EXPERT TESTIMONY IN CHILD SEXUAL ABUSE CASES

by

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I. HEARSAY FROM THE COMPLAINANT UNDER THE "MEDICAL TREATMENT" HEARSAY EXCEPTION

Background.
For the past fifteen years, the prosecution has been able to introduce out of court statements from alleged sex abuse victims under the ”medical treatment” hearsay exception. That is, whenever a kid has been taken to a doctor, or psychologist, social worker, etc. following an allegation of sexual abuse, the adult has been allowed to testify, as substantive evidence, to what the kid said, or what she did with the “anatomically correct” dolls. *See, e.g, State v. Jones*, 89 N.C. App. 584, 367 S.E.2d 139 (1988).

What Happened
All of a sudden in *State v. Hinnant*, 351 N.C. 277, 523 S.E.2d 663 (2000), the Supreme Court realized that what gives statements to doctors reliability is the “treatment motive” of the kid; not the prosecution motive of the adult. Because the state did not show that the complainant had any such motive, new trial for Mr. Hinnant.

Soon after *Hinnant*, the Court of Appeals went back to business as usual. In *State v. Lewis*, 172 N.C. App. 97, 616 S.E.2d 1 (2005), it held that all the prosecution has to do to show a "treatment motive" is to show that the kid knew she was talking to a doctor, or a nurse who was going to be talking to a doctor. Left untouched, the Court of Appeals will eviscerate the rule set out by *Hinnant*.

What to do.
1. Move for discovery of hearsay that the state intends to introduce. The state only has to give you notice of “residual” hearsay, but it doesn’t hurt to ask for all hearsay.

2. Make a motion *in limine* to exclude hearsay from the child complainant, and for a hearing on the motion before the state attempts to introduce the evidence. At the hearing, argue that the kid had no treatment motive for talking to the adult, and that the "medical treatment" exception does not apply.
3. When the prosecutor of the judge brings up *Lewis*, argue that whether a child has a treatment motive is determined on a case-by-case basis. Argue that the fact that the kid knows he is talking to a doctor is not enough to show that he has any particular reason to be truthful.
4. When you move for your own psychological examination of the complainant, *see infra.*, say you need an expert to determine if the child had a treatment motive (or is capable of having a treatment motive) in talking to the state's expert.
5. Present the testimony of your psychological witness that the complainant did not have a "treatment motive" in talking to the state's expert.
6. Watch out for the prosecution to try to introduce the hearsay under one of the other exceptions, like the "excited utterance" or "residual" exceptions. *See infra*
7. If the kid does not testify, argue that his statement to the nurse/doctor was "testimonial" and inadmissible under the Confrontation Cause regardless of whether it fits the statutory Medical Treatment" hearsay exception. *See infra*.

II. HEARSAY FROM THE COMPLAINANT UNDER OTHER HEARSAY EXCEPTIONS

Background

In *State v. Hinnant*, *supra.*, the Supreme Court closed down the medical treatment exception, by requiring the state to show that the kid had a treatment motive in making the declaration. Ex Chief Justice Lake wrote a concurring opinion solely to signal to judges (and DA's) that the hearsay might be admissible under other exceptions, like the excited utterance or residual exception

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The Court of Appeals got it immediately. In *State v. McGraw*, 137 N.C. App. 726, 529 S.E.2d 493 (2000), the Court of Appeals held that certain testimony had been improperly admitted under *Hinnant*, but noted that the evidence was admissible under the "excited utterance" exception.

