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Expert Testimony Describing Psychological Syndromes

John E.B. Myers*

Expert testimony describing psychological syndromes is offered in a broad range of civil and criminal litigation. Unfortunately, syndrome evidence occasionally leads to confusion. Judge Teague of the Texas Court of Criminal Appeals wrote in 1990 that “at the present time there are too many ‘syndromes’ and no consensus in the mental health community as to what they actually mean or are meant to mean.”¹ Writing in a similar vein, Chief Judge Everett of the Court of Military Appeals laments, “I have a good deal of difficulty with the use of ‘expert testimony’ in the area of profiles and syndromes because I am not convinced that such testimony is of much use to the fact finder.”²

Confusion regarding psychological syndromes occurs in part because the legal literature contains little information on the definition and uses of syndromes in medicine and psychology. Without a clear appreciation of the role syndromes play in clinical decision making, judges and attorneys are handicapped in their ability to evaluate the probative value of psychological syndromes. This Article seeks to fill this void in the literature by providing an analytical framework to assess psychological syndromes. The Article begins by explaining essential terms. This done, the Article describes two areas of misunderstanding that account for most of the confusion regarding psychological syndromes. Finally, the Article offers an approach to determine when psychological syndromes should be subjected to the special admissibility test for novel scientific evidence.

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1. *Duckett v. State*, 797 S.W.2d 906, 927 (Tex. Crim. App. 1990) (Teague, J., dissenting).
2. *United States v. August*, 21 M.J. 363, 365 (C.M.A. 1986) (Everett, C.J., concurring).

I. DEFINING TERMS

Although the legal literature devotes many pages to psychological syndromes,³ too little attention focuses on the meaning of syndromes, and on the role syndromes play in medicine and psychology.

A. Definition of Syndrome

The term "syndrome" has been used in western medicine since 1541.⁴ Syndrome is defined in *Dorland's Medical Dictionary* as "[a] set of symptoms which occur together."⁵ Murphy describes syndromes in *The Logic of Medicine*:

It sometimes happens that several manifestations, no one of which is specific, tend to occur together. Such a concurrence is referred to by the Greek word "syndrome;" indeed the word "syndrome" is a literal translation into Greek of the word "concurrence," a running together.

3. See, e.g., Charles Bleil, *Evidence of Syndromes: No Need for a "Better Mousetrap,"* 32 S. TEX. L.J. 37 (1990); Patricia A. Frazier & Eugene Borgida, *Rape Trauma Syndrome: A Review of Case Law and Psychological Research*, 16 LAW & HUM. BEHAV. 293 (1992); David McCord, *Syndromes, Profiles and Other Mental Exotica: A New Approach to the Admissibility of Nontraditional Psychological Evidence in Criminal Cases*, 66 OR. L. REV. 19 (1987); Regina A. Schuller & Neil Vidmar, *Battered Woman Syndrome Evidence in the Courtroom: A Review of the Literature*, 16 LAW & HUM. BEHAV. 273 (1992).

4. See T.R. Harrison, *Introduction to ENCYCLOPEDIA OF MEDICAL SYNDROMES* at xiii (Robert H. Durham ed., 1960) [hereinafter *ENCYCLOPEDIA OF MEDICAL SYNDROMES*]. Harrison states: The word *syndrome* has been in recognized use since 1541 when it appeared in Copland's English translation of Galen. Although the word is of uncertain definitude nosologically and scholars are not agreed upon a pronunciation, it has become one of the most universally used and seemingly indispensable medical terms extant.

Id.; see also BENJAMIN F. MILLER-CLAIR B. KEANE, *ENCYCLOPEDIA AND DICTIONARY OF MEDICINE, NURSING, AND ALLIED HEALTH* 1446 (5th ed. 1992) (defining syndrome as "a combination of symptoms resulting from a single cause or so commonly occurring together as to constitute a distinct clinical picture").

5. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1287 (26th ed. 1981).

In addition to defining "syndrome," "disease," and "diagnosis," it is useful to define "sign" and "symptom." In reaching diagnostic opinions, professionals consider signs as well as symptoms. A sign is an objective manifestation of disease or disorder observed by the professional on physical examination, e.g., a bruise. A symptom is the patient's description to the professional of the patient's subjective perceptions and memories of bodily and mental states, e.g., the patient's statement, "I feel like I'm going to vomit." Letter from Jan Bays, M.D., Director, Child Abuse Program, Emanuel Hospital, Portland, Oregon (March 2, 1993) (on file with author).

