

Innocence Legal Team  
1600 S. Main St., Suite 195  
Walnut Creek, CA 94596  
Tel: 925 948-9000

Attorney for Defendant

SUPERIOR COURT OF CALIFORNIA, COUNTY OF

PEOPLE OF THE STATE OF	)	Case No.
CALIFORNIA,	)	
	)	MOTION IN LIMINE:
Plaintiff,	)	MUNCHAUSEN BY PROXY SYNDROME
	)	OR FACTITIOUS DISORDER BY
	)	PROXY
vs.	)	
	)	
Defendant.	)	Date:
	)	Time:
	)	Dept:

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TO: All parties and to their attorneys of record, and to the  
Honorable Judge of the Superior Court:

The defense moves for a protective order that:

1. The prosecution not be allowed to introduce Munchausen by Proxy Syndrome or Factitious Disorder by Proxy as an indicator of child abuse as charged in the **Information/Indictment**.
2. The prosecution not be allowed to introduce Munchausen by Proxy Syndrome or Factitious Disorder by Proxy as Character Evidence on the issue of motive.
3. The prosecution not be allowed to introduce the diagnostic criteria or elements of Munchausen by Proxy Syndrome or Factitious Disorder by Proxy.

1           4.       In the alternative, if the prosecution is allowed to introduce Munchausen  
2 by Proxy Syndrome that the testimony be limited to the concept in general terms and  
3 not as it applies to the present case and that the jury be instructed that the principle  
4 assumes the act in question rather than attempts to explain why such an act occurs and  
5 not as an indicator or scientific proof that the alleged act did in fact occur.

6                   **MUNCHAUSEN BY PROXY SYNDROME OR FACTITIOUS DISORDER BY PROXY**  
7                   **FAILS KELLEY/FRYE AS AN INDICATOR OF PAST ABUSE.**  
8

9                                   **A - RAPE TRAUMA SYNDROME**  
10

11           In **People vs. Bledsoe** (1984) 36 Cal.3d 236, the California  
12 Supreme Court held that evidence that a victim was suffering  
13 from Rape Crisis Trauma Syndrome was not admissible for the  
14 purpose of proving that a rape had occurred. As a final witness  
15 to its case in chief, the prosecution had called a rape  
16 counselor who had treated the victim after the incident and who  
17 the prosecution indicated would testify that the victim was  
18 suffering from "rape trauma syndrome". The trial court found  
19 the evidence relevant on the issue of whether a rape occurred  
20 and determined that a showing of the victim's continuing  
21 condition and strife was further evidence of the fact that a  
22 rape occurred as opposed to evidence that a rape did not occur.  
23 (**Id.**, 36 Cal.3d 241.) The counselor testified at length that  
24 99.9% of the rape victims fall into the "rape trauma syndrome",  
25 and to its various aspects. Ultimately she expressed an opinion

1 based on her experience and past training in interviews and her  
2 contact with the victim, that the victim was suffering from rape  
3 trauma syndrome. (**Id.**, 36 Cal.3d 243-244.)

4 The Court stated:

5 "...rape trauma syndrome was not devised to determine  
6 the truth or accuracy of a particular past event--that  
7 is, whether in fact, a rape in the legal sense  
8 occurred-but rather was developed by professional rape  
9 counselors as a therapeutic tool to help identify,  
10 predict and treat emotional problems experienced by  
11 the counselors clients." (**Id.**, 36 Cal.3d 248 to 250,  
12 emphasis added.)

13  
14 The court went on to note that rape trauma counselors, by  
15 their training, are particularly required not to judge the  
16 credibility of their clients and not to pass judgment. Thus,  
17 "as a rule, rape counselors do not probe inconsistencies in  
18 their client's descriptions of the facts of the incident, nor do  
19 they conduct independent investigations to determine whether  
20 other evidence corroborates or contradicts their clients  
21 renditions." (**Id.**, 36 Cal.3d 250.)

22  
23 The court squarely held that expert testimony that a  
24 complaining witness suffers from rape trauma syndrome is not  
25 admissible to prove the witness was raped "[b]ecause the

1 literature does not even purport to claim that the syndrome is a  
2 scientifically reliable means of proving that a rape occurred."  
3 (*Id.*, 36 Cal.3d 251.)

4 **B - CHILD MOLEST SYNDROME**

5 In *In re Sara M.* (1987) 194 Cal.App.3d 585, the Court of  
6 Appeal held that evidence that a victim was suffering from Child  
7 Molest Syndrome was not admissible for the purpose of proving  
8 that a child molest had occurred.

9 The trial court allowed two expert witnesses to testify to  
10 the "Child Molest Syndrome" but did not allow the experts to  
11 testify to his opinion that a molest had in fact occurred.

