 906 (Tex. Cr. App. 1990).

[181]*See id*. at 915-19.

[182]*Id*. at 919-20.

[183]*Id*. at 915.

[184]*Id*. at 915-16.

[185]*Id*. at 915 n. 13; *Kirkpatrick*, 747 S.W.2d at 836.

[186]*Id*. at 920.

[187]*Duckett*, 797 S.W.2d at 915.

[188]*Id*. at 914.

However, the *Duckett* court threw out several long standing pre-rules principles (e.g., the presumption of inadmissibility), it reaffirmed another "well settled rule" that existed before the Rules of Criminal Evidence were adopted: that "the prosecution may not bolster or support its own witnesses unless they have been impeached on cross-examination."[189] Thus, while expert testimony that has the effect of bolstering the complainant may come into evidence for purposes of rehabilitation, it would not be admitted as substantive evidence. Because the child in *Duckett* was impeached, however, and because the expert's testimony went to the exact issue upon which the child was impeached, such indirect bolstering was admissible.[190]

The mandate that such evidence can only come in after the complainant is impeached was reversed, however, in 1993 in *Cohn v. State*.[191] The court therein disapproved the portion of *Duckett* which relied on the above stated "well settled rule" and held that expert testimony which "indirectly bolsters" the credibility of the complainant may be admitted as substantive evidence in the guilt/innocence stage of the trial.[192] The expert testimony in *Cohn* was basically identical to that in *Duckett*. The only difference was that the complainant was not impeached. After *Cohn*, theoretically, the psychiatrist may now be the state's first witness.[193] Obviously, psychiatric testimony is still very much allowed to rehabilitate a child witness after he has been impeached.[194] It is simply no longer limited to this use.[195]

This type of testimony is still very much alive and well. See the recent opinion of *Holiday v. State*, 2002 Tex. App. LEXIS 2073 at **25-30 (Tex. App. – Houston [14th Dist.], March 21, 2002, no pet.)(nfp), which analyzes this type of testimony coming from some kind of social worker. A humorous aspect of the opinion is that if the social worker had used the term "Child Sexual Abuse Accommodation Syndrome," then she would not have been

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[189]*Id*. at 918 (citations omitted).

[190]*Id*. at 919-20.

[191]849 S.W.2d 817 (Tex. Cr. App. 1993).

[192]*Id*. at 818-19.

[193]*But see Williams v. State,* 895 S.W.2d 363 (Tex. Cr. App. 1994)(holding that general testimony must be applied to the facts of the case to be "helpful" under Rule 702).

[194]*Duckett*, 797 S.W.2d at 920; *Wylie v. State*, 908 S.W.2d 307, 309 (Tex. App. -- SanAntonio 1995, pet. ref'd).

[195]*Cohn*, 849 S.W.2d at 818-19.

qualified to testify. But since she only covered the theory and symptoms of that syndrome, she was fine. *See id.* at **25-28.

DIRECT OPINION ON TRUTHFULNESS:

It could be said that the outer limit of the Child Sexual Abuse Accommodation Syndrome would be actually testifying that the child in question is telling the truth. This concept was addressed by the *Duckett* court and later in *Yount v. State*:[196] an expert may not directly testify that a particular witness is telling the truth.[197] *Yount* expanded this rule to include the class of persons to which the witness belongs.[198] This was true before the Rules of Criminal Evidence (later, Rules of Evidence) were adopted and has remained so thereafter.[199]

While it is still the rule that an expert is generally not allowed to give an opinion that a complainant or the class to which the complainant belongs is truthful, *see Yount v. State*, 872 S.W.2d 706, 712 (Tex. Crim. App. 1993), subsequent cases out of the Court of Criminal Appeals have blurred the lines a little bit.

In *Schutz v. State*, 957 S.W.2d 52 (Tex. Crim. App. 1997), a social worker (Patricia Burns) and a psychologist (Dr. David Poole) testified regarding the complainant, a child allegedly sexually abused. *See id.* at 56. In *Schutz*, defense counsel had cross-examined both the complainant and the complainant's mother regarding whether the child was manipulated or fantasized the alleged incident. *See id.* at 58-59. The expert testimony was supposedly put on in response to the defense "opening the door." The testimony, taken directly from the case, is as follows:

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[196]872 S.W.2d 706 (Tex. Cr. App. 1993).

[197]*Yount*, 872 S.W.2d at 709-11; *Duckett*, 797 S.W.2d at 914-15; see also *Cohn v. State*, 849 S.W.2d 817, 818 (Tex. Cr. App. 1993); *Perkins v. State*, 902 S.W.2d 88, 93 (Tex. App. -- El Paso 1995, pet. ref'd); *James v. Tex. Dept. Of Human Svcs*, 836 S.W.2d 236, 243 (Tex. App. -- Texarkana 1992, no pet.); *Martin v. State*, 819 S.W.2d 552, 555 (Tex. App. -- San Antonio 1991, no pet.); *Miller v. State*, 757 S.W.2d 880, 883 (Tex. App. -- Dallas 1988, pet. ref'd); *Kirkpatrick v. State*, 747 S.W.2d 833, 837-38 (Tex. App. -- Dallas 1987, pet. ref'd); *Garcia v. State*, 712 S.W.2d 249, 252 (Tex. App. -- El Paso 1986, pet. ref'd).

[198]*Yount*, 872 S.W.2d at 711.

[199]*See, e.g., Garcia*, 712 S.W.2d at 252.

Testimony of Burns:

[on manipulation]

> There are several things that I try to observe, and that is I first of all pay attention to the event that a child is describing, the way that that child describes it. If it's done in an appropriate-age appropriate manner.... I feel like if the child is being manipulated and coerced into something that often times the language would be more sophisticated than a child that age would know....I look for emotions and behaviors that are consistent with what she is describing or with what a child is describing. If a child is describing a situational sexual abuse then she many times will have a very distressed, painful expression of emotions, emotions where she would be exhibiting emotions that she does not realize that she is supposed to be exhibiting and describing in describing such events. So there is some parallel between the emotions she has and the event they are describing or she is describing....I look for the description. I look at the child and her age. I examine her language and her knowledge of certain things. In the case of sexual abuse, if the child has an advanced knowledge in this area then that is indicative of something that perhaps did definitively occur....I feel that if the child is being manipulated in a situation such as sexual abuse the behaviors that I would predict would be more of enthusiasm on the part of the child in telling the story where she would want to use the events and the happenings as a tool to get attention....Or, as I said before, if I saw a child with her emotions did not match up to the events that she was describing I would examine that, also.

[on fantasy]

> If I feel like that there is a situation where the child is making up a story or fantasizing the story I will continue questioning the child's difficulties. I think my feeling is if a child is lying about something like this then that is what I need to get a handle on because that's just as big a problem as, you know, telling the truth about this.
>
> Q. Do you have an opinion as to whether [A.S.] exhibited any of those traits or characteristics of manipulation that you have described to the jury?
> ....
> A. Yes I have.
>
> Q. What is that opinion?

....[intervening objections by defense counsel]

A. My opinion is that [A.S.] has not exhibited-in my professional opinion she has not exhibited behaviors that point to having been manipulated.

Q. And based upon your experience, training and expertise, your close relationship and therapy of [A.S.], do you have an opinion as to whether she has exhibited any of the traits of fantasizing?

...

A. Yes.

Q. And what is your opinion?

....[intervening objections by defense counsel]

A. My opinion is she has not exhibited any evidence of fantasizing.

Id., 957 S.W.2d at 56-57.

Testimony of Poole:

[on manipulation]

The point of the material that the kid generates in the testing has to do with what is on their mind. Usually if a kid is prepared to dispose of a relationship with one parent, trash it, be a party to getting them in trouble, they are usually coming under some significant pressure from some other source. The kinds of things that you will find the kid worrying about is the source of the pressure. If they are getting threats, if they are getting told they might get abandoned, nobody loved anymore, they will never see them again or pressure like that you will see the kid worried about losing a parent who would be putting the pressure on them. It's depending upon where their anguish and anxiety is coming from.

