NOTES

UNWARRANTED SKEPTICISM: THE FEDERAL COURTS' TREATMENT OF CHILD SEXUAL ABUSE ACCOMMODATION SYNDROME

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I. INTRODUCTION

Child sexual abuse ("CSA") is a prevalent problem in our society, with estimates indicating as many as 500,000 new incidents in the United States each year.[1] Although some statistics signal a relative decrease in substantiated CSA cases between 1990 and 2004,[2] the figures are nonetheless alarming. In 2005 alone, over 300,000 children were reported to U.S. state and local child protection services as victims of sexual abuse.[3] Further, one study reported that more than 8% of U.S. children are victims of sexual abuse.[4] While CSA happens to children of both sexes and all ages, from infants to adolescents,[5] more than one-half of the defendants sentenced in 2006 for CSA abused a victim under the age of twelve.[6] Furthermore, "between 25% and 35% of all sexual abuse victims involve children under the age of 7."[7] The bottom line is that CSA remains a serious problem.

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[1] *See* David Finkelhor, *Current Information on the Scope and Nature of Child Sexual Abuse*, 4 FUTURE OF CHILDREN 31, 34 (1994).

[2] *See* David Finkelhor & Lisa Jones, *Why Have Child Maltreatment and Child Victimization Declined?*, 62 J. SOC. ISSUES 685, 685 (2006).

[3] *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., ADMIN. ON CHILDREN, YOUTH & FAMILIES, CHILD MALTREATMENT 2005 (2007), *available at* http://www.acf.hhs.gov/programs/cb/pubs/cm05/cm05.pdf.

[4] David Finkelhor, Richard Ormrod, Heather Turner & Sherry L. Hamby, *The Victimization of Children and Youth: A Comprehensive, National Survey*, 10 CHILD MALTREATMENT 5, 10 (2005).

[5] *See, e.g.*, Lucy Berliner & Diana M. Elliott, *Sexual Abuse of Children*, *in* THE APSAC HANDBOOK ON CHILD MALTREATMENT 55, 56 (John E. B. Myers, Lucy Berliner, John Briere, C. Terry Hendrix, Carole Jenny, & Theresa A. Reid eds., Sage Publ'ns 2d ed. 2002).

[6] MARK MOTIVANS & TRACEY KYCKELHAHN, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: 2006 FEDERAL PROSECUTION OF CHILD SEX EXPLOITATION OFFENDERS 6 (2007), http://www.ojp.usdoj.gov/bjs/pub/pdf/fpcseo06.pdf.

[7] Sonja N. Brilleslijper-Kater, William N. Friedrich & David L. Corwin, *Sexual Knowledge and Emotional Reaction as Indicators of Sexual Abuse in Young Children: Theory and Research Challenges*, 28 CHILD ABUSE & NEGLECT 1007, 1007 (2004).

Yet, despite being a particularly heinous and deplorable act, CSA is nonetheless a challenging crime to prosecute. Describing child abuse generally, the Supreme Court stated in *Pennsylvania v. Ritchie*[8] that it "is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim."[9] CSA, in turn, often presents an even greater challenge of identification and prosecution to courts; the frequent lack of physical evidence,[10] the often limited verbal and cognitive abilities of young victims,[11] the reluctance to disclose or testify against parents and loved ones, and the overall secretive nature of sexual abuse are all difficulties particular to CSA.[12] Altogether, these factors make both the detection and prosecution of CSA cases a difficult and sometimes frustrating process.

When prosecuting CSA cases, courts must battle both the challenges associated with child witnesses and also the common misconceptions about what constitutes "typical" behavior for CSA victims.[13] Most victims of CSA are sexually abused by someone they know, love, and trust.[14] As "no child is prepared for the possibility" of being sexually abused by a loved one, the hurt and vulnerable child is often coerced or intimidated into keeping the abuse a secret.[15] Accordingly, a significant proportion of CSA victims delay reporting the abuse, while some never disclose the abuse at all.[16] The secretive nature of sexual abuse and the low rate of disclosure among CSA victims pose an added challenge to the acknowledged difficulty of presenting child witnesses.[17]

Furthermore, since a child victim's testimony is often the most important evidence in CSA cases,[18] the child's credibility is frequently a main focal point.[19] The child's credibility often presents the greatest challenge to a prosecutor's case because CSA victims often act in ways that seem counterintuitive and contrary to society's "common sense" belief of

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[8] 480 U.S. 39 (1987).
[9] *Id.* at 60.
[10] *See* American Academy of Pediatrics, *Committee on Child Abuse and Neglect, Guidelines for the Evaluation of Sexual Abuse of Children: Subject Review*, 103 PEDIATRICS 186, 188 (1999) ("Physical findings are often absent even when the perpetrator admits to penetration of the child's genitalia.").
[11] *See* Mindombe v. United States, 795 A.2d 39, 46 (D.C. 2002) ("We believe there is a difference, however, between an adult witness narrating his or her story of abuse and a young child recounting and expressing his or her recollection of abuse. There are special cognitive issues that relate to children who are victims of sexual abuse that usually are not at issue when the witness is an adult.").
[12] *See, e.g.*, *In re* Cindy L., 947 P.2d 1340, 1348–49 (Cal. 1997); State v. Miller, 718 So. 2d 960 (La. 1998).
[13] *See* Roland M. Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 CHILD ABUSE & NEGLECT, 177, 178 (1983).
[14] *See* Martin A. Finkel & Allan R. DeJong, *Medical Findings in Child Sexual Abuse*, *in* CHILD ABUSE: MEDICAL DIAGNOSIS & MANAGEMENT 207, 219 (Robert M. Reece & Stephen Ludwig eds., Lippincott, Williams & Wilkins 2001).
[15] *See* Summit, *supra* note 13, at 181.
[16] *See* Thomas D. Lyon, *Scientific Support for Expert Testimony on Child Sexual Abuse Accommodation*, *in* CRITICAL ISSUES IN CHILD SEXUAL ABUSE: HISTORICAL, LEGAL, AND PSYCHOLOGICAL PERSPECTIVES 107 (Jon R. Conte ed., Sage Publ'ns 2002) [hereinafter Lyon, *Scientific Support*]; Kamala London et al., *Disclosure of Child Sexual Abuse*, 11 PSYCHOL. PUB. POL'Y & L. 194, 194 (2005).
[17] *See* State v. Jones, 772 P.2d 496, 499 (Wash. 1989) ("Children are often ineffective witnesses.").
[18] *See* John E.B. Myers, 1 MYERS ON EVIDENCE 351 (2005).
[19] *See* Eze v. Senkowski, 321 F.3d 110, 112 (2d Cir. 2003) ("[T]hese cases frequently hinge on judgments about credibility in which jurors must choose between contradictory stories . . . .").

how a typical CSA victim would act.[20] The effect of a CSA victim retracting or recanting her allegations or testimony greatly undermines both her credibility and the prosecutor's case, thus significantly diminishing the likelihood that a conviction will be obtained. If the prosecutor chooses to proceed, even in light of a victim's recantation, expert behavioral science testimony such as Child Sexual Abuse Accommodation Syndrome ("CSAAS") is often utilized by prosecutors as a means of educating the jury that recantations are not rare in true cases of abuse and as a way to rehabilitate the alleged victim's credibility and testimony.[21] Despite widespread acceptance of the use of CSAAS expert testimony in state courts, a line of federal cases in which defendants have experienced some success challenging such testimony based on ineffective assistance of counsel claims is making it likely that a prosecutor will no longer be able to use this necessary tool.

This Note will analyze recent court decisions in the Second, Ninth, and Tenth Circuits which seem to indicate a growing skepticism towards the scientific validity of CSAAS. This Note will also discuss why courts should not doubt the scientific validity and legal relevancy of CSAAS, especially when presented in cases where children recant allegations of CSA. Part II of this Note provides background on the origins of CSAAS, its purpose, and its use in both federal and state courts. Part III of this Note addresses the growing skepticism of federal courts towards the scientific validity of CSAAS, and traces this skepticism through the evolution of the defense counsel's duty to consult expert witnesses in CSA cases in the Second Circuit. Part IV of this Note details the empirical evidence supporting the scientific validity of both CSAAS and the phenomenon of recantation and explains why, when the prosecution presents expert testimony on CSAAS to explain to the jury why an abused child might recant, the courts should not treat this theory as junk science.

II. CSAAS AND THE COURTS

A. CHILD SEXUAL ABUSE ACCOMMODATION SYNDROME

In 1983, in an effort to address common misconceptions and myths about CSA victims, Roland Summit published an article on CSAAS.[22] CSAAS identifies five categories of behavior—Secrecy, Helplessness, Accommodation, Delayed Disclosure and Retraction—that represent "a contradiction to the most common assumptions of adults" about victims of CSA.[23] CSAAS explains how the sexual abuse is kept contained in a shroud of secrecy through threats, coercion, and "exploitation of the helpless and dependent child."[24] CSAAS describes the cyclical nature of the sexual abuse, the child's attempts at understanding and reconciling her

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[20] *Id.*
[21] *Id.*
[22] *See generally* Summit, *supra* note 13.
[23] *Id.* at 181–90.
[24] Lyon, *Scientific Support*, *supra* note 16, at 109.

conflicting feelings about the abuser, and the child's tendency to blame herself for the abuse.[25] The Secrecy, Helplessness, and Accommodation categories of behavior provide a context and explanation for the fourth behavior described in CSAAS: how and why a child's disclosure is often delayed, unconvincing, and conflicted, and how the child's disclosure is often met with disbelief and rejection.[26] Finally, the most controversial and perhaps most counterintuitive behavior CSAAS attempts to address is Retraction, or Recantation.[27] CSAAS explains that as a result of the negative consequences of disclosure, a child will recant or retract her allegations of sexual abuse.[28]

CSAAS was not designed by Summit as a diagnostic tool, but rather a tool to address and disabuse people of myths and misconceptions about how sexually abused children "should" behave.[29] Accordingly, if a child displays one or several symptoms of CSAAS, it is not proof of sexual abuse, nor does it increase the likelihood that the child was abused.[30] The true value of CSAAS lies in its ability to explain the behavior of the alleged victim which may seem inconsistent with abuse, thereby rehabilitating the alleged victim's credibility and testimony.[31]