12 According to one psychologist who had treated Sara M., the  
13 common characteristics of child molest victims included:

14 1. Consistency in recounting the molestation to different  
15 people;

16 2. Denial the molestation occurred;

17 3. Sexual knowledge beyond that usually associated with  
18 the victim's age;

19 4. The ability to recall the molestation over an extended  
20 period of time;

21 5. A feeling of loss of control over their life. (*Id.*, at  
22 p. 589.) Another psychologist who treated Sara elaborated on  
23 the symptoms of child molest syndrome:

24 6. They often are angry or depressed;

- 1           7. They often exhibit a variety of behavioral problems;
- 2           8. They suffer from sleep disturbances or eating
- 3 disorders;
- 4           9. They show a false sense of maturity;
- 5           10. They may trust too much or too little;
- 6           11. They are fearful of the purported molester;
- 7           12. They consistently name one person as the molester,
- 8 and;
- 9           13. Details of the incident may be revealed only over
- 10 time. (*Id.*, at p. 589.)
- 11
- 12

13           **In re Sara M.**, supra, the court held that the Child Molest

14 Syndrome's primary purpose at trial in that case was as evidence

15 that the molest did in fact take place and its admission was

16 therefore reversible error. (*Id.*, at p. 592, 595.)

17

18 Why Syndromes and Predictors are Inadmissible:

19

20           The fatal defect in the Child Molest Syndrome was the same

21 defect in the Rape Trauma Syndrome: child molestation was

22 presumed!

23

24           "Psychologists testified the syndrome is neither

25 included in the DSM nor recognized by the American

Psychological Association or any other professional

1 organization. They described the syndrome as being in  
2 the beginning stages of development and acceptance.  
3 No treatises on the syndrome were introduced into  
4 evidence. The psychologists further testified they  
5 did not know how the symptoms of the syndrome were  
6 developed; they knew of no studies comparing the  
7 reactions of children known to be molested with those  
8 who claimed to be molested or with those who were not  
9 molested. A basic defect of the syndrome is thus  
10 apparent: the syndrome was developed on the assumption  
11 the children studied were in fact molested. Moreover,  
12 while no one at the hearing testified directly  
13 concerning the reason for the syndrome's development,  
14 it appears to be a tool for therapy and treatment,  
15 much like the rape trauma syndrome. Consequently, the  
16 same problem discussed in Bledsoe may be present in  
17 the case of the child molest syndrome: if it was not  
18 developed as a truth-seeking procedure but rather as a  
19 therapeutic aid, it cannot be used for a different  
20 purpose, i.e., to prove a molestation occurred." **In re**  
21 **Sara M.** (1987) 194 Cal.App.3d 585, 594, 239 Cal.Rptr.  
22 605-611.

23  
24 In **People vs. Roscoe** (1985) 168 Cal.App.3d 1093, the  
25 prosecution introduced opinion testimony of the child's

1 therapist that the child was a victim of molest. The  
2 prosecution tried to distinguish the case from **Bledsoe** by  
3 arguing that the therapist never mentioned Child Molest  
4 Syndrome. The court held the impact of his testimony was such  
5 even if he didn't use the term and held the testimony  
6 inadmissible, relying on **Bledsoe**. (*Id.*, at pp. 1098-1100.)

7 See also **People vs. Jeff** (1988) 204 Cal.App.3d 309, holding  
8 testimony concerning the victim's post-molest symptoms  
9 inadmissible to prove a molest has occurred.

10 In **People vs. Stoll** (1989) 49 Cal.3d 1136, the Supreme  
11 Court reaffirmed its holding in **Bledsoe** but clarified the  
12 rationale. The court held that the issue of whether or not  
13 Kelly/Frye applied to evidence of Rape Trauma Syndrome had never  
14 been raised in **Bledsoe**. It went on to conclude the rationale of  
15 **Bledsoe** was not based on Kelly/Frye and should not have been  
16 based on Kelly/Frye. The court stated:

17 "On appeal, the parties debated whether the evidence  
18 satisfied the Kelly-Frye test, with no one disputing  
19 that such test was the appropriate standard. (See *id.*  
20 at pp. 245-247 & fn. 7, 203 Cal.Rptr. 450, 681 P.2d  
21 291.)

22  
23  
24 In **Bledsoe**, we first noted that other evidence at  
25 trial had established that the victim promptly

1 reported the attack, immediately displayed emotional  
2 upset, and bore bruises and other signs of injury. We  
3 therefore inferred that the expert's testimony was not  
4 offered for the limited purpose of explaining any  
5 post-rape conduct (e.g., delayed reporting) which a  
6 lay jury might otherwise view as inconsistent with a  
7 forcible rape claim. Under our view of the facts,  
8 expert testimony describing the syndrome and applying  
9 it to this victim was used to prove that 'a rape in  
10 the legal sense had, in fact, occurred.' (36 Cal.3d at  
11 p. 248, 203 Cal.Rptr. 450, 681 P.2d 291, italics  
12 added.)