[on fantasy]

Well, one of the aspects you look at in the testing is seeing if the reactions that the child has, the interpretation, shapes of the ink blots, the identification of

the content of the picture has some relevance to what is really there. If they are talking about material that is actually depicted, if their perception of things is common and it's recognizable to other people, that is one of the ways you judge whether the kid is in touch with reality and whether their perception of what is going on has any similarity to what is really out there. It's one of the things we evaluate. You usually find kids distorting those kind of interpretations in pretty dramatic ways if they are really out of touch with reality. And it's usually evident clinically in a lot of other different ways, too, if a child is so convinced about the reality of the situation that they're distorting what is really going on.

Q. Dr. Poole, based upon your experience, your training, your education in your profession, my question to you is do you have an opinion based upon your examination of [A.S.] whether she has been the subject of manipulation.

A. Yes.

Q. And what is that opinion?

[renewed objections]

A. The evidence I have available to me made that the less likely explanation.

Q. Do you have an opinion based upon your experience, training and expertise and examination of [A.S.] whether her allegations are the subject of fantasy?

A. My opinion is that they were not the result of fantasy.

Defense counsel: Object to unresponsive.

Court: Sustained.

Q. Do you have an opinion?

A. Yes.

Defense counsel: Same objection.

A. That they were not to [sic] result of fantasy.

Id. at 57-58.

Schutz is an extremely long - and very important - opinion. It is important not only to the issues of fantasy and manipulation, but also how and when experts can testify about the truthfulness of a child complainant.

The court recognized that the question to be resolved was whether testimony concerning fantasy and manipulation is the same as testimony that a witness is telling the truth. *See id.* at 59. The underlying and implied question could have been phrased, "and if so, then what?" The Court of Criminal Appeals could very well have gutted *Yount* with this opinion, but I would argue it chose not to do so. In fact, the court cited *Yount* in support of the implied proposition that testimony regarding the "tendency" of a class to be truthful is still not admissible. *See id.* at 70.

I believe that the court intended to use *Schutz* as an opportunity to really delineate what is or is not an opinion on truthfulness, to what extent any such opinions could be admissible, and if so, who could testify to them (expert vs lay person). One should read this opinion at least two or three times before going into trial in a child sexual abuse case.

At the end of the majority opinion, the Court of Criminal Appeals provides a chart for determining whether certain testimony is admissible:

Categories of Testimony Impacting Truthfulness of a Witness (from *Schutz v. State*, 957 S.W.2d 52, 75 (appendix) (Tex. Crim. App. 1997)).		
Substantive evidence of guilt which incidentally impacts on credibility (Category 1)	testimony about symptoms exhibited by child abuse victims and whether or not child in question exhibits those symptoms physical evidence and whether such evidence is consistent or inconsistent with child's allegations	Admissible during offering party's case-in-chief (or in cross-examination of other party's witnesses)

Categories of Testimony Impacting Truthfulness of a Witness (from *Schutz v. State*, 957 S.W.2d 52, 75 (appendix) (Tex. Crim. App. 1997)).		
General testimony relating to impaired witnesses or declarants (Category 2)	testimony in general about the ability of a class of persons recognized by society as being impaired, such as young children or the mentally retarded, to distinguish reality from fantasy and to perceive, remember, and relate the kinds of events at issue in the case	Admissible during offering party's case-in-chief (or in cross- examination of other party's witnesses) if an impaired person is expected to be a witness or declarant
General testimony that directly attacks credibility (Category 3)	testimony that child has a general character for making untruthful or dishonest statements testimony that child has a general character for fantasizing or is the kind of person that is susceptible to manipulation; testimony that child has difficulty distinguishing between fantasy and reality testimony about the common symptoms or traits of a child who is fantasizing or being manipulated coupled with testimony that the child in question does not exhibit those symptoms or traits testimony that a child suffers from a mental handicap, mental disorder, the influence of a chemical substance, or some other physical or mental impairment coupled	Admissible during offering party's case-in-chief (or cross- examination of other party's witnesses) to attack credibility of witness or out-of-court declarant there is a loose fit between the rebuttal testimony and the predicate attacks on credibility; predicate attacks may include an attorney's questions as well as testimony; expert testimony is generally permitted to rebut lay testimony as well as other expert testimony

Categories of Testimony Impacting Truthfulness of a Witness (from *Schutz v. State*, 957 S.W.2d 52, 75 (appendix) (Tex. Crim. App. 1997)).		
	with testimony about adverse effects that such impairment may have on perception and/or memory testimony that certain third parties committed acts designed to manipulate the child into making certain allegations	
General testimony that directly supports credibility (Category 4)	testimony that child has a general character for making truthful or honest statements testimony that child does not have a general character for fantasizing or is not the kind of person that is susceptible to manipulation; testimony that child does not have difficulty distinguishing between fantasy and reality; testimony about the common symptoms or traits of a child who is fantasizing or being manipulated coupled with testimony that the child in question does not exhibit those symptoms or traits testimony that certain third parties have not committed acts designed to manipulate the child into making certain allegations	Admissible during offering party's case-in-chief (or cross- examination of other party's witnesses) to attack credibility of witness or out-of-court declarant there is a loose fit between the rebuttal testimony and the predicate attacks on credibility; predicate attacks may include an attorney's questions as well as testimony; expert testimony is generally permitted to rebut lay testimony as well as other expert testimony

Categories of Testimony Impacting Truthfulness of a Witness (from *Schutz v. State*, 957 S.W.2d 52, 75 (appendix) (Tex. Crim. App. 1997)).		
	testimony that a child does not suffer from a mental handicap, mental, disorder the influence of a chemical substance, or some other physical or mental impairment that would adversely affect perception and/or memory	
Specific testimony attacking or supporting credibility (Category 5)	testimony about specific instances in which the child has lied, fantasized or had been manipulated; specific instances in which the child told the truth, accurately perceived reality, or resisted manipulation (Rule 608(b)) testimony that the child's allegations relating to the offense at trial were the result of manipulation or fantasy, or were lies; testimony that the child's allegations were not the result of manipulation or fantasy, or were not lies testimony that a child did not in fact accurately perceive or remember events due to a physical or mental impairment	May be admitted only to rebut other specific testimony attacking or supporting credibility and only if there is a tight fit between the rebuttal testimony and the previous specific testimony attacking or supporting credibility; expert testimony is generally not permitted to rebut lay testimony

After reviewing the chart, let us now take a look at the court's specific holdings in *Schutz*, which it helpfully divided by witness. Remember, both Burns and Poole testified as

to both fantasy and manipulation. The court analyzed as follows:

> Burns did not express an opinion about whether the child's allegations had been the subject of manipulation but stated merely that the child did not exhibit "behaviors that point to being manipulated." While some of the behaviors described by Burns would be commonly known by laypersons to be indications of manipulation, we find that at least some behaviors were not. We do not believe that laypersons would necessarily associate with manipulation "more enthusiasm" in telling the story or the use of more sophisticated language. We hold that Burns' testimony that the complainant did not exhibit the traits of manipulation did not constitute a direct comment upon the truth of the complainant's allegations.
>
> Burns' testimony about fantasy is a different matter. Although Burns was asked whether the complainant displayed the "traits" of fantasizing, Burns had not described any "traits" of fantasizing in her testimony. Instead, she merely equated fantasizing with lying. Her testimony that the complainant had not exhibited any evidence of fantasizing was therefore a direct comment on the truthfulness of the complainant's allegations.
>
> Poole testified that whether the complainant had been the subject of manipulation was the "less likely explanation." He did not testify merely that the complainant did not exhibit characteristics associated with manipulation nor did he even testify that the complainant was not easily manipulated. Instead, he expressed an opinion on whether the complainant had in fact been manipulated. The State argues that Poole's conclusion is not a comment on truthfulness because it is logically possible for someone to be manipulated against making allegations. But that claim ignores the reality of the testimony at trial. The child made allegations of abuse, and the defense raised the issue of manipulation by cross-examining the child about whether her grandmother told her what to say. By saying that it was less likely that the child had been manipulated, Poole clearly conveyed to the jury that the child's allegations were not the result of manipulation. We hold that this testimony was a direct comment on the truthfulness of the complainant's allegations.
>
> Likewise, Poole's testimony that the allegations "were not the result of fantasy" constituted a direct comment on the truthfulness of the complainant's allegations.

