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Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment

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CHILD SEXUAL ABUSE AND STATEMENTS FOR THE PURPOSE OF MEDICAL DIAGNOSIS OR TREATMENT

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Two distinct rationales ensure the trustworthiness of hearsay evidence admitted under Federal Rule of Evidence 803(4), which excepts statements for the purpose of medical diagnosis or treatment. First, a patient has a selfish interest in providing truthful information in order to obtain treatment. Second, a statement is reliable if a medical expert uses it to form a basis for diagnosis or treatment. Professor Mosteller examines how courts have analyzed and applied rule 803(4) in child sexual abuse cases, and concludes that their confusion of the two rationales has resulted in decisions which are theoretically, as well as constitutionally, infirm. He then offers guidance as to when and how rule 803(4) can be applied to achieve more accurate results.

I. INTRODUCTION

Statements made to a physician for the purpose of receiving medical treatment have long been received under an exception to the rule that excludes hearsay. The theory of the exception in its archetypal form is straightforward: a patient's selfish interest in receiving appropriate treatment guarantees the trustworthiness of the statement. In this archetypal form, the exception is among the most solidly founded within the hearsay rules.

In the last decade, two unrelated developments have undermined the coherence of the exception. First, rule 803(4) of the Federal Rules of Evidence,[1] the modern embodiment of this exception,[2] expanded the range of statements admis-

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1. Federal Rule of Evidence 803(4) states:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
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> . . . .
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> (4) STATEMENTS FOR PURPOSES OF MEDICAL DIAGNOSIS OR TREATMENT. Statements for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

FED. R. EVID. 803(4).

2. The federal rule has provided the model for the definition of this exception in the majority of American jurisdictions. Twenty-five states (Alaska, Arizona, Arkansas, Colorado, Delaware, Hawaii, Iowa, Maine, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Ohio, Oregon, South Dakota, Texas, Utah, Washington, West Virginia, Wisconsin, and Wyoming) and the military courts adopted federal rule 803(4) verbatim or with only a minor stylistic variation. Seven states (Florida, Idaho, Michigan, Oklahoma, New Hampshire,

sible to include statements made for the exclusive purpose of diagnosis when the declarant has no belief that she will receive treatment. Second, the exception has found increased use in an enormously expanding volume of prosecutions for child sexual abuse.[3] In these cases the exception has been applied to statements involving medical and psychological diagnosis or treatment that often include a large quantity of "social" data, encompassing the historical details of the crime and the identity of the perpetrator. Also, the exception has been applied to statements made to a growing range of professionals in medical, psychological, and social work fields.

The exception has not weathered these developments particularly well. While it has served as a useful vehicle for the admission of declarations by victims in child sexual abuse prosecutions, its application has in many instances lost touch with the theories of trustworthiness that underlie the exception. Applications in this highly charged field[4] have tended to expose the thinness of the justification for extending the exception to statements made without any view toward treatment. The result has been to render the exception too broad in some situations. On the other hand, judicial reaction to what some have viewed as excessive expansion has threatened to restrict the exception in situations where a liberal application would be justified.

Rhode Island, and Vermont) and Puerto Rico adopted a modified version of the federal rule language. 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶¶ 803(4)[02], [03] (1987 & 1988 Supp.). Some of the modifications were minor; other states, such as Rhode Island, made major changes by excluding statements made to a physician consulted solely for trial preparation. *Id.* at 254 (1988 Supp.).