13  
14 Bledsoe understandably concluded that the counselor's  
15 testimony was erroneously admitted for this purpose.  
16 A careful reading of Bledsoe reveals that our primary  
17 concern was the logical irrelevance of the evidence:  
18 (1) the 'syndrome' was designed solely as a  
19 nonjudgmental means by which to 'identify, predict and  
20 treat' the victim's emotional problems; (2) since  
21 counselors rarely question the victim's factual  
22 account, the syndrome is an inappropriate means of  
23 deciding the intricate legal issue of consent (i.e.,  
24 whether the defendant reasonably, and in good faith  
25 believed that the victim consented despite her good



1 faith belief that she did not); (3) the syndrome is  
2 characterized by a `broad range of emotional trauma'  
3 not limited to victims of rape; and (4) a counselor's  
4 assessment of the victim's feelings is not necessarily  
5 an accurate measure of whether a third party, namely  
6 the defendant, acted in legally culpable manner. (36  
7 Cal.3d at pp. 249-250, & fn. 12, 203 Cal.Rptr. 450,  
8 681 P.2d 291.)

9  
10 Bledsoe acknowledged a handful of out-of-state cases  
11 applying the Frye test to evidence of `rape trauma  
12 syndrome' on grounds that juries might view this  
13 therapeutic diagnosis as `scientific' proof a rape had  
14 occurred. (See 36 Cal.3d at p. 248, 203 Cal.Rptr.  
15 450, 681 P.2d 291.) However, Bledsoe did not hold  
16 that the Kelly-Frye test applied to the expert opinion  
17 in that case, nor did we discuss the test's  
18 relationship to `syndrome' or other expert  
19 psychological evidence in general. Assuming, like the  
20 parties, that the test did apply, we simply concluded  
21 that the prosecution would not be able to prove that  
22 rape trauma syndrome was generally accepted by the  
23 counseling community to prove criminal guilt." (**Id.**,  
24 at pp. 1160-1161.)

1 It should be noted that the Child Sexual Abuse  
2 Accommodation Syndrome, articulated by Dr. Roland Summit, was  
3 not accepted by the Revision Committee of the DSM III-R as it  
4 was without scientific basis. See, Issues in Child Abuse  
5 Accusations, Vol. 3, No. 1, Winter 1991.

6 **C - EXPERT TESTIMONY THAT A CHILD IS A VICTIM**  
7 **OF CHILD MOLEST, BASED UPON OBSERVATIONS**  
8 **WITH ANATOMICAL DOLLS, IS INADMISSIBLE.**  
9

10 In the case of **In re Amber B.** (1987) 191 CA3d 682, 236  
11 Cal.Rptr. 623, the court held that the Kelly-Frye test applied  
12 to the psychological technique of detecting child sexual abuse  
13 by observing the child's behavior with anatomically correct  
14 dolls and analyzing the child's report of abuse. The court  
15 ruled that such a technique failed the Kelly-Frye test of  
16 reliability and its wrongful admission into evidence compelled  
17 reversal:  
18

19 "We conclude that the practice of detecting child  
20 sexual abuse by (1) observing a child's behavior with  
21 anatomically correct dolls, and (2) analyzing the  
22 child's reports of abuse, is what Shirley  
23 characterizes as 'a new scientific process operating  
24 on purely psychological evidence' (31 Cal.3d at p. 53,  
25 181 Cal.Rptr. 243, 723 P.2d 1354) and is subject to  
the Kelly-Frye test. The specific causes of age-

1 inappropriate child sexual behavior, and indeed the  
2 entire field of child sexuality since the theories of  
3 Sigmund Freud, are beyond the scope of critical  
4 analysis by the average lay person. Thus a  
5 psychologist's examination and analysis employed the  
6 technique used by Dr. Raming may be surrounded by an  
7 'aura of infallibility', and a trier of fact would  
8 tend to ascribe 'an ordinally high degree of  
9 certainty' to the technique. (**People vs. McDonald**,  
10 supra, 37 Cal.3d at p. 372, 208 Cal.Rptr. 236, 690  
11 P.2d 709.) Unlike with expert testimony where a  
12 witness gives a personal opinion, triers of fact are  
13 in no position to temper their acceptance of the  
14 psychological evidence 'with a healthy skepticism born  
15 on their knowledge that all human beings are  
16 fallible.' (Ibid.)

17  
18 The trial court therefore erred when it failed to  
19 require a showing of general acceptance in the  
20 relevant scientific community in accordance with  
21 Kelly-Frye." (Id., at p. 692.)