B. RECANTATION HAPPENS

Recantation among CSA victims is a common phenomenon.[32] While various factors may contribute to recantation, familial pressure is often the strongest motivation for recantation among CSA victims.[33] In *People v. Galarza*,[34] defendant Ricardo Galarza appealed his conviction for sexually abusing his two young sisters-in-law based partly on the fact that one of the victims recanted her allegations that the defendant raped her repeatedly from the time she was 10 years old.[35] While recanting, the victim admitted that her family stopped talking to her because of her allegations against the defendant.[36] The court, affirming the defendant's conviction, noted that the recanting victim's "family had put 'an incredible amount of pressure' on her to recant."[37] *People v. Daniels*[38] provides another example of familial pressures contributing to a victim's recantation. In *Daniels*, the victim was 13 years old when the defendant, the boyfriend of victim's mother, began

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[25] *See* Summit, *supra* note 13, at 184–86.
[26] *Id.* at 186–88.
[27] Lyon, *Scientific Support*, *supra* note 16, at 128.
[28] *See* Summit, *supra* note 13, at 188; Lyon, *Scientific Support*, *supra* note 16, at 109.
[29] *See* sources cited *supra* note 28.
[30] *See* Lyon, *Scientific Support*, *supra* note 16, at 109–10; Thomas D. Lyon & Jonathan J. Koehler, *The Relevance Ratio: Evaluating the Probative Value of Expert Testimony in Child Sexual Abuse Cases*, 82 CORNELL L. REV. 43, 54–58 (1996).
[31] *See* Mark S. Brodin, *Behavioral Science Evidence in the Age of Daubert: Reflections of a Skeptic*, 73 U. CIN. L. REV. 867, 869 (2005).
[32] *See, e.g.*, United States v. Rojas, 2008 U.S. Dist. LEXIS 55135 (D.S.D. 2008); Ibarra v. Alameida, 2008 U.S. Dist. LEXIS 3589 (E.D. Cal. 2008); People v. Nugent, 2008 Cal. App. Unpub. LEXIS 7466; People v. Ushikoshi, 2008 Cal. App. Unpub. LEXIS 91.
[33] *See* Summit, *supra* note 13, at 188.
[34] 2003 Cal. App. Unpub. LEXIS 10036.
[35] *Id.* at 18–22.
[36] *Id.* at 22.
[37] *Id.* at 34.
[38] 2007 Cal. App. Unpub. LEXIS 2761.

sexually abusing her.[39] The victim reported the sexual abuse, but recanted her allegations once the other children in the household, particularly her younger sister, became upset that the defendant was gone.[40] In both *Galarza* and *Daniels*, the CSA victims recanted. While not all recantations are attributable to familial pressure, the fact is that recantation occurs in CSA cases, and not just in rare, isolated instances. Prosecutors, when faced with a recanting CSA victim, often use CSAAS expert testimony to help rehabilitate the victim's testimony.

C. ADMITTING EXPERT TESTIMONY REGARDING CSAAS IN STATE AND FEDERAL COURTS

State and federal courts differ in their approach to determining whether to admit expert testimony. Although federal courts must abide by the Federal Rules of Evidence ("FRE")[41] when determining whether to admit expert testimony, no standard approach exists for state courts. Like all other forms of expert testimony, expert testimony regarding CSAAS must pass whichever standard a court chooses before it is admitted into evidence.

1. *Admitting CSAAS Expert Testimony in State Courts*

Unlike the federal court system, no single approach exists for determining the admission of expert testimony in the state court systems,[42] where most cases concerning CSA are heard. Some courts have adopted the *Daubert* standard or similar tests,[43] while others continue to use a pre-*Daubert* approach known as the *Frye* standard.[44] Regardless of which

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[39] *Id.* at 3–5.
[40] *Id.* at 6.
[41] *See* FED. R. EVID. 702, 403.
[42] *See* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE 652 (Aspen Publishers 3d ed. 2003).
[43] States adopting the *Daubert* standard or a similar test are: Alaska, Arkansas, Colorado, Connecticut, Delaware, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maine, Michigan, Mississippi, Montana, Nebraska, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, West Virginia and Wyoming. *See* State v. Coon, 974 P.2d 386 (Alaska 1999); Farm Bureau Mut. Ins. Co. of Arkansas, Inc. v. Foote, 14 S.W.3d 512 (Ark. 2000); People v. Shreck, 22 P.3d 68 (Colo. 2001); State v. Porter, 698 A.2d 739 (Conn. 1997), *cert. denied*, 523 U.S. 1058 (1998); M.G. Bancorporation, Inc. v. Le Beau, 737 A.2d 513 (Del. 1999); Kolln v. Saint Luke's Reg'l Med. Ctr., 940 P.2d 1142 (Idaho 1997); Sears Roebuck & Co. v. Manuilov, 742 N.E.2d 453 (Ind. 2001); Hutchison v. Am. Family Mut. Ins. Co., 514 N.W.2d 882 (Iowa 1994); Debruler v. Com., 231 S.W.3d 752 (Ky. 2007); Cheairs v. State ex rel. Dep't of Transp. & Dev., 861 So. 2d 536 (La. 2003); State v. MacDonald, 718 A.2d 195 (Me. 1998); Gilbert v. DaimlerChrysler Corp., 685 N.W.2d 391, (Mich. 2004), *cert. denied*, 546 U.S. 821 (2005); Miss. Transp. Comm'n v. McLemore, 863 So. 2d 31 (Miss. 2003); State v. Moore, 885 P.2d 457 (1994); Epp v. Lauby, 715 N.W.2d 501 (Neb. 2006); State v. Alberico, 861 P.2d 192 (N.M. 1993); State v. Goode, 461 S.E.2d 631 (N.C. 1995); Terry v. Caputo, 875 N.E.2d 72 (Ohio 2007); Taylor v. State, 889 P.2d 319 (Okla. Crim. App. 1995); Mitchell v. Mt. Hood Meadows, 99 P.3d 748 (Or. Ct. App. 2004); *In re* Mackenzie C., 877 A.2d 674 (R.I. 2005); State v. Council, 515 S.E.2d 508 (S.C. 1999), *cert. denied*, 528 U.S. 1050 (1999); State v. Corey, 624 N.W.2d 841 (S.D. 2001); McDaniel v. CSX Transp., Inc., 955 S.W.2d 257 (Tenn. 1997); E.I. du Pont de Nemours & Co., Inc. v. Robinson, 923 S.W.2d 549 (Tex. 1995); State v. Streich, 658 A.2d 38 (Vt. 1995); State v. Lockhart, 542 S.E.2d 443 (W. Va. 2000); Chapman v. State, 18 P.3d 1164 (Wyo. 2001).
[44] Under the rule established in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), the determining factor of whether expert testimony is admitted into evidence is whether the expert's evidence is generally accepted by the scientific community. *See id.* at 1014. Although many states have adopted *Daubert*, more than a dozen states continue to apply the *Frye* or a similar standard. *See* MUELLER & KIRKPATRICK, *supra* note 42, at 652; Emily L. Baggett, *The Standards Applied to the Admission of Soft Science Experts in State Courts*, 26 AM. J. TRIAL ADVOC. 149, 154 (2002).

standard a state uses to determine the admissibility of expert testimony, most state courts have accepted the use of CSAAS.[45] Consequently, although the standard for admitting expert testimony varies from state to state, all state courts allowing CSAAS view it as a rehabilitative tool rather than a diagnostic tool used to offer proof of sexual abuse.

Furthermore, when courts have allowed expert testimony on CSAAS, they are cognizant of the potential abuse of expert testimony and are thus careful to weigh the probative value of the evidence against its possible prejudicial value. Courts admitting expert testimony on CSAAS therefore limit its use to explaining characteristics and common behavioral traits of sexually abused children in general.[46] Accordingly, courts have drawn the line when expert testimony regarding CSAAS has been used to bolster the credibility of the specific child victim, or when it has been used to prove that the specific child victim was abused.[47] Thus, while both state and federal courts[48] have admitted expert testimony regarding CSAAS, limits and restrictions on the use and scope of such testimony reduce the possibility that the evidence will be misused or misunderstood[49] and emphasize that CSAAS is a rehabilitative, not diagnostic, tool.

2. *Admitting CSAAS Expert Testimony in Federal Courts*

Federal courts deciding whether to admit expert testimony under Rule 702[50] of the Federal Rules of Evidence are guided by the standard established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[51] In *Daubert*, the United States Supreme Court stated that courts, in determining whether to admit scientific evidence, must consider three factors: (1) the reliability, (2) the relevancy, and (3) the possible prejudicial nature of the evidence.[52]

Under the reliability standard, judges, acting as "gatekeepers,"[53] must decide whether the proffered expert testimony is "reliable." In the context of scientific evidence, the reliability of such evidence is based upon its scientific validity.[54] *Daubert* provides some suggestions for factors to consider in determining the reliability of the evidence, including whether the theory or technique has been "subjected to peer review and

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[45] *See, e.g.*, *In re* S.C., 138 Cal. App. 4th (Ct. App. 2006); State v. Collins, 163 S.W. 3d 614 (Mo. Ct. App. 2005); State v. P.H., 840 A.2d 808 (N.J. 2004); State v. A.O. 397 A.2d 1202 (N.J. Super. Ct. App. Div. 2007); Sanderson v. State, 165 P.3d 83 (Wyo. 2007).
[46] *See* sources cited *supra* note 45.
[47] *See, e.g.*, State v. Tibor, 738 N.W. 2d 492, 497 (N.D. 2007); Dennis v. State, 698 So. 2d 1356, 1357 (Fla. Dist. Ct. App. 1997).
[48] *See, e.g.*, sources cited *supra* note 45; U.S. v. Bighead, 128 F.3d 1329, 1331 (9th Cir. 1997); U.S. v. Antone, 981 F.2d 1059, 1062 (9th Cir. 1992); U.S. v. Tornowski, 29 M.J. 578, 580 (A.F.C.M.R. 1989).
[49] Lyon, *Scientific Support*, *supra* note 16, at 110.
[50] FRE 702, which governs testimony by experts, states: "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, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." FED. R. EVID. 702.
[51] 509 U.S. 579 (1993).
[52] *Id.* at 589–95.
[53] *Id.*
[54] *Id.* at 590 & n.9.

publication," whether there is "widespread acceptance" of the technique within the community, and whether the technique has been tested.[55]

