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INTRODUCTION

In the past, a major obstacle faced by child sexual abuse victims was society’s refusal to acknowledge that adults might actually be having sex with children. Although societal awareness of the problem of child sexual abuse has since increased dramatically, this increased recognition has resulted in new psychological and legal problems for child sexual abuse victims. A child who alleges that she is a victim of sexual abuse must deal with a criminal justice system unprepared for the unique burden of proof problems present in child sexual abuse cases and a mental health profession still in the process of understanding how sexual abuse affects a child's emotions and behavior.

1 See Jon R. Conte, The Therapist in Child Sexual Abuse: The Context of Helping, 51 New Directions for Mental Health Services 87, 87-88 (1991) (providing possible reasons why adult sexual abuse of children was not recognized as a serious problem among professionals until the mid-1970s).


4 See, e.g., Joseph H. Beitchman et al., A Review of the Short-Term Effects of Child Sexual Abuse, 15 Child Abuse & Neglect 537 (1991) (reviewing 42 studies that examined the short-term effects of child sexual abuse); Roberta A. Hibbard & Georgia L. Hartman, Behavioral Problems in Alleged Sexual Abuse Victims, 16 Child Abuse & Neglect 755 (1992) (comparing the incidence of reported behavioral indicators of sexual abuse in a group of alleged sexual abuse victims with that of a non-abused group); Sylvia B. Patten et al., Posttraumatic Stress Disorder and the Treatment of Sexual Abuse, 34 Social Work 197, 197 (1989) (recognizing similarities between the symptoms...
The standard of proof applicable to all criminal cases requires that the prosecution, in order to obtain a conviction, prove the defendant's guilt beyond a reasonable doubt. In child sexual abuse cases, a variety of factors make this standard of proof an extremely difficult one for the prosecution to meet. First, physical or medical evidence of the sexual abuse is rare. As a result, the prosecution's evidence often consists solely of the word of the child. Second, the fact that the child may not have immediately reported the abuse casts doubt on her claim. Finally, victims sometimes surprise prosecutors by recanting their accusations.

Like prosecutors, mental health professionals face special problems in dealing with child sexual abuse victims. In order to provide effective treatment to these child victims, professionals need guidance concerning the effects of sexual abuse on the victim. In response to this need, Dr. Roland C. Summit introduced the phrase "Child Sexual Abuse Accommodation Syndrome," or "CSAAS," to refer to five behavioral characteristics that he found to be common among sexually abused children. Summit intended for CSAAS to provide therapists with a model for treatment of child sexual abuse victims, and to aid therapists in accepting, rather than challenging, the child's allegations. Although Summit intended for CSAAS to be used solely as a therapeutic tool, prosecutors with burden of proof problems have presented expert testimony on CSAAS at trial in order to explain a victim's behavior to a jury, to rehabilitate a victim's credibility, and even to prove affirmatively that a child was abused. Consequently, the admissibility of expert testimony on CSAAS has been a subject of dispute in many courts.

exhibited by child sexual abuse victims and the symptoms of posttraumatic stress disorder).

1 In re Winship, 397 U.S. 358, 368 (1970).
2 Bradshaw & Marks, supra note 3, at 277, 283.
3 Id. at 277.
4 Id. at 276-77.
5 Roland C. Summit, The Child Sexual Abuse Accommodation Syndrome, 7 CHILD ABUSE & NEGLECT 177, 177-78 (1983). These common characteristics of sexually abused children have also been labeled as "child sexual abuse syndrome," "sexual abuse syndrome" and "victim accommodation syndrome." For the purposes of this Note, the term "child sexual abuse accommodation syndrome" [hereinafter CSAAS] will be used. The five characteristics of CSAAS are discussed infra note 22 and accompanying text.
6 Id. at 179-80.
7 State v. Dodson, 452 N.W.2d 610, 612 (Iowa Ct. App. 1989) (discussing expert testimony that explained why the child acted normally around the alleged abuser); People v. Wellman, 560 N.Y.S.2d 643, 644 (App. Div. 1990) (discussing expert testimony that explained the child's failure to immediately identify the defendant as an abuser), appeal denied, 578 N.E.2d 451 (N.Y. 1991); State v. Sims, 608 A.2d 1149, 1152 (Vt. 1991) (discussing expert testimony that explained why the child continued to visit the house in which the defendant lived and in which the alleged abuse occurred).
8 People v. Housley, 8 Cal. Rptr. 2d 431, 437 (Ct. App. 1992) (allowing expert testimony to explain why the child may have falsely recanted her claim of abuse).
testimony on CSAAS has become a center of controversy.\textsuperscript{14} While the majority of jurisdictions that have addressed the issue of admissibility allow the testimony for limited purposes,\textsuperscript{15} Kentucky represents the minority view on this issue in that it absolutely rejects expert testimony on CSAAS or any of its separate symptoms.\textsuperscript{16}

This Note analyzes Kentucky's approach to the admissibility of expert testimony on CSAAS. Part I examines the results of scientific research on the existence of CSAAS.\textsuperscript{17} Part II discusses three evidentiary issues that commonly arise when expert testimony on CSAAS is admitted.\textsuperscript{18} Part III reviews approaches that courts have taken in admitting expert testimony on CSAAS, and presents Kentucky's refusal to admit such testimony as an illustration of the minority approach.\textsuperscript{19} Part IV analyzes Kentucky's rationale for ruling CSAAS testimony inadmissible.\textsuperscript{20} The Note concludes that Kentucky should continue to reject expert testimony on CSAAS as a whole, but should admit expert testimony on two symptoms of CSAAS when presented independently of the syndrome.\textsuperscript{21}

I. THE EXISTENCE OF CSAAS

CSAAS consists of the following five categories of behavior: (1) secrecy; (2) helplessness; (3) entrapment and accommodation; (4) delayed, conflicted and unconvincing disclosure; and (5) retraction.\textsuperscript{22} Knowledge and understanding of the elements of the syndrome are necessary so that adults will avoid the tendency to blame an "uncertain,
emotionally distraught child" who accuses "a respectable, reasonable adult . . . of perverse, assaultive behavior."23