22  
23 (See also **United States vs. Gillespie** (9<sup>th</sup> Cir. 1988) 852 F.2d  
24 475,

1 481 [adopting the reasoning of **Amber B.**, supra, and finding  
2  
3 reversible error in the wrongful admission of expert opinion  
4  
5 testimony based on play therapy with anatomically correct  
6 dolls];

7 **In re Christine C.** (1987) 191 Cal.App.3d 676, 680, 236 Cal.Rptr.  
8 630 [error in allowing expert testimony regarding minor's  
9 behavior with anatomically correct dolls.]

10       In **In re Christie D.** (1988) 206 CA3d 469, 253 Cal.Rptr.  
11 619, the court held evidence of an alleged child victim's  
12 behavior with anatomical dolls without the use of expert opinion  
13 equally inadmissible because the effect was to make the trier of  
14 fact the expert on an unproven technique. In other words, the  
15 deletion of the expert's opinion does not cure the problem noted  
16 in **In re Amber B** (1987) 191 CA3d 682, 236 Cal.Rptr. 623 and **In**  
17 **re Christine C.** (1987) 191 CA3d 676, 236 Cal.Rptr. 630.

18       The use of anatomical dolls as an indicator of abuse is  
19 without scientific merit. Anatomical dolls are likely to elicit  
20 sexual reenactment in older children even if they have not been  
21 abused. (Everson, M. & Boat, B. (1990), "Sexual doll play among  
22 young children: Implication for the use of anatomical dolls in  
23 sexual abuse allegations," Journal of American Academy of Child  
24 and Adolescent Psychiatry, 29, 736-742.)  
25

1           Within the scientific community the use of anatomical dolls  
2 is questioned because they are sensitive but lack specificity of  
3 the information obtained. Specificity is the ability to  
4 identify persons who do not become abusive, so called true  
5 negatives. Sensitivity is the ability of the information to  
6 identify people who actually become abusive, so called true  
7 positive. (Schneider, C., Helfer, R., & Hoffmeister, J. (1980)  
8 Screening for the potential to abuse: a review. In C. Kempe &  
9 R. Helfer (Eds.), The Battered Child, 3d Ed. (pp.420-430).  
10 Chicago: University of Chicago Press.

11  
12           **MUNCHAUSEN BY PROXY SYNDROME OR FACTITIOUS DISORDER BY PROXY**  
13           **IS INADMISSIBLE CHARACTER EVIDENCE.**

14  
15           Evidence Code Section 1101 precludes evidence of character  
16 to prove conduct:

17           "Except as provided in this section and in sections  
18 1102 and 1103, evidence of a person's character or a  
19 trait of his character (whether in the form of an  
20 opinion, evidence of reputation, or evidence of  
21 specific instances of his or her conduct) is  
22 inadmissible when offered to prove his or her conduct  
23 on a specified occasion."

24  
25           Evidence Code Section 1102 provides:

1 "In a criminal action, evidence of the defendant's  
2 character or a trait of his character in the form of  
3 an opinion or evidence of his reputation is not made  
4 inadmissible by section 1101 if such evidence is:

5 (a) Offered by the defendant to prove his conduct  
6 in conformity with such character or trait of  
7 character.

8 (b) Offered by the prosecution to rebut evidence  
9 addressed by the defendant under subdivision (a).

10  
11  
12 **PROFILES AND COMMON CHARACTERISTICS OF**  
13 **CHILD MOLESTERS ARE CHARACTER EVIDENCE.**  
14

15 In the case of **U.S. vs. Gillespie** (9th Cir. 1988) 852 F2d  
16 475, the court found evidence of characteristics common to child  
17 molesters to be inadmissible character evidence. It further  
18 held that introduction of the defendant's general background  
19 does not put his character into evidence:

20 "The government called Dr. Maloney allegedly to rebut  
21 what it termed the appellant's testimony he could not  
22 have molested the child. Dr. Maloney testified that  
23 the characteristics of a molester include an early  
24 disruption of the family environment, often with one  
25 parent missing: a relationship with the parent of the

1 opposite sex who is dominant; unsuccessful  
2 relationships with women; a poor self-concept; and  
3 general instability in the background.  
4

5 The trial court's admission of the testimony was an  
6 abuse of discretion. Neither the appellant, his  
7 witnesses, nor his lawyer put his general character at  
8 issue or testified he had any specific character  
9 traits that rendered him incapable of molesting a  
10 female child. The appellant's testimony as to his  
11 childhood was general background information, which  
12 did not put his character at issue. See *McLister*, 608  
13 F.2d at 789.  
14

15 We have stated in dictum that testimony of criminal  
16 profiles is highly undesirable as substantive evidence  
17 because it is of low probativity and inherently  
18 prejudicial. See *Hernandez*, 717 F.2d at 554-55  
19 (testimony of the profile of a drug courier ordinarily  
20 inadmissible as substantive evidence of guilt). The  
21 jury's perception of the appellant's character and  
22 credibility are crucial to the outcome of this case;  
23 therefore, admission of Dr. Maloney's testimony was  
24 not harmless error." (*Id.*, at pp. 479-480.)  
25

1 The California Supreme Court has also ruled that evidence  
2 of sexual deviancy or non-sexual deviancy is character evidence.  
3 In the case of **People vs. Stoll** (1989) 49 C3d 1136, 265  
4 Cal.Rptr. 111,, the court held admissible as character evidence  
5 psychiatric testimony of defendant's absence of sexual deviancy.