Id. at 73. The court went on to hold that the defense had not opened the door to the expert

testimony through questioning, although the door was certainly opened for the witness being questioned to rebut the characterization being conveyed by the questioning. *See id.* at 73-74.

Three years after *Schutz*, the San Antonio court decided *Aguilera v. State*, 75 S.W.3d 60 (Tex. App. - San Antonio 2002, pet. ref'd). This was a child sexual abuse case where the state presented a psychologist in its case in chief who testified as follows:

> Q. In the course of your practice as a psychologist with children who have been victims of sexual abuse, have you ever encountered any children that lied?
>
> A. Yes, sir.
>
> Q. What percentage of children would you estimate, out of all the patients that you've seen, what percentage of children did you find to be lying?
>
> A. Consistently, since about 1973, in training. About one out of ten, about ten percent there is something that does not come together; and that has stayed through time with me since that time to the present, ten percent.
>
> Q. And what kind of a test-what kind of testing or evaluation, or what kind of psychological evaluating tools do you use to test as far as that is concerned?
>
> A. The strongest is-there is not a test. It is the-
>
> [objections]
>
> Q. I'm sorry. Yes, let me rephrase. Are there any tools in evaluating the psychological evaluation that can help you determine if a child is lying?
>
> A. Yes, sir.
>
> [objections]
>
> A. I understood the question: Are there any tools and evaluation that help to identify the ten percent who are malingering, lying, being deceitful?
>
> Q. That is correct.
>
> A. Okay. The reason we have this procedure with the Children's Advocacy-

> [objections]
>
> Q. (BY MR. RAUL MARTINEZ) Your answer to the question, Dr. Pi±a? You may answer.
>
> A. The answer is yes, sir.
>
> Q. Okay. And when you make a finding, a psychological finding the child may be lying, do you still continue to provide services to those children as well?
>
> [objections]
>
> Q. (BY MR. RAUL MARTINEZ) Dr. Pi±a, one last question: In terms of your conversations with Amber Smith, in terms of your observations of the videotape, did you find her story to be consistent throughout the time?
>
> A. Yes.

Id., 75 S.W.3d at 64-65. The court of appeals reversed, citing *Yount*.

Once this case had run its course, the state brought a second case to trial and again used this same psychologist. *See Aguilera v. State*, 2007 WL 120562, No. 04-05-00622 (Tex. App. - San Antonio, Jan. 19, 2007, pet. ref'd)(nfp). In that case, the psychologist testified as follows:

> First, with respect to Amber's symptoms, Dr. Pina testified on direct examination that "she exhibited symptoms ... that were consistent with other children of the same age, same background, who claimed that they were sexually abused and were found to have been such by proceedings such as this one or other methods also." He then discussed the particular symptoms he observed in Amber, citing her hyper-vigilance, self-isolation, exhibition of a startled response when interrupted, signs of depression, sleep disturbances, headaches, separation anxiety and advanced sexual knowledge and preoccupation, as the symptoms that were consistent with those of sexually abused children.

Id. at *3. The court held that this testimony, which it characterized as "testimony that Amber's symptoms were consistent with those of children who had been sexually abused," was not an opinion that Amber was credible. *Id*. The court likened it to the type of evidence held admissible in *Duckett* and *Cohn*.

The trickier part of the psychologist's testimony came when he was again asked by the prosecutor whether the complainant's story was consistent. That reads as follows:

> [D]uring a later portion of direct examination in which the prosecutor asked, "Did you perform any tests to determine the consistency of her story?" Dr. Pina replied, "... What I did is that I took a look at, and I could call it essentially testing, what she had said before to her boyfriend, to her aunt - on the videotape that was done before I saw her, that I did not see. I saw her blind, and then what she told me, and then kept up across time, also the police investigator and those reports, reviewed them, and I saw the consistency across symptoms." The prosecutor then asked, "I think you've said that you saw consistency across time?" Dr. Pina responded, "So, we're taking a look at the issue of consistency, the consistency of the symptoms and how these symptoms reacted to known treatments where we know what's going to happen if someone claims a specific symptom and then you apply the treatment and you see if the person gets better or not. You also provide fake symptoms at times to see if a person catches onto that." Finally, in explaining the approach of the multidisciplinary team to which he belongs, Dr. Pina further stated, "The multidisciplinary team also takes on a different function, which is, to disagree purposefully to find flaws or to find problems with a particular case...." Dr. Pina did not state whether Amber did or did not exhibit fake symptoms, and did not state that his team could find no flaws in her story.

Id. at *4. Unlike the case with Aguilera's previous trial, the court of appeals here held that the expert had not crossed the line into a direct opinion on truthfulness, pointing out that:

> Here, Dr. Pina was describing the general approach of his team in verifying the truthfulness of a child's allegations by providing fake symptoms to check the reaction and by disagreeing to find flaws in the story. He did not express an opinion as to whether Amber "caught on" to the fake symptoms, and did not state whether or not his team found any flaws in Amber's story. Dr. Pina did not express an opinion on whether Amber had in fact been manipulated or whether her allegations were the result of fantasy. The fact that the jury could draw an inference from Dr. Pina's testimony that Amber was being truthful does not make his testimony inadmissible as a direct comment on her credibility.

Id. In setting out the rule of *Schutz*, the court of appeals boiled it down:

> Whether a particular child is lying, fantasizing or being manipulated is a matter

> within the knowledge of lay persons, and expert testimony on the issue is thus inadmissible. However, a party may attack the credibility of a witness by offering the following kinds of manipulation evidence: "(a) evidence that the person is, in general, the kind of person who is easily manipulated, (b) common signs or symptoms of manipulation and evidence that the person displays some or all of these signs or symptoms, and (c) evidence of third person acts or words designed to manipulate." Expert testimony that a complainant does not exhibit the traits of manipulation does not constitute a direct comment on the complainant's truthfulness, and is thus admissible.

Id. at *4 (citing *Schutz*, and also recognizing *Schutz*' holding that expert testimony stating complainant did not exhibit any traits of fantasizing did constitute an impermissible comment on truthfulness where the expert did not describe any "traits" of fantasizing and merely equated it with lying). Any simplification of *Schutz* is a good thing.

Finally, there are two unpublished opinions out of the Fort Worth court that bear mention, as they involve the trial court excluding defense evidence and also further explain *Schutz*.

The first case is *Denton v. State*, 2006 WL 2076534, No. 02-05-044-CR (Tex. App. - Fort Worth, July 27, 2006, pet. ref'd). In this aggravated sexual assault of a child case, the defense sought to have an expert (Dr. Peek, a psychologist) testify to his opinion that the complainant (C.D.) "had memorized his testimony and that he was reciting a story that he had learned in previous interviews." *Id.* at *2. He further testified that the complainant's testimony at trial was "'very remembered and mechanical' as [he] would answer different questions with the same words." *Id.* The witness went on:

> Dr. Peek explained that as a child repeats the same story in response to multiple interviews, he begins repeating the same words rather than referring to the event itself. Furthermore, Dr. Peek explained that children begin to reinforce the version of the story that is pleasing to the interviewer. Because of this, Dr. Peek testified, the child's testimony becomes so “packaged” that it needs other corroboration. And in that case, Dr. Peek stated, whether the child has been previously abused would be of importance because (1) a child who had already been through a sexual abuse interview would be very sophisticated sexually and (2) a young child's memory works in such a way that events often become combined. Dr. Peek testified that from his review of CPS documents, C.D. had an extensive prior history of sexual abuse.