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. . . The mere occurrence of two (or more) findings in a patient does not suffice to constitute a syndrome. . . . [I]t would be necessary to establish that they occurred together more often than one would expect by chance, before there would be anything to comment on.⁶

“Syndrome” is defined somewhat loosely in medicine and psychology. The *Encyclopedia of Medical Syndromes* states that the “definition of a syndrome is both vague and variable.”⁷ Wulff writes in *Rational Diagnosis and Treatment* that “most syndromes . . . are not well defined. . . .”⁸ Thus, the word “syndrome” is elastic, and applies in a variety of situations.

Syndrome is not the only descriptor affixed to concurring symptoms. The term “profile” is occasionally employed to describe a set of symptoms, characteristics, or behaviors.⁹ The American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders*¹⁰ uses the word “disorder” rather than syndrome, although the Manual recognizes that “each of the mental disorders is conceptualized as a clinically significant behavioral or psychological syndrome or pattern. . . .”¹¹ In this Article, the word “syndrome” is used, keeping in mind that other labels are sometimes at work.

B. Definition of Disease

It is important to define “disease,” and to differentiate diseases from syndromes. *Dorland’s Medical Dictionary* defines disease as:

6. EDMOND A. MURPHY, *THE LOGIC OF MEDICINE* 112 (1976) (emphasis added).

7. *ENCYCLOPEDIA OF MEDICAL SYNDROMES*, *supra* note 4, at xiii.

8. HENRIK R. WULFF, *RATIONAL DIAGNOSIS AND TREATMENT* 105 (1976).

9. See *Wyatt v. State*, 578 So. 2d 811 (Fla. Dist. Ct. App. 1991) (rejecting defendant’s proposed expert testimony that defendant did not fit profile of pedophile because such an opinion is not admissible under Florida evidence law); *United States v. Gillespie*, 852 F.2d 475 (9th Cir. 1988); 1 JOHN E.B. MYERS, *EVIDENCE IN CHILD ABUSE AND NEGLECT CASES* § 4.50, at 328-32 (1992) (collecting cases) [hereinafter *EVIDENCE IN CHILD ABUSE CASES*].

10. AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (3d ed. rev. 1987).

11. *Id.* at xxii.

[A]ny deviation from or interruption of the normal structure of function of any part, organ, or system (or combination thereof) of the body that is manifested by a characteristic set of symptoms and signs and whose etiology, pathology, and prognosis may be known or unknown.¹²

C. Differentiating Diseases From Syndromes

The concepts of disease and syndrome overlap, but are not synonymous. With diseases, the cause of the malady is usually, although not always, known. Thus, influenza is produced by a specific virus, as is polio. With syndromes, by contrast, the cause of the patient's symptoms is often unknown or poorly understood. The *Encyclopedia of Medical Syndromes* describes the difference between diseases and syndromes:

The terms *syndrome* and *disease* are often unwittingly used interchangeably although they are not synonymous. In general, a syndrome evokes more interest and is more challenging than a disease because its relationships are more obscure and its etiology is less apparent. If, subsequently, a specific etiologic factor does become manifest, the condition should then be reclassified to a disease.¹³

In *DeGowin & DeGowin's Bedside Diagnostic Examination*, the authors expand on the distinction between disease and syndrome:

For several thousand years physicians have recorded their observations and clinical trials about patients. In the accumulated facts they have discerned disordered patterns of bodily structure, function, and mentation. Some patterns of features recur with such frequency as to suggest a common cause; the disorder with these features is called a disease and is given a specific name. . . . Other clusters of attributes, *less closely related to a single cause*, but known by a combination of features, are called syndromes.¹⁴

12. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 385 (26th ed. 1981).

13. ENCYCLOPEDIA OF MEDICAL SYNDROMES, *supra* note 4, at xiii-ix; *see also* EDMUND A. MURPHY, THE LOGIC OF MEDICINE 114 (1976) (explaining that "where there is a rational connection between manifestations, it is not useful to apply the term 'syndrome'").

14. RICHARD L. DEGOWIN, DEGOWIN & DEGOWIN'S BEDSIDE DIAGNOSTIC EXAMINATION 1 (5th ed. 1987) (emphasis added).

Thus, diseases often have a relatively well understood relationship to a specific cause or etiology. By contrast, the cause or causes of syndromes are often unknown or obscure.

D. Definition of Diagnosis

“Diagnosis” has more than one meaning. First, diagnosis is a process.¹⁵ It is the “art of distinguishing one disease from another.”¹⁶ Second, diagnosis describes the end-product of the diagnostic process. Diagnosis is the “name given to a disease that has been distinguished from others.”¹⁷ Diagnostic terminology is employed with syndromes as well as diseases.