However, the Court simultaneously stated that these factors were not exhaustive and that the presence of any of these factors was not a "*sine qua non* of admissibility."[56] Recognizing the myriad factors that could be considered when determining the scientific validity of proffered evidence, the Court in *Daubert* emphasized the "flexible" nature of the reliability inquiry.[57]

The second part of the *Daubert* test requires courts to consider the "fit" and "helpfulness" of the expert testimony.[58] "Fit" refers to the degree to which the proffered expert testimony is tied to the facts of the case—the closer the resemblance between the expert testimony and the facts of the case, the better the "fit."[59] Related to the "fit" requirement is the precondition of "helpfulness," which states that in order for expert testimony to be admitted, there must be a valid scientific connection between the testimony and the "pertinent inquiry" of the case.[60] The "helpfulness" standard does not require that the subject matter of the proffered expert testimony be completely beyond the understanding of the jury[61]—it is enough for the expert testimony to be admitted if it will "assist" the jury in resolving the issue at hand.[62]

Finally, the last part of the *Daubert* test stems from FRE 403, which permits judges to exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."[63] The Court, recognizing the specific prejudicial dangers inherent in expert testimony, requires judges to

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[55] *Id.* at 593–95.
[56] *Id.*
[57] *Daubert*, 509 U.S. at 593–95. Additionally, the 2000 Advisory Committee Notes accompanying the amendment to FRE 702 provide these additional factors for courts to consider when determining the reliability of evidence: "(1) Whether experts are 'proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying'; (2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion; (3) Whether the expert has adequately accounted for obvious alternative explanations; (4) Whether the expert 'is being as careful as he would be in his regular professional work outside his paid litigation consulting'; and (5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give." FED. R. EVID. 702, advisory committee's notes. *See also* Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152 (1999) ("[W]e conclude that the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable.").
[58] *Daubert*, 509 U.S. at 591–92.
[59] *Id.*; MUELLER & KIRKPATRICK, *supra* note 42, at 654.
[60] *Daubert*, 509 U.S. at 592–93.
[61] *See* Robert P. Mosteller, *Legal Doctrines Governing the Admissibility of Expert Testimony Concerning Social Framework Evidence*, 52 LAW & CONTEMP. PROBS. 85, 96–97 (1989).
[62] *See* Tyus v. Urban Search Mgmt., 102 F.3d 256, 263 (7th Cir. 1997) (holding that a trial court is "not compelled to exclude expert testimony just because the testimony may, to a greater or lesser degree, cover matters that are within the average juror's comprehension'"(quoting United States v. Hall, 93 F.3d 1337, 1342)); United States v. Hines, 55 F. Supp. 2d 62, 64 (D. Mass. 1999) ("[E]ven if the inferences may be drawn by the lay juror, expert testimony may be admissible as an 'aid' in that enterprise.").
[63] *Daubert*, 509 U.S. at 595. The Court in *Daubert* refers to Rule 403 of the Federal Rules of Evidence which states, in full: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

carefully weigh the probative value of the proffered evidence against its prejudicial value.[64]

In fashioning this three-part test, the *Daubert* Court relied on the language of FRE 702.[65] However, unlike Rule 702, which divides expert testimony into three categories—"scientific, technical, . . . [and] specialized"—the Court in *Daubert* only addressed scientific evidence, leading to confusion about the scope of *Daubert*'s application.[66] Any confusion about the breadth and applicability of *Daubert* was mitigated by the Supreme Court's subsequent decision in *Kumho Tire Co. v. Carmichael*,[67] which clarified that *Daubert* applies to all expert testimony.[68]

All three factors—reliability, relevance, and probative value—are important in determining whether to admit expert testimony or not, but the central point of contention over the admittance of CSAAS expert testimony under the *Daubert* test turns on the scientific validity of CSAAS.[69]

III. THE FEDERAL COURTS' TREATMENT OF ALLEGATIONS OF CHILD SEXUAL ABUSE

Federal courts have long been skeptical of children's allegations of sexual abuse.[70] The fear of the "wrongfully accused"[71] is especially salient in CSA cases, where people—judges and juries alike—tend to believe that children frequently lie and make up allegations of abuse. It therefore follows that CSAAS expert testimony, utilized to rehabilitate the alleged victim's credibility and testimony, is viewed with an especially suspicious eye.[72] In particular, federal courts are receptive to the notion that CSAAS is scientifically invalid, or "junk science,"[73] and should therefore not be admitted into evidence. Nowhere is this skepticism more apparent than in a recent line of Second Circuit cases. In each case, the Second Circuit court managed to inject its concerns about CSAAS's scientific validity via findings of ineffective assistance of counsel ("IAC"). To understand the

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[64] *Daubert*, 509 U.S. at 595.
[65] *Id.* at 589 ("The primary locus of this obligation is Rule 702, which clearly contemplates some degree of regulation of the subjects and theories about which an expert may testify").
[66] *See* MUELLER & KIRKPATRICK, *supra* note 42, at 655–56.
[67] 526 U.S. at 152.
[68] FED. R. EVID. 702, advisory committee's notes.
[69] Because CSAAS stems from a "soft" science (psychology), legal scholars debate whether it passes the reliability requirement of FRE 702 and *Daubert*. *See, e.g.*, Brodin, *supra* note 31; Dyane L. Noonan, *Where Do We Go from Here? A Modern Jurisdictional Analysis of Behavioral Expert Testimony in Child Sexual Abuse Prosecutions*, 38 SUFFOLK U. L. REV. 493 (2005).
[70] *See* Maryland v. Craig, 497 U.S. 836 (1990), (Scalia, J., dissenting) ("[C]hildren are substantially more vulnerable to suggestion than adults, and often unable to separate recollected fantasy (or suggestion) from reality.").
[71] *See, e.g.*, Falsely-Accused.net, http://www.falsely-accused.net.
[72] *See* Diana Younts, *Evaluating and Admitting Expert Opinion Testimony in Child Sexual Abuse Prosecutions*, 41 DUKE L.J. 691 (The debate over the reliability of expert evidence in child sex abuse cases "raises the specter that unreliable evidence is routinely admitted in child sexual abuse prosecutions and that innocent defendants face prosecution and conviction because of unreliable expert testimony."); Mary Ann Mason, *The Child Sex Abuse Syndrome: The Other Major Issue in State of New Jersey v. Margaret Kelly Michaels*, 1 PSYCHOL., PUB. POL'Y & L. 399, 402–08 (1995).
[73] *See* Joëlle Anne Moreno, *Beyond the Polemic Against Junk Science: Navigating the Oceans that Divide Science and Law with Justice Breyer at the Helm*, 81 B.U. L. REV. 1033, 1036–39 (2001).

significance of these findings, we first must review the standards for IAC claims.

A. INEFFECTIVE ASSISTANCE OF COUNSEL STANDARDS

In *Strickland v. Washington*,[74] the Supreme Court established a two-prong test for IAC claims. Under this standard, in order to prove IAC, the defendant must show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense.[75] It is essential that the defendant prove both prongs.[76]

1. *Deficient Performance*

To prove that counsel's performance was deficient, the defendant must show that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[77] The Court goes on to explain that the "proper measure of attorney performance remains simply reasonableness under prevailing professional norms."[78] Therefore, the burden is on the defendant to show that counsel's acts or omissions were the result of unreasonable judgment and not trial strategy.[79] This burden of proof is difficult to meet, as the *Strickland* test begins with the presumption that counsel acted competently.[80] Furthermore, "reasonable" attorney conduct falls within a wide range—the Supreme Court has urged courts to

> Be careful not to narrow the wide range of conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct and thereby intrude into the State's proper authority to define and apply the standards of professional conduct to those it admits to practice in its courts.[81]

Given the proclivity towards heavy deference to a defense counsel's performance, defendants often have a difficult time proving this first part of the *Strickland* test.[82]

2. *Prejudice to Defense*

Even if the defendant is able to clear the difficult hurdle of proving that counsel's performance was deficient, the defendant must still prove that the deficient performance prejudiced the defense.[83] To prove prejudice, the

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[74] 466 U.S. 668 (1984), *reh'g denied*, 467 U.S. 1267, 82 (1984) *and on remand*, 737 F.2d 894 (11th Cir. 1984).
[75] *Id.* at 687.
[76] *Id.*
[77] *Id.*
[78] *Id.* at 688.
[79] *Id.* The Court also states that "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)).
[80] *Strickland*, 466 U.S. at 690 ("[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.").
[81] Nix v. Whiteside, 475 U.S. 157, 165 (1986).
[82] *See* Yarborough v. Gentry, 540 U.S. 1 (2003) (noting that the Sixth Amendment "guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight").
[83] *Strickland*, 466 U.S. at 687.

defendant has the burden of proving that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[84] That said, the Supreme Court has cautioned against "focusing solely on mere outcome determination . . . without attention to whether the result of the proceeding was fundamentally unfair or unreliable."[85] The Court opined that such an analysis would be defective because to "set aside a conviction or sentence solely because the outcome would have been different . . . may grant the defendant a windfall to which the law does not entitle him."[86] Thus, just proving that the outcome would be different but for counsel's mistake is not enough to satisfy the second prong of the *Strickland* test. The defendant must also prove the mistake was so grave that the reliability of the entire trial process was affected.[87]

Given the wide range of "reasonable" attorney performance, the presumption of counsel's competency and the deference of courts to counsel's trial strategy, a defendant must meet an extraordinarily high burden of proof to prevail on an IAC claim.

B. INEFFECTIVE ASSISTANCE OF COUNSEL AND THE STANDARD OF HABEAS REVIEW

Issues of IAC often arise in petitions for writs of habeas corpus.[88] State habeas claims must be analyzed under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").[89] The AEDPA states:

> [A]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.[90]

The Supreme Court has held that under the AEDPA, federal courts are required to defer to the state court's decisions unless that decision constituted an "objectively unreasonable"[91] application of clearly established federal law.[92] Accordingly, when a petitioner files a writ of

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[84] *Id.* at 694. The Court also notes, "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error *had no effect on the judgment*." *Id.* at 691 (emphasis added).
[85] Lockhart v. Fretwell, 506 U.S. 364, 369 (1993).
[86] *Id.* at 369–70.
[87] *See, e.g.*, Rompilla v. Beard, 545 U.S. 374, 390 (2005).
[88] *See, e.g.*, *id.*; Wiggins v. Smith, 539 U.S. 510 (2003); Richey v. Bradshaw, 498 F.3d 344 (6th Cir. 2007); Dugas v. Coplan, 428 F.3d 317 (1st Cir. 2005); Lewis v. Roberts, 353 F. Supp. 2d 1133 (D. Kan. 2005).
[89] *See* Lockyer v. Andrade, 538 U.S. 63, 71 (2003).
[90] 28 U.S.C. § 2254(d) (2007).
[91] "Unreasonableness" is determined by an "objective" standard. *See* Williams v. Taylor, 529 U.S. 362, 409 (2000).
[92] *Lockyer*, 538 U.S. at 75. *See also Williams*, 529 U.S. at 411 ("[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly."); Gersten v. Senkowski, 426

habeas corpus alleging IAC, the threshold question is whether the state court unreasonably applied the *Strickland* standard.