Id. Note, however, that Dr. Peek also testified that he could not form an opinion about

whether C.D.'s testimony was truthful. *Id.*

Nonetheless, the court of appeals affirmed the trial court's exclusion of this evidence on the basis that it was a direct comment on C.D.'s truthfulness:

> As the State points out, the court of criminal appeals in *Schutz* discussed "learned memory" under the heading of manipulation. And the court held that evidence that a child complainant's allegations are the result of manipulation is inadmissible. Here, Dr. Peek's opinion was not merely that C.D. exhibited characteristics associated with one who was reciting a story that he had memorized from previous interviews, nor was he merely going to testify that C.D. was easily manipulated. *Cf. id.* at 73 (holding expert testimony that complainant did not exhibit behaviors of manipulation admissible because it did not constitute a direct comment on the truth of the complainant's allegations); *Vasquez v. State*, 975 S.W.2d 415, 418-19 (Tex.App.-Austin 1998, pet. ref'd) (holding testimony admissible that complainant's statement had characteristics commonly found in descriptions of actual events). Rather, Dr. Peek's proffered testimony expressed a direct opinion on whether C.D. had in fact memorized his testimony and was reciting a story that he had learned in previous interviews. *See Schutz*, 957 S.W.2d at 73 (holding expert's testimony was direct comment on truthfulness of complainant's allegations when he testified that the "less likely explanation" was that complainant had been the subject of manipulation). Therefore, we hold that although Dr. Peek explained that he was not giving an opinion on C.D.'s truthfulness, his testimony was nevertheless a direct comment on the truthfulness of C.D.'s allegations and, thus, properly excluded.

Id. at *3 (citations partially omitted).

In *DeLong v. State*, 2006 WL 3334061, Nos 02-04-410-CR, 02-04-411-CR (Tex. App. - Fort Worth 2006, pet. ref'd) the defense-offered testimony was from an expert (Elizabeth Loftus) who would testify about the "phenomenon of 'false memories.'" *Id.* at *2. Of course, this was a child sexual abuse case. The defense proposed, through Dr. Loftus, "to show that the complainant's allegations and the circumstances surrounding their outcry statements were consistent with the false memory phenomenon." Id. Her qualifications and testimony were described by the court as follows:

> [S]he is a psychologist who specializes in the area of cognitive psychology and, more specifically, the area of human memory and suggestibility. She has studied human memory since the 1960s and has published articles, papers, and

textbooks on the subject since the early 1970s. Dr. Loftus said that she has conducted hundreds of experiments on human memory involving over 20,000 subjects; many of the experiments involved suggestibility. Her curriculum vitae includes a list of her peer-reviewed and other publications, most on the subject of memory and many on suggestibility.
...

Dr. Loftus testified [outside the presence of the jury] that a false memory is an untrue memory that the witness or complainant nonetheless believes to be true. She explained that a false memory can be very detailed, and a person who has a false memory can be very confident and even emotional about the false memory. Dr. Loftus testified that she could not say whether a particular person is lying or that a particular memory is a false memory-in other words, that she could not comment directly on the truthfulness of a complainant's allegations-but she could say whether the circumstances indicated suggestion of the sort that can lead to a false memory.

Appellant's counsel posed a series of hypothetical situations to Dr. Loftus that tracked the circumstances surrounding the complainants' outcry statements. In her opinion, it was “certainly possible” that the circumstances surrounding H.W.'s outcry were consistent with the formation of false memories of the sexual abuse she reported, that J.W.'s outcry was “absolutely” consistent with suggestion and memory contamination, and that there was a “major worry” about suggestibility with respect to S.K.'s outcry - especially because she denied any abuse in her first interview with police, but then alleged abuse after she spoke with other witnesses. Dr. Loftus said that the circumstances surrounding J.W.'s outcry paralleled the methodology she used in the laboratory to induce false memories in test subjects.

Of the five categories of credibility evidence identified in *Schutz*, Dr. Loftus's false-memory testimony best fits into the third category, general testimony that directly attacks credibility. An example of general testimony that directly attacks credibility listed by court of criminal appeals includes testimony about the common symptoms or traits of a child who is fantasizing or being manipulated coupled with testimony that the child in question exhibits some or all of those symptoms or traits. Such testimony is ôgeneralö in the sense that it does not comment on the truthfulness of the specific allegations made by the complainant. Dr. Loftus's testimony was likewise general. She testified that she could not say that any particular allegation was false, but could say that the circumstances surrounding the complainants' outcries were consistent with the

> creation of false memories. Thus, Dr. Loftus's false-memory testimony was general testimony that directly attacked the complainants' credibility, and such evidence is admissible during the offering party's case-in-chief. *See id.*; *see also Wright v. State*, Nos. 01-05-00597-CR, 01-05-00598-CR, 01-05-00599-CR, 2006 WL 2076148, at *8 (Tex.App.-Houston [1st Dist.] July 27, 2006, no pet. h.) (holding defense counsel ineffective for failing to secure expert testimony "regarding false allegations of sexual assault occurring after a divorce and the accepted protocols for interviewing suspected child sexual assault victims," which would have been admissible under *Schutz*); *Segura v. State*, No. 03-03-00685-CR, 2005 WL 2313559, at *4 (Tex.App.-Austin Sept.23, 2005, no pet.)(not designated for publication) (noting that expert testimony on false memory and "memory hardening" admitted without objection); *Ard v. State*, No. 05-02-01915-CR, 2004 WL 1813753, at *2 (Tex.App.-Dallas Aug.16, 2004, pet. ref'd) (not designated for publication) (noting admission without objection of psychologist's testimony on how memory can be influenced or altered).
>
> At trial, the State argued that Dr. Loftus's testimony was irrelevant to any question before the jury because Dr. Loftus testified that she could not say whether a witness was lying or whether any particular memory was a false memory. That argument turns the relevancy analysis on its head because, as we have already observed, an expert may not testify that a particular witness is being truthful. *See Yount*, 872 S.W.2d at 711.
>
> We hold that Dr. Loftus's false-memory testimony was general evidence that directly attacked the complainants' credibility and was, therefore, relevant and admissible during Appellant's case-in-chief-provided that her opinion was shown to be reliable.

Id. at *5-*6. Again, any explanation of *Schutz* is welcome.

In *Denton*, the expert was not allowed to testify because the expert's opinion went beyond stating "merely that C.D. exhibited characteristics associated with one who was reciting a story that he had memorized from previous interviews" or just testifying that C.D. was "easily manipulated." Rather, according to the court, the expert was going to testify that C.D. had in fact memorized his testimony and "was reciting a story that he had learned in previous interviews." *Denton*, 2006 WL 2076534 at *3. Exclusion of the testimony was not an abuse of discretion and the case was affirmed.

In *DeLong*, "Dr. Loftus testified that she could not say whether a particular person is

lying or that a particular memory is a false memory - in other words, that she could not comment directly on the truthfulness of a complainant's allegations - but she could say whether the circumstances indicated suggestion of the sort that can lead to a false memory." *DeLong*, 2006 WL 3334061 at *5. Exclusion of the testimony was abuse of discretion and the case was reversed.

MUNCHAUSEN SYNDROME BY PROXY:

In *Reid v. State*, 964 S.W.2d 723 (Tex. App. — Amarillo 1998, pet. ref'd) the court held that the trial court did not abuse its discretion in admitting testimony opining that the defendant suffered from Munchausen Syndrome by Proxy to establish the intent to kill her child.

FUTURE DANGEROUSNESS:

Of course, *Nenno v. State* is itself a future dangerousness case. *See id.*, 970 S.W.2d at 562. Obviously, this is treated as a "soft science." Other cases dealing with future dangerousness include *Russeau v. State*, 171 S.W.3d 871, 883 (Tex. Crim. App. 2005); *Allen v. State*, 2006 WL 1751227 at *5, No. AP-74951 (Tex. Crim. App., June 28, 2006)(nfp); and *Espada v. State*, 2008 WL 4809235 at *8, No. AP-75,219 (Tex. Crim. App. 2008)(nfp).

SEXUAL ABUSE OF CHILDREN:

Here are just a few more of the many cases dealing with "expert" testimony pertaining to the behaviors of sexually abused children:

Wyatt v. State, 23 S.W.3d 18 (Tex.Crim. App. 2000)(testimony regarding sex offenders); *Wright v. State*, 2007 WL 1726253 (Tex. App. -- Fort Worth, June 14, 2007, pet. ref'd)(forensic interviewing protocols); *Escamilla v. State*, 2006 WL 220861, No. 06-05-00082-CR (Tex. App. -- Texarkana, Jan. 31, 2006)(grooming, delayed outcry); *Dennis v. State*, 178 S.W.3d 172 (Tex. App. -- Houston [1st Dist.] 2005, pet. ref'd)(behaviors of abused children); *Mulvihill v. State*, 177 S.W.3d 409 (Tex. App. -- Houston [1st Dist.] 2005, pet. ref'd)(behaviors of sexual abuse victims); *Comeaux v. State*, 2005 WL 1149795, No 14-03-01223-CR (Tex. App. -- Houston [14th Dist.] 2005, pet. ref'd)(grooming, delayed outcry, behaviors consistent with sexual abuse); *Johnson v. State*, 2005 WL 2155203, No. 12-03-00306 (Tex. App. -- Tyler, Sept. 7, 2005, no pet.)(delayed outcry).