E. Syndromes and Diseases Share the Feature of Diagnostic Value

Diseases and syndromes share the medically and forensically important feature of diagnostic value. That is, diseases and syndromes point with varying degrees of certainty to particular causes. With many diseases, the relationship between symptoms and etiology is clear. With syndromes, by contrast, the relationship is often unclear or unknown. Despite this lower degree of diagnostic certainty, however, syndromes are suggestive of particular causes.

The important point about syndromes is that the certainty with which a syndrome points to a particular cause varies with the syndrome. Thus, syndromes are on a continuum of certainty. Some syndromes point with greater certainty to their cause than others.

15. See HENRIK R. WULFF, *RATIONAL DIAGNOSIS AND TREATMENT* (1976). The author describes diagnosis as a process and explains:

When the clinician has recorded his patient's iatrotropic symptoms and the usual routine data, he will consider which diagnosis is the most *probable*, and if this diagnosis is a clinical syndrome, he will institute those investigations which are necessary to fill in the nosographic picture. If the patient does not fulfill the criteria for that syndrome, he will then institute those investigations which are necessary to make or exclude the diagnosis of the second most *probable* syndrome, and so on.

Id. at 105.

16. DORLAND'S *ILLUSTRATED MEDICAL DICTIONARY* 369 (26th ed. 1981).

17. *Id.*

Two syndromes that are used in litigation illustrate the continuum of certainty: Battered child syndrome and rape trauma syndrome.

THE CONTINUUM OF CERTAINTY



Less Certainty

Greater Certainty

Rape Trauma
Syndrome

Battered Child
Syndrome

A child with battered child syndrome is very likely to have suffered nonaccidental injury. That is, battered child syndrome points convincingly to abuse. From a medical point of view, battered child syndrome has high diagnostic value. From a forensic point of view, battered child syndrome has high probative value.¹⁸ The syndrome points directly to abuse.

Contrast the high probative value of battered child syndrome with the lower probative value of rape trauma syndrome to prove that a woman did not consent to sexual intercourse.¹⁹ Rape trauma syndrome consists of symptoms that are caused by a number of events including, but not limited to, rape. Rape trauma syndrome

18. Expert testimony on battered child syndrome has been approved by every appellate court to consider it. For review of cases, see *EVIDENCE IN CHILD ABUSE CASES*, *supra* note 9, § 3.5, at 143-47.

19. Recent psychological research indicates that some psychological symptoms may be unique to rape victims, increasing the probative value of rape trauma syndrome. See Patricia A. Frazier & Eugene Borgida, *Rape Trauma Syndrome: A Review of Case Law and Psychological Research*, 16 *LAW & HUM. BEHAV.* 293 (1992).

points toward rape, but not as convincingly as battered child syndrome points toward child abuse.²⁰

II. TWO SOURCES OF MISUNDERSTANDING REGARDING PSYCHOLOGICAL SYNDROMES

Misunderstanding regarding psychological syndromes springs from two sources. The first source of confusion relates to the continuum of certainty along which syndromes are arrayed. Individuals unschooled in syndromes may overlook the continuum, and succumb to the fallacy that all syndromes point clearly and convincingly to a particular cause. This error leads to unwarranted inflation of the probative value of particular syndromes.

The problem of inflated probative value is abetted by the names of certain syndromes.²¹ Rape trauma syndrome is a prime example. The name *rape* trauma syndrome suggests a strong relationship between the syndrome and rape. In fact, however, although rape trauma syndrome provides some evidence of rape, the probative value of the syndrome is at the low end of the continuum of certainty. The very name "rape trauma syndrome" exaggerates the probative value of the syndrome.

The second and, in some respects, more serious source of confusion regarding psychological syndromes arises from application of the word "syndrome" to situations that differ markedly from the meaning of syndromes in medicine and psychology. Recall that in medicine and psychology, syndromes typically point with varying degrees of certainty to particular

20. Courts differ on the purpose for which rape trauma syndrome (RTS) is admissible. Several jurisdictions allow RTS testimony to prove that rape occurred, that is, as substantive evidence of lack of consent. *See, e.g.,* United States v. Reynolds, 29 M.J. 105 (C.M.A. 1989); State v. Huey, 145 Ariz. 59, 699 P.2d 1290 (1985); State v. Marks, 231 Kan. 645, 647 P.2d 1292 (1982); State v. McCoy, 179 W. Va. 223, 366 S.E.2d 731 (1988). Other courts reject RTS as substantive evidence, but permit RTS evidence to rehabilitate the victim's credibility following impeachment. *See, e.g.,* People v. Bledsoe, 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1984); People v. Hampton, 746 P.2d 947 (Colo. 1987); People v. Taylor, 75 N.Y.2d 277, 552 N.E.2d 131, 552 N.Y.S.2d 883 (1990); State v. Hall, 330 N.C. 808, 412 S.E.2d 883 (1992).