1. *The Admission of Expert Testimony and Federal Habeas Review*

Because a state trial court's decision regarding the admissibility of expert testimony is a matter of state law, it is not recognized by federal courts under federal habeas review.[93] Thus even if a federal court disagrees with the state court's admittance of expert testimony, under federal habeas review, the court may not address the issue unless the admission of the evidence violated a specific constitutional guarantee.[94]

C. GROWING SKEPTICISM, INEFFECTIVE ASSISTANCE, AND THE SECOND CIRCUIT

The 1980's witnessed a massive change in public awareness of CSA.[95] As the public became more aware of the issue, the number of reported cases of CSA skyrocketed—the number of sexually abused children surged from 6,000 in 1976 to an estimated 100,000 cases just eight years later.[96] Coupled with this rising awareness, however, was the growing worry that innocent people were being falsely accused of CSA as chilling accounts of false accusations levied by "coercive investigators" and "overzealous prosecutors" were widely disseminated in the media.[97] A few cases in particular gained notoriety as direct consequences of the "wave of hysteria" regarding CSA allegations.[98] Consequently, both the general public and courts alike grew increasingly skeptical of allegations of CSA. In the Second Circuit, this growing skepticism can be traced through the evolution of the defense counsel's duty to consult an expert in CSA cases.

F.3d 588, 607 (2d Cir. 2005) (stating that "to be 'unreasonable,' the state court's application of federal law must reflect 'some increment of incorrectness beyond error,' although that 'increment need not be great'") (citing Henry v. Poole, 409 F.3d 48, 68 (2d Cir. 2005)).

[93] *See, e.g.*, Morrison v. Schriro, 2007 WL 4661614, at *13, (D. Ariz. 2007) (stating that "the claim Petitioner's rights were violated because the trial court refused to conduct a Frye hearing is arguably not cognizable in the context of a petition seeking federal habeas relief because it raises an issue of state law, rather than federal constitutional law").

[94] *See* Milone v. Camp, 22 F.3d 693, 702 (7th Cir. 1994) (adding that "[a]bsent a showing that the admission of the evidence violated a specific constitutional guarantee, a federal court can issue a write of habeas corpus on the basis of a state court evidentiary ruling only when that ruling violated the defendant's right to due proves by denying him a fundamentally fair trial").

[95] JULES EPSTEIN, THE PROSECUTION AND DEFENSE OF SEX CRIMES § 5.02 (Matthew Bender & Co., Inc. 2007).

[96] *Id.*

[97] *See, e.g.*, Richard A. Gardner, Letter to the Editor, *Child Sex Abuse Cases Can Be Witch Hunts*, N.Y. TIMES, June 19, 1992, at A26; Evelyn Nieves, *Abuse-Case Reversal Called Sign of Trend*, N.Y. TIMES, April 6, 1993, at B4.

[98] *See generally,* DOROTHY RABINOWITZ, NO CRUELER TYRANNIES: ACCUSATION, FALSE WITNESS, AND OTHER TERRORS OF OUR TIMES (Simon & Schuster 2004) (describing, among others, the 1985 Margaret Kelly Michaels case and the 1995 Wenatchee Washington case).

1. *The Duty to Call or Consult a Medical Expert*

a. Is There a Duty to Consult an Expert?

Traditionally, the decision of whether or not to consult or call an expert has almost always been viewed as a strategic decision.[99] For this reason, courts have generally been reluctant to find IAC when defense counsel fails to call an expert.[100] The Second Circuit was no different. In the 1983 case *Trapnell v. United States*,[101] for example, the Second Circuit ruled that a defense counsel's failure to call certain medical expert witnesses was a strategic choice and therefore did not constitute IAC.[102] However, as general skepticism of CSA allegations continued to spread, the Second Circuit's traditional deference to the defense counsel's trial strategy eroded in favor of an affirmative duty to consult a medical expert in CSA cases.

b. Lindstadt v. Keane

The Second Circuit first discussed the possibility of such a duty in the 2001 case *Lindstadt v. Keane*.[103] In *Lindstadt*, the defendant George Lindstadt was convicted in the New York Supreme Court of Suffolk County for acts of sodomy against his young daughter.[104] After failed appeals at the state court level,[105] Lindstadt petitioned for a writ of habeas corpus on the grounds that he was denied his Sixth Amendment right to enjoy effective assistance of counsel.[106] Citing four errors made by Lindstadt's defense counsel, the Second Circuit Court of Appeals reversed the Eastern District of New York Court's decision to deny Lindstadt's writ and granted Lindstadt's petition on the basis that the defense counsel's four errors amounted to constitutionally ineffective performance.[107] For the purposes of this Note, I will only discuss one of these alleged errors, the defense counsel's failure to consult a medical expert and "effective[ly] challenge . . . the only physical evidence of sexual abuse."[108]

During the *Lindstadt* trial, the only physical evidence of sexual abuse that the prosecution presented was the testimony of Dr. Milton Gordon, a pediatrician who performed a genital examination on the alleged victim.[109] Dr. Gordon concluded that his observations were "consistent with sexual abuse" based on two pieces of medical literature, the "Boston study" and a

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[99] *See, e.g.*, Lema v. United States, 987 F.2d 48, 54 (1st Cir. 1993).
[100] *See, e.g.*, Samatar v. Clarridge, 225 F. App'x 366 (6th Cir. 2007) (holding a failure to call an expert witness "is unquestionably tactical" and does not constitute ineffective assistance of counsel); Phoenix v. Matesanz, 233 F.3d 77 (1st Cir. 2000) (holding that counsel's failure to call blood and fingerprint experts was strategic and therefore not ineffective assistance of counsel); Knott v. Mabry, 671 F.2d 1208 (8th Cir. 1982) (holding that counsel's failure to consult an arson expert in an arson case did not constitute ineffective assistance of counsel).
[101] 725 F.2d 149 (2d Cir. 1983).
[102] *Id.* at 156.
[103] 239 F.3d 191 (2d Cir. 2001).
[104] *Id.* at 193.
[105] *See id.* at 197.
[106] *Id.*
[107] *See id.* at 194, 197–205.
[108] *Id.* at 194.
[109] *Lindstadt*, 239 F.3d at 195–96, 201–02.

review conducted by Dr. McCaully of Johns Hopkins University.[110] Relying on these two studies, Dr. Gordon rejected Lindstadt's counsel's attempt during cross-examination to "elicit an admission" that the physical evidence might have been caused by factors other than sexual abuse.[111] At no point before or during the trial did the defense counsel request or attempt to secure a copy of either study.[112]

The Second Circuit Court of Appeals found that Lindstadt's counsel's failure to request copies of the two studies cited by Dr. Gordon and familiarize himself with them was "an amazing dereliction"[113] that resulted in a "ruinous" cross-examination of Dr. Gordon.[114] The court further faulted Lindstadt's counsel for failure to contact "an expert, either to testify or (at least) to educate counsel on the vagaries of abuse indicia."[115] Reasoning that if Lindstadt's counsel had consulted a medical expert, he could have easily obtained evidence that cast doubt on Dr. Gordon's testimony,[116] the court remarked that "It is difficult to imagine a child abuse case . . . where the defense would not be aided by the assistance of an expert."[117] The court therefore granted Lindstadt's petition for writ of habeas corpus on the conclusion that Lindstadt's counsel's failure to consult an expert "contributed significantly to his ineffectiveness."[118]

c. Pavel v. Hollins

Soon after *Lindstadt*, the Second Circuit heard a factually similar case in *Pavel v. Hollins*.[119] As in *Lindstadt*, the defendant in *Pavel*, Kenneth Pavel, was convicted of CSA[120] and likewise petitioned for a writ of habeas corpus on the basis of IAC.[121] Pavel alleged that his defense counsel's failure to call a medical expert contributed to his deprivation of effective assistance.[122] Sanford Meltzer, Pavel's defense counsel, had failed to prepare a defense, based on his belief that the trial judge would grant his

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[110] *Id.* at 196. This Note does not purport to support or challenge the medical soundness of Dr. Gordon's testimony.

[111] *Id.* ("Defense counsel tried to elicit an admission that the damage might have been caused by horseback riding, gymnastics, masturbation, or infection; the doctor's rejection of each of these alternative causes was based largely on the 'Boston study' and the 'McCaully review' he had referenced earlier.").

[112] *Id.* at 201–02.

[113] *Id.* at 201.

[114] *Id.* at 202. The Court rejected the district court's opinion that Lindstadt's counsel performed a satisfactory cross-examination of Dr. Gordon: "This effort was hamstrung . . . by counsel's lack of familiarity with the studies upon which Dr. Gordon was presumably relying; the effect was ruinous . . . ."

[115] *Lindstadt*, 239 F.3d at 202.

[116] *See id.* at 201 ("[A]n expert could have brought to light a contemporaneous study . . . that found similar irregularities on the hymens of girls who were *not* abused."). *See also id.* at 202 (noting that Lindstadt's appellate counsel "was able to locate contemporaneous studies that cast doubt on any link between (i) the scarring of the posterior fourchette disclosed by the toliudine dye test and (ii) sexual abuse").

[117] *Id.* (citing Beth A. Townsend, *Defending the "Indefensible": A Primer to Defending Allegations of Child Abuse*, 45 A.F.L. REV. 261, 270 (1998)).

[118] *Id.*

[119] 261 F.3d 210 (2d Cir. 2001).

[120] Defendant was convicted of sexually abusing his sons, Matthew and David Pavel. *Id.* at 211.