3. A growing body of literature has analyzed the application of hearsay exceptions in child abuse and sexual abuse cases. *See, e.g.*, J. MYERS, CHILD WITNESS LAW & PRACTICE (1987); J. SELKIN & P. SCHOUTEN, THE CHILD SEXUAL ABUSE CASE IN THE COURTROOM (1987); R. UNDERWAGER & H. WAKEFIELD, ACCUSATIONS OF CHILD SEXUAL ABUSE (1988); CHILD SEXUAL ABUSE AND THE LAW (J. Bulkley 2d ed. 1982); SEXUAL ABUSE ALLEGATIONS IN CUSTODY AND VISITATION CASES (E. Nicholson & J. Bulkley ed. 1988); Feher, *The Alleged Molestation Victim, The Rules of Evidence, and the Constitution: Should Children Really Be Seen and Not Heard?*, 14 AM. J. CRIM. L. 227 (1988); Graham, *Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions*, 40 U. MIAMI L. REV. 19 (1985) [hereinafter Graham, *Indicia of Reliability*]; Graham, *The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse: The State of the Relationship*, 72 MINN. L. REV. 523 (1988) [hereinafter Graham]; McCord, *Expert Psychological Testimony about Child Complainants in Sexual Abuse Prosecutions: A Foray into the Admissibility of Novel Psychological Evidence*, 77 J. CRIM. L. & CRIMINOLOGY 1 (1986); Myers, *Hearsay Statements by the Child Abuse Victim*, 38 BAYLOR L. REV. 775 (1986); Comment, *Evidentiary Problems in Criminal Child Abuse Prosecutions*, 63 GEO. L.J. 257 (1974); Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 COLUM. L. REV. 1745 (1983); Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806 (1985).

4. The courts are often very candid in their result orientation. In Goldade v. State, 674 P.2d 721 (Wyo. 1983), *cert. denied*, 467 U.S. 1253 (1984), the court admitted hearsay statements against the defendant in a child abuse prosecution. In doing so, it acknowledged,

> If the goal of our court were simply to pursue the common-law tradition of *stare decisis*, then the cited authorities must be recognized as supporting the position of the appellant [to exclude the statement]. In this instance, however, the function of the court must be to pursue the transcendent goal of addressing the most pernicious social ailment which afflicts our society, family abuse, and more specifically, child abuse.

Id. at 725. *See also* Note, *Evidence—Hearsay—Child Abuse and Neglect—A Child's Statements Naming an Abuser Are Admissible Under the Medical Diagnosis or Treatment Exception to the Hearsay Rule*—Goldade v. State, *674 P.2d 721 (Wyo. 1983)*, 53 U. CIN. L. REV. 1155 (1984) (applauding the court's use of this hearsay exception to help meet the social problem of child abuse).

The hearsay exception under federal rule 803(4) is based on two distinct rationales: the traditional theory, noted above, which this Article will term the selfish treatment interest,[5] and a new theory, which admits statements that a medical expert uses to form a basis for diagnosis or treatment. These two different rationales should logically produce an exception with different dimensions. However, most courts have made the fundamental mistake of treating the exception as if it covered hearsay statements within its bounds uniformly, regardless of which of the two underlying rationales supports admission. As a consequence, courts have made several types of errors. Some courts have included within the exception statements made for the exclusive purpose of diagnosis, without any anticipated treatment, just as freely as statements made for treatment purposes. Another group of courts has suggested that, before a statement may be received under the exception, both of the exception's rationales must be satisfied. Finally, courts have failed to recognize that the confrontation clause prohibits application of an expanded rule 803(4) in some criminal cases.

Part II of the Article develops the two theories of trustworthiness contained within rule 803(4) and explores their implications for a number of issues that arise in applying the exception in child sexual abuse cases. In Part III, the Article examines the tortured analysis that has resulted from the failure of courts to appreciate the significance of the separate rationales undergirding the exception. Part IV develops the restrictions that the confrontation clause should impose on the introduction of statements under rule 803(4) in criminal cases in which the declarant does not testify. Finally, in Part V, the Article proposes an analysis that explicitly recognizes the differences in theories underlying the rule and permits broader admissibility in civil cases and those criminal cases where the confrontation clause is not applicable. In such cases, statements that are admitted exclusively because they form a basis of the medical expert's opinion would generally be admissible, but even here the analysis would exclude some statements concerning psychological and social information. Several factors would be relevant to admissibility: the subject of the opinion to be rendered and whether the opinion itself is admissible, the expertise of the expert receiving the statement, the possible relationship to treatment, and the circumstances under which the statement was made.