What to do

1. Assume that the prosecutor will try to get in the hearsay under both the Medical Treatment exception and either the excited utterance or residual exceptions.
2. Move for pre-trial discovery of hearsay from the complainant the state intends to introduce. The state does not have to give it to you, unless it is "residual exception" hearsay, but it doesn't hurt to ask for all hearsay.
3. Have the state specify on the record which hearsay exception it is relying on, and have the judge make a specific ruling as to the admissibility of the hearsay under that exception. Otherwise the Court of Appeals may find the evidence admissible under a theory that was neither argued nor ruled on. *See McGraw, supra*.
4. For the excited utterance exception be ready to demand that the state show that the

statements was "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Rule 803(2); that it was "spontaneous and sincere" *State v. Reid*, 335 N.C. 647, 440 S.E.2d 776 (1994); that it "suspended reflective thought". *State v. Smith*, 315 N.C. 76, 337 S.E.2d 833 (1985)(but kids stay startled longer than adults; 2-3 days)

5. For the residual exception, remember that the state must show six things:

1) the proponent has given written notice
2) the statement is not admissible under any other hearsay exception
3) the statement has "circumstantial guarantees of trustworthiness" equivalent to other exceptions
4) the statement is material
5) the statement is more probative than other available evidence
6) the purposes of the rules of evidence and the interest of justice will be served by admission

State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985).

6 Be ready to argue that the statement lack reliability because of the way the interview was conducted, the bias of the interviewer, etc. *See infra.*

7. If you have an expert, see if she will testify about the circumstances under which the child made the alleged statement, and whether those circumstances were such as to give the statement conclusive reliability. Remember that the expert can sit in the courtroom and listen to the adults' testimony about the hearsay, and base opinions from the testimony about the mental state of the child at the time of the declaration.

8 If the kid does not testify, move to exclude the hearsay under the Confrontation Clause.

III. THE CONFRONTATION CLAUSE AND HEARSAY FROM THE COMPLAINANT.

Background

In *Crawford v. Washington*, 541 U.S. 36, 158 L.Ed.2d 77 (2004), the United States Supreme Court held that "testimonial" statements made out-of-court violate the Confrontation Clause when introduced in a criminal prosecution.

Other jurisdictions have held that statements by a child to a police investigator or social worker are testimonial where "the government was purposefully creating formalized statements for potential use at trial." Mosteller, *Crawford v. Washington*: Encouraging and Ensuring the Confrontation of Witnesses, 39 U. Rich L. Rev. 511, 538 (2005); s*ee, e.g., Snowden v. State*, 846 A.2d 36, 47 (Md. App. 2004)(statement to social worker gathering prosecutorial information was testimonial).

In North Carolina, a social worker interrogating a suspect in collaboration with law enforcement is a government agent, who must *Mirandize* the suspect. *State v. Morrell*, 108 N.C. App. 465, 424 S.E.2d 147 (1993).

What to do:

1. Move for discovery of hearsay that the state intends to introduce. The state only has to give you notice of "residual" hearsay, but it doesn't hurt to ask for any hearsay.
2. Make a motion *in limine* to exclude hearsay from the child complainant, and for a hearing

on the motion before the state attempts to introduce the evidence.

3. At the hearing, establish the relationship between the adult witness (nurse, social worker, etc) and the prosecution.

4. Argue that the witness was a government agent. Cite *Morrell*. Argue that the resulting statement by the kid was testimonial under *Crawford*. Make sure you mention the CONSTITUTION.

IV. MEDICAL EXPERT TESTIMONY THAT THE COMPLAINANT HAS BEEN ABUSED.

Background

By statute, a party may not introduce expert testimony on a character trait of another. N.C. Gen. Stat. § 8C-1, Rule 405 (a). In cases of child sexual abuse, an expert may not testify that the prosecuting child-witness in a sexual abuse trial is believable, *State v. Aguallo*, 318 N.C. 590, 350 S.E.2d 76 (1986), or that the child is not lying about the alleged sexual assault, *State v. Heath*, 316 N.C. 337, 341 S.E.2d 565 (1986)

Most jurisdictions exclude expert testimony that a child has been sexually abused if that opinion is based on the child's "history." Some do so because it constitutes expert vouching for the credibility of the complainant. *See, e.g.*, *Viterbo v. Dow Chemical Co.*, 826 F.2d 420, 424 (5th Cir. 1987)("doctor's opinion based solely on patient's oral history is nothing more than patient's testimony dressed up and sanctified"). Other jurisdictions exclude opinion testimony that a child has been abused based on her accusation because it lacks scientific reliability. *See, e.g., State v. Cressey*, 137 N.H. 402, 628 A.2d 696 (1993)

In North Carolina, the rationale for exclusion a medical opinion that a child has been abused is based on the vouching concern. *See State v. Stancil, supra*. [NOTE: the concern over expert testimony based on psychological characteristics is also based on a perceived lack of scientific reliability. S*ee State v. Hall*, 330 N.C. 808, 412 S.E.2d 883 (1992); and the following section.]