6 "We decide whether a criminal defendant charged with  
7 committing lewd and lascivious acts upon a child may  
8 introduce a psychologist's opinion testimony, based  
9 upon an interview and professional interpretation of  
10 standardized written personality tests, that defendant  
11 displays no signs of `deviance' or `abnormality'.

12 Under existing law and the facts of this case, the  
13 evidence bears on a defense claim that the charged  
14 acts did not occur. Professional testimony regarding  
15 the absence of sexual deviance also is authorized  
16 under statutory rules permitting a criminal defendant  
17 to introduce evidence of his `good character'." (**Id.**,  
18 at p. 1140.)

19  
20 "At the outset, defendant's claim that the testimony  
21 is relevant character evidence must be sustained."  
22 (**Id.**, at p. 1152.)

23  
24 The Supreme Court found the admissibility of the character  
25 evidence controlled by Evidence Code Section 1102:



1 "Section 1102 allows an accused to present expert  
2 opinion testimony of this kind to indicate his  
3 nondisposition to commit a charged sex offense. This  
4 section was enacted in 1965, after People vs. Jones,  
5 supra, 42 Cal.2d 219, 266 P.2d 38, was decided.  
6 (Stats.1965, ch. 299, Sec. 2, p. 1336.) As the  
7 accompanying Law Revision Commission Comment makes  
8 clear, the statute codified Jones's rule permitting  
9 introduction of defense expert opinion of 'good  
10 character' to show noncommission of charged crimes.  
11 (29B West's Ann.Evid.Code (1966 ed.) pp. 12-13.) The  
12 Legislature thus implicitly endorsed 'lack of  
13 deviance' as a relevant character trait in a lewd and  
14 lascivious conduct case, even though the 'sexual  
15 psychopathy' provisions cited in Jones were overhauled  
16 in the same, as well as prior, years. (See, e.g.,  
17 former Welf. 7 Inst. Code, Sec. 5501, amended by  
18 Stats.1963, ch. 2913, sec. 5, p. 3907, repealed by  
19 Stats.1965, ch. 391, sec. 3, p. 1630, replaced by  
20 Stats. 2965, ch. 391, sec. 5, p. 1643 [mentally  
21 disordered sex offender (MDSO) provisions; later  
22 revised and repealed].)" (**Id.**, at p. 1153.)

23  
24 "We see no reason to depart from this settled  
25 approach. As discussed, criminal defendants are

1 authorized to use character evidence, including expert  
2 opinion, to prove 'conduct in conformity'. (Sec.  
3 1102, italics added.) This principle applies where  
4 lack of deviance is offered as circumstantial evidence  
5 that a defendant is unlikely to have committed charged  
6 acts of molestation." (*Id.*, at p. 1158.)

7  
8 "Expert opinion that defendants show no obvious  
9 psychological or sexual problem is circumstantial  
10 evidence which bears upon whether they committed  
11 sexual acts upon children, and is admissible  
12 'character' evidence on their behalf." (*Id.*, at p.  
13 1161.)

14  
15 In **People vs. Ruiz** (1990) 222 Cal.App.3d 1241, the court  
16 held that based upon **People vs. Stoll**, supra, that profile  
17 evidence of a pedophile may be admissible. However, since the  
18 profile had not been standardized against a population group of  
19 pedophiles it was not admissible. (*Id.*, at pp. 1245-1246.)

20 **THERE IS NO "TYPICAL" CHILD MOLESTER.**

21  
22 In **People vs. McAlphin** (1991) 53 Cal.3d 1289, the Supreme  
23 Court held it was proper to admit expert testimony that, under  
24 the current state of scientific knowledge, there was no profile  
25 of a "typical" child molester, and that such persons are instead  
found in all walks of life. (*Id.*, at pp. 1302-1303.)

1 The admissibility of "profile" evidence was considered in  
2 **People vs. Stoll**, supra:

3 "The Attorney General argues that, under Bledsoe,  
4 supra, 36 Cal.3d 236, 203 Cal.Rptr. 450, 681 P.2d 291,  
5 use of `syndrome' or `profile' terminology by a mental  
6 health professional makes the diagnosis seem  
7 `scientific' to a jury, and thus invokes Kelly/Frye.  
8 We adopted no such per se rule in Bledsoe, despite its  
9 reference to concerns raised in out-of-state cases.  
10 We are not persuaded that juries are incapable of  
11 evaluating properly presented references to  
12 psychological `profiles' and `syndromes'." (**Id.**, at  
13 p. 1161, fn. 22.)