[121] *Id.*

[122] *Id.* Again, for purposes of this Note, I will not address the other errors alleged in Pavel's petition for writ.

motion to dismiss the charges based on insufficient evidence.[123] Consequently, Meltzer failed to consult with or call a medical expert to testify about either of the alleged victims' physical examinations.[124]

The Second Circuit Court of Appeals viewed *Pavel* as substantially similar to *Lindstadt* on the basis that "[b]oth cases were essentially 'credibility contests.'"[125] Accordingly, "[w]hen a sex abuse case boils down to such a 'credibility contest,' physical evidence will often be important."[126] Additionally, the court argued, "[W]hen a case hinges all-but-entirely on whom to believe, an expert's interpretation of relevant physical evidence (or the lack of it)" is especially important.[127] Therefore, the court concluded, in cases involving CSA and the "vagaries of abuse indicia," effective counsel performance will "generally require some consultation with an expert."[128]

The court found Meltzer's excuse for failing to call a medical expert "inadequate" and that it contributed to his "constitutionally deficient" performance.[129] Although the *Pavel* court acknowledged the deference usually accorded to a defense counsel's "strategic" decisions under *Strickland*, it distinguished from *Strickland*, reasoning that Meltzer's decision to not consult or call a medical expert could not be described as "strategic" because it had "nothing to do with serving Pavel's interests."[130] More significantly, the court concluded that Meltzer's failure to call a medical expert was constitutionally deficient because it was "not based on pre-trial consultation with such an expert."[131]

d. A Per Se Rule?

From *Lindstadt* and *Pavel*, a per se rule seemed to emerge. Noting the tendency for CSA cases to turn into credibility contests, the Second Circuit Court of Appeals stressed the importance of the defense counsel's pre-trial investigation and analysis of physical evidence. Taken together, the court's decisions in *Lindstadt* and *Pavel* imposed a duty on defense counsels in CSA cases to call or at least consult with a medical expert. In other words, when presented with physical indicia of CSA, defense counsel's failure to consult a medical expert would be sufficient "evidence of nearly per se ineffectiveness."[132] However, did this new duty only apply to calling and

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[123] *Id.* at 212 & n. 2 (Meltzer later testified, "I felt that the medical evidence was insufficient to sustain a conviction. As a result, I did not prepare a defense for Mr. Pavel, believing instead that a motion to dismiss the State's case at the close of its evidence in chief would be granted by the Court.").

[124] *Id.* at 212. The prosecution presented a medical expert who testified that the records of the boys' physical examinations were consistent with their allegations of sexual abuse. *Id.* at 215.

[125] *Pavel*, 261 F.3d at 224 (noting, "In both cases, the only witnesses to the alleged abuse were its victims and the defendant, and there was no substantial circumstantial evidence of abuse").

[126] *Id.*

[127] *Id.* ("Because of the importance of physical evidence in 'credibility contest' sex abuse cases, in such cases physical evidence should be a focal point of defense counsel's pre-trial investigation and analysis of the matter.").

[128] *Id.*

[129] *Id.* at 223.

[130] *Id.*

[131] *Pavel*, 261 F.3d at 223.

[132] Jelinek v. Costello, 247 F. Supp. 2d 212, 271–72 (E.D.N.Y. 2003); Spencer v. Donnelly, 193 F. Supp. 2d 718, 734–35 (W.D.N.Y. 2002) (Defendant's petition for writ of habeas corpus was granted on the grounds that his defense counsel's failure to consult a medical expert to "educate her on the vagaries of

consulting medical experts, or did the Second Circuit's rule portend a move into expert psychological testimony? The Second Circuit did not leave this question unanswered for long.

2. *The Duty to Consult an Expert Applies to Psychological Witnesses*

Two years after *Lindstadt* and *Pavel*, the Second Circuit once again addressed the issue of the defense counsel's duty to consult an expert in CSA cases in *Eze v. Senkowski*.[133] This time, however, the court not only affirmed the duty to consult a medical expert but also considered the duty to consult a psychological expert.

a. Eze v. Senkowski

Defendant Louis Eze was charged with and convicted of sexually abusing his nieces, Chendo and Nnedi.[134] At trial, the prosecution's only proffered physical evidence of sexual abuse was based on the testimony of Dr. Stephen Lazoritz, the physician who examined the girls.[135] Based on his observations that the girls had "abnormal and attenuated hymens," Dr. Lazoritz concluded that both Chendo and Nnedi were sexually abused.[136] On cross-examination, however, Eze's defense counsel ably and effectively elicited answers from Dr. Lazoritz stating that his findings regarding Chendo and Nnedi's hymens could have been caused by trauma other than sexual abuse.[137]

In addition to Dr. Lazoritz's testimony regarding the physical evidence, the prosecution also presented expert witness Jan Henry to testify about the psychology of CSA.[138] Ms. Henry's testimony was limited to explaining CSAAS[139] and the behavioral characteristics of sexually abused children.[140] On cross-examination, Ms. Henry acknowledged the susceptibility of children to adult influence and the possibility "that a child's mental process could change the facts surrounding the abuse and add people who were not actually there."[141] Defense counsel was thus able to effectively cross-

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abuse indicia" in a child sexual abuse case contributed to defense counsel's ineffective assistance of counsel.). *See also* Eze v. Senkowski, 321 F.3d 110 (2d Cir. 2003) ("A lesson to be learned from *Lindstadt* and *Pavel* is that when a defendant is accused of sexually abusing a child and the evidence is such that the case will turn on accepting one party's word over the other's, the need for defense counsel to, *at a minimum, consult with an expert* to become educated about the 'vagaries of abuse indicia' is crucial." (emphasis added)).

[133] 321 F.3d 110.

[134] *Id.* at 112.

[135] *Id.* at 115.

[136] *Id.* at 116 ("Dr. Lazoritz concluded 'beyond a reasonable degree of medical certainty that [Chendo] was sexually abused . . . .' Dr. Lazoritz was less certain that Nnedi had been sexually abused and concluded that 'if Nnedi made a statement that she was sexually abused, I would say, with a reasonable degree of medical certainty, that these findings were consistent with that abuse.'").

[137] *Id.* (The Court also noted that the "most critical point elicited during Dr. Lazoritz's cross examination was that he had examined Chendo in 1988, at which point he made findings regarding her attenuated hymen and scar tissue similar to those he made in January 1992. This line of questioning raised the serious possibility that Chendo's abnormally large hymenal opening in 1992 existed prior to the alleged abuse in 1991.").

[138] *Id.* at 116–17.

[139] *Eze*, 321 F.3d at 116–17. Note that, in *Eze*, the Court refers to CSAAS as "child sexual abuse syndrome."

[140] *Id.*

[141] *Id.* at 117.

examine both the medical and psychological experts presented by the prosecution.

Eze was convicted based on the girls' testimony and the expert medical and psychological testimony at trial.[142] He subsequently petitioned for a writ of habeas corpus, citing IAC.[143] The district court rejected Eze's claim, but the appellate court vacated and remanded the case to the district court to allow Eze's trial counsel to explain his acts and omissions.[144] In particular, the Court of Appeals was interested in why Eze's trial counsel failed to call both a medical expert and an expert to refute Ms. Henry's testimony about the behavioral patterns of sexually abused children.[145] Even though in comparison to Lindstadt's and Pavel's trial counsel, Eze's trial counsel was able to effectively cross-examine both witnesses, his failure to independently consult medical and psychological experts was enough to cause the appellate court to question the effectiveness of his performance and consequently vacate and remand the decision to the district court.[146] Noting the incredibly high standard of effective assistance of counsel the court in *Eze* established, the court in *Jelinek v. Costello*[147] stated, "The court of appeals for the Second Circuit has recently gone so far as to imply that all of counsel's significant trial decisions must be justified by a sound strategy—*a significant raising of the bar that would appear to require an unrealistic degree of perfection in counsel.*"[148] The appellate court's interest in why Eze's trial counsel failed to consult a psychology expert was particularly noteworthy—before this case, the court had only considered a defense counsel's failure to consult or call a *medical* expert when reviewing petitions for writ of habeas corpus alleging IAC. *Eze* thus signaled the beginning of the Second Circuit's expansion of what type of experts a defense counsel must consult in a CSA case.

b. Gersten v. Senkowski

Although the Second Circuit briefly considered in *Eze* whether a defense counsel's duty to consult an expert in CSA cases extended to psychological experts, the court did not fully address this question until *Gersten v. Senkowski*.[149] By concluding that Gersten's counsel was ineffective for two independent and equally harmful reasons—(1) failing to consult a medical expert and (2) failing to consult a psychological expert, the court unmistakably expanded the duty of defense counsels in CSA cases to also include the duty to consult psychological experts.

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[142] *Id.* at 119.
[143] *Id.* at 119–20.
[144] *Id.* at 136–38.
[145] *Eze*, 321 F.3d at 136.
[146] *Id.* Noting the incredibly high standard of effective assistance of counsel the court in *Eze* established, the court in *Jelinek* stated, "The court of appeals for the Second Circuit has recently gone so far as to imply that all of counsel's significant trial decisions must be justified by a sound strategy—*a significant raising of the bar that would appear to require an unrealistic degree of perfection in counsel.*" 247 F. Supp. 2d at 267 (emphasis added).
[147] 247 F. Supp. 2d 212.
[148] *Id.* at 267 (emphasis added).
[149] 426 F.3d 588.

i. Duty to Consult Medical Expert

In *Gersten*, the Appellate Court reviewed the Eastern District of New York's decision to grant petitioner Ben Gersten's petition for a writ of habeas corpus on the basis that he had received IAC.[150] Gersten had been charged and convicted of sexually abusing his daughter.[151] During the trial, the prosecution presented five witnesses, including Dr. Bella Silecchia, a medical expert who had physically examined the alleged victim.