The first two elements of CSAAS—secrecy and helplessness—relate to the basic vulnerability of children.24 Dr. Summit explains how the secrecy surrounding the abuse becomes "both the source of fear and the promise of safety"25 to the child. The adult perpetrator takes advantage of the authoritarian relationship with the child in order to convince the child that the sexual activity should remain "our secret."26 In addition, the perpetrator can often use this authoritarian relationship to avoid resistance from the child.27 Because children are taught to be compliant and loving to their caretakers, many child sexual abuse victims feel helpless and see no choice but to "play possum" when they are being abused.28

Once the sexual abuse occurs, a pattern normally develops in which the perpetrator repeatedly abuses the child, sometimes for a period of years.29 At this point, the only alternative for the child, who feels that she cannot report the abuse, is to accept and adapt to the situation.30 The child then begins to experience the three elements of CSAAS that "are sequentially contingent on sexual assault"—accommodation, delayed disclosure and retraction.31 A child who accommodates to the situation may act out her anger and fear in other ways, such as through substance abuse, multiple personalities, promiscuous sexual activity, repeated runaways, and suicidal behavior.32

When these accommodation mechanisms finally collapse, the victim may disclose that she has been abused. However, this disclosure may not occur until years after the abuse first began, causing many adults to question the child's claim.33 A child faced with such pressure, as well as accusations from others that she is the one who is lying, will often decide that she would have been better off if she had never reported the abuse. Consequently, the victim will retract her allegation in the hopes that everything will return to "normal."34

23 Id. at 178.
24 Id. at 177, 181, 182-83.
25 Id. at 181.
26 Id.
27 Id. at 182.
28 Id. at 183-84.
29 Id. at 184.
30 Id.
31 Id. at 177, 181.
32 Id. at 184-86.
33 Id. at 186.
34 Id. at 188.
Summit intended his article on CSAAS to explain why aspects of a victim’s behavior may seem inconsistent with abuse. However, Summit himself acknowledges that the complexity of the act of child sexual abuse precludes a conclusion that every victim will exhibit every characteristic of CSAAS, or that every child who does exhibit the symptoms of CSAAS will be a victim of sexual abuse. Rather than being definitive proof of the occurrence of abuse, CSAAS merely "represents a common denominator of the most frequently observed victim behaviors." 

Summit’s article on CSAAS has spurred a large body of research on the question of whether child sexual abuse victims experience certain symptoms with sufficient frequency and commonality to label the symptoms a "syndrome." A relatively recent review of the existing research on the short-term effects of child sexual abuse indicates that "there does not appear to be sufficient evidence at this time to postulate the existence of a unique 'sexual abuse syndrome' with a specific course or outcome." The authors of the review note that a serious methodological problem with the forty-two studies reviewed was the lack of appropriate control groups. The resulting inability to compare the behavior of the child sexual abuse victims with non-abused children limits any "firm" conclusions about sexually abused children that could be drawn from the review.

Although research supporting Summit’s concept of a "syndrome" is sparse, one study did provide support for Summit’s conclusions concerning both delayed disclosure and retraction. This research focused specifically on children’s reporting of abuse, and indicated that disclosure for most child sexual abuse victims consists of a process, rather than a definable event. Regarding delayed disclosure, "[t]he common

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35 Id. at 179. 
Without a clear understanding of the accommodation syndrome, clinical specialists tend to reinforce the comforting belief that children are only rarely legitimate victims of unilateral sexual abuse and that among the few complaints that surface, most can be dismissed as fantasy, confusion, or a displacement of the child’s own wish for power and seductive conquest.

36 Id. at 180.

37 Id.

38 Beitchman et al., supra note 4, at 546. The American Psychiatric Association apparently agrees with this conclusion as it has not included CSAAS in the Diagnostic and Statistical Manual of Mental Disorders (DSM-III-R), its official publication of recognized mental disorders. See Diagnostic and Statistical Manual of Mental Disorders (American Psychiatric Association ed., 3d ed. rev. 1987).

39 Beitchman et al., supra note 4, at 551.

40 Sorenson & Snow, supra note 2, at 11.

41 Id. This study was somewhat unique in that it was based solely on child sexual abuse cases
presumption that most abused children are capable of immediate active disclosure" was not supported by the study in that "seventy-nine percent of the children in this study initially denied their abuse or were tentative in disclosing it." Furthermore, while twenty-two percent of the victims eventually recanted their original allegations, the fact that ninety-three percent of these victims later reaffirmed that the abuse had occurred supports the concept of retraction as "a recognized phenomenon in child sexual abuse cases."

II. EVIDENTIARY CONCERNS

Introduction of CSAAS into the courtroom has led to an emotional, heated debate that centers on a court's attempt to "vindicate the right of one accused of child sexual abuse to a fair trial according to accepted rules of evidence, while at once shielding the complainant from undue additional trauma, . . . [and, at the same time, preserving] the people's powerful interest in persistent prosecution of abusers." Thus, courts faced with expert testimony on CSAAS must evaluate the testimony in light of numerous evidentiary concerns, as well as the conflicting interests of the victim and the defendant. In particular, expert testimony on CSAAS raises issues regarding the relevancy of the testimony, the appropriate standard of admissibility, and whether the testimony invades the province of the jury.

The threshold inquiry that a court must make in admitting any type of evidence is determining whether that evidence is relevant. Relevant evidence is that which is both material to the proceeding and probative.

that had been confirmed in one of three ways: (1) a confession or legal plea; (2) a criminal conviction; or (3) medical evidence indicative of sexual abuse. Id. at 5.

Id. at 11.
Id. at 12.
Id. at 14.
Compare Holmes, supra note 14, at 169 (advocating the adoption of a standard of admissibility specifically tailored to CSAAS testimony because of the jury's need for such testimony) with Cohen, supra note 14, at 456 (emphasizing the failure of expert testimony on characteristics of sexual abuse victims to meet the federal standards of admissibility).

" Goodson v. State, 566 So. 2d 1142, 1143 (Miss. 1990).

"See FED. R. EVID. 402 ("All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.").

Although the admissibility of expert testimony on CSAAS is governed by state law, the federal rules will be used as illustrations since many states, including Kentucky, model their rules of evidence after the federal rules.