14  
15 **People vs. Harlan** (1990) 222 Cal.App.3d 439, 448-449 quotes  
16 **Stoll** with approval on the subject of allowing profiles although  
17 that case did not contain a profile issue. In **People vs. Ruiz**,  
18 supra, the court found profile evidence can be admissible but  
19 found the particular profile evidence proffered in that case to  
20 be inadmissible because of the defendant's failure to  
21 demonstrate the reliability of the material on which his expert  
22 based his opinion. (222 Cal.App. 3d at pp. 1245-1246.)

23  
24 However, as stated above, **People vs. Stoll**, supra, 49  
25 Cal.3d at p. 1159, held that the psychological evaluations or  
personality evaluations was CHARACTER EVIDENCE! Also see **People**

1 **vs. Ruiz**, supra, wherein the court held that these opinions were  
2 character evidence:

3 "It is now settled that psychological opinions based  
4 upon personal examination and analysis of accepted  
5 psychological tests, such as the MMPI and MCMI, may be  
6 admitted as character evidence...." (**Id.**, at p.  
7 1243.)

8  
9 The defendant's and the victim's character can only be  
10 placed in evidence by the defendant. (Evidence Code sections  
11 1101, 1102, 1103.)

12 **STUDIES ON RELIABILITY OF PROFILES REQUIRED**  
13 **BEFORE ADMISSIBLE AS "PREDICTORS."**

14  
15 In **People vs. Ruiz**, supra, the court held that based upon  
16 **People vs. Stoll**, supra, that profile evidence of a pedophile  
17 may be admissible. However, since the profile had not been  
18 standardized against a population group of pedophile it was not  
19 admissible. The court stated:

20  
21 "Still, it is not enough to determine that certain  
22 material--here, profile evidence--might be admissible.

23 Evidence Code section 801, subdivision (b) requires  
24 that the matter underlying an expert's opinion be of  
25 `a type that reasonably may be relied upon by an  
expert in forming an opinion upon the subject to which

1 his testimony relates.' Thus there must be some  
2 showing that the material on which the expert bases  
3 his or her opinion--here the profiles of the primary  
4 types of pedophile--is reliable.

5  
6 As discussed, supra, there was no such showing in the  
7 present case. There was no evidence that the  
8 scientific community had developed any standard  
9 profile of a pedophile. Indeed, Dr. Berg explained  
10 that the tests he used were not designed to elicit  
11 that information and had not been standardized against  
12 a population group of pedophile. Dr. Berg said that  
13 the disorder usually manifests itself in persons who  
14 have become fixated on children or on persons who have  
15 experienced some recent stress, but there was no  
16 showing that Dr. Berg was stating anything other than  
17 his personal opinion, nor was there any showing that  
18 his personal opinion in such matters was reliable.

19  
20 We conclude that in this case, at least, the evidence  
21 properly was excluded." (*Id.*, at pp. 1245-1246.)  
22

23 An Expert's Personal Opinion About a Defendant is Inadmissible:

24 Other cases hold that it is error for an expert to express  
25 a

1 personal expert opinion that the defendant is what he is accused  
2 of being. In **People vs. McDonald** (1984) 37 Cal.3d 351, 208  
3 Cal.Rptr. 236, the court ruled that the expert should have been  
4 permitted to testify about psychological factors affecting the  
5 reliability of eyewitness identification. It did not hold that  
6 the expert could give an opinion on the reliability of  
7 particular eyewitness testimony. (Also see **People vs. Page**  
8 (1991) 2 Cal.App.4th 161.) In **People vs. Brown** (1981) 116  
9 Cal.App.3d 820, 172 Cal.Rptr. 221, the court found error where a  
10 police officer testified as to the definition of a heroin  
11 "runner" and then went further to render an opinion that the  
12 defendant in the case was in fact a runner. The court held that  
13 the jury was qualified as the witness to determine whether the  
14 defendant worked as a runner. Finally, in **In re Cheryl H.**  
15 (1984) 153 Cal.App.3d 1098, 1118-1125, the court held that the  
16 opinion of a psychiatrist who had examined a suspected victim of  
17 sexual molest as to the identity of the defendant as the abuser  
18 was inadmissible  
19

20 **MUNCHAUSEN BY PROXY SYNDROME OR FACTITIOUS DISORDER BY PROXY**  
21 **IS INADMISSIBLE CHARACTER EVIDENCE ON THE ISSUE OF MOTIVE.**  
22

23 **PEOPLE v. PHILLIPS DISTINGUISHED**

24 **Add in appropriate argument**

25 **PEOPLE v. BLEDSOE DISTINGUISHED**

1                   **Add in appropriate argument**

2   **IN THE ALTERNATIVE, IF THE COURT HOLDS THAT PEOPLE v.**  
3   **BLEDSON IS CONTROLLING THE PROSECUTION IS LIMITED TO GENERIC**  
4   **TESTIMONY.**

5  
6           In **People vs. Roscoe** (1985) 168 Cal.App.3d 1093, the court  
7 established rules on the use of experts to rehabilitate alleged  
8 victims:

9           "The Bledson court would permit the expert to tell the  
10 jury about 'recent findings of professional research  
11 on the subject of a victim's reaction to sexual  
12 assault' to rehabilitate the complaining witness.