21. Among the syndromes with names that give a false sense of certainty are false memory syndrome and parental alienation syndrome. In point of fact, these two syndromes are nondiagnostic in nature, and provide no insight into the cause of "false" memories or "parental alienation."

causes. Presence in a patient of symptoms comprising a syndrome assists the diagnostic process by pointing to the cause of the illness. Some so-called syndromes depart from this accepted meaning in that they do *not* point with *any* degree of certainty to a particular cause. The term “nondiagnostic syndrome” will be used to describe syndromes that fall outside the traditional meaning of syndrome, and that do not point to a particular cause.

It is useful to describe a nondiagnostic syndrome, and to contrast it with a syndrome that possesses diagnostic value. One is hard-pressed to find a nondiagnostic syndrome that has caused more confusion in legal circles than child sexual abuse accommodation syndrome (CSAAS). The term CSAAS was coined by psychiatrist Roland Summit to describe how children accommodate to ongoing sexual abuse.²² Children “learn to accept the situation and to survive. There is no way out, no place to run. The healthy, normal, emotionally resilient child will learn to accommodate to the reality of continuing sexual abuse.”²³ Summit described five aspects of the accommodation syndrome: (1) secrecy, (2) helplessness, (3) entrapment and accommodation, (4) delayed, conflicted, and unconvincing disclosure, and (5) retraction or recantation.²⁴

CSAAS is a nondiagnostic syndrome because it does not point with any certainty to sexual abuse. The fact that a child demonstrates one or more aspects of CSAAS does not assist in determining whether the child was sexually abused. For example, the fact that a child delayed reporting and then recanted is hardly evidence that abuse occurred.²⁵ Summit observes that “[t]he accommodation syndrome is neither an illness nor a diagnosis, and it can’t be used to measure whether or not a child has been

22. See generally Roland C. Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 CHILD ABUSE & NEGLECT 177 (1983).

23. *Id.* at 184.

24. *Id.* at 181.

25. See Andrew Cohen, Note, *The Unreliability of Expert Testimony on the Typical Characteristics of Sexual Abuse Victims*, 74 GEO. L.J. 429, 446 (1985) (stating: “There is something fundamentally strange about saying that since the child denies that the event occurred, it must have occurred.”).

sexually abused.”²⁶ CSAAS was designed not to prove that abuse occurred, but to explain children’s reactions to sexual abuse.

Contrast CSAAS, which lacks diagnostic value, with battered child syndrome. Battered child syndrome is a diagnostic syndrome in the traditional sense of the word. Battered child syndrome points clearly to physical abuse. With battered child syndrome, one reasons from the presence of certain injuries to the cause thereof. Similar reasoning cannot be used with CSAAS because the five attributes of CSAAS do not point to their cause.²⁷

CSAAS led to confusion in child sexual abuse litigation when prosecutors mistakenly offered expert testimony on the syndrome as substantive evidence of abuse.²⁸ Thus, in *Lantrip v. Commonwealth*,²⁹ the prosecutor’s expert testified that the child’s “behavior subsequent to the incident fulfills the guidelines of the Sexual Abuse Accommodation Syndrome.”³⁰ The Kentucky

26. Mary B. Meinig, *Profile of Roland Summit*, 1 VIOLENCE UPDATE 6, 6 (May 1991).

27. See generally John E.B. Myers et al., *Expert Testimony in Child Sexual Abuse Litigation*, 68 NEB. L. REV. 1 (1989) [hereinafter *Expert Testimony*]. The authors write:

Unfortunately, a number of mental health professionals, lawyers, and commentators drew unwarranted comparisons between battered child syndrome and child sexual abuse accommodation syndrome. This error led to considerable confusion. First, some professionals misinterpreted Summit’s article, believing Summit had discovered a “syndrome” that could diagnose sexual abuse. This mistake is understandable, if not forgivable. Mental health and legal professionals working in the child abuse area had long been accustomed to thinking in terms of syndrome evidence to prove physical abuse. Battered child syndrome was an accepted diagnosis by the time Summit’s accommodation syndrome came along in 1983. It was natural for professionals to transfer their understanding of battered child syndrome to this new syndrome, and to conclude that the accommodation syndrome, like battered child syndrome, could be used to detect abuse.