In *State v. Hammett*, 361 N.C. 92, 637 S.E.2d 518 (2006), a doctor testified that there was definitive evidence of penetration of the complaining witness' vagina by some object. Indeed, there was no argument that somebody abused the girl; the defense was that another person was the culprit. On those facts, the Supreme Court approved of medical testimony that the girl had been abused by somebody (not necessarily the defendant), and that the complainant's physical symptoms were caused by penetration. However, the witness went too far when she testified that, even with no physical evidence at all, she would have concluded that the complainant had been abused because of her "history," *i.e.* her accusation of the defendant; *see also State v. Chandler* 364 N.C. 313, 318 (2010)(may not testify that a child has been abused without <u>definitive</u> physical evidence of abuse)

Whether a particular witness' testimony constitutes expert vouching must be determined on a case-by-case basis. *Hammett*, 361 N.C. at 94; *Chandler*, 364 N.C. at 319.

If there is no physical evidence "diagnostic for abuse" (*i.e.* eliminating other cases) the witness may not testify that the child has been abused. *State v. Hammett*, 361 N.C. at 99; *Chandler*, 364 N.C. 313, 318.

The testimony must not implicate the defendant as the abuser. *Id.* at 96.

What to do.

1. Move to discover the expert's report, and all of the underlying data (e.g. interviews, tests) *See* attached goby.
2. Make sure you know specifically what she will testify to. Interview the witness if possible.
3 Make a pre-trial motion for a *voir dire* hearing on the foundation for the expert's testimony. *See* attached goby.
4. If there is physical evidence and the witness wants to testify that the kid "has been abused," argue to the judge that, unless the witness can show that the physical evidence itself is *diagnostic* of abuse, (*i.e.*, eliminating other causes) the witness is still basing her opinion on the credibility of the kid (the kid's "history") and her opinion is without an adequate foundation. Point out that, in several cases, there was plenty of physical evidence. *See State v. Couser*, 163 N.C. App. 727, 594 S.E.2d 420 (2004) (abrasions on the introitus); *State v. Ewell,* 168 N.C. App. 98, 606 S.E.2d 914 (2005) (sexually transmitted disease); *State v. Parker* 111 N.C. App. 359, 432 S.E.2d 705 (1993) (damaged hymen); *State v. Trent,* 320 N.C. 610, 359 S.E.2d 463 (1987) (missing hymen). All of those cases were cited by *Hammett*; none were overruled. It was the witness's opinion as to the cause of the physical evidence that courts found to be improper. Note that *Hammett* and *Chandler* say that the physical evidence must be diagnostic for sexual abuse. Note also that the opinion must not implicate the defendant as the abuser.
5. Get studies showing that the physical evidence found by the state's witness is not diagnostic for abuse. E.g. Lorandos & Campbell, *Myths and realities of sexual abuse evaluation and diagnosis: a call for judicial guidelines*, 7 Journal of the Institute for Psychological Studies 1, 5 (1995)(The only "definitive" physical evidence of abuse is pregnancy, the presence of semen, or a sexually transmitted disease.) These can come through your own expert or from research in a medical school library or online. In a *voir dire*, use treatise cross examination to get the witness to admit that it is not generally accepted that the physical evidence she found is diagnostic for abuse. Argue that the witness should not be allowed to testify that the child has been abused.
6. Argue that, aside from the opinion being expert vouching, it is not scientifically reliable. Unless the witness uses techniques that have been proven (through scientific studies) to reliably distinguish abused from non-abused children, her testimony is not helpful to the jury. *Howerton v. Arai Helmet*, 358 N.C. 440, 597 S.E.2d 674 (2004)