At trial, Dr. Silecchia reported that on her observations and concluded that her findings could not be explained by anything other than penetrating trauma, thus fully supporting the allegations that the alleged victim had been sexually abused.[152] On cross-examination, Gersten's defense counsel elicited concessions from Dr. Silecchia stating that she was unable to establish when the damage to the hymen or rectum occurred, but the defense counsel failed to examine the colposcope photographs that Dr. Silecchia had based many of her conclusions on pretrial and "did not once refer" to them during cross-examination.[153]

Gersten submitted an affidavit from Dr. Jocelyn Brown, a doctor specializing in pediatric medicine in support of his petition for a writ of habeas corpus.[154] After reviewing Dr. Silecchia's testimony, the alleged victim's medical records, and the colposcope photographs, Dr. Brown stated in her affidavit that Dr. Silecchia's findings were "no longer considered of significance in the forensic community when evaluating children suspected of being sexually abused . . . ."[155] In complete contradiction to Dr. Silecchia's findings, Dr. Brown strongly asserted that the physical evidence presented in the case "did not appear in any respect to be indicative of penetrating trauma to the alleged victim's vagina or anus, and thus none of the medical evidence corroborated the allegations of abuse or the alleged victim's testimony."[156] Additionally, Dr. Brown stated that she would have offered and testified to these opinions if she had been consulted by Gersten's defense counsel.[157]

Given the Second Circuit's previous holdings in *Lindstadt* and *Pavel*, the court unsurprisingly concluded that defense counsel's failure to consult or call a medical expert to review or challenge Dr. Silecchia's medical evidence constituted IAC.[158] The court found that had counsel performed even a rudimentary investigation, he would have readily discovered "exceptionally qualified medical experts . . . who would testify that the prosecution's physical evidence was not indicative of sexual penetration

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[150] *Id.* at 591.
[151] *Id.*
[152] *Id.* at 594–95 ("She stated that the findings could not be explained by blunt, nonpenetrating trauma such as 'fall[ing] onto the bar of a bike or something,' and that the trauma to the hymen could not be explained by masturbation because a child masturbating for pleasure would tend to focus on the clitoris and not the hymen, and in any event to explain the penetrating trauma that Dr. Silecchia found would require masturbation to the point of pain and bleeding . . . .").
[153] *Id.* at 595–96.
[154] *Id.* at 599.
[155] *Gersten*, 426 F.3d at 599.
[156] *Id.* at 600.
[157] *Id.*
[158] *Id.* at 610–11, 614.

and provided no corroboration whatsoever of the alleged victim's story."[159] By failing to consult a medical expert, "[the defense counsel] essentially conceded that the physical evidence was indicative of sexual penetration." Noting that the prosecution's case "rested centrally on the alleged victim's testimony and its corroboration by the indirect physical evidence as interpreted by the medical expert," the court therefore found that the defense counsel's failure to consult a medical expert constituted ineffective assistance.[160]

ii. Duty to Consult Psychological Expert

What distinguished *Gersten* from previous holdings, however, is that the Second Circuit also directly addressed a defense counsel's duty to consult a psychological expert. One of the expert witnesses the prosecution presented was Dr. Donald J. Lewittes, a child psychologist who testified primarily about CSAAS.[161] Dr. Lewittes testified about the behavioral and psychological responses of sexually abused children and the "idiosyncratic reactions" to sexual abuse that children might present.[162] Dr. Lewittes did not testify about the facts of Gersten's particular case nor did he offer any opinion specific to the alleged victim in the case.[163] Gersten's defense counsel did not ask Dr. Lewittes any questions about the scientific basis and validity of CSAAS.[164]

In support of his petition for writ, Gersten attached a particularly damning affidavit from Dr. John C. Yuille, a forensic psychologist and professor.[165] Dr. Yuille's affidavit stated that CSAAS is "no longer regularly accepted in the CSA research community" and "has no scientific validity in the field of CSA."[166] The court, seizing on Dr. Yuille's attack on CSAAS, concluded that defense counsel's failure to consult a psychological expert to rebut Dr. Lewittes's testimony on CSAAS constituted IAC.[167] The Court's skepticism as to the validity of the alleged victim's claims of sexual abuse and the scientific validity of CSAAS testimony was abundantly clear[168] when it stated:

> *[E]ven a minimal amount* of investigation into the purported "Child Sexual Abuse Accommodation Syndrome" would have revealed that it lacked any scientific validity for the purpose for which the prosecution

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[159] *Id.* at 608.
[160] *Id.* ("[I]n a case where the only direct evidence that any crime occurred or that, if it did, the petitioner committed it, was the testimony of the alleged victim, for defense counsel to simply concede the medical evidence without any investigation into whether it could be challenged was performance that the state court could not reasonably find to be objectively reasonable.").
[161] *Gersten*, 426 F.3d at 596–97.
[162] *Id.*
[163] *Id.* at 597.
[164] *Id.* Counsel's failure to question Dr. Lewittes seemed to particularly trouble the Court: "Defense counsel did not ask Dr. Lewittes any questions about the *supposed* scientific basis for his testimony regarding Child Sexual Abuse Accommodation Syndrome . . . nor did counsel ask any questions about the "*research literature*" that *purportedly* supported his conclusion . . . ." *Id.* (emphasis added).
[165] *Id.* at 599.
[166] *Id.* at 600–01.
[167] *Gersten*, 426 F.3d at 611.
[168] *See id.* at 612 (The Court disdainfully wondered how the County Judge could have "reconciled his unflappable belief in the alleged victim's credibility with a complete lack of any objective evidence to support her story.").

> utilized it: as a generalized explanation of children's reactions to sexual abuse, including delayed disclosure and blurred memory.[169]

The court's statement that only a "minimal" amount of investigation into CSAAS would be necessary to effectively refute its purported scientific and legal value illustrates just how much the court doubts the theory's scientific validity. In effect, the *Gersten* holding mandates a defense counsel to consult with a psychological expert for the sole purpose of attacking the scientific validity of CSAAS.

The Second Circuit has thus transitioned from deferring to counsel's trial decisions to the point where a defense counsel's failure to consult with any expert, medical or psychological, in a CSA case is almost automatically sufficient proof of IAC. What could account for the Second Circuit's rapidly expanding demands of defense counsel in CSA cases? Perhaps the Second Circuit's demand on defense counsel in CSA cases to consult with experts regarding medical issues allowed it to more easily apply its logic to psychology, a less respected branch of science—after all, if medical doctors were incorrect about sexual abuse, then surely psychologists could also be doubted.

D. OUTSIDE THE SECOND CIRCUIT

The line of Second Circuit cases just examined are indicative of the way federal courts, which were unable to question the admittance of such testimony when reviewing federal habeas claims, were still able to inject their doubts and skepticism regarding CSAAS expert testimony through findings of IAC.

Altogether, *Pavel*, *Lindstadt*, and *Gersten* illustrate not only the evolving duties of defense counsel in CSA cases—duties to consult both medical and psychological experts in all cases of CSA—but they also illustrate the impetus behind those changes—increasing doubts about the scientific validity of CSAAS. The pertinent question, therefore, is whether other circuits are likely to adopt the approach of the Second Circuit. Recent cases in both the Tenth and Ninth Circuits suggest that the answer is yes.

The 2006 case *Barkell v. Crouse*,[170] suggests the Tenth Circuit's willingness to follow the Second Circuit's approach and impose stricter duties on defense counsel in CSA cases. In *Barkell*, defendant Gerald Barkell was convicted for sexually abusing his stepdaughter.[171] After the Wyoming Supreme Court denied Barkell's appeal for remanding the case to the trial court for an evidentiary hearing, Barkell petitioned for a writ of habeas corpus on two grounds: first, that his rights to due process and meaningful appeal were violated and second, that he was denied IAC.[172]

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[169] *Id.* at 611 (emphasis added). Here, Yuille speaks specifically to the issue of delayed disclosure and blurred memory, but his comments serve as a general indictment of CSAAS.
[170] 468 F.3d 684 (10th Cir. 2006).
[171] *Id.* at 687.
[172] *Id.* For the purposes of this Note, I will not discuss Barkell's claim of violations of his rights to due process. However, it should be noted that the Tenth Circuit court held that under AEDPA's standard of review, Barkell was not entitled to relief on this claim. *See id.* at 688.

In considering Barkell's IAC claims, the court distinguished between Barkell's counsel's alleged trial and alleged pretrial errors.[173] Barkell alleged that his defense counsel provided ineffective assistance during trial as evidenced in part by his flawed cross-examination of the state's expert witness.[174] Barkell further claimed IAC based on defense counsel's failure to investigate and failure to consult an expert witness.[175] The court affirmed the district court's denial of relief on Barkell's IAC claims relating to his counsel's trial performance.[176] However, regarding his claims of IAC based on his attorney's pretrial performance, the court held that Barkell "adequately alleged deficient pretrial investigation" and that the failure to consult an expert pretrial could possibly constitute IAC.[177]

Although the court declined to definitively find whether these errors would be sufficient to sustain an IAC claim, it reversed the district court's denial of Barkell's pretrial IAC claims and remanded to the district court to hold an evidentiary hearing.[178] In other words, while the Tenth Circuit did not automatically hold that Barkell's counsel's failure to consult an expert constituted IAC, the appellate court left open the possibility that this failure did constitute IAC. This possibility suggests the Tenth Circuit's willingness to adopt the Second Circuit's approach and impose stricter duties on defense counsel in CSA cases.

The Ninth Circuit will likely follow if the recent case, *Jackson v. Yates*,[179] is any indication. The Ninth Circuit has already adopted at least one aspect of the Second Circuit's approach to CSA cases—namely, its growing focus on the scientific validity of expert testimony.

In *Yates*, defendant Jared Jackson was convicted for, among other charges, sexually abusing his stepdaughters.[180] In his petition for writ of habeas corpus, Jackson alleged that he was denied effective assistance of counsel based in part on his attorney's failure to consult with a medical expert.[181] In support of his IAC claims, Jackson relied on the *Lindstadt*, *Pavel*, and *Gersten* line of Second Circuit cases.[182] Treating this line of cases as precedential authority, the Ninth Circuit conducted a full review of them and distinguished between them and *Yates* on various grounds, including the presence of circumstantial evidence.[183]

However, one of the crucial distinctions the Ninth Circuit made between *Yates* and the Second Circuit cases (especially *Gersten*) ultimately

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[173] *Id.* at 690.
[174] *Id.* at 690–91, 699 (The court pointed to a particularly disastrous part of defense counsel's cross-examination of the prosecution's expert: "[defense counsel asked] whether children in stepparent families are more likely to be abused than other children, a question that elicited a damaging affirmative answer.").
[175] *Id.* at 692.
[176] *Barkell*, 468 F.3d at 692.
[177] *Id.* at 698–99.
[178] *Id.* at 699.
[179] No. C-07-0009 MHP, 2008 U.S. Dist. LEXIS 1522 (N.D. Cal. Jan. 7, 2008).
[180] *Id.* at *2–7.
[181] *Id.* at *10.
[182] *Id.* at *21.
[183] *Id.* at *36 ("Petitioner's action is distinguishable from the Second Circuit authority because in petitioner's case substantial circumstantial evidence of abuse was found during the search of petitioner's home.").

rested on the fact that in *Yates*, the medical expert's testimony was not based on "discouraged" science.[184] The Ninth Circuit declined to find that defense counsel's failure to consult an expert witness amounted to IAC in *Yates* almost entirely because the prosecution's expert testimony relied on "accepted" science.[185] Implicit in this reasoning is that if the prosecution's expert testimony relies on anything that might be "discouraged" or scientifically invalid, defense counsel's failure to consult an expert might very well constitute IAC.

