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DAUBERT STRATEGIES FOR THE CRIMINAL DEFENSE BAR

*Michael D. Cicchini**

INTRODUCTION

In states that use the *Daubert* reliability standard for the admission of expert testimony at trial, criminal defense lawyers have intuitively known what the objective evidence now shows: courts employ a blatant, pro-prosecutor double standard.¹ As discussed in Part I, there is a lax, virtually nonexistent standard for state experts and a strict, hyper-critical standard for defense experts. The results are so lopsided that, at least in one state, the defense cannot cite a single appellate decision where any state's expert was ever excluded or any defense expert was ever allowed to testify.²

With very few, if any, on-point appellate cases to cite when moving to exclude the state's expert or seeking to admit a defense expert, what is the criminal defense lawyer to do? In light of the scarcity of favorable cases, this Article provides two possible strategies for the defense.

Part II of this Article provides a defense strategy for excluding the state's experts. It is a goose-and-the-gander strategy in that defense counsel identifies relevant, in-state cases in which courts have excluded defense experts, and then adapts that judicial reasoning to argue that the state's expert must also be excluded.³ Part II illustrates this strategy through a sample motion to exclude a state's expert on Child Sexual Abuse Accommodation Syndrome, a form of "commonality evidence" that prosecutors use to bolster their witness's testimony and put the gloss of faux expertise on the state's case.⁴

Part III of this Article provides a defense strategy for gaining the admission of a defense expert. It is a less-is-more strategy in that defense counsel proffers "exposition testimony," rather than having the defense expert apply his or her

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1. *See infra* Part I.
2. *See id.*
3. *See infra* Part II.
4. *See id.*

expertise to the facts of the case at bar.⁵ This form of testimony, which has been explicitly approved in many jurisdictions, eliminates one of the prongs in *Daubert*'s multi-pronged test, thereby increasing the defendant's odds of gaining admission of the evidence.⁶

I. THE *DAUBERT* STANDARD (AND DOUBLE STANDARD)

The admissibility of expert testimony at criminal trials, like most aspects of criminal law and procedure, is highly state specific. In the so-called *Daubert* states, the proponent of such evidence must satisfy some version of the multi-pronged *Daubert* reliability standard.⁷ The first three prongs of the test, which essentially address the testimony's relevance and the individual expert's qualifications, are often stated as follows:

[1] If scientific, technical, or other specialized knowledge [2] will assist the trier of fact to understand the evidence or to determine a fact in issue, [3] a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise⁸

The next three prongs often focus on the reliability of the expert's testimony and comprise the very essence of the *Daubert* standard. These three reliability prongs separate *Daubert* from other standards of admissibility, such as the mere relevancy test⁹ and the *Frye* test.¹⁰ Under one *Daubert*-based statute, an expert may only testify if:

[4] the testimony is based upon sufficient facts or data, [5] the testimony is the product of reliable principles and methods, and [6] the witness has applied the principles and methods reliably to the facts of the case.¹¹

Finally, for purposes of this Article, the proponent of the expert testimony must also satisfy a seventh prong which is typically found in a related discovery statute. An example of such a statute is as follows:

[7] [The proponent] shall . . . disclose to the [other party] . . . any reports or statements of experts made in connection with the case or, if an expert

5. See *infra* Part III.

6. See *id.*

7. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993). For the so-called *Daubert* trilogy of cases, see also *General Electric Co. v. Joiner*, 522 U.S. 136 (1997) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). Many state court decisions, however, will turn on the language of the state's statute, and state court decisions interpreting it, without even mentioning *Daubert* or the *Daubert* trilogy.

8. WIS. STAT. § 907.02 (2020) (parenthetical numbers added) (adopting and codifying *Daubert*). These three elements are not unique to *Daubert*; there are often elements of other, lower standards of admissibility. See, e.g., N.J.R. EVID. 702 (2020).

9. Before adopting and codifying *Daubert*, Wisconsin, for example, used a mere relevancy standard for the admissibility of expert testimony: "the trial judge merely require[d] the evidence to be an aid to the jury or reliable enough to be probative. Simply stated, this [was] a relevancy test." *State v. Jones*, 791 N.W.2d 390, 396 (Wis. Ct. App. 2011) (internal punctuation and citations omitted).

10. *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923) (requiring that the science about which the expert would testify has "gained general acceptance in the particular field in which it belongs").

11. WIS. STAT. § 907.02 (2020); see also FED. R. EVID. 702.

does not prepare a report or statement, a written summary of the expert's findings or the subject matter of his or her testimony¹²

The experienced (or perhaps cynical) defense lawyer cringes upon seeing a multi-factor test like the *Daubert* standard. All of those factors—some of which actually have multiple sub-factors¹³—give pro-state judges incredible flexibility to reach their predetermined outcome of ruling for the prosecutor. That is why “[c]ritics have long complained that a different standard applies when defendants, as opposed to prosecutors, seek to introduce expert evidence.”¹⁴

For example, courts routinely allow prosecutors to present expert testimony on “handwriting identification, ballistics, [and] bite marks,” even though “there are serious reliability issues” with such evidence.¹⁵ On the other hand, courts often *exclude* “testimony about the dangers of unreliable eyewitness identification,” even though such evidence is “backed up by relatively robust findings[.]”¹⁶ Why? Because that evidence “tend[s] to be offered primarily by criminal defendants.”¹⁷ As two authors observed in their nationwide study of judicial reliability analyses: “It is incredibly rare to find any discussion of reliability, except in one context: *when courts exclude defense experts.*”¹⁸