13           (**People vs. Bledson**, supra, 36 Cal.3d at p. 247, 203  
14 Cal.Rptr. 450, 681 P.2d 291.) The language suggests-  
15 although it does not explicitly require-that the  
16 opinion testimony must be based upon the literature in  
17 the field and the general professional experience of  
18 the witness rather than upon an analysis and diagnosis  
19 based upon a review and evaluation of the facts in the  
20 case at hand. Thus, for example, a victim whose  
21 credibility is attacked for initially denying that he  
22 had been molested could be rehabilitated by expert  
23 testimony that such denials are more likely than not  
24 in molestation cases. The testimony would not be that  
25 this particular child was a victim of molestation,

1 causing him to react in a certain way, but rather that  
2 as a class victims of molestation typically make poor  
3 witnesses, and are reluctant to disclose or discuss  
4 the sordid episodes.

5  
6 Since the language used by the court does not clearly  
7 proscribe testimony in support of credibility based  
8 upon a diagnosis of the victim, we must consider  
9 Bledsoe further.

10  
11 Credibility questions arise whenever the defendant  
12 denies the victim's story, explicitly or implicitly  
13 suggesting misrecollection or fabrication. If, in  
14 every such case, the jury could be informed that a  
15 doctor had diagnosed the complainant, based upon the  
16 specific facts in the case, as a child molest victim  
17 (or rape victim, or whatever), then the protection  
18 against misuse of psychologists' testimony erected by  
19 Bledsoe would be largely dismantled.

20  
21 Where the expert refers to specific events, people and  
22 personalities and bases his opinion as to credibility  
23 on his diagnosis of this witness, then the conclusion  
24 that the witness is credible rests upon the premise  
25 that the diagnosis is accurate, and that in fact



1 molestation had occurred. The jury in effect is being  
2 asked to believe the diagnosis, to agree that the  
3 doctor's analysis is correct and that the defendant is  
4 guilty. Such a result would subvert the sound rule  
5 adopted by a unanimous Supreme Court in Bledsoe. It  
6 follows, therefore, that the expert testimony  
7 authorized by Bledsoe to permit rehabilitation of a  
8 complainant's credibility is limited to discussion of  
9 victims as a class, supported by references to  
10 literature and experience (such as an expert normally  
11 relies upon) and does not extend to discussion and  
12 diagnosis of the witness in the case at hand." (*Id.*,  
13 at p. 1099-1100.)

14  
15 The court also held that the doctor/expert should not be  
16 allowed to discuss the facts of this particular case under  
17 Evidence Code Section 352.

18 "While we believe that this reading of Bledsoe is  
19 proper, we find as an independent ground of decision  
20 that all of the above considerations required the  
21 trial court to exclude this testimony under Evidence  
22 Code Section 352, even though this was not  
23 specifically urged in support of defendant's various  
24 objections. It would be possible for an expert  
25 witness to tell the jury about various studies showing

1 typical responses of victims in molest situations  
2 without relying on a detailed analysis of the facts in  
3 the case at hand. All of the `probative value' that  
4 the prosecution was entitled to could have been  
5 preserved by so limiting the doctor's testimony,  
6 without creating any `substantial danger of undue  
7 prejudice'. (Evid. Code Section 352). The doctor's  
8 discussions of specific facts of this case in support  
9 of his conclusion that the complainant was indeed a  
10 victim of molestation by the defendant had all the  
11 force of a district attorney's closing argument, and  
12 even greater impact since it was delivered in clinical  
13 terms by a `doctor' purporting to make an objective  
14 scientific analysis." (**Id.**, at p. 1100.)

15  
16 The Correct Procedure for Dispelling Myths:

17 In **People vs. Gray** (1986) 187 Cal.App.3d 213, 218, the  
18 court allowed an expert witness to testify regarding the child  
19 abuse accommodation syndrome. It was made clear to the jury  
20 that this was not a diagnosis or a test for child abuse. The  
21 expert did not form any opinions that the child had been  
22 molested. The expert confined his remarks to behavioral traits  
23 of child abuse victims as a class nor did he rely on a detailed  
24 analysis of the facts in the case at hand. The expert's  
25

1 testimony was allowed to explain that late reporting is not  
2 unusual and disclosure of details over time is not unusual.