Federal Rule of Evidence 401 defines relevant evidence as "evidence having any tendency to
Once the materiality and probativeness of the evidence are established, courts must then determine if the value of the evidence is outweighed by its costs in terms of unfair prejudice to the defendant and considerations of judicial economy. Jurisdictions continue to disagree on the relevancy of expert testimony on CSAAS. While some jurisdictions find the testimony to be irrelevant because "it does not render the desired inference more probable than not," others have admitted the testimony as relevant to the issue of the child's credibility. Even among those jurisdictions that consider expert testimony on CSAAS to be relevant, the question turns to whether the probative value of the evidence outweighs its prejudicial impact to the defendant. Important, competing factors in this regard include the tendency for juries to attribute an "aura of special reliability and trustworthiness" to experts, and the belief that expert testimony is necessary because a child's reactions to sexual abuse are not within the common knowledge of jurors.

In addition to the general relevance requirement imposed on all evidence, many courts require that expert testimony on CSAAS satisfy an

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." FED. R. EVID. 401; see also 1 MCCORMICK ON EVIDENCE § 185, at 774-75 (John W. Strong et al. eds., 4th ed. 1992) (explaining that "[a] fact that is 'of consequence' is material, and evidence that affects the probability that a fact is as a party claims it to be has probative force" (footnote omitted)).

- See FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."). Considerations of judicial economy are particularly important in evaluating expert testimony on CSAAS because Federal Rule of Evidence 702 allows an expert to testify as to "scientific, technical or other specialized knowledge [only if his testimony] will assist the trier of fact to understand the evidence or to determine a fact in issue." FED. R. EVID. 702. Expert testimony is therefore excluded if it is "unhelpful[,] ... superfluous and a waste of time." FED. R. EVID. 702 advisory committee's note (citing 7 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1918 (James H. Chadbourn ed. rev. 1978)).


- See People v. Housley, 8 Cal. Rptr. 2d 431, 437 (Ct. App. 1992) (admitting testimony to rehabilitate the victim's credibility after the child recanted her claim of abuse).

- State v. Logue, 372 N.W.2d 151, 157 (S.D. 1985) (quoting United States v. Armaral, 488 F.2d 1148, 1152 (9th Cir. 1973)).

additional standard of admissibility known as the *Frye* standard, first articulated in *Frye v. United States.* The *Frye* standard governs the admissibility of expert testimony that is based on novel scientific evidence and requires that, in order to admit "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."  

Courts that apply the *Frye* standard to expert testimony on CSAAS find that because the psychological research on child sexual abuse has not revealed a "syndrome" common to child sexual abuse victims, CSAAS has not been "generally accepted." Thus, failure to satisfy the *Frye* standard is an oft-cited ground for ruling expert testimony on CSAAS inadmissible.

The advantages of applying the *Frye* standard are that it reserves the task of determining the reliability of scientific evidence to the experts, ensures the availability of a sufficient number of experts to testify about the evidence's reliability in an adversarial proceeding, promotes uniformity of decision, and excludes unreliable evidence. Despite the benefits of the *Frye* standard, however, it has been heavily criticized as being too vague and too conservative, particularly in regard to expert testimony on psychological evidence such as CSAAS.

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54 293 F. 1013 (D.C. Cir. 1923).
55 *Id.* at 1014.
56 *See supra* notes 38-39 and accompanying text.
58 *See* United States v. Downing, 753 F.2d 1224, 1235 (3d Cir. 1985); Myers et al., *supra* note 14, at 28 n.88.
59 The following questions, raised by the *Frye* standard, illustrate the standard's vagueness:
   When is evidence scientific? What is the "particular field" to which a scientific principle or application belongs? What is meant by "general acceptance" within the relevant field?
   How does one prove general acceptance? Finally, when an expert's testimony is based on the novel application of a scientific principle, must the proponent establish the reliability of the underlying principle as well as the application?
   Myers et al., *supra* note 14, at 24.
60 *See, e.g.,* Downing, 753 F.2d at 1236 ("Under *Frye,* some have argued, courts may be required to exclude much probative and reliable information from the jury's consideration, thereby unnecessarily impeding the truth-seeking function of litigation.").
61 One justification for not applying the *Frye* standard to expert testimony on CSAAS is that, as psychological evidence, CSAAS is not as easily quantifiable as other types of scientific evidence. Holmes, *supra* note 14, at 151. Another problem is that since experts on CSAAS are not limited to one "particular field," the *Frye* standard could require proof of general acceptance among all relevant
In response to the criticisms of the Frye standard, some jurisdictions have admitted expert testimony on CSAAS by applying an alternative to the Frye standard known as the "relevance analysis." Under the relevance analysis, general scientific acceptance of CSAAS is just one of the factors a court may consider in evaluating the reliability and probative value of the CSAAS evidence. Upon determining that the CSAAS evidence has probative value, the court bases its decision on the admissibility of the evidence on the traditional procedure of weighing the probative value of the evidence against its prejudicial impact on the defendant.

If expert testimony on CSAAS is deemed to be relevant and admissible under the applicable standard, then the testimony is presented to a jury. A common concern that courts have with admitting expert testimony on CSAAS is that the testimony may interfere with a jury's fact-finding function, including a jury's decisions on credibility issues. Expert testimony on CSAAS may impermissibly influence a jury in two ways. First, jurors may defer to the opinions of the expert in order to avoid having to draw their own conclusions. Second, the expert may testify, either directly or indirectly, on the child's truthfulness. Recognizing these potential problems, some jurisdictions rule expert testimony on CSAAS inadmissible on the basis that admission of such testimony denies the defendant his right to a fair trial.

fields, such as social work, psychology, and psychiatry. Id. at 151-52; see also People v. Beckley, 456 N.W.2d 391, 404 (Mich. 1990) (holding the Frye standard inapplicable to expert testimony on the behavioral sciences when the prosecution uses the testimony to explain a particular behavior).

See Downing, 753 F.2d at 1237 (stating that satisfaction of the Frye standard was neither necessary nor sufficient for admissibility); Myers et al., supra note 14, at 29-32; Holmes, supra note 14, at 153-56.