These cynical views are supported by the data. For example, one author identified 67 *Daubert* appellate cases where “the government challenged the exclusion of its experts.”¹⁹ The government’s record in those appeals was 61-6.²⁰ The article also identified 54 *Daubert* appellate cases where the defendants argued “that their expert was improperly excluded.”²¹ The government’s record in those cases was 44-10.²² And of those ten defense victories, “only one case was actually remanded for retrial.”²³ An appellate record of 105-16—or 114-7, depending on how one defines a “victory”—certainly sets off the alarm bell for a pro-state double standard.

More recently, I conducted an intra-state analysis of all expert witness cases that reached the Wisconsin appellate courts since that state adopted the *Daubert*

12. WIS. STAT. § 971.23 (1) (e), (2m) (am) (2020).

13. See Daniel D. Blinka, *The Daubert Standard in Wisconsin: A Primer*, WIS. LAW. (Mar. 1, 2011), <https://www.wisbar.org/newspublications/wisconsinlawyer/pages/Article.aspx?Volume=84&Issue=3&ArticleID=2348> [<https://perma.cc/8K6G-L3P3>] (noting that with regard to determining the reliability of the principles and methods, there is a list of ten sub-factors which is “neither exclusive nor dispositive”).

14. Brandon L. Garret & Chris Fabricant, *The Myth of the Reliability Test*, 86 FORDHAM L. REV. 1559, 1577 (2018).

15. Julie A. Seaman, *A Tale of Two Dauberts*, 47 GA. L. REV. 889, 894–95 (2013) (internal citations omitted).

16. *Id.*

17. *Id.*

18. Garret & Fabricant, *supra* note 14, at 1571 (emphasis added).

19. D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*, 64 ALB. L. REV. 99, 105 (2000).

20. *Id.*

21. *Id.* at 106.

22. *Id.*

23. *Id.* at 106–07.

standard, and the evidence was even more lopsided.²⁴ In 68 appellate cases comprised of 134 judicial decisions across all levels of the state court system—i.e., trial courts, appellate courts, and the state supreme court—prosecutors amassed a towering and undefeated 134-0 record.²⁵ Regardless of the type of case, the type of expert, the party calling the expert, and the procedural posture, in cases that have been appealed the defense has never won a single *Daubert* ruling at any level of the state court system.²⁶

Given this absurd double standard, is it even worth the defense lawyer's valuable time to litigate *Daubert* issues?²⁷ The answer is often yes. First, *Daubert* appellate court decisions tend to be highly fact specific, often turning not only on the criminal charge and the type of expertise, but also on the individual witness's qualifications, the underlying facts of the case, the scope of the proposed testimony, and the precise nature of the legal challenge.²⁸ Because two cases are rarely identical, any adverse appellate court decision will probably not be directly on point with defense counsel's case.

Second, even when the defense lawyer can predict with near certainty that the trial judge will (a) allow the state's expert to testify or (b) exclude the defendant's expert, there may be secondary benefits to litigating *Daubert* issues. Most significantly, when challenging the state's expert, pretrial litigation may help defense counsel prepare an effective cross-examination for trial. Further, both (a) pretrial motions to exclude the state's expert and (b) efforts to admit the defense expert, even if unsuccessful, may prevent future claims of ineffective assistance of counsel (IAC) if the defendant is convicted. Avoiding IAC claims benefits both defense counsel and the defendant.²⁹

The real question, then, is how does defense counsel attempt to exclude a state's expert or win the admission of a defense expert? The answer is obviously highly fact dependent. However, in jurisdictions like Wisconsin with its 134-0 record in favor of the state, this much is certain: the conventional strategy of citing an in-state, on-point appellate case appears to be impossible. Defense counsel should therefore consider different, less conventional approaches.

24. See Michael D. Cicchini, *The Daubert Double Standard*, 2021 MICH. ST. L. REV. (forthcoming 2021) (manuscript at 8–12), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3787772.

25. *Id.*

26. *Id.* In order to rule out possible innocent explanations for the state's 134-0 record, I also dove into the murky details of the cases. I found that, with regard to three categories of expert testimony—blood alcohol level, child interview protocols, and firearms evidence—courts *allowed* the state's experts but *excluded* the defendants' experts. *Id.* at 13. And with regard to all cases and types of experts, I identified eight pro-state tactics that judges used to help prosecutors build their unblemished record. *Id.* at 13–26.

27. The practicing criminal defense lawyer must often make decisions about how to allocate his or her limited time among numerous competing demands, even within a single case. This is true despite the best advanced planning and ongoing time management, as unexpected issues often surface before and during trial. In this regard, the saying about “the best-laid plans of mice and men” is certainly on point.

28. See, e.g., *United States v. Vargas*, 471 F.3d 255, 261–62 (1st Cir. 2006).

29. Being accused of ineffective assistance of counsel (IAC) can be very time consuming, if not harmful, for defense (trial) counsel. See Michael D. Cicchini, *Constraining Strickland*, 7 TEX. A&M L. REV. 351, 367–70 (2020). Further, when post-conviction counsel for the defendant uses the IAC framework instead of directly attacking the trial judge's decision, this can also harm the defendant's chances of prevailing on post-conviction motion or appeal. See *id.* at 364–67.