Of course, you should always read *Duckett* and *Cohn*.

EYEWITNESS IDENTIFICATION:

Eyewitness identification has been faring a lot better in the courts than during the bad old days of *Pierce* to *Weatherred* (see above). A recent case:

Stephenson v. State, 226 S.W.3d 622 (Tex. App. -- Amarillo 2007, no pet.).

HYPNOTICALLY ENHANCED TESTIMONY:

State v. Medrano, 127 S.W.3d 781 (Tex. Crim. App. 2004); *Zani v. State*, 758 S.W.2d 233 (Tex. Crim. App. 1988).

Zani sets a standard for this testimony that is higher than *Kelly* or *Nenno*, which is intended to reflect its inherent great risks. In *Medrano*, the Court of Criminal Appeals reaffirmed *Zani*, holding that it was not overruled by *Nenno*.

DRUG ADDICTION:

Roberts v. State, 220 S.W.3d 521 (Tex. Crim. App. 2007).

PRISON GANGS:

Garza v. State, 2008 WL 5049910, No. AP-75477 (Tex. Crim. App., Nov. 26, 2008).

"DIMINISHED CAPACITY":

More accurately referred to as psychiatric psychological evidence of a mental disease or defect directed at a specific intent element of an offense which contains one.

Jackson v. State, 160 S.W.3d 568 (Tex. Crim. App. 2005).
Ruffin v. State, 270 S.W.3d 586 (Tex. Crim. App. 2008).

SHOE AND TIRE PRINTS:

See Rodgers v. State, 205 S.W.3d 525 (Tex. Crim. App. 2006); *Frankenfield v. State*, 2008 WL 4603572, Tex. App. Austin, Oct. 16, 2008, no pet.)(nfp). Dealing with this evidence on its merits is a straightforward *Nenno* analysis.

SCENT LINEUPS AND OTHER DOG ISSUES:

Winston v. State, 78 S.W.3d 522 (Tex. App. -- Houston [14th Dist.] 2002, pet. ref'd) was a case of first impression dealing with "scent lineups." A scent lineup is a procedure whereby a dog picks someone out of a lineup based upon his smell. Applying the *Nenno* standard, the court held that such a procedure can be reliable. The court first observed that the defendant had not really questioned whether the handler's (Deputy Pinkett's) testimony fell within his area of expertise as a dog handler. As to whether the field is expertise is legitimate, the court looked at a range of cases dealing with dog evidence:

> Texas courts have recognized the admissibility of many types of dog-related evidence. *See Parker v. State*, 46 Tex.Crim. 461, 80 S.W. 1008, 1011 (1904) (recognizing admissibility of dog-tracking evidence); *Fitts v. State*, 982 S.W.2d 175, 184 (Tex.App.-Houston [1st Dist.] 1998, pet. ref'd) (recognizing admissibility of a dog's reaction to the presence of hydrocarbons for determining probable cause); *Walsh v. State*, 743 S.W.2d 687, 689 (Tex.App.-Houston [1st Dist.] 1987, pet. ref'd) (recognizing the use of drug-sniffing dogs for determining probable cause).

Id., 78 S.W.3d at 526. These cites are supplied here to give you a head start on research if you come across any other types of dog cases.

The court went on to analyze the question at hand, and, in language quite complimentary of certain breeds of dogs to track scents - especially blood hounds - the court held that the field of expertise is indeed legitimate. *See id.*

Finally, the court addressed the third prong of *Nenno* - whether the expert properly relied on and used the principles in the field, which the court characterized as the "most significant prong." *Id.* at 527. To answer this question, the court said, "we believe this determination turns in each case on three factors: (1) the qualifications of the particular trainer, (2) the qualifications of the particular dog, and (3) the objectivity of the particular lineup." *Id.* at 527. As to the second prong of this analysis, the court set out a further analytical framework:

> [A] dog is "qualified" for a particular case if (1) the dog is of a breed characterized by acuteness of scent and power of discrimination, (2) the dog has been trained to discriminate between human beings by their scent, (3) by experience the dog has been found to be reliable, (4) the dog was given a scent known to be that of the alleged participant in the crime, and (5) the dog was given the scent with in the period of its efficiency.

Id. at 527-528 (citations omitted). In this case, all three of the issues were resolved favorably to the dog in a fairly long and detailed analysis. *See id.* at 527-529. This analysis has since been reaffirmed by both courts of appeals in Houston. *See Risher v. State*, 227 S.W.3d 133 (Tex. App. - Houston [1st Dist.] 2007, pet. ref'd); *Martinez v. State*, 2006 WL 3720136, No. 14-05-01056-CR (Tex. App. - Houston [14th Dist.] 2006, no pet.)(nfp).

In the 2007 case of *Trejos v. State*, 243 S.W.3d 30 (Tex. App. - Houston [1st Dist.] 2007, pet. ref'd), the court of appeals modified the analysis to fit a different kind of dog - a "cadaver dog." This case was another "third prong" case and used the same test for the third Nenno prong from Winston (the qualifications of the particular trainer, the qualifications of the particular dog, and the objectivity of the particular lineup), except in this case, the court changed the third factor to "objectivity of the particular cadaver search." *Id.*, 243 S.W.3d at 50. After a fairly extensive analysis, the court additionally modified the 5 factor test for the qualifications of the dog to read as follows:

> Having examined the five factors in Risher and Winston, we have determined that those factors must be adapted slightly to meet the unique function of a cadaver dog - to detect deteriorating human remains. We conclude that the factors we must examine to determine a cadaver dog's qualifications and reliability are whether the dog (1) is a breed or type that typically works well off-lead, (2) has been trained to discriminate between human scents and animal scents, and (3) has been found by experience to be reliable. These factors are not exclusive. Other factors may be considered in an appropriate case.

Id. at 52-53. Basically, the court holds that a dog called upon to distinguish between a human dead body and an animal dead body just doesn't have to be as good as one that can do scent lineups. Hence, the "breed characterized by acuteness of scent and power of discrimination" has been dropped.

This modified analysis really kind of makes sense. Whatever remains the dog finds can ultimately be conclusively proven to either be human remains or not. Just be sure that if you are faced with a scent lineup, you use the scent lineup analysis, because the cadaver dog analysis is far less rigorous.

ABEL ASSESSMENT:

The "Abel Screen" or "Abel Assessment" is a commonly-used substitute for the penile plethysmograph. It doesn't fare so well in *In re CDK*, 64 S.W.3d 679 (Tex. App. – Amarillo 2002, no pet.). In a colorful opinion sprinkled with references to literary works dealing with witchcraft (Harry Potter, for one) the court of appeals makes one wonder if the Abel Screen could ever be admissible.

HORIZONTAL GAZE NYSTAGMUS:

An officer can testify as an expert on the administering of the Horizontal Gaze Nystagmus Test and his conclusions therefrom if he is qualified as an expert in both the administration and technique of the test. *See Emerson v. State*, 880 S.W.2d 759, 769 (Tex. Crim. App. 1994). To qualify as an expert in the administration of the test, the officer has to show that he has a "practitioner certification" from the State of Texas. *See id.* The officer is allowed to testify as to performance on the test, but not to correlate that performance to an actual blood alcohol concentration. *See id.*

In *Smith v. State*, 65 S.W.3d 332, 343-44 (Tex. App. – Waco 2001, no pet.), the court held that a certification from Texas A&M will do in a pinch, joining the Fort Worth court, which had previously decided the same thing in *Kerr v. State*, 921 S.W.2d 498, 502 (Tex. App. – Fort Worth 1996, no pet.). The same court, however, later held that no certification at all – from anywhere – was going to far. *See Ellis v. State*, 86 S.W.3d 759 (Tex. App. – Waco 2002, pet. ref'd). And if it weren't for the good ol' harmless error rule, they might have even had to reverse that case.