For a list of other factors a court may consider, see Myers et al., supra note 14, at 30-32, and Holmes, supra note 14, at 153 n.79.

1 McCormick on Evidence, supra note 48, § 203, at 873-75.


Id. at 445-47.

Id.

Id. at 448-49.

In 1982, the Hawaii Supreme Court ruled that an expert testifying about the typical characteristics of child sexual abuse victims could also testify as to his opinion of the child's believability. State v. Kim, 645 P.2d 1330, 1334-35 (Haw. 1982). The Hawaii high court overruled Kim in State v. Batangan, 799 P.2d 48, 54 (Haw. 1990), and the rule currently adhered to by practically all jurisdictions prohibits an expert from testifying directly as to the child's credibility. Cirelli, supra note 65, at 448.

III. JUDICIAL TREATMENT OF EXPERT TESTIMONY ON CSAAS

A. Admission of Expert Testimony on CSAAS

While the proponents for admitting expert testimony on CSAAS emphasize the numerous proof problems common to child sexual abuse cases, courts also necessarily recognize that child sexual abuse cases are as difficult to defend as they are to prosecute. In an attempt to protect the interests of both the victim and the defendant, the majority of jurisdictions have held that expert testimony on CSAAS is admissible. The jurisdictions vary, however, on the degree of specificity allowed and the appropriate use of such expert testimony.

A few jurisdictions allow the expert to testify only in general terms regarding the characteristics of CSAAS; the expert is therefore not permitted to relate the elements of CSAAS to any specific behaviors exhibited by the victim. Courts that have adopted this approach consider sexual abuse to be outside a juror’s common experience. Thus, expert testimony on CSAAS is admitted to help the jurors better understand the subject. Although permitted to give general background information about CSAAS, the expert may not refer specifically to the victim’s behavior due to the potential for the testimony to become an “impermissible comment on the child’s credibility.”

A second approach adopted by some jurisdictions concerning the admissibility of CSAAS testimony is to allow the expert to testify

79 See supra notes 6-8 and accompanying text.
71 See infra notes 73-83 and accompanying text.
72 Hammock v. State, 411 S.E.2d 743, 748 (Ga. Ct. App. 1991); Davenport v. State, 806 P.2d 655, 660 (Okla. Crim. App. 1991); see also Batangan, 799 P.2d at 52 (holding that once the expert has testified regarding the general characteristics of sexual abuse victims, “[t]he jury is fully capable, on its own, of making the connection to the facts of the particular case,” such as the specific behaviors of the victim); State v. Svihl, 490 N.W.2d 269, 273 (S.D. 1992) (stating that limiting expert testimony to general traits and characteristics is the “better practice”). But see Commonwealth v. Dunkle, 602 A.2d 830, 831 (Pa. 1992) (holding the admission of expert testimony reversible error even though the expert never related her general testimony on CSAAS to the specific behaviors of the victim).
73 See State v. Catsam, 534 A.2d 184, 187 (Vt. 1987) (holding that expert testimony in child sexual abuse cases provides jurors with “a better understanding of the emotional antecedents of the victim’s conduct”).
74 See State v. Sims, 608 A.2d 1149, 1154 (Vt. 1991). Although the Vermont Supreme Court has not prohibited experts from referring to the victim’s behavior, the court noted that it has “repeatedly found use of particularized testimony to be error.” Id. See also People v. Housley, 8 Cal. Rptr. 2d 431, 435 (Cal. App. 1992) (finding that expert who had never met the victim and who limited her testimony to explaining the general behavior of sexual abuse victims did not opine on the victim’s credibility).
regarding both the general characteristics of CSAAS and the specific behaviors that the expert observed in the victim.76 The rationale behind this more liberal approach is that once the jury hears testimony regarding the general characteristics of CSAAS and the symptoms exhibited by the victim, the jury possesses the knowledge necessary to determine whether or not the abuse actually occurred.77

Finally, while some jurisdictions focus on the specificity of the expert testimony, other jurisdictions, such as California78 and Michigan,79 merely examine the prosecution's purpose in presenting the expert testimony. These jurisdictions recognize the usefulness to the jury of expert testimony on CSAAS but limit its use to "rebutting an inference that a complainant's postincident behavior was inconsistent with that of an actual victim of sexual abuse, incest or rape."80 Since the use of the testimony is limited to rehabilitating the witness, expert testimony on CSAAS is admissible only after the defense has attacked the victim's credibility.81 The court may also attempt to prevent the misuse of testimony through a jury instruction stating "that the expert's testimony is not intended and should not be used to determine whether the victim's molestation claim is true."82 Such a "limited admissibility" approach83 protects both the victim's interest in not having her behavior misinterpreted by the jury, and the defendant's interest in not having expert testimony on CSAAS used as affirmative proof of abuse.

74 See Calloway v. State, 520 So. 2d 665, 668 (Fla. Dist. Ct. App. 1988); Cohn v. State, 804 S.W.2d 572, 574 (Tex. Ct. App. 1991); cf. State v. Davis, 581 N.E.2d 604, 611-12 (Ohio Ct. App. 1989) (holding that expert testimony that the victim exhibits signs of CSAAS is only admissible in cases where the victim is "very young" and not competent to testify). But see People v. Knupp, 579 N.Y.S.2d 801, 802-03 (App. Div. 1992) (holding that expert testimony that victims exhibited symptoms of CSAAS was impermissible attempt to prove the defendant's guilt).


78 E.g., People v. Bowker, 249 Cal. Rptr. 886 (Cl. App. 1988).


80 Id. at 399 (quoting People v. Beckley, 409 N.W.2d 759, 763 (Mich. Ct. App. 1987)).


82 Bowker, 249 Cal. Rptr. at 892. A subsequent California decision required that this limiting instruction be a sua sponte instruction. See People v. Houley, 8 Cal. Rptr. 2d 431, 437 (Cl. App. 1992); see also State v. Stallings, 419 S.E.2d 586, 592 (N.C. Ct. App. 1992) (limiting instruction necessary to ensure that the jury use the evidence for corroborative, as opposed to substantive, purposes).