This Article offers one such approach: identifying and adopting the underlying judicial reasoning and prosecutorial tactics that produced the state's 134-0 record, and then flipping the script. That is, when defense counsel moves to exclude the state's expert, counsel may wish to cite and apply the courts' reasoning from those cases that excluded defense experts; conversely, when defense counsel seeks admission of a defense expert, counsel may wish to adopt the prosecutorial tactics that were used successfully to admit the state's experts.

II. EXCLUDING THE STATE'S EXPERT: THE GOOSE AND THE GANDER

When seeking to exclude a prosecutor's expert witness, defense counsel must first identify the cases in the relevant jurisdiction where courts have excluded defense experts. Then, counsel's underlying strategy will be to demonstrate that what was good for the goose (i.e., the court's reasoning in excluding defense experts) must also be good for the gander (i.e., should be applied consistently and used to exclude the state's expert). My recent intrastate analysis of *Daubert* cases revealed that, in non-traffic criminal cases, the most common type of expertise peddled by the state was syndrome evidence.³⁰ I will therefore use that class of evidence when discussing this defense strategy for exclusion.³¹

Syndrome evidence is also known as commonality evidence, which is exactly what it sounds like: the state calls an "expert" to testify about what is "common" in a particular situation.³² The prosecutor's goal is to put the gloss of faux expertise on the state's otherwise weak case. The state has numerous, full-time government agents—e.g., social workers, child advocates, domestic abuse counselors, and especially police officers—at its beck and call to testify about commonalities. For example:

Did the alleged victim delay reporting the crime until several months or even years later? There's an expert for that. Such delayed reporting is "very common" among victims of the crime for which the defendant is being prosecuted.

Did the alleged victim recant the allegation by saying that he or she made it up while in a drunken state of anger? Don't worry, there's an expert for that, too. Recantations are "very common" among victims who, often, are forced by defendants to recant the truth.

Did the defendant refuse to answer questions when approached by the police? There is definitely an expert for that. Such *pre-Miranda* silence

30. See Cicchini, *supra* note 24, at 11.

31. In cases where the defense fails to exclude the state's expert, for strategies that use defense experts in rebuttal, see generally Edward J. Imwinkelried, *Defense Attacks on Prosecution Scientific Evidence: The Standard for Defense Rebuttal Evidence is Already Lower than the Standard for Prosecution Evidence*, 93 TEMP. L. REV. 55 (2020).

32. See Risinger, *supra* note 19, at 112–15.

demonstrates a “consciousness of guilt” and is “very common” among people who commit the type of crime for which the defendant is on trial.³³

To demonstrate this defense strategy for excluding such evidence, I will use a particular category of commonality evidence called Child Sexual Abuse Accommodation Syndrome (CSAAS). Here is an example, from *State v. Smith*,³⁴ of a CSAAS expert’s qualifications and the state’s pretrial summary of her proposed testimony. First, to qualify its child-advocate witness as an expert under the *Daubert* test:

The State submitted a curriculum vitae for [the witness] that showed she had a bachelor’s degree in social work and had been employed by the . . . Department of Human Services in child protective services for two decades followed by five years as director of the . . . Child Advocacy Center. [The witness] had extensive training in child maltreatment and had provided training for others in the areas of child maltreatment, interviewing children, sexualized behaviors, and mandatory reporting.³⁵

Second, for the pretrial summary of its witness’s testimony, the state provided the following information:

[The witness] would not testify about specifics involving this case but . . . would testify about *what, oftentimes, she sees* victims of child sexual assault do. And she would testify about delayed disclosure, how it’s *quite common* for children to wait to disclose. The State also provided that [the witness] would testify how child sexual assault victims *often, perhaps*, become withdrawn, their mood changes, they struggle academically, may act out as well as a wide range of behaviors that are *common* in child sexual assault cases.³⁶

In sum, the state uses a child advocate, not a research psychologist, to testify about what is “common” in her own experiences, rather than what the published studies have found. And of course, because nearly everything is “common”—including the unspecified “wide range of behaviors”—the expert’s testimony nearly always matches the facts of, and therefore bolsters, the prosecutor’s case.

How, specifically, the defense lawyer might attempt to exclude such evidence is best illustrated through a sample motion, below. For consistency, the motion cites cases from the same jurisdiction, Wisconsin, whenever possible. When necessary, it cites cases from other jurisdictions, i.e., Kentucky, Missouri, New Jersey, and Tennessee.

For organization and clarity, the sample motion has seven numbered paragraphs. These seven paragraphs and their topic headings track the seven prongs of the particular *Daubert* standard set forth in Part I of this Article. For paragraphs (and *Daubert* elements) numbered two, three, four, and six, I identified

33. MICHAEL D. CICCHINI, ANATOMY OF A FALSE CONFESSION: THE INTERROGATION AND CONVICTION OF BRENDAN DASSEY 181 (2018). Unlike *post*-Miranda silence, *pre*-Miranda silence is often used against defendants. See, e.g., *State v. Mayo*, 734 N.W.2d 115 (Wis. 2007).

34. 874 N.W.2d 610 (Wis. Ct. App. 2015).