In *Hunt v. State*, 2002 Tex. App. LEXIS 621 (Tex. App. – Houston [14th Dist.], Jan. 31, 2002, no pet.)(nfp) the appellant was successfully able to show at trial that the cop really did not administer the HGN test very well. He messed it up in a number of respects. He then pointed out that the NHTSA manual states that the HGN must be administered exactly as shown in the manual or the results are scientifically invalid. *See id.* at *3. He also reminded the court that the third prong of *Kelly* requires that "the technique must have been properly applied on the occasion in question." *Id.*, 824 S.W.2d at 573.

Faced with an argument like that, the court did what courts are want to do – skipped the question and went directly to harm. But toward the end of the harm analysis, the court did mention that it was assuming that the admission of the HGN test and testimony was error. *See id.* at *6. This would be a good argument to remember.

VIII. "LAY" EXPERT TESTIMONY.

Texas Rule of Evidence 701 states:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

A lay witness can express opinions about his or her common knowledge, perceptions, as well as observations based upon experience. At first blush this seems more harmless than it actually is, so watch out. In actuality, the ONLY thing that separates a lay opinion witness from an "expert" for purposes of Rule 702 is that the lay witness must testify about something he actually perceived (through sight, smell, taste, hearing or touch). Otherwise, it can be difficult to tell the difference between the two. For instance, a lay witness may testify regarding such matters as height, weight, smell, distance, speed or color.[200] A lay witness who is familiar with a particular person may testify regarding the person's voice, handwriting or sanity.[201] What marijuana smells like is specialized knowledge, but a "non-expert" may communicate to the jury that he smelled it. What sexually abused kids act like is also specialized knowledge, but that too can be testified to by a lay witness who actually perceived it (such as the social worker who counseled the child).[202]

The perception requirement of Rule 701 requires the proponent of the lay-opinion testimony to establish the witness has personal knowledge of the events upon which he bases his opinion.[203] The court must determine whether the opinion is rationally based on that perception.[204] The second requirement of Rule 701 is that the opinion be helpful to the trier of fact in understanding the witness's testimony or in determining a fact issue.[205] The

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[200]*See Boothe v. State*, 474 S.W.2d 219 (Tex.Crim.App. 1971)[smell of marijuana].

[201]*See Cadd v. State*, 587 S.W.2d 736, 739 (Tex.Crim.App. 1979)[handwriting].

[202]*See, e.g., Harnett v. State*, 38 S.W.3d 650, 656-59 (Tex. App. – Austin 2000, pet. ref'd).

[203]*See Fairow v. State*, 943 S.W.2d 895, 898 (Tex.Crim.App.1997).

[204]*See id*. at 899-900.

[205]*See id*. at 900.

helpfulness of an opinion is determined from the facts of the case. Whether an opinion satisfies the requirements of Rule 701 is within the sound discretion of the trial court, and its decision concerning admissibility should be overturned only if it abuses its discretion.[206]

Like so many of the rules of evidence, Rule 701 can be used as both a sword and a shield. What follows are two examples of Rule 701 in action. In both cases, watch how sponsoring counsel (the state in each of these cases) circumvents the *Daubert* problems with their witness and gets the testimony in front of the jury. As with Section V., above, it should be assumed that unless otherwise indicated, the following excerpts are quotes from the cases.

***Lavergne v. State*, 2001 WL 225701 at **2-4 (Tex. App. – Houston [1st Dist.], March 8, 2001, no pet.)(nfp).**

In this case the appellant claimed that the trial court committed reversible error by not excluding the testimony of Officer Sellers that he could determine appellant was a user of cocaine by the pungent odor of his fingertips and the burns on his fingers should have been excluded.

Officer Sellers testified that, as a police officer, he had extensive training and experience in how narcotics are used. When questioned by the State about whether there was any other indication besides the package of cocaine recovered at the scene that appellant was using cocaine, the record shows Officer Sellers replied, "Yes, sir.... His fingertips." The record shows the following transpired:

[DEFENSE]: I object unless [Officer Sellers] has experience in usage and testifying. He has not demonstrated that at all.

[COURT]: I will let him testify to what he saw. I won't let him interpret that unless something else is proved.
...
Q [STATE]: What specific factors did you observe that indicated to you that [appellant] does use cocaine or did use cocaine back in July of 1999?

A [OFFICER SELLERS]: Index finger and forefinger had--the fingertips were burned and there was a pungent odor about him.
...
Q [STATE]: Let's take the pungent odor first. In your experience, why--how would you describe that odor, first of all, or can you describe it?

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[206] *See id.* at 901.

[DEFENSE]: Judge, I object unless he has medical training or medical experience that tells whether a pungent odor relates specifically to a specific drug like cocaine, and he has not testified to that.

[COURT]: Do you have any training to allow you to do that?

[OFFICER SELLERS]: No medical training, no, sir.

[THE COURT]: All right. I will sustain your objection.

[DEFENSE]: Ask the jury to disregard that last statement of his.

[COURT]: I don't know that he answered it; did he?

[DEFENSE]: I think he tried to get into it. I just want them to be advised that's not something they can consider as evidence.

[COURT]: I will allow the testimony up to this point, but do not go into it any further.

Q [STATE]: Officer, let me make it clear I am not trying to get into your medical expertise because obviously none of us in here, except for [a] few exceptions, are actually doctors medically trained. I am just trying to talk about your experience as a police officer, what you have seen, what you observed, and what you have smelled. Have you observed as a police officer, in your training and your experience in dealing with cocaine offenders, specifically, a particular odor that's unique to cocaine users?

A [OFFICER SELLERS]: Yes, sir.

[DEFENSE]: Objection. Same objection as before, Judge, without any medical training and experience.

[COURT]: Well, I will let him testify to what he's observed, but I won't let him interpret that as to whether it's cocaine and what it is. I will let him testify to what he observed.

...

Q [STATE]: You observed this pungent odor about this particular defendant?

A [OFFICER SELLERS]: Yes, sir.

Q [STATE]: And just in regards to this particular defendant, that indicated to you that

he uses cocaine?

[DEFENSE]: I object to any indication.

[COURT]: That's sustained.

Q [STATE]: Let me switch over to--there was the pungent odor. What was the second clue to you?

A [OFFICER SELLERS]: Fingertips.

Q [STATE]: What's the significance of the fingertips? How did you describe that ?

A [OFFICER SELLERS]: Superficial burns on the fingertips.

Q [STATE]: And what is the significance of that to you?

[DEFENSE]: Again, I object if it relates to any interpretation of cocaine.

[COURT]: I will overrule that.

[OFFICER SELLERS]: Of holding a crack cocaine pipe.

Q [STATE]: Well, can you just briefly tell the jury how is cocaine ingested if it's crack, and what is a crack pipe?

[DEFENSE]: Again, I object unless he has specific training in this field.

[COURT]: That will be overruled.

[OFFICER SELLERS]: Crack cocaine is ingested through a pipe. We are not speaking of the conventional pipe you smoke tobacco or per se marijuana in, you're talking about a cylindrical item usually--commonly made of either glass or steel or copper that is approximately three to five inches long, or I would say more.
... Since glass and metal are conductors of heat, it often causes burning on the fingers that they hold it with, commonly the index finger and the forefinger.

On appeal, appellant contends Officer Sellers was not qualified to give an opinion as to the interpretation of factors of cocaine usage, and he cites *Nenno v. State* for the proposition that Officer Sellers's testimony did not satisfy the standard for non-

scientific expert testimony. However, contrary to appellant's contentions, Officer Sellers's testimony was based on his own personal observations and experiences as a police officer, and was not offered as non-scientific expert testimony. *See Reece v. State*, 878 S.W.2d 320, 324-25 (Tex.App.--Houston [1st Dist.] 1994, no pet.) (holding police officers may testify, based upon training and experience, that a defendant's actions are consistent with someone selling cocaine). Officer Sellers's testimony was admissible under Rule 701 as opinion testimony. Thus, we find the trial court did not abuse its discretion in admitting Officer Sellers's opinion testimony.

We overrule point of error three.