The prosecution may point out that, in *State v. Spencer*, 119 N.C. App. 662, 459 S.E.2d 812 (1995), the Court of Appeals said, in *dictum*, that an expert's opinion that a child has been abused is presumptively reliable. If so, argue 1) that was *dictum* rather than holding, 2) it does not survive the later cases and 3) each expert has his or her own methodology for determining if

a child has been abused; the state has the burden of showing that this witness is accurate in distinguishing abused from non-abused children.

7. If the witness is allowed to testify, cross-examine her on the [lack of] foundation for her opinion. *See* "Cross-examination" attachment.

8. Make a motion for a medical examination of the kid. *See* attached goby. Argue that it is fundamentally unfair (say "Constitution" for a state's witness to testify that a child has been abused without your expert having a chance to rebut that with his own examination. [The law is dead against us, but the issue needs to be raised in order to get the appellate courts to change the law].

V. PSYCHOLOGICAL EXPERT TESTIMONY THAT THE COMPLAINANT HAS BEEN ABUSED.

Background

In *State v. Hall*, 330 N.C. 808, 412 S.E.2d 883 (1992), three experts testified that the complainant suffered from Post Traumatic Stress Disorder and Conversion Reaction as the result of sexual abuse. The Court of Appeals found no error in the testimony. This Court reversed, holding that such evidence was not admissible, at least as substantive evidence of the crimes. This Court emphasized that it is the jury, rather than the expert, who is in the better position to evaluate the truthfulness of the complainant:

> When the complainant testifies at trial that she has been sexually assaulted, the jury is given the unique and exclusive opportunity to access [sic] the credibility of her story, both on direct and cross-examination. This is accomplished in a manner which is not usually available to the treating physician who generally assumes the veracity of the patient's account in formulating a diagnosis and treatment. The jury is also able to evaluate her story in light of other evidence adduced at trial. These factors ameliorate the lack of critical inquiry by therapists and may put the jury in an improved position to determine the complainant's credibility.

330 N.C. at 822, 412 S.E.2d at 891.

Despite *Hall*, the state has, for the most part, gotten away with presenting expert testimony that, because a child acts in certain ways, she has been abused. *State v. Figured*, 116 N.C. App.1, 446 S.E.2d 838 (1994); *State v. Stancil,* 355 N.C. 266, 559 S.E.2d 788 (2002).

What to Do.

1 Get your own expert if possible, or other assistance if necessary

2 Make a pre-trial motion to discover the opinion testimony and its foundation. *See* attached goby.

3. Make a pre-trial motion for a *voir dire* hearing on the foundation for the expert's testimony. *See* attached goby.

4. Make a motion for an independent psychological evaluation of the kid. *See* attached goby.

5. Move to exclude the testimony for lack of foundation. The state will argue that *Hall* only forbids "syndrome" testimony. Point out that a syndrome is nothing more than a collection of symptoms. It would be absurd to say that the witness cannot say that a child has been abused because she has a syndrome, but can say she has been abused because she has certain symptoms. The state will argue that *State v. Kennedy*320 N.C. 20, 357 S.E.2d 359 (1987) said that a witness may testify to the symptoms of abuse and that a child has symptoms consistent with abuse.

Argue that even the "consistent with" language is improper vouching. *See* next section.

6. If you have an expert, have her testify in the *voir dire* that there are no set of psychological or behavioral symptoms that distinguish abused from non-abused children.

7. If the state's opinion comes in anyway, continue to object for lack of foundation.

8. Cross-examine the witness about the foundation. *See* "Cross-examination" attachment.

9. Have your witness testify that the symptoms described by the state's witness do not distinguish abused from non-abused children. [As a precaution, you should make a motion *in limine* to order the prosecution not to follow up the above with "You did not even examine the child, did you?"]