35. *Id.* at 614.

36. *Id.* at 613 (emphasis added).

in-state cases in which the court had excluded defense experts; I then adopted the courts' reasoning and argued that, because those defense experts were excluded, the court must also exclude the state's CSAAS expert for the same reasons.

One Wisconsin case cited in the motion is *State v. Murphy*, in which the court excluded the defendant's expert testimony in support of an accidental shooting defense.³⁷ Despite a highly qualified defense witness offering commonality testimony based on his own experiences, the court excluded the witness and launched several hyper-technical, even disingenuous criticisms.³⁸ This makes *Murphy* an excellent case to cite when arguing that what was good for the goose (when excluding the defense expert) must also be good for the gander (when deciding on the admissibility of the state's expert). *Murphy* features prominently in paragraphs (and *Daubert* elements) numbered three and four.

[State or People or Commonwealth]

v.

[Defendant's name]

[Case No.]

DEFENDANT'S MOTION TO EXCLUDE THE STATE'S EXPERT

The Defendant, appearing specially by [his / her] attorney and reserving the right to challenge the Court's jurisdiction, moves the Court, pursuant to the legal authorities set forth below, for: (A) an order excluding the state's expert-witness testimony from trial; or, in the alternative, (B) a pretrial *Daubert* hearing where the state must produce its expert witness for examination on all matters relevant to the admissibility of the testimony.

As indicated in the state's notice and summary of expert testimony filed with this Court, the state intends to introduce commonality testimony by its witness, a social worker, about what is allegedly common in child sexual abuse cases such as ours. This line of testimony is also known as Child Sexual Abuse Accommodation Syndrome (CSAAS), a specific category of commonality testimony.

CSAAS has been called "*an exemplar of junk science* that should not be used in any way in any context (particularly in legal settings, where impactful decisions are being made)." *State v. J.L.G.*, 190 A.3d 442, 458 (N.J. 2018) (emphasis added) (citing several published studies and then holding that CSAAS testimony is not admissible). The defense therefore moves to exclude the state's proffered testimony on the following, specific grounds which track the relevant statutory prongs.

37. No. 2017AP1559-CR, 2018 WL 3954208 (Wis. Ct. App. Aug. 16, 2018).

38. *See id.*

1. The testimony does not constitute “scientific, technical, or other specialized knowledge” but, rather, is common knowledge. Sec. 907.02, Wis. Stats.

- a. That a child might not immediately disclose an incident or might exhibit “a wide range of behaviors” following an incident is *common knowledge*. With regard to delayed reporting, for example, a New Jersey court held that when the child testified that she delayed reporting the incident because she was embarrassed and fearful, “[n]o juror needed help from an expert to understand and evaluate [such] testimony” and, therefore, “expert testimony is not called for to assist the trier of fact.” *J.L.G.*, 190 A.3d at 466. More generally, a Missouri court eloquently explained that using an expert to recycle common knowledge “would be a superfluous attempt to put the gloss of expertise, like a bit of frosting, upon inferences which lay persons were equally capable of drawing from the evidence.” *State v. Davis*, 32 S.W.3d 603, 609 (Mo. Ct. App. 2000).
- b. That is, using an expert to bolster the state’s allegation would invade the province of the jury in deciding witness credibility. *State v. Haseltine*, 352 N.W.2d 673 (Wis. Ct. App. 1984) (“[T]he [expert’s] opinion, with its aura of scientific reliability, creates too great a possibility that the jury abdicated its fact-finding role to the [expert] and did not independently decide [the defendant’s] guilt.”). Similarly, as a Tennessee court recognized, testimony about CSAAS “may lead a jury to abandon its responsibility as fact finder and adopt the judgment of the expert. Such evidence carries strong potential to prejudice a defendant’s cause by encouraging a jury to conclude that . . . it is more likely that the defendant committed the crime Expert testimony of this type invades the province of the jury to decide on the creditability of witnesses.” *State v. Ballard*, 855 S.W.2d 557, 561-62 (Tenn. 1993). That is why other states, such as Kentucky, “have reversed a number of cases because of trial error in permitting the use of testimony regarding the so-called ‘child abuse accommodation syndrome’ to bolster the prosecution’s case.” *King v. Commonwealth*, 472 S.W.3d 523, 528 (Ky. 2015).

2. The testimony would not “assist the trier of fact.” Sec. 907.02, Wis. Stats.

- a. In addition to the reasons set forth above, the witness’s exposition testimony would not assist the trier of fact for another reason: it does not “fit the facts of the case” and, therefore, “must be excluded.” *State v. Dobbs*, 945 N.W.2d 609, ¶ 32 (Wis. 2020) (excluding the defense expert for lack of “fit”). In fact, the state fails to link *any* of the subjects in its summary of testimony to the facts of our case. Because the testimony is not “sufficiently tied to the facts of the case” it would not “aid the jury in resolving a factual dispute.” *Id.* at ¶ 44. Rather, the

“testimony would mislead or confuse the jury” and must be excluded. *State v. Schmidt*, 884 N.W.2d 510, 532 (Wis. Ct. App. 2016).