II. The Basic Rationale Of The Hearsay Exception For Statements Made For The Purpose Of Medical Diagnosis Or Treatment

The hearsay exception for statements made to a medical doctor for the purpose of treatment has a long history under the common law.[6] As with most

5. The term selfish *treatment* interest is used because the declarant may also have a selfish interest that would discourage him or her from giving accurate statements of physical or mental condition. In that situation, the declarant's selfish interest undermines, rather than supports, the trustworthiness of the statement. For example, when speaking to a medical expert engaged in preparing trial testimony, the declarant's interest may be in providing exaggerated or entirely false information about the seriousness of the condition so as to enhance the size of the recovery at trial.

6. Statements of presently existing bodily condition were universally received as a hearsay

hearsay exceptions, admission of the class of statements is based on a combination of two elements—trustworthiness and necessity.[7] Trustworthiness is the more important factor for statements under this exception.[8] Such trustworthiness traditionally is based on the presumed interest of the declarant in making truthful and accurate statements to her doctor to facilitate appropriate treatment.[9]

The Federal Rules of Evidence worked a number of changes in the scope and application of the traditional hearsay exception for a patient's statement to her doctor. Two changes are of particular note. First, the rule admits statements made to a doctor consulted *only* for the purpose of diagnosis, when no treatment is anticipated by the declarant. The archetypal statement involved here is one made to a physician who is consulted for the purpose of the doctor giving expert testimony at trial. Second, the rule admits statements of general causation of the condition or injury.[10]

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exception. Statements relating medical history were received in some jurisdictions. *See* MCCORMICK ON EVIDENCE § 292 (E. Cleary 3d ed. 1984). *See also* 6 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1719 (Chadbourn rev. 1976) (statements to a physician may be admissible even though similar statements to a layperson may not be).

7. *See generally* Dallas County v. Commercial Union Assurance Co., 286 F.2d 388, 396-97 (5th Cir. 1961) (classical discussion of general requirements for admission of hearsay evidence); 5 J. WIGMORE, *supra* note 6, § 1420 (relating the general purpose of the rule excluding hearsay to the keys to the exceptions—circumstantial probability of trustworthiness and necessity). Necessity in some situations is used almost literally, as where the declarant is unavailable because of death (dying declarations). In other situations, the term is used to mean that evidence of equal value is not presently available (excited utterances). Finally, in some situations, convenience would be a more appropriate term than necessity (business records). *Id.* § 1421.

The "mix" of trustworthiness and necessity is not consistent among exceptions. In some exceptions, only one of the two factors is particularly strong; in others, one may be almost entirely lacking. *Id.* § 1423.

8. "Necessity" is present in some statements—those concerning an existing condition, particularly those involving subjective symptoms, where the statements of the "patient" are the only practical available information. *See* 4 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 443, at 594 & n.75 (1980); 4 J. WEINSTEIN & M. BERGER, *supra* note 2, ¶ 803(4)[01], at 144 & n.9. However, for such statements, the instant exception is unnecessary. The exception for statements of then-existing physical or mental condition, embodied in rule 803(3), would be applicable regardless of who was the auditor of the statement. *See generally* MCCORMICK ON EVIDENCE, *supra* note 6, § 291 (generally courts have not required statements of bodily feeling to be made to a physician to qualify as an exception).

9. Hearsay is excluded because uncross-examined out-of-court statements are seen as raising four testimonial infirmities: errors in narration (sometimes referred to as ambiguity), faulty perception, erroneous memory, and insincerity. Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 958 (1974). Theoretically, statements are received under a hearsay exception when some or all of these infirmities are minimized or eliminated. *Id.* at 964-65. In making the determination concerning admissibility, courts and commentators focus the inquiry upon necessity, *see supra* note 7, and trustworthiness, examining trustworthiness in terms of how the potential exception meets the four testimonial infirmities. *See, e.g.*, 4 D. LOUISELL & C. MUELLER, *supra* note 8, § 444, at 593-94.

Under the present exception, since the declarant is generally describing her own symptoms, the hearsay dangers of misperception and erroneous memory are minimal, and because of the perceived importance of treatment and the resulting care of the declarant in reciting accurately her condition, the danger of faulty narration is diminished. *Id.* However, the reduction of the insincerity danger appears to be the chief justification for this hearsay exception.