***Urias v. State*, 1999 WL 546860 at *1 (Tex. App. – Austin, July 29, 1999, no pet.)(nfp).**

THE STATE: Officer, in your experience and training as a peace officer, have you had occasion to see people that have been--that have been stabbed like the victim in this case was stabbed?

WITNESS: Yes, sir. I have seen other stab victims.

THE STATE: And based on your training and experience and working with other stab victims, do you have an opinion as to whether or not the instrument that caused this stab wound would be capable of causing serious bodily injury or both.

APPELLANT'S COUNSEL: I object your Honor. He hasn't laid a sufficient predicate of his being any type of an expert in weapons, in medicine, physician, anything like that that would qualify him to testify whether this particular wound or any instrument that caused it would be capable of causing death. So we would object to the admission of that evidence.

THE COURT: I'll sustain the objection.

THE STATE: Let me ask you this: Officer, when you saw the victim and you assessed his wounds, did you feel like his health was in jeopardy?

WITNESS: Yes, sir.

THE STATE: Did you feel like, in fact, that his life might be in jeopardy?

APPELLANT'S COUNSEL: Excuse me, your Honor. Same objection. It's irrelevant

whether he felt the victim's life was in jeopardy. This is sort of a back doorway of getting in the evidence you already said was not admissible. We would object.

THE COURT: I'm going to overrule your objection.

THE STATE: Officer, were you concerned the victim's actual life might be in jeopardy?

WITNESS: Yes, sir.

The court of appeals found that the officer's testimony was properly admitted under TEX. R. EVID. 701.[207] (Note that the court of appeals, in a short and shallow analysis, also determined that the officer would have qualified to give the expert opinion under Rule 702.)[208]

[207] *See id.* at *3.

[208] "Officer Cristofferson testified about his training and experience as a police officer, including five and one-half years as a police officer and sheriff's deputy. The trial court could properly have determined that he possessed special knowledge and that his testimony would assist the jury in its evaluation of the evidence." *Id.* at *3. Calling this a "shorthand" version of the test is an understatement to say the least.

IX. EXPERTS FOR THE INDIGENT DEFENDANT

Article 26.05(a) Texas Code of Criminal Procedure, provides that court appointed counsel is entitled to reimbursement for the expenses of expert witness testimony. Reimbursement is based upon a schedule of fees adopted in each county. Senate Bill 7, passed this year (the "Fair Defense Act") is going to change this and may give indigents more access to expert testimony where in the past it has been virtually unheard of in non-urban counties (and not common in some urban counties).

In the landmark case of *Ake v. Oklahoma*,[209] the Supreme Court held that an indigent defendant is entitled access to a competent psychiatrist in order to examine the defendant and assist his attorney in the evaluation, preparation and presentation of his defense. The defendant must make an *ex parte* threshold showing to the trial judge that his future dangerousness is likely to be a significant factor at the punishment stage of his capital trial.

In *DeFreece v. State*,[210] the Court of Criminal Appeals held that *Ake* requires access to an adversarial psychiatrist who will "provide technical assistance to the accused, to help evaluate the strength of his defense, to offer his own expert diagnosis at trial if it is favorable to that defense, and to identify the weaknesses in the state's case." An "examination by a 'neutral' psychiatrist" is ***not*** a constitutionally acceptable option,[211] and Texas courts have no authority to appoint a neutral doctor to perform a future dangerousness examination in any event.[212]

The issue of future dangerousness is ***always*** a significant factor at the punishment stage of a capital trial in Texas. The jury must decide in every capital trial whether there is a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society. A sentence of life in prison is mandatory if the jury has a reasonable doubt about that question.[213]

Moreover, once a defendant has made an *ex parte* offer of proof that a psychiatrist

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[209]470 U.S. 68 (1985).

[210]848 S.W.2d 150, 159 (Tex.Crim.App. 1993).

[211]*DeFreece*, 848 S.W.2d at 159.

[212]*See Bradford v. State*, 873 S.W.2d 15 (Tex.Crim.App. 1993); *Bennett v. State*, 742 S.W.2d 664, 671 (Tex.Crim.App. 1987).

[213]*See* TEX CODE CRIM. PRO. ANN. Art. 37.071(2)(b)(1)(g).

would probably give favorable testimony about his future dangerousness, it would violate due process for him to be denied that "opportunity to raise in the jurors' minds questions about the State's proof of an aggravating factor" because of his poverty.[214] In *Ake*, the Supreme Court held that an indigent defendant was entitled to psychiatric assistance on the issue of future dangerousness, even though he made no showing whatsoever that it would yield favorable evidence. Deprivation of necessary expert assistance is not subject to "a harm analysis".[215]

The indigent defendant's right to expert witness assistance was further expanded by the Court of Criminal Appeals in *Rey v. State*,[216] to include a pathologist.

> "...a pathologist is not per se excluded from the confines of *Ake*--in any given case, the necessity for the appointment under *Ake* will depend upon whether the defendant has made a sufficient threshold showing of need for the expertise of a pathologist in that particular case."[217]

Therefore, in light of *Rey*, indigent defendants should be able to obtain any expert assistance for which they can demonstrate need.[218]

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[214]*Ake v. Oklahoma*, 470 U.S. 68, 82, 84 (1985). *See also Williams v. State*, 958 S.W.2d 186, 194 (Tex.Crim.App. 1997)[defendant entitled to make showing *ex parte*].

[215]*See De Freece v. State*, 848 S.W.2d 150, 160 (Tex.Crim.App. 1993).

[216]897 S.W.2d 333 (Tex.Crim.App. 1995).

[217]*Rey v. State*, 897 S.W.2d 333, 339 (Tex.Crim.App. 1995).

[218]*But see Elmore v. State*, 968 S.W.2d 462 (Tex. App. — Eastland 1998, pet. ref'd)(not error for trial court to deny request for court appointed breath test expert in a driving while intoxicated trial).

X. TWO EXAMPLES OF PSYCHIATRIC TESTIMONY IN A CHILD SEXUAL ABUSE CASE

From: Westfall, "Psychiatric Testimony in Child Sexual Abuse Cases in Texas," *Voice for the Defense*, v.25 n.5 at 12 (June 1996). The entire article may be downloaded from my website: www.wpcfirm.com.

Psychiatric testimony can be placed on a continuum generally covering the ground between broad generalizations to the left and very specific opinions and conclusions to the right. At the far left is testimony that merely describes in a general way the behaviors likely to be observed in children who have been sexually abused. At the next level of specificity the expert would add testimony regarding behavior observed in the complainant in the case at trial, leaving it to the jury to draw its own conclusions regarding how the complainant's behavior may or may not match the behaviors of the class. Going one step further, the expert actually does the matching.

At this point, the expert may be asked to render one or more opinions. As with factual background and observations, there is a spectrum of opinions that could be offered by the expert, going from least to most specific. At one end of the spectrum, the expert may testify that the behavior of the complainant is "consistent with having experienced some traumatic event." This opinion should be the only one rendered when the child demonstrates only behaviors that are non-specific to sexual abuse.[219] Moving rightward, the expert may testify that the child's behavior is "consistent with having been sexually abused." Scientifically, this opinion would be correctly rendered when the child demonstrates behaviors, such as sexually acting out, which are specific to sexually abused children.[220] Moving still further testimony that in the expert's opinion,"the complainant was sexually abused." A final type of opinion would be that the complainant is telling the truth or the class to which the complainant belongs is generally truthful.

The following two examples demonstrate psychiatric testimony such as may be seen in a child sexual abuse case. You can expect to hear such testimony from anyone who is familiar with the professional literature of the field and not necessarily a psychiatrist. Pediatricians and Child Protective Services caseworkers are usually more than happy to render "opinions" such as those demonstrated below. It is incumbent upon the defense lawyer, therefore, to be familiar with the literature as well, along with having a good feel for

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[219]*See* Myers, et al., *Expert Testimony in Child Sexual Abuse Litigation*, 86 NEB. L. REV. 1, 52-62 (1989).

[220]*See id.*

when the "expert" crosses the line, as many are wont to do.[221] Each of the examples below will be analyzed in accordance with the current caselaw to determine if this expert crosses the line and when. For purposes of these examples, assume the complainant is a five year-old girl who has not been impeached and other requirements for admissibility have been met (e.g., relevance and qualifications).