- b. This issue of “fit” is an important matter to be decided *before* trial, as the dangers of allowing the testimony, subject to an in-trial objection, are great. In *Schmidt*, for example, the defense expert on suggestive interview techniques was excluded *before* trial because, if allowed to testify, “it is entirely probable that the jury would conclude, *based solely on the fact that he was testifying*, that suggestive interview techniques had been used . . . despite the absence of any evidence to that effect.” *Id.* (emphasis added). For the same reasons, the state’s witness in our case must be excluded.

3. The witness is not “qualified as an expert.” Sec. 907.02, Wis. Stats.

- a. The state’s witness is a social worker and child advocate, not a research or even a clinical psychologist. The state’s witness would be testifying *not* based on any published research, but rather solely on her own personal experiences about what (in hindsight and subject to confirmation bias) she believes is “common.”
- b. Courts have excluded such commonality testimony when proffered by defense experts who rely on their personal experiences. For example, when the defense attempted to call a certified firearms safety instructor (with twenty years of experience and two relevant college degrees) to testify, based on his own experiences, about the commonalities of accidental gun discharges, the court excluded the testimony. *State v. Murphy*, No. 2017AP1559-CR, unpublished slip op., ¶ 37 (Wis. Ct. App. Aug. 16, 2018) (citing “pertinent defects in [the witness’s] qualifications” to draw such conclusions from his twenty years of personal experience).³⁹

4. The testimony is not “based upon sufficient facts or data.” Sec. 907.02, Wis. Stats.

- a. As explained above, the state’s witness’s proposed testimony about what she believes to be “common” is based on the witness’s personal experiences. Without knowing the sample size of her cases or the population size of reported and (more importantly) *substantiated* child sexual assault allegations, the Court cannot conclude that her experiences are sufficient to justify her conclusions. By comparison, when

39. The witness’s qualifications were set forth in the defendant’s appellate brief, which counsel may wish to cite in footnote form if not in the body of the motion. *See* Brief of Defendant-Appellant at 17–18, *State v. Murphy*, No. 2017AP001559-CR (Wis. Ct. App. Aug. 16, 2018), 2017 WL 5890839. *Murphy* is unpublished, and not all such cases may be cited as binding, or even persuasive, authority. For the rule in Wisconsin, see WIS. STAT. § 809.23(3)(b) (2020) (“[A]n unpublished opinion issued on or after July 1, 2009, that is authored by a member of a three-judge panel or by a single judge under s. 752.31 (2) may be cited for its persuasive value. A per curiam opinion, memorandum opinion, summary disposition order, or other order is not an authored opinion for purposes of this subsection. Because an unpublished opinion cited for its persuasive value is not precedent, it is not binding on any court of this state.”). Further, Wisconsin litigants should provide a copy of the unpublished cases cited as persuasive authority. *See* WIS. STAT. § 809.23(3)(c) (2020) (“A party citing an unpublished opinion shall file and serve a copy of the opinion with the brief or other paper in which the opinion is cited.”).

the defense firearms expert in *Murphy* intended to testify about commonalities in accidental gun discharges, the court excluded the witness because there was no proffer as to “the sample size” of his accidental discharge cases or the size of the relevant population of such cases. *Murphy*, No. 2017AP1559, unpublished slip op. at ¶ 37. This same standard must be applied to the state’s expert as well.

- b. More significantly, the state’s witness in our case has no control group. The things she claims are “common” among sexual abuse victims “can also be found in non-abused children.” *J.L.G.*, 190 A.3d at 457. That is, children who are *not* abused sexually “often, perhaps, become withdrawn, their mood changes, they struggle academically, may act out” for a variety of reasons or for no reason at all. In fact, “some CSAAS symptoms . . . may be *more common* in non-abused children than in abused children.” *Id.* at 457-58 (emphasis added). Consequently, the witness’s opinion, even more so than the defense witness’s opinion in *Murphy*, “is conjecture because of insufficient facts or data” and, therefore, must be excluded. *Murphy*, No. 2017AP1559, unpublished slip op. at ¶ 37 (excluding the defendant’s testimony because it lacked a control group for comparative purposes).

5. The testimony is not “the product of reliable principles or methods.”

Sec. 907.02, Wis. Stats.

- a. Because the state’s witness is not a research scientist, she has no identifiable principles or methods to ensure that her testimony about what is “common” is untainted by confirmation bias or selective memory. How, for example, does she define “act[ing] out” and does she consistently identify and record this behavior in her cases? How long does it take for a disclosure to be considered “delayed,” and how accurately does she record the timing of the disclosures in her cases? The state has not provided this information, and the Court therefore cannot conclude that the witness’s testimony is “the product of reliable principles or methods.” Quite to the contrary, the published research actually shows there are “no behaviors or symptoms that reliably distinguish an abused child from a nonabused one.” *J.L.G.*, 190 A.3d at 458 (citing published studies).
- b. In our case, the state’s witness’s testimony is based on after-the-fact recollections of an “advocate for victims of child sexual abuse, and not a body of empirical data.” *Id.* Such advocacy work does not even qualify as “[c]linical wisdom”; nonetheless, clinical experiences, even when they are contemporaneously documented by a psychiatrist or clinical psychologist, “must be examined with care and objectively tested” before they may be presented to a jury to win a conviction. *Id.* In our case, the state’s proffered testimony has been objectively tested, and it has failed. *Id.*

6. The state’s witness has not “applied the principles and methods reliably to the facts of the case.” Sec. 907.02, Wis. Stats. [Note to reader: This element of *Daubert* does not apply to exposition testimony. *See infra* Part III.]