If the first error was erroneously equating child sexual abuse accommodation syndrome with a diagnostic device, the second mistake was hardly less serious. Some professionals conflated the reactions described by Summit, which are not probative of abuse, with behaviors that are probative of abuse. This combination of behaviors was then denominated a syndrome, the presence of which was supposedly probative of abuse. The defect of this “syndrome” is that some of its components are probative of abuse and others are not. Opinions based on such a “syndrome” are of dubious reliability.

Id. at 67-68 (citations omitted).

28. See, e.g., *People v. Payan*, 220 Cal. Rptr. 126 (1986), *reh’g denied and ordered depub’d*, Jan. 30, 1986. Courts have clarified early confusion about the proper role of expert testimony describing CSAAS. See *People v. Bowker*, 203 Cal. App. 3d 385, 249 Cal. Rptr. 886 (1988); *State v. J.Q.*, 130 N.J. 554, 617 A.2d 1196 (1993).

29. 713 S.W.2d 816 (Ky. 1986).

30. *Id.* at 817.

Supreme Court ruled correctly that CSAAS is inadmissible to prove that abuse occurred.³¹

Misunderstanding of CSAAS has had unfortunate consequences. Expert testimony based on CSAAS led some courts to believe the syndrome was designed to diagnose child sexual abuse. So viewed, CSAAS was doomed to fail because it simply does not diagnose. It is not surprising that courts became suspicious of the ability of mental health professionals to diagnose sexual abuse. Unlike battered child syndrome, which is highly probative of nonaccidental injury, the accommodation syndrome appeared anything but reliable. Courts were not informed that the accommodation syndrome was being asked to perform a task it could not accomplish.³²

CSAAS has a place in the courtroom, but not as substantive evidence that abuse occurred. The syndrome is useful to rehabilitate children's impeached credibility by explaining that behaviors such as delayed reporting and recantation are not inconsistent with sexual abuse.³³

The common feature of nondiagnostic syndromes is that they do not point with any certainty to a cause. The cause must be ascertained by other means. In sum, the purpose of nondiagnostic syndromes is not to establish causes, but to describe reactions to *known* causes.

When evidence of a psychological syndrome is offered, it is essential to determine whether the syndrome is diagnostic or nondiagnostic. Differentiating diagnostic from nondiagnostic syndromes draws on analytical principles familiar to the bench and bar. Determining whether a syndrome is diagnostic is essentially a question of logical relevance, that is, does the presence of certain symptoms have any tendency in reason to make the existence of a

31. The Kentucky Supreme Court based its decision on the fact that CSAAS is not generally accepted in the scientific community as a reliable way to diagnose child sexual abuse. *Id.* at 817. In a series of decisions subsequent to *Lantrip*, the Kentucky Supreme Court continues its rejection of expert testimony based on CSAAS. The Kentucky experience with CSAAS is described in *Hellstrom v. Commonwealth*, 825 S.W.2d 612 (Ky. 1992).

32. *Expert Testimony*, *supra* note 27, at 68.

33. *State v. J.Q.*, 130 N.J. 554, 617 A.2d 1196 (1993); EVIDENCE IN CHILD ABUSE CASES, *supra* note 9, § 4.33, at 289.

particular cause more probable?³⁴ If the answer is yes, the syndrome is diagnostic. If it is not possible to draw a logical inference from symptoms to cause, the syndrome is nondiagnostic. If the syndrome is nondiagnostic, it goes without saying that it should not be admissible to establish the cause of a patient's symptoms.

The confusion that so often accompanies expert testimony describing psychological syndromes abates when judges, attorneys, and expert witnesses understand the distinction between diagnostic and nondiagnostic syndromes, and when syndromes are categorized appropriately. When a diagnostic syndrome is involved, it is important to evaluate its probative worth in terms of the continuum of diagnostic certainty.

III. PSYCHOLOGICAL SYNDROMES AS NOVEL SCIENTIFIC EVIDENCE

New psychological syndromes pop up regularly.³⁵ Late entries include parental alienation syndrome,³⁶ false memory syndrome,³⁷ lying child syndrome,³⁸ and confusional arousal

34. FED. R. EVID. 401 (defining relevant evidence to mean "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"); CAL. EVID. CODE § 210 (West 1992) (stating relevant evidence means "evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action").

35. Indeed, so many syndromes emerge that Judge Teague of the Texas Court of Criminal Appeals wondered when there will be an "appellate court judge syndrome." *Werner v. State*, 711 S.W.2d 639, 649 (Tex. Crim. App. 1986) (Teague, J., dissenting).

36. See generally RICHARD A. GARDNER, *THE PARENTAL ALIENATION SYNDROME AND THE DIFFERENTIATION BETWEEN FABRICATED AND GENUINE CHILD SEX ABUSE* (1987). For a case discussing this nondiagnostic syndrome, see *Wiederholt v. Fischer*, 169 Wis. 2d 524, 485 N.W.2d 442 (1992).