3 **PEOPLE v. BLEDSOE:**

4 **LIMITING A SUBTERFUGE AROUND BLEDSOE**

5  
6 **USE OF EXPERT TESTIMONY TO DISPEL MYTHS**

7 In the wake of **Bledsoe** reviewing courts have held valid the  
8 use of expert testimony to dispel myths about child molest  
9 victims. However, the testimony is limited to victims as a  
10 class and not a particular alleged victim. **People vs. Roscoe**,  
11 supra, 168 Cal.App.3d at pp. 1098-1100; **People vs. Gray** (1986)  
12 187 Cal.App.3d 213, 218; **People vs. Coleman** (1989) 48 Cal.3d  
13 112, 144; and **People vs. Stark** (1989) 213 Cal.App.3d 107, 116-  
14 117. In addition, testimony not properly limited is excludable  
15 pursuant to Evidence Code section 352. (**Roscoe**, supra, at p.  
16 1100.)  
17

18  
19 **LIMITS ON EVIDENCE TO DISPEL MYTHS**

20 In **People vs. Bowker** (1988) 203 Cal.App.3d 385, 394, 249  
21 Cal. Rptr. 886, 891, the court considered whether or not the  
22 testimony of a child abuse accommodation syndrome expert fell  
23 within the **Bledsoe** exception permitting such testimony for the  
24 narrow purpose "of disabusing the jury of misconceptions as to  
25 how child victims react to abuse." (Id., at p. 392.) The court

1 reaffirmed that "**Bledsoe** must be read to reject the use of CSAAS  
2 evidence as a predictor of child abuse," and found the expert's  
3 testimony had exceeded the **Bledsoe** exception holding that "at a  
4 minimum the evidence must be targeted to a specific 'myth' or  
5 'misconception' suggested by the evidence." (Id., at pp. 393-  
6 394.) The court further held:

7 "In the typical criminal case, however, it is the  
8 People's burden to identify the myth or misconception  
9 the evidence is designed to rebut. Where there is no  
10 danger of jury confusion, there is simply no need for  
11 the expert testimony." (Id., at p. 394.)  
12

13 In determining that the expert's testimony erroneously  
14 exceeded the permissible limits of the **Bledsoe** exception, the  
15 **Bowker** court found that the expert's testimony was tailored to  
16 fit the children in that particular case, asked for sympathy,  
17 asked that children be believed and by describing each aspect of  
18 CSAAS theory provided a scientific framework the jury could use  
19 to predict a molest occurred. The court ruled that this  
20 evidence should have been excluded. (Id., at pp. 394-395.)  
21

22  
23 **JURY INSTRUCTION**  
24  
25

1 When testimony is introduced to dispel a myth the jury must  
2 be instructed not to use that evidence to predict a molest has  
3 been committed.

4 "Beyond the tailoring of the evidence itself, the jury  
5 must be instructed simply and directly that the  
6 expert's testimony is not intended and should not be  
7 used to determine whether the victim's molestation  
8 claims is true. The jurors must understand that CSAAS  
9 research approaches the issue from a perspective  
10 opposite to that of the jury. CSAAS assumes a  
11 molestation has occurred and seeks to describe and  
12 explain common reactions of children to the  
13 experience. (See *In re Sara M.*, supra, 194 Cal.App.3d  
14 at p. 593, 239 Cal.Rptr. 605.) The evidence is  
15 admissible solely for the purpose of showing that the  
16 victim's reactions as demonstrated by the evidence are  
17 not inconsistent with having been molested." (**Bowker**,  
18 supra, at p. 394; **People vs. Housley** (1992) 6  
19 Cal.App.4th 947, 958-959 [such instruction required  
20 sua sponte].)  
21  
22  
23  
24  
25

## EVIDENCE CODE §352

1 Evidence Code section 352 requires the trial court to balance any  
2 asserted probative value of a particular piece of evidence against its prejudicial value  
3 and exclude evidence the prejudice of which outweighs its probative value or has a  
4 substantial danger of confusing the issues or misleading the jury. In **People vs. Harris**  
5 (1990) 60 Cal.App.4th 727, the reviewing court restated the meaning of "prejudice"  
6 within the context of Evidence Code section 352:

7 ""The prejudice which [section 352] is  
8 designed to avoid is not the prejudice or  
9 damage to a defense that naturally flows from  
10 flows from relevant, highly probative evidence.'  
11 [Citations.] 'Rather, the statute uses the word  
12 in its etymological sense of "prejudging" a person  
13 or cause on the basis of extraneous factors."  
14 [Citation omitted.]" (**Id.**, at p. 737.)  
15

16 Add in appropriate argument  
17

## 18 CONCLUSIONS

19  
20 Add in appropriate conclusion  
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23  
24  
25