7. The state’s summary fails to provide the defense with adequate notice of the witness’s testimony. Sec. 971.23 (1) (e), Wis. Stats.

- a. The discovery statute requires the state to provide “a written summary of . . . the subject matter” of the proposed testimony. *Id.* However, the state’s summary is grossly inadequate as it leaves several questions unanswered. For example, what are these “wide range of behaviors that are common in child sexual assault cases”? What does it mean that a child “often, perhaps,” exhibits such behaviors? With regard to “delayed disclosure,” what does “quite common” mean? And how long after an incident must a disclosure occur to be considered “delayed”?
- b. The state’s incredibly skeletal, vague, hide-the-ball summary does not comply with the discovery statute or permit the defendant to effectively cross-examine the state’s witness, thus violating numerous rights including the constitutional rights of confrontation and to present a defense. *See generally Crawford v. Washington*, 541 U.S. 36, 61 (2004) (the right of confrontation commands that evidence be adequately tested in “the crucible of cross-examination.”); *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (“the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.”).

THEREFORE, based on the above facts and legal authorities, the defendant moves the Court to (A) exclude the witness’s testimony or, in the alternative, (B) schedule a pretrial *Daubert* hearing to determine admissibility.

[Date]

[Signature Block]

Actual motions will vary dramatically based on several factors, including the type of expert, the expert’s qualifications, the underlying facts of the case, the substantive legal authorities in the relevant jurisdiction, and, of course, the applicable procedural law, local court rules, and individual judge’s practices and proclivities.

If the court grants the motion’s alternative request of a pretrial *Daubert* hearing, defense counsel should be prepared to ask the questions that are explicitly stated in, or implied by, the motion. That way, even if the court permits the state’s expert to testify at trial, defense counsel will be better prepared for in-trial cross-examination.

III. CALLING THE DEFENSE EXPERT: LESS IS MORE

Experienced defense lawyers are aware—at least anecdotally if not empirically—that “the expert evidence of criminal prosecutors is subject to less scrutiny than that of criminal defendants[.]”⁴⁰ As a result, defense lawyers may spend many hours in preparing to use a defense expert. Whether drafting a thorough summary of expert testimony or painstakingly proofing the expert’s report,⁴¹ the defense lawyer goes to great lengths to ensure that all of *Daubert*’s prongs are satisfied.

Paradoxically, it is this thoroughness and level of detail that often gives the pro-prosecutor court the ammunition to *exclude* the defendant’s expert witness. Such judicial rulings are not just hyper-critical, but often irrational and even disingenuous. And they are most problematic when the defense expert applies the subject matter of his or her expertise to the facts of the case, as required by *Daubert*’s sixth prong.⁴²

For example, in *State v. Bauer*, the defense attempted to call a psychologist to testify about “suggestive interview techniques” and how they can lead to false allegations by children.⁴³ The expert’s qualifications and the reliability of his principles and methods were not in dispute; rather, the court excluded the testimony under *Daubert*’s sixth prong, claiming the expert failed to “sufficiently connect his opinions to the facts of the case”⁴⁴—or, as the statute reads, to “appl[y] the principles and methods reliably to the facts of the case.”⁴⁵

The expert did identify suggestive interview techniques in the case at bar, such as “asking [the alleged] child victim to name body parts before the child . . . made any allegations” of sexual abuse.⁴⁶ But the court’s criticism was this: “notwithstanding this specific critique, [the expert] fail[ed] to draw any conclusions about the reliability of the [alleged] victim’s accusations.”⁴⁷ That is, he failed to conclude that the suggestive questioning had “actual effects on the child or her statements” in which she accused the defendant.⁴⁸ The court’s opinion is mind-boggling and flat-out wrong. It excluded the expert’s testimony because he did not provide an opinion that was impossible to form and, even if it could be formed, likely would have been inadmissible at trial.⁴⁹

40. Déirdre Dwyer, *(Why) Are Civil and Criminal Expert Evidence Different?*, 43 TULSA L. REV. 381, 383 (2007).

41. See, e.g., WIS. STAT. § 971.23(2m)(am) (2020) (requiring the defense to provide “any reports or statements of experts made in connection with the case or, if an expert does not prepare a report or statement, a written summary of the expert’s findings or the subject matter of his or her testimony . . .”).

42. WIS. STAT. § 907.02 (2020) (providing that for testimony to be admissible, the court must determine that the expert “applied the principles and methods reliably to the facts of the case”).

43. *State v. Bauer*, No. 2018AP169-CR, 2019 WL 477361, at *4 (Wis. Ct. App. Feb. 7, 2019).

44. *Id.* at *3.

45. WIS. STAT. § 907.02 (2020).

46. *Bauer*, 2019 WL 477361 at *4.

47. *Id.* (emphasis added).

48. *Id.* at *3 (emphasis added).