Example 1

1. Prosecutor: What types of behaviors is a child who has been sexually abused likely to show?

   Expert: A broad range of behaviors, or no behaviors at all. Some twenty percent of abused children actually demonstrate no observable behaviorial reactions. Of those who do, some non-specific reactions to abuse may include anxiety, regression, sleep disturbance, depression, nightmares, and enuresis. More specific reactions may include sexually acting out, 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.

2. Prosecutor: What behaviors did you see in the complainant?

   Expert: Upon my examination of the complainant, I noticed that she was quite anxious. She could not sit still. I also noticed that she was aloof -- she did not readily engage in conversation with me, even when her mother

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[221]The following testimony by a pediatrician transpired in 1995 in a Tarrant County courtroom during her direct examination by the state:

Q. Okay. Doctor, in your professional experience, is it common to have physical findings of sexual abuse?

A. No, that's -- that's the confusing part. Only about 15 to 25 percent of the children have any kind of physical findings at all. ...

Q. And, Doctor, in your opinion of the other percentage of cases, which are the vast majority, does that mean that they didn't occur? That the child was not sexually abused?

A. No, they don't. Children are remarkably credible and direct and honest.

was present. I also noticed that she clung very close to her mother. I tried repeatedly to call her to me, but she would just look at me briefly, then turn around and bury her face in her mother's chest. I attempted to address with her the subject of the alleged abuse, but she refused to talk about it, thereby demonstrating avoidance of the subject. At one point, she cried.

3. Prosecutor: Doctor, what do these behaviors mean to you in your profession?

Expert: In light of my experience and the accepted literature, these behaviors are consistent with some traumatic event occurring in the child's life.

4. Prosecutor: Could that traumatic event be sexual abuse?

Expert: Yes.

5. Prosecutor: Have you formed an opinion regarding whether the complainant was sexually abused?

Expert: Yes. In my opinion, the complainant was sexually abused.

Prosecutor's question number one and the answer thereto are admissible as substantive evidence in the state's case in chief on guilt innocence.[222] This is a question calling for "general background information" and such information is provided by the expert in this case. This type of exchange was expressly approved in *Duckett*.[223] The prosecutor's second question and answer thereto are also permissible. In this exchange, the expert "applies the abstract elements" of his syndrome evidence to the complainant -- compares the complainant's behavior to that of the class of abused children who have been studied. This testimony was likewise sanctioned in *Duckett* and other cases.[224]

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[222]*Cohn*, 849 S.W.2d at 818-19.

[223]*Duckett*, 797 S.W.2d at 908-09; *see also, Cohn*, 849 S.W.2d at 817-18. But note that after *Williams v. State*, 895 S.W.2d 363 (Tex. Cr. App. 1994), it is doubtful that the state could present *only* this testimony, without tying it down to the facts of the case, presumably through the expert. *See id*. at 366.

[224]*Duckett*, 797 S.W.2d at 908-09; *see also, Cohn*, 849 S.W.2d at 817-18; *Gonzales v. State*, 831 S.W.2d 347, 352-54 (Tex. App. -- 1992, pet. ref'd); *Vasquez v. State*, 819 S.W.2d 932, 935 (Tex. App. -- Corpus Christi 1991, no pet.).

In his third question, the prosecutor asks the expert to draw a conclusion based upon the behavior of the complainant. The answer given by the expert is that the child's behavior is consistent with a traumatic event. Given the expert's previous answer, which described behaviors in the complainant that were non-specific of abuse, this is the only opinion that he could make and stay within the confines of Rule 705(c).[225] This opinion is admissible and was sanctioned by the Court of Criminal Appeals in *Cohn v. State*.[226] The court in *Cohn* held that it was permissible for the expert to testify that the complainant's non-specific anxiety behavior was consistent with having been sexually abused.[227] Therefore, question number four and its response are proper. Relying upon the accepted psychological literature, however, the court determined that such non-specific anxiety behaviors can only be circumstantial evidence of abuse.[228] Observations of this type of behavior cannot form the basis for the opinion that the complainant necessarily was abused. Thus, the expert here crosses the line between questions four and five.[229]

Example 2

1. Prosecutor: What types of behaviors is a child who has been sexually abused likely to show?

   Expert: A broad range of behaviors, or no behaviors at all. Some twenty percent of abused children actually demonstrate no observable behaviorial reactions. Of those who do, some non-specific reactions to abuse may include anxiety, regression, sleep disturbance, depression, nightmares, and enuresis. More specific reactions may include sexually acting out, 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.

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[225]*See Cohn*, 849 S.W.2d at 819 (citing Myers, *supra* note 29 at 60-61).

[226]*Id*.

[227]*Id*.; *see also Zinger v. State*, 899 S.W.2d 423, 432 (Tex. App. -- Austin 1995, pet. granted).

[228]*Id*.

[229]This line, of course, should be crossed outside of the presence of the jury in a Rule 705(b) hearing. Use the literature and Rule 705(c) to curtail the expert's opinions to the extent possible.

2. Prosecutor: What behaviors did you see in the complainant?

Expert: In watching the child play, I noticed a pattern of sexual advances by her toward many of her playmates. When she did not know she was being watched, she would constantly grab and fondle the crotches of the young boys and sometimes do the same to the young girls in the group. This behavior ceased when an adult was in the room. In drawing exercises, her pictures almost invariably contained enlarged genitalia, always male. She demonstrated sexualized play with the dolls.

3. Prosecutor: Doctor, what do these behaviors mean to you in your profession?

Expert: These behaviors are strongly indicative of sexual abuse.

4. Prosecutor: Doctor, have you formed any opinions in regard to this case?

Expert: Yes. In my opinion, this child has been sexually abused.

5. Prosecutor: Doctor, have you ever seen a false complaint of sexual abuse?

Expert: Yes, they are rare, but I have seen them.

6. Prosecutor: Why are they rare?

Expert: Because the vast majority of complaints of sexual abuse in children, in my experience, are true.

7. Prosecutor: How about this one?

Expert: This child is telling the truth.

Questions one through three and the answers thereto are admissible for the same reasons stated in regard to Example One. In question four, the expert renders the direct opinion that the child has been sexually abused. While this was an inadmissible opinion under Example One's set of facts, it *may* not be so here. While this opinion is not *expressly* sanctioned in any case, *Cohn v. State*[230] appears implicitly to allow such an opinion where

[230]849 S.W.2d 817 (Tex. Cr. App. 1993).

there are behaviors that are specific, as opposed to non-specific, to abuse.[231]

Question number five is objectionable under Rule 401 as is the answer thereto -- they are simply irrelevant. In addition, the answer probably violates Rule 702 -- it is very close to a direct opinion on the truthfulness of the class of persons to which the complainant belongs and hence will not "assist the trier of fact."[232] The answer to number six is a clear violation of this rule.[233] The answer to number seven, of course, is inadmissible as a direct opinion on the truthfulness of the complainant.[234]

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[231]*Cohn*, 849 S.W.2d at 819; *see also Decker v. State*, 894 S.W.2d 475, 478-79 (Tex. App. -- Austin 1995, pet. ref'd). The expert in *Cohn* testified only that the complainant exhibited behaviors non-specific to sexual abuse. In summing up, the court observed that "Dr. Roy did not testify directly that the children were sexually abused or that they were telling the truth. His testimony therefore did not approach the level of 'replacing' the jury ... ." *Cohn*, 849 S.W.2d at 818. At first blush, it appears that the court equates a direct opinion that the children have been sexually abused with a direct opinion on the truthfulness of the children. This conflicts, however, with the later analysis in the case which strongly implies that such an opinion will be admissible in a "specific behavior" case. *Id*. at 819. While an argument could be made that the two statements should be treated equally, the opposite argument is probably more persuasive theoretically. To say that the child had been abused means the child is telling the truth about her abuse. To say that the child is telling the truth means that the child is telling the truth about her abuse and that the defendant is the perpetrator. Theoretically, the two statements really are different. The defense argument regarding this opinion should be couched not under Rule 702, but rather in terms of Rule 403. *See id.*

[232]*See Yount*, 872 S.W.2d at 711 and cases cited therein.

[233]*Id*.

[234]*Id*. at 712.