83 See 1 McCormick ON EVIDENCE, supra note 48, § 59 (discussing the use of the "limited admissibility" approach when evidence may be admissible for one purpose, but not for another).
B. Rejection of Expert Testimony on CSAAS

Despite the various approaches for admitting expert testimony on CSAAS, there are jurisdictions that consistently reject such testimony. When courts survey the various approaches that previously have been taken concerning expert testimony on CSAAS, Kentucky's approach is often cited as an example of the minority view. Kentucky represents the extreme in that Kentucky courts reject all types of expert testimony on CSAAS. Thus, the testimony is prohibited even when the expert limits his testimony to one or more of the individual symptoms of CSAAS, and refrains from labeling the symptom as a component of a "syndrome."

Kentucky first addressed the issue of the admissibility of expert testimony on CSAAS in Bussey v. Commonwealth. The appellant in Bussey was convicted of attempted first-degree sodomy. Part of the prosecution's case consisted of a psychiatrist's testimony regarding the common symptoms of "the 'relatively new' concept" of CSAAS, as well as the psychiatrist's expert opinion that the victim exhibited such symptoms. However, the expert acknowledged his inability to conclude either that the victim's symptoms were a direct result of the alleged abuse, or that the victim's symptoms were the unique result of sexual abuse by the appellant.

The Supreme Court of Kentucky found that admission of the psychiatrist's testimony constituted reversible error for two reasons. First, the prosecution did not establish that CSAAS is "generally accepted in the medical community." Second, the expert testimony was "immaterial as to the establishment of the appellant's guilt" because the expert could not connect the existence of the syndrome to the alleged abuse by the appellant.

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85 See infra notes 102-07 and accompanying text.
86 697 S.W.2d 139 (Ky. 1985).
87 Id. at 140-41.
88 Id. at 140.
89 Id.
90 Id. at 141. The fact that the psychiatrist could not distinguish symptoms of the victim that might have resulted from sexual abuse by someone other than the appellant was of particular importance in this case. There was evidence presented at trial that the victim had also been sexually abused by her uncles. Id.
91 Id.; see supra notes 55-64 and accompanying text.
92 Bussey, 697 S.W.2d at 141.
In the year following the *Bussey* decision, the Kentucky Supreme Court was again faced with a child sexual abuse case in which the prosecution presented expert testimony relating the general characteristics of CSAAS to the specific behavior of the victim. In *Lantrip v. Commonwealth*,\(^9\) the expert witness testified that the victim's behavior was consistent with four of the five elements of CSAAS.\(^{94}\) In holding that admission of the expert's testimony was reversible error, the court applied the rationale of *Bussey*. The court emphasized that even if CSAAS were generally accepted, evidence that the victim exhibited such symptoms would not prove, by itself, that the victim had been sexually abused.\(^{95}\) Rather, "there would remain the question of whether other children who had not been similarly abused might also develop the same symptoms or traits."\(^{96}\)

The decisions in *Bussey* and *Lantrip* illustrate Kentucky's rejection of expert testimony on CSAAS when the evidence consists of both general testimony on the syndrome and the expert's observation of the victim's specific characteristics. The alternative approach then taken by Kentucky prosecutors was to limit the expert's testimony to only the general elements of the syndrome. For example, in *Hester v. Commonwealth*,\(^97\) the expert testified that children normally do not disclose specific details of an alleged incident of sexual abuse unless they have actually experienced the abuse,\(^{98}\) and gave reasons why children in general often recant allegations of sexual abuse.\(^{99}\) Additionally, an expert in *Mitchell v. Commonwealth*\(^100\) testified as to the general psychological reaction of child sexual abuse victims, but she never specifically related her testimony to any of the victims.\(^101\)

Both *Mitchell* and *Hester* were subsequently reversed due to the admission of the experts' generalized testimony on CSAAS. In *Mitchell*, the court reiterated its belief that evidence on CSAAS was not relevant to the issue of the appellant's guilt or innocence, and that it failed to satisfy the *Frye* standard.\(^102\) In *Hester*, on the other hand, the court

\(^{9}\) 713 S.W.2d 816 (Ky. 1986).

\(^{94}\) Id. at 817. The one element that the victim had not exhibited was retraction. Id. For a discussion of the elements of CSAAS, see supra notes 22-34 and accompanying text.

\(^{95}\) *Lantrip*, 713 S.W.2d at 817.

\(^{96}\) Id.

\(^{97}\) 734 S.W.2d 457 (Ky.), cert. denied, 484 U.S. 989 (1987).

\(^{98}\) Id. at 458.

\(^{99}\) Id. Children may recant sexual abuse allegations "because the family has put pressure on them either verbally, or by their actions to be loyal to the family." Id.

\(^{100}\) 777 S.W.2d 930 (Ky. 1989).

\(^{101}\) Id. at 932.

\(^{102}\) Id. at 933.
raised the additional concern that expert testimony on CSAAS invades the province of the jury. Since the children in *Hester* had recanted their allegations in court, "[t]he admission of the expert opinion was improper as it, in effect, told the jury to believe the story the children had initially told and disbelieve the testimony given in open court." As such, the testimony constituted an impermissible comment on the ultimate issue before the jury.

The *Hester* case is distinguishable from the prior cases on CSAAS in Kentucky in that the expert never referred to a "Child Sexual Abuse Accommodation Syndrome" during her testimony. However, the Kentucky Supreme Court has found this distinction to be immaterial. In Kentucky's two most recent cases involving expert testimony on CSAAS, the prosecution purposefully limited the expert's testimony to the individual symptoms of CSAAS. Despite the fact that the experts never mentioned a syndrome, the court ruled that the admission of the testimony was reversible error. According to the court, "[n]either the syndrome nor the symptoms that comprise the syndrome have recognized reliability in diagnosing child sexual abuse as a scientific entity."