49. In Wisconsin and elsewhere, witness truthfulness and credibility is for the jury to determine. See *State v. Haseltine*, 352 N.W.2d 673, 676 (Wis. Ct. App. 1984) (“[T]he psychiatrist’s opinion, with its aura of scientific

What can defense counsel possibly do in light of an irrational ruling like this? One strategy is to provide less information by not even trying to apply the witness's expertise to the facts of the case. But isn't satisfying every prong of the *Daubert* statute, including its application prong, a prerequisite to using an expert at trial? Under the plain language of the statute cited in Part I, the answer is yes. Despite that plain language, however, the real answer is often no. Defense counsel may be able to dispense with the application prong by disclosing less information and presenting the expert's testimony as general or educational testimony—also known as exposition testimony. Many jurisdictions⁵⁰ are aligned with the Supreme Court of Wisconsin, which held:

We conclude that Wis. Stat. § 907.02(1) continues to permit an expert witness to testify in the form of an opinion 'or otherwise,' including *exposition testimony on general principles without explicitly applying those principles to, or even having knowledge of, the specific facts of the case*. If an expert testifies in the form of an opinion, then the expert must apply the principles and methods reliably to the facts of the case.⁵¹

For an example of exposition testimony, recall *State v. Smith* and the state's summary of expert testimony for its CSAAS witness, which began: "[The witness] would *not* testify about specifics involving this case . . ."⁵² The state was giving notice of exposition testimony, as the expert would instead testify in a general, educational format about "what, oftentimes, she sees victims of child sexual assault do."⁵³ Such an expert would not make any reference to, and probably wouldn't know anything about, the specific child-accuser or the facts of the case at bar.

Instead of the CSAAS expert discussing the facts of the specific case, *the prosecutor* connects the dots between (a) the expert's general, exposition testimony about what is "common" and (b) the facts of the case. No doubt, these two things will match-up nicely; they nearly always do with vague commonality evidence which is malleable enough to fit most occasions. Then, after connecting the dots, the prosecutor will tell the jury what the expert didn't explicitly say: the commonalities of CSAAS are present in the case at bar because the defendant actually assaulted the child, and the jury should therefore convict him.

How could the defense use this type of less-is-more strategy? Continuing with *State v. Bauer*, which involved suggestive questioning of the child-accuser,

reliability, creates too great a possibility that the jury abdicated its fact-finding role to the psychiatrist . . ."); WIS. JURY INSTRUCTION CRIM. 300 ("You are the sole judges of the credibility, that is, the believability, of the witnesses and of the weight to be given to their testimony.").

50. See Risinger, *supra* note 19, at 131–32 (discussing the holdings of numerous courts permitting the use of exposition testimony).

51. *State v. Dobbs*, 945 N.W.2d 609, 624 (Wis. 2020) (emphasis added). The court's conclusion violates the plain language of the statute, which clearly requires the expert to apply his or her expertise to the facts of the case, regardless of the form of the testimony. As the concurrence in *Dobbs* astutely observed: "Today, we made Wis. Stat. § 907.02(1) say something that no reasonably capable English-speaker would understand it to say." *Id.* at 642 (Kelly, J., concurring).

52. 874 N.W.2d 610, 613 (Wis. Ct. App. 2015) (emphasis added).

53. *Id.*

the expert in that case would have testified in two parts.⁵⁴ First, for purposes of clarity, there would normally be general testimony designed to educate the jury and answer questions such as these: What are suggestive questions? Do they cause children to make false allegations? If yes, how and why does that happen? How do you know that? And second, the expert then intended to apply those principles to the facts of the case at bar by identifying actual suggestive questions asked by the child's interviewer.⁵⁵

This second part of the testimony is what got the defense into trouble. Because the expert failed to conclude that the suggestive questions had actual effects on the child, the expert failed *Daubert's* sixth prong.⁵⁶ But had the defense simply proffered the exposition portion of the testimony—the general, educational part—there would be no application for the court to criticize. Rather, the witness would have only provided “exposition testimony on general principles without explicitly applying those principles to, or even having knowledge of, the specific facts of the case.”⁵⁷

Under this simplified approach, after defense counsel elicits exposition testimony from the expert, counsel does something similar to what the prosecutor did in *State v. Smith*: defense counsel connects the dots between (a) the experts' general, exposition testimony about suggestive questions and false allegations and (b) the specific, suggestive questions the interviewer asked the child-accuser in the case at bar. In connecting those dots, defense counsel would be laying the foundation for the following closing argument: we know that suggestive questions lead to false allegations, as the expert told us how and why that happens; we know the interviewer asked suggestive questions of the child in this case; the interviewer's suggestive questions led the child to falsely accuse the defendant; all of the other evidence or lack thereof also indicates this is a false allegation; and, finally, the state has not proven guilt beyond a reasonable doubt and the jury must find the defendant not guilty.⁵⁸

This strategy may not be ideal in all cases, and, depending on numerous factors, may certainly not be as powerful as having *the expert* apply the general, educational portion of the testimony to the facts of the case. For example, in cases with DNA evidence, the expert's application of principles and methods to the

54. No. 2018AP169-CR, 2019 WL 477361, at *1 (Wis. Ct. App. Feb. 7, 2019).

55. *Id.* at *4.

56. *Id.* at *3–4.