10. During the charge conference, ask the judge to instruct that the evidence of the complainant's psychological condition is not substantive evidence that she was abused. *See* Pattern Jury Instruction -- Crim. 104.96. If the state argues that there was only evidence about symptoms, not "syndromes," point out that a syndrome is only a term for a collection of symptoms.

VI. EXPERT TESTIMONY THAT THE COMPLAINANT'S SYMPTOMS ARE "CONSISTENT WITH" ABUSE.

Background

All prosecutor's most judges, and too many defense lawyers believe that, even without physical evidence, an expert may testify that a kid's psychological symptoms and [lack of] physical symptoms are "consistent with" abuse. *State v. Fuller*, 166 N.C. App. 548, 603 S.E.2d 569 (2004). If that notion is not challenged, we will be stuck with experts continuing to vouch for the credibility of the kid.

In *State v. Frady*, ___N.C. App. ___, 752 S.E.2d 465 (2013), a prosecution pediatrician testified that the complainant's "disclosure" was "consistent with sexual abuse." The Court of Appeals ordered a new trial on the ground that this was expert vouching. The Attorney General has since argued that the reason the testimony was inadmissible was that the witness did not personally examine the child, but based her opinion on the child's "history." It is expected that the State will continue to make that argument.

What to do

1. When you move to discover the state's expert's opinion, ask specifically if the witness will be testifying that the child "has been abused" or that the child's symptoms are "consistent with abuse" or both.

2. Make a motion for an examination of the kid. *See* attached goby.

3. Move for a *voir dire* on the witness's opinion testimony. *See* attached goby. Point out specifically that you want an opportunity to challenge the opinions the child's symptoms are "consistent with abuse." You need a *voir dire* so that the judge can hear what "consistent with abuse" sounds like coming from the witness; chances are it will sound like "has been abused."

4. In arguing to exclude the "consistent with" opinion, argue that the jury will be confused; tricked into thinking that the opinion is "has been abused." Point out that, in several cases, the

experts themselves have confused the terms "consistent with" and "has been." *See State v. Cleveland*, 154 N.C. App. 742, 572 S.E.2d 874 (2002)(unpublished)(expert asked if symptoms consistent with abuse; answer, "He has probably been abused."); *State v. Givens*, 158 N.C. App. 745, 582 S.E.2d 82 (2003)(unpublished)(expert asked if she had an opinion as to whether the child's symptoms were "consistent with a child who has been abused;" answer, "she has been abused."); *State v. Thornton*,158 N.C. App. 645, 582 S.E.2d 308 (2003) (expert asked if complainant exhibited symptoms of an abused child; answer: "[she] has absolutely been sexually abused").

5. If the prosecugftor brings up *Frady*, argue that the holding in *Frady* was that the "consistent with" language is vouching; the observation that the witbess did not examine the child was *dictum.*

6. Argue that other jurisdictions have flatly rejected the "consistent with" langauge. *See e.g.*, *State v. Cressey*, 628 A.2d 696, 699-700 (N.H. 1993):

> We reject the State's assertions that the scope of [the expert's] testimony was somehow limited by her statements in conclusion that the children exhibited symptoms "consistent with those of sexually abused children. We see no appreciable difference between this type of statement and a statement that, in her opinion, the children were sexually abused.

7. Point out that experts themselves use the two phrases ("has been" and "consistent with") intgerchangeably. *See, e.g., State v. Cleveland*, 154 N.C. App. 742, 572 S.E.2d 874 (2002) (unpublished)(expert asked if symptoms consistent with abuse; answer, "He has probably been abused."); *State v. Givens*, 158 N.C. App. 745, 582 S.E.2d 82 (2003)(unpublished)(expert asked if she had an opinion as to whether the child's symptoms were "consistent with a child who has been abused;" answer, "she has been abused."); *State v. Thornton*,158 N.C. App. 645, 582 S.E.2d 308 (2003) (expert asked if complainant exhibited symptoms of an abused child; answer: "[she] has absolutely been sexually abused").