37. An increasing number of adults claim to remember long-forgotten sexual abuse during childhood. Recovery of such memories often occurs during psychotherapy. The reliability of these memories is a hotly contested. In March 1992, the "False Memory Syndrome Foundation" was established to respond to what its founders perceive to be widespread creation of false memories of abuse.

38. See *Jennette v. State*, 197 Ga. App. 580, 583, 398 S.E.2d 734, 737 (1990) Here, the court held that the jury did not need expert assistance to evaluate the children's credibility. *Id.* The defendant, a Junior ROTC instructor, was charged with sexually abusing several of his female students. *Id.* at 582, 398 S.E.2d at 735. At trial, defendant offered expert testimony on the "lying

syndrome.³⁹ The reliability of some new psychological syndromes is seriously in doubt, and expert testimony based on such syndromes should be subjected to the special admissibility test for novel scientific evidence.⁴⁰

Jurisdictions apply several tests to novel scientific evidence,⁴¹ the most well-known of which derives from the 1923 decision in *Frye v. United States*.⁴² In *Frye*, the United States Court of Appeals for the District of Columbia ruled on the admissibility of a precursor of the polygraph. The court wrote:

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.⁴³

child syndrome" which, according to defendant, would "explain the propensity of a child to relate and to repeat untruthful statements about a person who is an authority figure in their life in order to manipulate that child's environment." *Id.* at 584, 398 S.E.2d at 736. The trial court rejected the expert testimony, and the court of appeals affirmed, ruling that the proffered testimony "goes to the credibility and believability of the victim witnesses' testimony that appellant committed the acts charged." *Id.* at 583, 398 S.E.2d at 737.

39. See generally *People v. Cegers*, 7 Cal. App. 4th 988, 9 Cal. Rptr. 2d 297 (1992).

40. Courts apply the special admissibility test to novel psychological syndromes. See *People v. Bledsoe*, 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1984) (rape trauma syndrome); *People v. Bowker*, 203 Cal. App. 3d 385, 249 Cal. Rptr. 886 (1988) (child sexual abuse accommodation syndrome).

Reliability is the key factor in the assessment of novel scientific evidence. *People v. Kelly*, 17 Cal. 3d 24, 30, 549 P.2d 1240, 1244, 130 Cal. Rptr. 144, 148 (1976); EVIDENCE IN CHILD ABUSE CASES, *supra* note 9, § 4.17, at 257-58.

41. This Article is not the place for a lengthy analysis of the strengths and weaknesses of the various tests. For an in-depth analysis, see Paul C. Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later*, 80 COLUM. L. REV. 1197 (1980); EVIDENCE IN CHILD ABUSE CASES, *supra* note 9, §§ 4.14-4.19, at 255-68.

42. 293 F. 1013 (D.C. Cir. 1923). California courts employ the *Frye* test. *People v. Kelly*, 17 Cal. 3d 24, 549 P.2d 1240, 130 Cal. Rptr. 144 (1976).

In *People v. Stoll*, the California Supreme Court discussed application to psychological evidence of the rule governing novel scientific evidence. *People v. Stoll*, 49 Cal. 3d 1136, 1156, 783 P.2d 698, 710, 265 Cal. Rptr. 111, 123 (1989). The court stated "that, given the rule's prophylactic purpose, nothing precludes its application to 'a new scientific process operating on purely psychological evidence.'" *Id.* In California, the special admissibility test is known as the *Kelly-Frye* test.

43. *Frye*, 293 F. at 1014.

Under the *Frye* test, the proponent of novel scientific evidence must establish that the evidence has gained general acceptance in the relevant scientific community.⁴⁴ Although *Frye* remains the law in many states,⁴⁵ the test is increasingly criticized because its conservative nature leads to exclusion of scientific evidence that could assist the trier of fact.⁴⁶ An increasing number of courts reject *Frye* in favor of a two-stage process known as relevance analysis.⁴⁷ With relevance analysis, general acceptance in the scientific community is no longer the sole criteria governing admissibility. Courts consider all factors that shed light on the reliability of the evidence. Once reliability is assessed, the court

44. *People v. Shirley*, 31 Cal. 3d 18, 54, 641 P.2d 775, 796, 181 Cal. Rptr. 243, 265 (1982) ("It is the proponent of such testimony, of course, who has the burden of making the necessary showing of compliance with *Frye*, i.e., of demonstrating by means of qualified and disinterested experts that the new technique is generally accepted as reliable in the relevant scientific community.").