**IV. ANALYSIS OF KENTUCKY'S APPROACH TO EXPERT TESTIMONY ON CSAAS**

**A. Background**

As courts in other jurisdictions continue to struggle with the issue of admissibility of expert testimony on CSAAS, an analysis of Kentucky's established law can serve as a source of guidance. The Kentucky decisions are based on the resolution of three evidentiary issues that arise when expert testimony on CSAAS is presented in child sexual abuse cases. First, the Kentucky Supreme Court has determined that expert

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103 *Hester*, 734 S.W.2d at 458.
104 Id.
105 Id. at 459; see also *Hellstrom* v. Commonwealth, 825 S.W.2d 612, 613-14 (Ky. 1992) (holding that it was reversible error for expert testifying on CSAAS to express his opinion that the complainant was a victim of intrafamily sexual abuse).
106 *Hester*, 734 S.W.2d at 458.
107 *Hellstrom* v. Commonwealth, 825 S.W.2d 612, 613 (Ky. 1992) (expert testified that delayed disclosure is a common occurrence in child sexual abuse cases); *Brown* v. Commonwealth, 812 S.W.2d 502, 503 (Ky. 1991) (expert testified as to "whether the victim's behavior was 'consistent with abuse'" without specifically referring to CSAAS).
108 *Hellstrom*, 825 S.W.2d at 614.
109 See supra notes 45-69 and accompanying text.
testimony on CSAAS fails to meet the Frye standard of admissibility.\textsuperscript{110} Second, the court has ruled that expert testimony on CSAAS is not relevant to the issue of the appellant’s guilt or innocence.\textsuperscript{111} Finally, the Kentucky high court has held that testimony concerning CSAAS invades the province of the jury.\textsuperscript{112}

\textbf{B. The Frye Standard}

Despite numerous criticisms of the Frye standard,\textsuperscript{113} its “general acceptance” test is the requisite standard of admissibility in Kentucky for novel scientific evidence.\textsuperscript{114} Kentucky courts recognized the Frye standard as early as 1960,\textsuperscript{115} and have applied the standard to such evidence as truth serum tests,\textsuperscript{116} Human Leukocyte Antigen blood tests,\textsuperscript{117} expert testimony on “battered wife syndrome,”\textsuperscript{118} and profile evidence of a pedophile in a child sexual abuse case.\textsuperscript{119} There is, however, one notable case in which the Kentucky Supreme Court did not apply the Frye standard—Brown v. Commonwealth.\textsuperscript{120}

In Brown, the court admitted evidence concerning a novel blood test, despite the fact that the evidence had “not yet come into general acceptance and use.”\textsuperscript{121} The court apparently applied a standard of admissibility similar to the relevance analysis,\textsuperscript{122} treating the novelty of the blood test as one factor to consider in evaluating the evidence’s credibility, not its admissibility.\textsuperscript{123} However, the application of an alternative standard of admissibility to novel scientific evidence in Brown

\textsuperscript{110} Bussey v. Commonwealth, 697 S.W.2d 139, 141 (Ky. 1985).
\textsuperscript{111} Mitchell v. Commonwealth, 777 S.W.2d 930, 933 (Ky. 1989); Bussey, 697 S.W.2d at 141.
\textsuperscript{112} Hester v. Commonwealth, 734 S.W.2d 457, 459 (Ky.), cert. denied, 484 U.S. 989 (1987).
\textsuperscript{113} See supra notes 59-61 and accompanying text.
\textsuperscript{115} Dugan v. Commonwealth, 333 S.W.2d 755, 757 (Ky. 1960).
\textsuperscript{116} Id. (holding that the tests “have not attained sufficient scientific recognition of dependability and reliability”).
\textsuperscript{117} Perry v. Commonwealth \textit{ex rel. Kessinger}, 652 S.W.2d 655, 661 (Ky. 1983).
\textsuperscript{118} Commonwealth v. Rose, 725 S.W.2d 588 (Ky. 1987) (holding that battered wife syndrome is a mental condition, and that only psychiatrists and clinical psychologists may be qualified to testify as experts on the syndrome), overruled by Commonwealth v. Craig, 783 S.W.2d 387, 388-89 (Ky. 1990) (holding that battered wife syndrome is not a mental condition, and therefore expert testimony on the syndrome need not come from a psychiatrist or clinical psychologist).
\textsuperscript{119} Dyer v. Commonwealth, 816 S.W.2d 647, 653 (Ky. 1991).
\textsuperscript{120} 639 S.W.2d 758 (Ky. 1982), cert. denied, 460 U.S. 1037 (1983).
\textsuperscript{121} Id. at 760.
\textsuperscript{122} See supra notes 62-64 and accompanying text.
\textsuperscript{123} Brown, 639 S.W.2d at 760.
should not be read as a rejection of the *Frye* standard. The Kentucky Supreme Court has since specifically acknowledged that expert testimony on CSAAS must satisfy the *Frye* standard of admissibility.

Kentucky's conclusion that CSAAS does not meet the *Frye* standard is supported by the research on the subject, which indicates that the concept of a "syndrome" common to sexual abuse victims has not gained general acceptance. In fact, there is little disagreement, even among proponents of admitting expert testimony on CSAAS, that the evidence is not generally accepted for the purpose of proving that abuse occurred. Thus, the majority of jurisdictions that allow expert testimony on CSAAS must do so by rejecting the *Frye* standard and adopting an alternative admissibility standard. Since Kentucky vigorously adheres to the *Frye* standard when faced with expert testimony on CSAAS, the CSAAS testimony has been correctly ruled inadmissible.

**C. Relevance**

The second ground on which Kentucky rejects expert testimony on CSAAS is that the testimony is not relevant evidence. The standard for determining the relevancy of expert testimony in Kentucky follows that of the federal courts. The evidence must tend "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" and must be helpful to the jury. The Kentucky Supreme Court has repeatedly rejected expert testimony on CSAAS because it is not relevant to the issue of the appellant's guilt or innocence.