In *Gersten*, the prosecution introduced CSAAS testimony during the trial to assist the jury to make sense of why the alleged victim was delayed in disclosing. The Second Circuit, however, was easily convinced that CSAAS expert testimony was "junk science" based on Dr. Yuille's affidavit. Interestingly, the Second Circuit was so easily convinced that CSAAS had no redemptive value even though the prosecution purported to use it to explain the alleged victim's delayed disclosure, a well-documented phenomenon among victims of sexual abuse.[186] Delayed disclosure is just one of five phenomena covered in CSAAS.[187] What if the prosecution had introduced CSAAS testimony to explain some other characteristic of CSAAS--what if the prosecution had used CSAAS testimony to explain recantation, a much more controversial phenomena than delayed disclosure?

Moreover, what if there had been an affidavit in *Yates* that was equivalent to the Yuille affidavit in *Gersten*—that is, an affidavit questioning the scientific validity of the prosecution's expert's testimony? Would the Ninth Circuit have then ruled, like the Second Circuit, that defense counsel's failure to consult an expert in a CSA case constituted IAC? Expanding this further, one can imagine a future case in the Ninth Circuit where, presented with similar facts—delayed disclosure and allegations of CSA against a father—the petitioner attaches an affidavit similar to the Yuille affidavit, claiming that the CSAAS evidence proffered by the prosecution is a "junk science." Would the Ninth Circuit follow the lead of the Second Circuit and treat CSAAS as a "junk science" and impose higher duties on defense counsel? *Yates* indicates the answer is yes.

Overall, both *Barkell* and *Yates* suggest troubling implications for the use of CSAAS in future CSA cases. They signal an increasing tendency to doubt and disregard the scientific validity of CSAAS and suggest that CSA cases where a child recants will look particularly weak to appellate courts. After the Ninth Circuit's treatment of *Yates*, one can easily imagine a case where CSAAS expert testimony is not admitted or thrown out because of skepticism about its scientific validity. However, this skepticism about the validity of CSAAS and the applicability and legal relevancy of CSAAS in CSA cases where the alleged victim recants is unwarranted.

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[184] *Id.* at *24–25.
[185] *See Yates*, 2008 U.S. Dist. LEXIS 1522, at *24–25.
[186] *See* Part IV for discussion.
[187] *See* Summit, *supra* note 13.

IV. THE VALIDITY OF CSAAS

Skepticism about the validity of CSAAS and the applicability and legal relevancy of CSAAS in CSA cases where the alleged victim recants is unwarranted. There is empirical evidence to support both the scientific validity of CSAAS and the tendency for sexually abused children to recant their allegations of CSA.

The most vociferous critics of CSAAS expert testimony have attacked it as "a fabricator's best friend."[188] Among these critics, the most common objection to the use of CSAAS evidence in trials is the contention that CSAAS is "not diagnostic"—that is, that CSAAS does not correctly and accurately diagnose children who have been sexually abused.[189] This criticism represents a fundamental misunderstanding of the essential purpose and value of CSAAS. The theory was designed to address common myths and misconceptions about victims of CSA and to explain behavior of the alleged victim that might seem inconsistent with sexual abuse. So while the contention that CSAAS cannot diagnose CSA is absolutely correct, to attack the theory for its non-diagnostic nature is to fault it "for failing a standard it was never intended to meet."[190] Such an attack reflects a fundamental misunderstanding about the relevance and usefulness of CSAAS in CSA cases.

The other major point of contention is the idea that CSAAS is not scientifically valid.[191] As discussed in the previous section, the Second Circuit is particularly receptive to this argument—its holding in *Gersten* makes its skepticism about the scientific validity of CSAAS especially clear. In *Gersten*, the prosecution had offered CSAAS evidence to address the alleged victim's delayed disclosure.[192] The *Gersten* court's finding of IAC[193] leaned heavily on the Yuille affidavit, which presumably persuaded the court that there was no empirical evidence to support the scientific validity of CSAAS, particularly with regard to the phenomena of delayed disclosure. However, this is simply not the case. Study after study has provided strong empirical support for the tendencies of CSA victims to delay disclosure, showing that the *Gersten* court's skepticism was misplaced and unnecessary.[194]

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[188] David Feige, *Stupid-Syndrome Syndrome: Yet More Junk Science to Confound the Legal System*, SLATE., Apr. 6, 2005, http://www.slate.com/id/2116324/.
[189] *See id*. ("CSAAS is, simply put, not diagnostic.").
[190] Lyon, *Scientific Support*, *supra* note 16, at 107.
[191] *See, e.g.*, April R. Bradley & James M. Wood, *How Do Children Tell? The Disclosure Process in Child Sexual Abuse*, 20 CHILD ABUSE & NEGLECT 881 (1996); STEPHEN J. CECI & MAGGIE BRUCK, JEOPARDY IN THE COURTROOM: A SCIENTIFIC ANALYSIS OF CHILDREN'S TESTIMONY 34 (Am. Psychological Ass'n 1995); Mary Ann Mason, *A Judicial Dilemma: Expert Witness Testimony in Child Sex Abuse Cases*, 19 J. PSYCHIATRY & L. 185, 197 (1991).
[192] *Gersten*, 426 F.3d at 591–93 (For more than three years, the alleged victim failed to disclose to anyone about the alleged ongoing sexual abuse.).
[193] This Note has already discussed the facts and details of *Gersten* at great length in the previous section. *See supra* Part III.
[194] *See, e.g.*, Lyon, *Scientific Support*, *supra* note 16; London et al., *supra* note 16; Irit Hershkowitz, Yael Orbach, Michael E. Lamb, Kathleen J. Sternberg & Dvora Horowitz, *Dynamics of Forensic Interviews with Suspected Abuse Victims Who Do Not Disclose Abuse*, 30 CHILD ABUSE & NEGLECT 753 (2006); Daniel W. Smith & Elizabeth J. Letourneau, *Delay in Disclosure of Childhood Rape: Results from a National* Survey, 24 CHILD ABUSE & NEGLECT 273 (2000). It should be noted that these

The Second Circuit's willingness to discount—based on a single affidavit—the efficacy and value of CSAAS expert testimony in explaining delayed disclosure, an aspect of CSAAS fully supported by strong empirical evidence, demonstrates its intense skepticism of the scientific validity of CSAAS. It consequently follows that a skeptical federal court would be even more willing to discount CSAAS expert testimony when proffered to explain recantation, a more controversial aspect of CSAAS. The line of Second Circuit cases, *Barkell*, and *Yates* all strongly suggest that when presented with a case where the alleged victim recants her allegations of CSA, CSAAS expert testimony presented by the prosecution to explain the child's recantation will likely be treated as "junk science" by the court and thrown out. However, skepticism about the occurrence of recantation, like skepticism about CSAAS testimony, is also unwarranted. Recantation is a real and significant phenomenon among sexually abused children.

Recantation remains perhaps the most controversial and disputed of the five aspects described in CSAAS.[195] At the center of the controversy is the contention of CSAAS critics that sexually abused children seldom recant.[196] However, skepticism about the occurrence of recantation among sexually abused children is unwarranted because studies strongly support the fact that sexually abused children recant, and they recant in large numbers.

Why might a sexually abused child recant after disclosure? Skeptics of recantation and CSAAS allege that children who recant do so because their allegations of CSA were fabricated.[197] Critics further claim the fabricated allegations are often the result of children's suggestibility and interviewers' improper questioning.[198]

Rebutting this argument, one compelling and empirically supported explanation for recantation is premised on social and familial factors. Studies on CSA disclosure have consistently shown that these factors greatly influence a child's disclosure of CSA.[199] In fact, when Summit first described the phenomenon of recantation, he opined that the influence of

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studies' empirical support of CSA victims' tendencies to delay disclosure also provides strong support for the scientific validity of the first three CSAAS categories: secrecy, helplessness and accommodation.

[195] *See* Lyon, *Scientific Support*, *supra* note 16, at 128.

[196] *See* Bradley & Wood, *supra* note 191 (reporting a 4% recantation rate); Diana M. Elliott & John Briere, *Forensic Sexual Abuse Evaluations of Older Children: Disclosures and Symptomatology*, 12 BEHAV. SCIENCES & L. 261 (finding a 9% recantation rate); *See generally* London et al., *supra* note 16. *But see* Lindsay C. Malloy et al., *Filial Dependency and Recantation of Child Sexual Abuse Allegations*, 46 J. AM. ACAD. CHILD ADOLESC. PSYCHIATRY 162, 166 (2007) (observing a 23.1% recantation rate).

[197] *See* London et al., *supra* note 16, at 217 ("Although our analysis shows that some children recant sexual abuse, the results of this analysis show that *recantation is uncommon among sexually abused children*." (emphasis added)).

[198] For a discussion on children's memory and suggestibility, see Maggie Bruck & Stephen Ceci, *Forensic Developmental Psychology*, 16 CURRENT DIR. PSYCHOL. SCI. 229 (2004).