8. Point out that the courts have disapproved verbal formulae other than "has been abused": as vouching. *See, e.g., State v. Giddens*, 363 N.C. 826 (2010)(per curiam)(testimony that DSS substantiated abuse by the defendant improper vouching); *State v. Horton*, 200 N.C. App. 74, 682 S.E.2d 754 (2009)(testimony that the details of a child's statement "enhance her credibility" improper expert vouching).

9. If the "consistent with" opinion does come in, cross-examine the expert on what "consistent with" means (and does not mean). *See* "Cross-examination" attachment.

VII. AN INSTRUCTION ON "INTERESTED EXPERT WITNESSES."

Background.

Often the expert witness testifying for the prosecution has an obvious personal bias. That is, the pediatrician who testifies that your client battered a two year old child, or the social worker who testifies that your client sexually molested a young girl, believes that your client is a monster, and wants him to be locked up for a long time. One participant in the Child Medical Examiner Program (CME) testified to the mission of that organization:

> The CME or Child Medical Examination Program is an advocacy program for children that helps in investigating and determining if the child has suffered abuse, assisting in providing them treatment, assisting the non-offending family members this [sic] treatment and counseling, and then helping to identify the individual responsible for the abuse and finding them guilty and the punishment for that.

State v. Bush, supra. at 257 (emphasis in original).

What to do.
There is a Pattern Jury Instruction on interested witnesses. *See* N.C. P. I --Crim 104.20. Ask the judge (in writing) to modify the pattern to include a reference to the potential interest of expert witnesses. It can be as simple as "You may find that an *expert* witness is interested . . . " Or you could ask the judge to add a little bit to the Pattern Instruction on expert witnesses. *See* N.C. P. I -- Crim. 104.94. Something like, "You may consider any personal or professional interest or bias of the expert witness in determining how much weight to give her opinion."

VIII. EXAMINATION OF THE COMPLAINANT BY YOUR EXPERT.

Background.
North Carolina and Texas are the only states that do not allow the defense to conduct a court-ordered examination of a state's witness. Our Supreme Court has held that a trial court has no authority to order such an examination because there is nothing in the discovery statutes authorizing it. *See State v. Fletcher*, 322 N.C. 415, 368 S.E.2d 633 (1988). In child abuse cases, this means that the defense is not able to conduct a medical or psychological examination of the prosecuting witness to contradict the state's expert opinion that the child has been abused. This puts the defense in an unconstitutional disadvantage.

What to do
Although the law is that the court cannot order an evaluation of the complainant, there is nothing to prevent a parent from allowing it. There may be some situations in which the parent of the child will cooperate. Otherwise, in order to get this issue back before the Appellate Division, make a motion in the trial court to have the prosecuting witness examined by your expert. Cite to both the Due Process and Confrontation Clauses of both constitutions.

IX. TESTIMONY BY YOUR EXPERT

Background.
In *State v. Frady*, ___N.C. App. ___, 752 S.E.2d 465 (2013), a prosecution pediatrician testified that the complainant's "disclosure" was "consistent with sexual abuse." The Court of Appeals

ordered a new trial on the ground that this was expert vouching. The Attorney General has since argued that the reason the testimony was inadmissible was that the witness did not personally examine the child, but based her opinion on the child's "history." It is expected that the State will continue to make that argument.

What to do

1. If the prosecutor argues that your expert may not testify because he or she did not personally examine the complainant, point out that the law presently does not allow for a defense examination of the complainant. *See* Section VIII. Argue that this denies you an opportunity to present a defense to the state's expert testimony. Cite to both the Due Process and Confrontation Clauses of both constitutions.
2. Make a proffer of what your expert would testify to.

STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE

_____ COUNTY SUPERIOR COURT DIVISION
00 CrS _____

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STATE OF NORTH CAROLINA	)	
	)	
v.	)	Motion for Discovery of Foundation
	)	For Expert Opinions
JOHN DOE	)	

****

NOW COMES the defendant named, through counsel, pursuant to G.S. 15A-902 and 903, the Constitution of the United States, Amendments VI and XIV, and the Constitution of North Carolina, Article I, sections 19, 23 and 24, and hereby requests that the Office of the District Attorney for the ____ Judicial District voluntarily provide the discovery specified below. In the alternative, the defendant moves the Superior Court for _____ County for an Order requiring the District Attorney to provide the discovery specified below. In support of this Motion, the defendant shows the following:

1. The defendant has been indicted for _____.

2. On _____, the defendant filed a Motion for Discovery. This Motion included, inter alia , a request for results of tests and examinations under G.S. 15A-903(e). In response to this request, the District Attorney disclosed a report by Dr. _____, stating the results of various tests and examinations. The report does not contain the data underlying the results obtained by Dr. _____.

3. Defendant anticipates that the state will attempt to introduce opinion testimony through expert witnesses in this case.

4. It will be the responsibility of the trial court, to evaluate the proffered opinions to determine the adequacy of the scientific foundation for the opinions. *See Howerton v. Arai Helmet,* 358 N.C. 440, 597 S.E.2d 674 (2004)
.

5. The discovery statutes and both state and federal Constitutions entitle the defendant to more than a conclusory statement of opinion contained in a report. Rather, the defendant is entitled to the data, if any, underlying the final opinion. *State v. Cunningham*, 108 N.C. App. 185, 423 S.E. 2d 802 (1992); G.S. 15A-903(e).

6. Defendant is also moving for the trial court to conduct a pre-trial hearing in order to evaluate the adequacy of the foundation of the opinions to be proffered by the state and to exclude opinions which have an inadequate scientific foundation.;

7. In order to adequately represent the defendant at this hearing, as well as at trial, the undersigned hereby moves for discovery of matters pertinent to the state's proffered expert testimony. Specifically, the defendant moves for the Court to order the District Attorney to disclose the following:

a. A concise and specific statement of each expert opinion the state intends to introduce, including but not limited to, opinions

i. that the complainant has been abused;
ii. that the complainant has psychological or physical symptoms consistent with abuse;
iii. that the history given by the complainant is consistent with abuse;
iv. that there are generally recognized psychological or physical symptoms of sexual abuse;
v. that children do not or cannot fabricate claims of abuse;
vi. that the witness follows accepted professional standards for evaluating cases of alleged sexual abuse.
vii. that the complainant is (or was) credible.
viii. that the complainant had a "treatment motive" in making her statement to the state's witness.

b. The name, address and curriculum vita of each witness the state intends to qualify as an expert in order to present such opinion testimony;

c. The scientific or technical foundation of each opinion, including, but not limited to:

i Citations to empirical studies supporting the opinion;
ii Citations to articles or chapters in scientific treatises or journals supporting the opinion;
iii Data collected by the witness or those under his/her supervision, in connection with this case, including the data collections instruments used, the data collection procedures, and the statistical analysis applied to the data in forming the opinion to be proffered.

9. Counsel cannot adequately prepare to meet the anticipated expert testimony without the requested information.

WHEREFORE, the defendant requests that the State voluntarily provide the foregoing items of discovery prior to trial or any pre-trial hearing on the admissibility of expert testimony. FURTHER, if the District Attorney fails or refuses to provide the requested voluntary discovery, Defendant moves this Court for a hearing on this Motion in advance of trial.

Respectfully submitted this the ___ day of ____, 2003

_____
Joe Lawyer
Joe Lawyer's Address

CERTIFICATE OF SERVICE

STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE

_____ COUNTY SUPERIOR COURT DIVISION
00 CrS _____

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STATE OF NORTH CAROLINA	)	
	)	Motion for Independent
v.	)	Psychological and Medical Examination of
	)	the Complainant
JOHN DOE	)	

****

NOW COMES the defendant named, through counsel, pursuant to the Constitution of the United States, Amendments VI and XIV, and the Constitution of North Carolina, Article I, sections 19, 23 and 24, and moves the Court for an Order allowing the defendant to conduct an independent psychological and medical examination of the complainant. In support of this Motion, the defendant shows the following:

1. The defendant has been indicted for _____.

2. Defendant anticipates that the state will attempt to introduce opinion testimony through expert witnesses in this case. This may include opinions:

i. that the complainant has been abused;
ii. that the complainant has psychological or physical symptoms consistent with abuse;
iii. that the history given by the complainant is consistent with abuse
iv. that the complainant is (or was) credible reporter of abuse.
v. that the complainant had a "treatment motive" in making a statement to the state's expert.