45. See, e.g., *Prater v. State*, 307 Ark. 180, 820 S.W.2d 429 (1991); *People v. Stoll*, 49 Cal. 3d 1136, 783 P.2d 698, 265 Cal. Rptr. 111 (1989); *Giannelli*, *supra* note 41, at 1205 (stating that "[T]he *Frye* test has dominated the admissibility of scientific evidence for more than half a century"); 1 DAVID W. LOISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 105, at 821 (1979) (stating that "[T]he *Frye* approach has been widely adopted by both state and federal courts.").

46. *Prater v. State*, 307 Ark. 180, 820 S.W.2d 429, 431 (1991); *State v. Rimmasch*, 775 P.2d 388, 396 (Utah 1989); *United States v. Gipson*, 24 M.J. 246, 250 (C.M.A. 1987); Linda E. Carter, *Admissibility of Expert Testimony in Child Sexual Abuse Cases in California: Retire Kelly-Frye and Return to a Traditional Analysis*, 22 LOYOLA L.A. L. REV. 1103, 1142-43 (1989); David McCord, *Expert Psychological Testimony About Child Complainants in Sexual Abuse Prosecutions: A Foray into the Admissibility of Novel Psychological Evidence*, 77 J. CRIM. L. & CRIMINOLOGY 1, 29-30 (1986).

In *People v. Stoll*, the California Supreme Court recognized with apparent approval the conservative nature of the *Kelly-Frye* test. *People v. Stoll*, 49 Cal. 3d 1136, 783 P.2d 698, 265 Cal. Rptr. 111 (1989). The court wrote:

The courts are willing to forego admission of [novel] techniques completely until reasonably certain that the pertinent scientific community no longer views them as experimental or of dubious validity. This all-or-nothing approach was adopted in full recognition that there would be a 'considerable lag' between scientific advances and their admission as evidence in a court proceeding.

Id. at 1156, 783 P.2d at 710, 265 Cal. Rptr. at 123.

47. For discussion of relevance analysis, see *People v. Pizarro*, 10 Cal. App. 4th 57, 93-94, 12 Cal. Rptr. 2d 436, 459-60 (1992); *United States v. Downing*, 753 F.2d 1224, 1238 (3d Cir. 1985); Carter, *supra* note 46, at 1147-48; Edward J. Imwinkelried, *The Standard for Admitting of Scientific Evidence: A Critique from the Perspective of Juror Psychology*, 28 VILL. L. REV. 554, 557-59 (1983); EVIDENCE IN CHILD ABUSE CASES, *supra* note 9, § 4.19; JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 703[03] (1992).

balances the probative value of the evidence against the likelihood of unfair prejudice to the opposing party.⁴⁸

There is ample reason to subject novel psychological syndromes to the special admissibility test before exposing jurors to such potentially powerful evidence.⁴⁹ First, as with all novel scientific evidence, it is critical to determine at the outset whether a new psychological syndrome is sufficiently reliable to warrant *any* consideration at trial.

The second reason to apply the special admissibility test is to determine whether a particular syndrome is diagnostic or nondiagnostic. If the syndrome is nondiagnostic, it should not be admissible to prove that a person's symptoms result from a particular cause. If the syndrome is diagnostic, it is important to locate the syndrome on the continuum of diagnostic certainty. This done, the court can balance the probative value of the syndrome against the possibility of unfair prejudice to the party opposing admission of the syndrome. The foregoing determinations should occur outside the presence of the jury, and the evidentiary hearing required by the special admissibility test is ideally suited to the task.

The third reason to apply the special admissibility test derives from the fact that "[l]ay jurors tend to give considerable weight to 'scientific' evidence when presented by 'experts' with impressive credentials."⁵⁰ Jurors can be "blindsided"⁵¹ by syndrome evidence, particularly when the syndrome "appears in both name and description to provide some definitive truth which the expert need only accurately recognize and relay to the jury."⁵²

48. FED. R. EVID. 403; *see* EVIDENCE IN CHILD ABUSE CASES, *supra* note 9, § 4.19, at 267 (describing the factors considered at the second stage).

49. *See Stoll*, 49 Cal. 3d at 1155-56, 783 P.2d at 710, 265 Cal. Rptr. at 123. Here, the California Supreme Court wrote that applicability of the test for novel scientific evidence "has often been determined by reference to its narrow 'common sense' purpose, i.e., to protect the jury from techniques which, though 'new,' 'novel,' or 'experimental,' convey a 'misleading aura of certainty.'" *Id.*

50. *People v. Kelly*, 17 Cal. 3d 24, 31, 549 P.2d 1240, 1245, 130 Cal. Rptr. 144, 149 (1976).