57. *Dobbs*, 945 N.W.2d at 624. With regard to exposition testimony, the court actually reformats the statutory test into four prongs: “(1) whether the expert is qualified; (2) whether the testimony will address a subject matter on which the fact finder can be assisted by an expert; (3) whether the testimony is reliable; and (4) whether the testimony will ‘fit’ the facts of the case.” *Id.* To compare these prongs of this new, four-part test to the statute in Part I of this Article: *prong (1)* of the new test corresponds to prong [3] of the statute; *prong (2)* of the new test corresponds to prongs [1] and [2] of the statute; *prong (3)* of the new test corresponds to, and seems to merge, prongs [4] and [5] of the statute; and *prong (4)* of the new test, the “fit” requirement, replaces prong [6] of the statute. But the “fit” requirement is redundant. If the testimony didn't “fit” the facts, then it wouldn't pass prong (2) of the new test or prong [2] of the statute, i.e., it would not assist the jury. This so-called “fit” prong is really nothing more than a relevancy test. “Fit goes primarily to relevance. . . . Whether expert testimony fits a case turns on whether . . . it will aid the jury in resolving a factual dispute.” *Id.* (internal punctuation and citations omitted).

58. Of course, this is greatly simplified and focuses on only one potential aspect of the evidence.

facts of the case, along with his or her ultimate opinion or conclusion, may be absolutely necessary. But with areas of expertise more accessible to the jury and presented in plain English—e.g., testimony about child interview techniques, eyewitness identifications, and false confessions—using exposition testimony might be nearly as effective.

Opting for exposition testimony under this less-is-more strategy may actually offer two advantages. First, as discussed above, by eliminating one of *Daubert*'s prongs, the defense is (at least theoretically) increasing the odds of winning admission of the evidence. Admittedly, one author found that “[w]hen it comes to summarizational or educational expertise (also known as exposition testimony), prosecution witnesses almost always are allowed to testify, and defense witnesses are rejected in a majority of cases.”⁵⁹ But it is unlikely such disparity is due to the form of the testimony; rather, it is likely attributable to its substance and the courts’ pro-state biases.⁶⁰ In other words, proffering exposition testimony, particularly in states that have explicitly approved that form of evidence, would seem to increase the odds of admission by eliminating *Daubert*'s sixth prong and, consequently, giving the court less to criticize.⁶¹

Second, when the expert witness offers only exposition testimony, the jury may actually find the witness to be *more credible* than if the witness were to apply his or her expertise to the facts of the case. Because the expert is not offering a pro-defendant opinion or conclusion, but instead is educating the jury about general principles, methods, and the findings of published studies, the tried-and-true prosecutorial tactic of branding the witness as a biased, bought-and-paid-for hired gun will be less effective.

Defense counsel should therefore consider this less-is-more strategy in cases where the judge may cause trouble for the defense—whether legitimately, disingenuously, or simply out of ignorance—with regard to *Daubert*'s application prong. And in cases where the judge specifically finds the defense evidence admissible on all other prongs but excludes the expert’s testimony *only* because he or she failed *Daubert*'s sixth, application prong, counsel can consider offering (or re-offering) the expert evidence in the form of exposition testimony.⁶²

59. Risinger, *supra* note 19, at 131–32 (internal punctuation omitted) (parenthetical added).

60. *See supra* Part I.

61. *Dobbs*, 945 N.W.2d at 624. The defense still has to demonstrate that the expert’s exposition testimony “fits” the facts of the case. *Id.* (describing “fit” as a relevance analysis). However, this should be easy to accomplish if defense counsel drafts, or at least reviews and approves of, the summary of expert testimony. In other words, counsel can all but ensure proper fit by making an offer of proof of the relevant facts and tailoring the summary of expert testimony to those areas of potential testimony that match those relevant facts.

62. In such situations, however, the court may simply change its reasoning for, or *add* reasons in support of, its initial decision to exclude the evidence. *See id.* at 617–18 (noting that on a motion to reconsider, the court simply changed its reason for excluding the defense witness to a legally proper reason, thus allowing it to maintain its predetermined decision to exclude the evidence).

CONCLUSION

In determining the admissibility of expert testimony in criminal trials, many states have modeled their statute on the *Daubert* reliability standard.⁶³ Defense lawyers have long believed, and the evidence now objectively shows, that when ruling on *Daubert* motions the courts employ a double standard: there is a lax, virtually nonexistent standard for the state's experts and a strict, hyper-critical standard for defense experts.⁶⁴ In light of this judicial bias, this Article presents two potential strategies for the defense when litigating *Daubert* issues.

First, when moving to exclude a state's expert, this Article provides a goose-and-the-gander strategy whereby defense counsel identifies relevant, in-state cases in which courts have excluded defense experts, and then adapts that judicial reasoning to argue that the state's expert must also be excluded.⁶⁵ More significantly, this Article illustrates this strategy through a sample motion to exclude a state's expert witness on Child Sexual Abuse Accommodation Syndrome, a form of "commonality evidence" often used by prosecutors to bolster their star witness's testimony and explain away any weaknesses in the state's case.⁶⁶

Second, when attempting to admit a defense expert, this Article provides a less-is-more strategy whereby the defense proffers "exposition testimony," rather than having the defense expert apply his or her expertise to the facts of the particular case.⁶⁷ Using this form of testimony, which has been explicitly approved in many jurisdictions, eliminates one of *Daubert*'s multiple prongs (thereby increasing the defendant's odds of gaining admission of the evidence), and may even increase the witness's credibility in the eyes of the jury.⁶⁸

63. *See supra* Part I.

64. *See id.*

65. *See supra* Part II.

66. *See id.*

67. *See supra* Part III.

68. *See id.*