3. This Court has previously issued an Order for Funds for a Medical Expert and a Psychological Expert to assist the defense. A review of the reports provided by the state's witnesses will not be enough to prepare the defendant's witnesses to effectively meet the opinion testimony to be proffered by the state.

4. In order to effectively meet the state's opinion testimony, as he is entitled to do under both state and federal constitutions, the defendant's expert witness must have access to the complaint in order to conduct independent examinations.

WHEREFORE, the defendant respectfully moves the Court to:

1. Issue an Order allowing the defendant to conduct a medical and psychological examination of the complainant; or

2. Exclude the opinion testimony proffered by the state

Respectfully submitted, this ___ day of ____, 2003

_____
Joe Lawyer
Joe Lawyer's Address

CERTIFICATE OF SERVICE

STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE

_____ COUNTY SUPERIOR COURT DIVISION
00 CrS _____

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STATE OF NORTH CAROLINA	)	
	)	Motion for Pre-trial Hearing
v.	)	on Admissibility of Expert
	)	Opinion Testimony
JOHN DOE	)	

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NOW COMES the defendant named, through counsel, pursuant to the Constitution of the United States, Amendments VI and XIV, and the Constitution of North Carolina, Article I, sections 19, 23 and 24, and moves the Court for a pre-trial hearing on the admissibility of expert opinion testimony. In support of this Motion, the defendant shows the following:

1. The defendant has been indicted for _____.

2. Defendant anticipates that the state will attempt to introduce opinion testimony through expert witnesses in this case. This may include opinions:

i. that the complainant has been abused;
ii. that the complainant has psychological or physical symptoms consistent with abuse;
iii. that there are generally recognized psychological or physical symptoms of sexual abuse;
iv. that the history given by the complainant is consistent with abuse;
v. that children do not or cannot fabricate claims of abuse;
vi. that the witness follows accepted professional standards for evaluating cases of alleged sexual abuse.
vii. that the complainant is (or was) credible.

3. It is the responsibility of the trial court to evaluate the proffered opinions to determine the adequacy of the scientific foundation for the opinions. *See Howerton v. Arai Helmet,* 358 N.C. 440, 597 S.E.2d 674 (2004). Allowing the jury to hear unfounded opinion testimony would violate the Due Process and Confrontation Clauses of both federal and state constitutions.

4. The state has the burden of establishing to the Court the scientific reliability of the opinions it

intends to present to the jury. *State v. Spencer*, 119 N.C. App. 662, 459 S.E.2d 812 (1995); Rules of Evidence, 705. It is the duty of this Court to exclude opinion testimony that is not supported by empirical study and based upon data collected under accepted scientific conditions. *Howerton.*

5. In order to avoid the inevitable prejudice from having the jury hear improper opinion testimony, the defendant respectfully requests the Court to conduct a hearing out of the presence of the jury on any and all expert testimony to be proffered by the state.

6. Because the outcome of this hearing will have a great impact on trial strategy for both parties, it is important for the hearing to be held in advance of trial.

WHEREFORE, the defendant respectfully moves the Court to conduct a hearing on any and all expert opinion testimony the state intends to present. FURTHER, the defendant respectfully moves to exclude from evidence any opinion testimony proffered by the state that the state has not shown to have an adequate scientific foundation..

Respectfully submitted, this ___ day of ____, 2000

_____
Joe Lawyer
Joe Lawyer's Address

CERTIFICATE OF SERVICE