51. The term is borrowed from the California Supreme Court's decision in *Stoll*, 49 Cal. 3d at 1157, 783 P.2d at 710, 265 Cal. Rptr. at 124.

52. *Id.* at 1156, 783 P.2d at 710, 265 Cal. Rptr. at 123.

A. *When is a Psychological Syndrome Novel?*

The wrapper is barely off some psychological syndromes, and their novelty is obvious.⁵³ With other syndromes, assessing novelty is more complex. One scientific principle remains novel for years, while another passes from novelty to acceptance overnight. One thing is clear: Novelty cannot be equated with longevity. Perhaps the most useful approach is to link novelty with reliability.⁵⁴ A scientific principle should be considered novel as long as substantial questions remain concerning its reliability. With the emphasis on reliability, the special admissibility test applies when expert testimony is based on scientific principles of questionable reliability.⁵⁵

B. *California's Unworkable Distinction Between Expert Opinion and Scientific Evidence*

California courts apply the special admissibility test to novel scientific evidence, but not to expert opinion.⁵⁶ Unfortunately, the

53. For example, the term "false memory syndrome" was coined in 1992, and, at this writing (March 1993), false memory syndrome is novel.

54. See *Stoll*, 49 Cal. 3d at 1155-56, 783 P.2d at 710, 265 Cal. Rptr. at 123.

55. EVIDENCE IN CHILD ABUSE CASES, *supra* note 9, § 4.17, at 257-58 (footnote omitted); see *In re Amber B.*, 191 Cal. App. 3d 682, 690, 236 Cal. Rptr. 623, 629 (1987) (California Court of Appeal measuring novelty in terms of the propensity of jurors to accord too much weight to scientific evidence and writing that "a scientific procedure, technique or theory should be characterized as a 'new scientific method of proof' . . . if factfinders would 'tend to ascribe an inordinately high degree of certainty' to it").

56. *People v. Cegers*, 7 Cal. App. 4th 988, 997, 9 Cal. Rptr. 2d 297, 303-04 (1992); *Stoll*, 49 Cal. 3d at 1141, 783 P.2d at 700, 265 Cal. Rptr. at 113; *People v. McDonald*, 37 Cal. 3d 351, 366-67, 690 P.2d 709, 719-20, 208 Cal. Rptr. 236, 246-47 (1984); see *Carter*, *supra* note 46, at 1112 (describing the California Supreme Court's distinction between expert testimony and scientific evidence). Professor Carter states:

[T]he court has exempted the "personal opinion" of a psychological expert from the *Kelly-Frye* requirements. In *People v. McDonald*, the court distinguished an expert's personal opinion from scientific evidence. The court stated that the *Kelly-Frye* rule did not apply, for example, to expert medical testimony, including expert psychiatric testimony. The court reasoned that the purpose of imposing the *Kelly-Frye* rule did not exist when the testimony was personal opinion because jurors are naturally more skeptical toward an expert's verbal opinion than they are toward machine-processed evidence, which exudes an "aura of infallibility."

Id. (footnotes omitted).

distinction between scientific evidence and expert opinion has not been made clear, and the dichotomy does little more than confuse analysis of when the special admissibility test applies. Professor Linda Carter argues convincingly that “the distinction between personal opinion and scientific evidence ignores the fact that all expert opinion is based on some underlying theory or process. To be consistent, expert testimony must be subjected to [the special admissibility test] if the principle it is based on is novel.”⁵⁷

California courts would do well to jettison the unworkable distinction between scientific evidence and expert opinion, and apply the special admissibility test whenever expert testimony is based in whole or considerable part on a novel psychological syndrome.⁵⁸ Moreover, if the court is persuaded that a new psychological syndrome underlies expert testimony, the proponent should not be allowed an end run around the admissibility test with the ruse of omitting the word “syndrome” from the expert’s testimony.

IV. CONCLUSION

Expert testimony describing psychological syndromes makes a useful contribution to litigation, but only when fact finders understand the strengths and weaknesses of such testimony. The special admissibility test for novel scientific evidence is a useful gate keeper, turning away syndromes that are not sufficiently reliable to find their way into evidence. Once reliability is established, it remains important to differentiate diagnostic from nondiagnostic syndromes, and to restrict syndromes to roles they are designed to fulfill.

57. Carter, *supra* note 46, at 1112-13.

58. See Stoll, 49 Cal. 3d at 1156, 783 P.2d at 710, 265 Cal. Rptr. at 123 (concluding that the test “applies to that limited class of expert testimony which is based, in whole or part, on a technique, process or theory which is *new* to science and, even more so, the law”).