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125 *See* Dyer *v.* Commonwealth, 816 S.W.2d 647, 653 (Ky. 1991). In determining the admissibility of profile evidence of a pedophile, the court stated that it had reversed previous child sexual abuse cases in which expert testimony on CSAAS had been admitted because "the evidence was insufficient to admit the evidence under the "Frye" test." *Id.*
126 *See supra* notes 38-39 and accompanying text. See also Commonwealth *v.* Dunkle, 602 A.2d 830, 832-39 (Pa. 1992), in which the Pennsylvania Supreme Court examined a large amount of the existing literature on the subject and ruled that CSAAS failed to satisfy the *Frye* standard.
128 *See supra* notes 47-53 and accompanying text.
129 *Ky. R. Evid.* 401.
130 *Ky. R. Evid.* 702.
131 *See* Mitchell *v.* Commonwealth, 777 S.W.2d 930, 933 (Ky. 1989); Bussey *v.* Commonwealth, 697 S.W.2d 139, 141 (Ky. 1985); *see also* Lantrip *v.* Commonwealth, 713 S.W.2d 816, 817 (Ky. 1986) (recognizing that if children who have not been sexually abused may also exhibit the symptoms of CSAAS, then "the development of [CSAAS] symptoms or traits . . . would not suffice,
Although the Kentucky Supreme Court has correctly recognized that CSAAS evidence is not probative of abuse, the court has ignored the fact that the appellant’s guilt or innocence is not the only fact that is of consequence in a criminal proceeding. As one commentator has noted, “[i]t should be obvious that evidence may be relevant because it bears logically upon the credibility of witnesses or the probativeness of other admitted evidence.” Expert testimony on CSAAS is relevant to the issue of the credibility of the victim, especially when the defense has presented evidence on the victim’s behavior in order to attack her credibility. Consequently, the Kentucky Supreme Court should first examine the context in which expert testimony on CSAAS is presented before automatically dismissing the evidence as irrelevant.

D. Invading the Province of the Jury

The context in which expert testimony on CSAAS is presented is also critical in determining whether the testimony invades the province of the jury. Of the six Kentucky cases involving expert testimony on CSAAS, the Kentucky Supreme Court has reversed only two on the

per se, to prove the fact of sexual abuse”).

An objection that expert opinion testimony invades the province of the jury stems from the traditional ultimate fact doctrine, which prohibits experts from opining on the “ultimate fact” in issue in the case. See 1 MCCORMICK ON EVIDENCE, supra note 48, § 12. This absolute bar on ultimate issue testimony has been removed by Federal Rule of Evidence 704, which states that “testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.” FED. R. EVID. 704(a).

Kentucky has not adopted a rule comparable to Federal Rule 704. Consequently, Kentucky case law governs the determination as to whether expert opinion testimony may be excluded solely on the basis that it embraces an ultimate fact. See LAWSON, supra note 114, § 6.20, at 53-57 (2d ed. Supp. 1989) (describing the “three stages of life” of the ultimate fact doctrine in Kentucky). The Kentucky courts have both excluded expert opinion testimony based on the ultimate fact doctrine, and admitted expert opinion testimony despite the fact that the testimony relates to an ultimate fact. Compare Pendleton v. Commonwealth, 685 S.W.2d 549, 553 (Ky. 1985) (“An opinion as to whether the accused had the ability or propensity to commit such an act is improper because it is an opinion on the ultimate fact, that is, innocence or guilt. Consequently, it invades the province of the jury.”) with Carpenter v. Commonwealth, 771 S.W.2d 822, 825 (Ky. 1989) (holding in a criminal abuse case that opinion testimony that the injuries were intentionally caused did not invade the province of the jury, because “[o]pinion testimony is admissible where it appears that the trier of fact would be assisted in the solution of the ultimate problem.”). In light of Kentucky’s inconsistent decisions on the ultimate fact doctrine, “[t]he most definite statement one can make about the state of the law at this time is the following: Opinion testimony may be inadmissible in some instances because the opinion embraces an ultimate fact.” LAWSON, supra note 114, § 6.20, at 57 (2d ed. Supp. 1989).

Hellstrom v. Commonwealth, 825 S.W.2d 612 (Ky. 1992); Brown v. Commonwealth, 812 S.W.2d 502 (Ky. 1991); Mitchell v. Commonwealth, 777 S.W.2d 930 (Ky. 1989); Hester v. Commonwealth, 734 S.W.2d 457 (Ky.), cert. denied, 484 U.S. 989 (1987); Lantrip v. Commonwealth, 713 S.W.2d 816 (Ky. 1986); Bussey v. Commonwealth, 697 S.W.2d 139 (Ky. 1985).
ground that the expert either improperly commented on the child's credibility or opined on the ultimate issue of guilt or innocence. The fact that the Kentucky Supreme Court failed to address the issue of whether the expert testimony invaded the province of the jury in all six cases indicates that expert testimony on CSAAS will not always interfere with the jury's fact-finding function. Such interference apparently arises only when the expert goes beyond providing background information on CSAAS and expressly or implicitly opines as to whether the child was a victim of sexual abuse. For example, the expert in Hester, in addition to explaining why a child might recant an allegation of sexual abuse, stated that when children "have given specific details [regarding the sexual abuse] to adults, generally—well almost universally this has happened to them." Since the expert implicitly conveyed her opinion that the child was in fact sexually abused, rather than merely providing the jury with information to aid them in making a decision, the court held that the expert's testimony invaded the province of the jury.

E. Synopsis

Of the Kentucky Supreme Court's three separate reasons for not admitting expert testimony on CSAAS, the testimony's failure to meet the Frye standard will apply to every case in which this novel scientific evidence is presented. Whether expert testimony on CSAAS is irrelevant and invades the province of the jury, however, will depend on the specific content of the expert's testimony in each particular case. Thus, if expert testimony on CSAAS, or its elements, were to meet the Frye standard, the evidence would be admissible in Kentucky under certain circumstances.

V. A New Approach for Kentucky

The failure of the Child Sexual Abuse Accommodation Syndrome to satisfy the Frye standard should not lead Kentucky courts to exclude expert testimony about a certain behavior of child sexual abuse victims

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135 See Hellstrom, 825 S.W.2d at 614 (finding that the expert "invaded the province of the jury by determining witness credibility and expressing his unqualified opinion on the ultimate issue"); Hester, 734 S.W.2d at 459 ("Expert opinion which purports to resolve the ultimate issue before the jury is inadmissible.").
136 See supra notes 86-108 and accompanying text.
137 See Myers et al., supra note 14, at 65 ("[T]here is a meaningful distinction between expert testimony that a particular child was sexually abused, and expert testimony that a child demonstrates behaviors commonly observed in the class of sexually abused children. In the latter case, the expert does not offer a direct opinion on the ultimate question of whether abuse occurred.").
138 Hester, 734 S.W.2d at 458.
139 Id. at 459.
for the sole reason that the behavior also happens to be a symptom of CSAAS. Rather, when faced with expert testimony on separate symptoms of CSAAS, the court should determine the admissibility of each individual symptom, respectively. Under this proposed approach, expert testimony concerning the tendency of child sexual abuse victims to delay disclosure and retract their accusations should generally be admissible in Kentucky to rebut an attack on the child's credibility.