[199] *See generally* A.N. Elliott & C.N. Carnes, *Reactions of Nonoffending Parents to the Sexual Abuse of Their Child: A Review of the Literature*, 6 CHILD MALTREATMENT 314 (2001); Beverly B. Lovett, *Child Sexual Abuse Disclosure: Maternal Response and Other Variables Impacting the Victim*, 21 CHILD & ADOLESCENT SOC. WORK J. 355 (2004).

family and social support played a large role in whether a child recanted after disclosure:

> "Beneath the anger of . . . disclosure remains the ambivalence of guilt and the martyred obligation to preserve the family. . . . [T]he child bears the responsibility of either preserving or destroying the family. [The child has] the 'bad' choice . . . to tell the truth and the 'good' choice . . . to capitulate and restore a lie for the sake of the family."[200]

In 2007, Malloy et al. ("Malloy") proposed a filial dependency model of recantation wherein the likelihood of recantation is related to and "affected by the child-perpetrator relationship, supportiveness of the nonoffending caregiver postdisclosure, child's age, and child's placement postdisclosure."[201] Malloy found that family pressures can lead genuinely sexually abused children to recant and that the influence of family pressures outweighed other factors typically attributed for recantation, such as the suggestibility of children.[202] Furthermore, because Malloy's sample consisted of only substantiated claims of CSA, the recants that occurred could not be attributed to the theory that they reflected false allegations.[203] Malloy's study provides strong evidence for why children recant, and also support for the proposition that recantation does in fact occur among sexually abused children. The question remains, however, how prevalent is recantation among sexually abused children, and should its rate of occurrence affect the use of CSAAS expert testimony?

In his 1983 paper on CSAAS, Summit declared that "whatever a child says about sexual abuse, she is likely to reverse . . . ."[204] The position of CSAAS critics, however, is that sexually abused children seldom recant.[205] In support of this claim, these critics often cite the 1996 study by Bradley and Wood, which reported a recantation rate of just four percent.[206] However, the Malloy (2007) study elicited a recantation rate of twenty three percent, more than five times the rate reported in Bradley & Wood (1996). What could account for this discrepancy? Malloy and her colleagues proposed three possible explanations for the difference: definitional differences,[207] the amount of follow-up interviews,[208] and

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[200] *See* Summit, *supra* note 13, at 187–88.
[201] Malloy et al., *supra* note 196, at 163.
[202] *Id.* at 167 ("Children who recanted appeared to be more susceptible to familial pressures to deny abuse than to pressures commonly believed to influence the accuracy of CSA claims, including those associated with repeated interviewing by professionals who presumably believed that abuse had occurred.").
[203] *Id.* at 166.
[204] Summit, *supra* note 13, at 188.
[205] *See* sources cited *supra* note 196.
[206] *See* Bradley & Wood, *supra* note 191; Malloy et al., *supra* note 196, at 166.
[207] Malloy et al., *supra* note 196, at 166–67. Malloy et al. opined that the definition of recantation might have effected reported rates of recantation. In their study, Malloy et al. considered recantations occurring in the context of both formal and informal interviews, while Bradley & Wood only recorded recantations to police and social services. However, even when Malloy et al. adjusted their definition of recantation and limited it to only formal interviews (as in Bradley & Wood), the recantation rate was 18.9%, more than four times the reported rate in Bradley & Wood. Thus, it is unlikely that definitional differences could account for the large discrepancy in reported recantation rates.
[208] *Id.* at 167. Noting that "pressures to recant likely build over time," Malloy et al. theorized that lower recantation rates in other studies could be attributable to limited follow-up interviews. Malloy et al. pointed out that in their study, children typically recanted during the fourth interview. Thus, they

caregiver support.[209] However, even when considering those three factors and adjusting their study, Malloy's results still supported the occurrence of recantation among sexually abused children. While their findings suggest that fewer sexually abused children recanted than Summit first opined,[210] the results imply that recantations do occur, are "hardly 'rare', and are reliably associated with filial dependency."[211]

Other studies also provide strong empirical support for the contention that sexually abused children often recant. For example, the presence of a non-congenital sexually transmitted disease is almost a definite indication that sexual abuse has occurred.[212] In a 1996 study by Gordon & Jaudes, out of fourteen children with an STD, only six children disclosed the sexual abuse, and of those six children, three later recanted their allegations.[213] In other words, Gordon & Jaudes' study illustrates a fifty percent recantation rate. Furthermore, the presence of an STD undermines the argument that the high recantation rate was a result of false allegations and thus vividly illustrates the real tendency of sexually abused children to recant.

Regardless of the exact rate of recantation, the fact is that strong empirical evidence exists to support the reality that sexually abused children do recant. Still, such evidence is not sufficient to satisfy critics of CSAAS and recantation. Kamala London and colleagues in a 2008 paper contend that the fact that less than a majority of children recant is somehow indicative of the legal irrelevancy of recantation.[214] However, such an argument illustrates a deep misunderstanding and misapplication of statistics. The frequency of recantation among sexually abused children is not enough to determine its legal relevancy—to truly determine the probative value of a statistic, one must examine its relevance ratio.[215] The relevance ratio, which measures the relevance or probative value of evidence, is determined by dividing the proportion of abused who show symptoms by the proportion of nonabused who show symptoms.[216] Determining the exact relevance ratio may prove impossible, for it is difficult to measure the proportion of nonabused children who recant. However, this does not render reported recantation rates of sexually abused children useless. Because a jury might believe that a sexually abused child

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hypothesized, previous studies' limited follow-up interviews could account for the difference in recantation rates.

[209] *Id.* Malloy et al. drew attention to the fact that in their study, 46.3% of caregivers expressed disbelief in the child's allegations of CSA, while only 24.7% of caregivers did in Bradley & Wood's 1996 study. They hypothesized that the fact that their sample population's nonoffending caregivers seemed to be less supportive than the nonoffending caregivers in Bradley & Wood's 1996 study might account for the higher reported recantation rate.

[210] Summit believed a majority of children recanted. *See* Summit, *supra* note 13, at 188.

[211] Malloy et al., *supra* note 196, at 168.

[212] *See* Myers, *supra* note 18, at 373–74; Thomas D. Lyon, *False Denials: Overcoming Methodological Biases in Abuse Disclosure Research*, *in* CHILD SEXUAL ABUSE: DISCLOSURE, DELAY, & DENIAL 41, 46 (Margaret-Ellen Pipe, Machael E. Lamb, Yael Orbach & Ann-Christin Cederborg eds., Lawrence Erlbaum Assocs. 2007).

[213] Stacy Gordon & Paula K. Jaudes, *Sexual Abuse Evaluations in the Emergency Department: Is the History Reliable?*, 20 CHILD ABUSE & NEGLECT 315, 317 (1996).

[214] *Cf.* Kamala London, Maggie Bruck, Daniel B. Wright, & Stephen J. Ceci, *Review of the Contemporary Literature on How Children Report Sexual Abuse to Others: Findings, Methodological Issues, and Implications for Forensic Interviewers*, 16 MEMORY 29, 38 (2008).

[215] *See* Lyon & Koehler, *supra* note 30, at 50.

[216] *Id.*

would never recant if she were telling the truth, informing the jury of the occurrence of recantation among sexually abused children would change how they view the numerator portion of the relevance ratio. That is to say, informing the jury of the rate of recantation among sexually abused children would likely cause jurors to increase the numerator (the proportion of abused children who show symptoms). Malloy's finding of a twenty three percent recantation rate among sexually abused children is therefore significant and carries probative weight because it affects jurors' perceptions of what proportion of sexually abused children recant. Moreover, one must remember the main purpose of CSAAS testimony—that it is not diagnostic and not meant to prove that a child has been abused. Rather, it is to assist the trier of fact. The primary goal of CSAAS testimony regarding recantation is to explain *how* recantation occurs rather than how *often* it occurs.[217] Thus, courts should not discount the use of CSAAS in cases where a child recants because less than a majority of sexually abused children recant.

Finally, critics argue that jurors do not need to hear expert opinion on CSAAS because the aspects of CSAAS are common knowledge.[218] But how much do jurors really know about characteristics of sexually abused children? Is it enough to render CSAAS expert testimony superfluous? A 2005 study by Jodi A. Quas and colleagues ("Quas") studied what jurors and college students knew about children's memory, suggestibility, and reactions to abuse.[219] Quas's study revealed "considerable variability in individuals' knowledge about children's eyewitness abilities and reactions to abuse and indicated that individuals possess both accurate and inaccurate beliefs."[220] Thus while some jurors were well-informed and possessed accurate knowledge about various aspects of child abuse, significant discrepancies still existed among the total pool of participants. Quas advised that expert testimony would be beneficial in educating jurors and ameliorating the discrepancies and inaccuracies in participants' knowledge.[221] In the end, use of CSAAS testimony should not be discouraged by courts simply because it might be within the common knowledge of some jurors because expert testimony could still serve an educatory purpose.[222]

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[217] Lyon, *Scientific Support*, *supra* note 16, at 132.
[218] *See* Commonwealth v. Dunkle, 602 A.2d 830, 838 (Pa. 1992) (refusing to allow the admission of CSAAS expert testimony: "[W]e do not believe that there is any clear need for an expert to explain this to a jury. This understanding is well within the common knowledge of jurors . . . As such, the need for expert testimony in this area is not apparent.").
[219] Jodi A. Quas, William C. Thompson, & K. Alison Clarke-Stewart, *Do Jurors "Know" What Isn't So About Child Witnesses?*, 29 L. & HUMAN BEHAV. 425, 425, 430–32 (2005). Among the many "belief statements" participants were asked to agree or disagree with was one specifically pertaining to the issue of recantation: "Children who retract (take back) their stories about sexual abuse were probably lying in the first place." *Id.* at 439.
[220] *Id.* at 452.
[221] *See id.*
[222] *See* discussion in *Tyus*, 102 F.3d at 263.

V. CONCLUSION

The sexual abuse of children remains a real, damaging, and prevalent problem in our society. For those victims who disclose the sexual abuse, CSAAS will likely serve an important role in helping others understand their behaviors and decisions. Prosecutors will continue to struggle to overcome the daunting challenges inherent in prosecuting CSA cases, and they should not have their efforts further impeded by courts' distrust and exclusion of CSAAS expert testimony.

At the heart of the Second Circuit's decisions to impose new duties on defense counsel in CSA cases is the deep distrust and skepticism of CSAAS. The Ninth and Tenth Circuit indicate a great likelihood of following the Second Circuit's lead, but they should refrain from doing so. Their skepticism is unwarranted. Study after study consistently supports the scientific validity of CSAAS. Strong empirical evidence exists to support the assertion that sexually abused children recant. It is therefore time for courts to stop doubting the scientific validity of CSAAS. Furthermore, in future CSA cases where the alleged victim recants and the prosecution presents expert testimony on CSAAS, the court should not treat this testimony as a "junk science." The tendency of sexually abused children to recant is a reality and, in fact, not "junk" at all.