By limiting the expert's testimony to the symptoms of delayed disclosure and retraction, such evidence would satisfy the Frye standard. Delayed disclosure and retraction are distinguishable from the CSAAS symptoms of secrecy, helplessness and accommodation in that the latter three symptoms are perceived as common reactions of a child to any stress or trauma, such as a divorce or a death in the family. The process by which a child reports an incident of sexual abuse, on the other hand, is more likely to result from an actual sexual abuse experience than from some other source of general stress. Moreover, research independent of that on CSAAS indicates that delayed disclosure and retraction are generally accepted in the scientific field as possible responses of a child to sexual abuse.

One potential problem with admitting expert testimony on delayed disclosure and retraction is that the evidence necessary to establish these behaviors as generally accepted is normally presented in the form of statistical probabilities. The use of statistics invokes the danger that the jury may interpret them as quantifying the victim's credibility. In order to avoid this problem, Kentucky courts should hold an in camera hearing in which the expert can inform the court of the available research on the subject. Further, when testifying in front of a jury, an expert's testimony

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140 This scenario is distinguishable from one in which the expert testifies as to all of the symptoms comprising CSAAS, but does not label them as a "syndrome." Since testimony on all of the symptoms of CSAAS is essentially the same as testimony on CSAAS, Kentucky should not admit the evidence simply because the expert never used the word "syndrome."

141 See Wheat v. State, 527 A.2d 269, 273 (Del. 1987) (describing delayed disclosure and retraction as two symptoms that are "especially linked to intrafamily child rape"). This statement is not intended to suggest that a child who alleges that she has been sexually abused is always telling the truth, for children do lie about sexual abuse. However, studies have shown that the false allegation rate for reports of child sexual abuse is only between two percent and eight percent. Mark D. Everson & Barbara W. Boat, False Allegations of Sexual Abuse by Children and Adolescents, 28 J. AM. ACAD. CHILD & ADOLESC. PSY. 230, 234 (1989).

142 See supra notes 41-44 and accompanying text.

143 See Wheat, 527 A.2d at 274-75 (likening expert testimony on recantation that is couched in terms of statistical probabilities to "lie detector" testimony). For example, an expert who testifies as to research in which 93% of the victims who recanted eventually reaffirmed their allegations is invading the province of the jury by implicitly placing the complainant who has recanted her allegation in the "group of 'false' recanters." Id.
should be limited to the fact that it is not uncommon for child sexual abuse victims to delay reporting the abuse or to recant their allegations at some point. This approach will avoid the possibility of a jury incorrectly applying statistical probabilities cited by the expert to their own evaluation of the victim’s credibility.

To ensure that the expert’s testimony is relevant, Kentucky courts should admit expert testimony on delayed disclosure and retraction only to rebut a defense attack on the victim’s credibility. Once the defense has specifically pointed out that the victim either delayed reporting the incident or has since recanted her allegation, the victim’s credibility becomes a fact that is of consequence to the proceeding, and expert testimony should be admitted to explain this behavior.

If the expert were limited to testifying that delayed disclosure and retraction are not uncommon in child sexual abuse victims, as opposed to saying that delayed disclosure and retraction are indicators of child sexual abuse, admitting the testimony would not unfairly prejudice the defendant. Furthermore, the evidence would not frustrate the goals of judicial economy, because jurors do not understand that these actions by the child do not have the same meaning as they would with other types of crime victims. Since the probative value of the testimony would normally outweigh its prejudicial impact on the defendant, expert testimony on delayed disclosure and retraction that is limited to rebuttal purposes would be admissible as to the issue of the victim’s credibility.

The main obstacle to admitting this otherwise relevant evidence is the danger that the jury will misuse the evidence. In order to prevent the jury from misinterpreting the evidence, Kentucky should follow the lead of California and instruct the jury as to the proper use of expert testimony on delayed disclosure and retraction.

CONCLUSION

There is no question about the seriousness of the problem of child sexual abuse and the need to find effective ways of combatting the problem. Nonetheless, even though Kentucky’s current refusal to admit

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144 See Cohen, supra note 14, at 446, in which the author recognizes that “[t]here is something fundamentally strange about saying that since the child denies that the event occurred, it must have occurred,” id., but also suggests that expert testimony on retraction may be appropriate for certain rehabilitative purposes. Id. at 158 n.110.

145 For example, the jury could mistakenly assume that since it is not unusual for child sexual abuse victims either to delay reporting the incident or to recant their allegations, the complainant’s display of these behaviors indicates that she was abused.

146 See supra notes 82-83 and accompanying text.
expert testimony on CSAAS makes it more difficult for the prosecution to obtain a conviction, this fact alone is not sufficient justification for Kentucky to admit expert testimony on CSAAS. As the Pennsylvania Supreme Court stated in Commonwealth v. Dunkle:147

We are all aware that child abuse is a plague in our society and one of the saddest aspects of growing up in today’s America. Nevertheless, we do not think it befits this Court to simply disregard long-standing principles concerning the presumption of innocence and the proper admission of evidence in order to gain a greater number of convictions. A conviction must be obtained through the proper and lawful admission of evidence in order to maintain the integrity and fairness that is the bedrock of our jurisprudence.148

In Kentucky, the admission of expert testimony on CSAAS is both improper and unlawful in that the evidence fails the Frye standard of admissibility, can be irrelevant, and may invade the province of the jury. However, the admission of expert testimony on delayed disclosure and retraction in child sexual abuse cases in order to rebut a defense attack on the victim’s credibility, coupled with a limiting instruction to the jury, would successfully combat the problem of child sexual abuse as well as maintain the integrity and fairness of the Kentucky judicial system.

Michele Meyer McCarthy

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148 Jd. at 838.