10. The exception as defined by the federal rule also allows admission of statements from the patient of past symptoms and medical history, which were excluded from the exception under the common law in many jurisdictions. 4 J. WEINSTEIN & M. BERGER, *supra* note 2, ¶ 803(4)[01], at

A. *Rationale for Statements for the Purpose of Diagnosis Only*

When the exception is applied to child sexual abuse cases, the most important of the changes in its scope is the expansion of the exception to cover statements made to nontreating doctors. The rationale for this change was rather poorly developed, however, and the official commentary provided little assistance in understanding the full implications.

The Advisory Committee Note states that "[c]onventional doctrine" excluded statements made to a physician solely for diagnostic purposes from the hearsay exception because they were not within its guarantee of truthfulness—"the patient's strong motivation to be truthful."[11] The Note, however, also observes that, even if the statements were not admitted under the exception to the hearsay rule, the expert was typically permitted to recite the statements if they formed a basis of his opinion. The Committee justified the expansion to eliminate this needless formalism:

> The distinction thus called for was one most unlikely to be made by the juries. The rule accordingly rejects the limitation. This position is consistent with the provision of Rule 703 that the facts on which expert testimony is based need not be admissible in evidence if of a kind ordinarily relied upon by experts in the field.[12]

The rationale for expansion of the traditional scope of this hearsay exception is thus straightforward, but it is quite limited. The statement made by the declarant to the doctor for purposes of diagnosis would be heard by the jury when the doctor described the basis of his opinion regardless of whether it was received as a hearsay exception. Because the jury was unlikely to be able, or perhaps willing, to limit its consideration of the statement, the Committee reasoned that the statement should be received for its truth. However, as the above quotation indicates, the expansion is justified by the analogy to the treatment of

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143; *see* United States v. Iron Shell, 633 F.2d 77, 83 & n.8 (8th Cir. 1980) (discussing the changes from common law made by the rule), *cert. denied*, 450 U.S. 1001 (1981).

Under the common law, when statements were made to doctors consulted solely for the purpose of diagnosis and typically in the anticipation of offering trial testimony, an array of restrictions had developed. These restrictions arose from the belief that the declarant had in such instances a selfish interest not in conveying accurately and honestly her symptoms but in exaggerating them. *See* Comment, *Hearsay Under the Proposed Federal Rule: A Discretionary Approach*, 15 WAYNE L. REV. 1077, 1134 (1969) ("[T]he declarant has every motive not to speak truthfully.").

When made for diagnosis only, some courts refused to admit even statements of present pain or symptoms for their truth despite the fact that such statements would have been received if made to a lay witnesses. Others rejected altogether statements of medical history or received them for the limited purpose of explaining the expert's opinion. Finally, some courts refused to receive statements of subjective, as opposed to objective, symptoms even as the basis of an expert opinion. MCCORMICK ON EVIDENCE, *supra* note 6, § 293. Apparently, the federal rule had the effect of eliminating all these subsidiary distinctions as well.

However, as discussed below, one may properly question whether statements concerning a past event relating exclusively to possible psychological injuries should be admissible as a class. *Id.* § 292, at 840 n.8 (validity of hearsay exception to physicians may be questioned regarding statements to psychiatrists because of declarant's condition and breadth of psychiatric interview). *Cf.* 4 J. WEINSTEIN & M. BERGER, *supra* note 2, ¶ 803(4)[01], at 147 (suggesting that a court might find statements made only for the purpose of diagnosis insufficient to sustain a verdict when the declarant is available but fails to testify).

11. FED. R. EVID. 803(4) advisory committee's note.

12. *Id.*

statements made to experts under rule 703—where the statements are not received for their truth as they are when received under a hearsay exception.[13] One, therefore, immediately is either presented with an apparently irrational inconsistency or is faced with the task of developing a set of principles to limit and rationalize this aspect of the exception.

While the distinction between admitting a statement under a hearsay exception and receiving it for a limited purpose to support the expert's opinion may be lost on juries, the distinction does have substantive significance.[14] The importance of receiving the statement for its truth under a hearsay exception is illustrated in the situations where the opinion of the expert is not admissible in the case and where the statement made to the expert is the only evidence offered on a critical point. If the statement is received substantively under a hearsay exception, then it would be received in each of the above situations and could be used by the jury as proof of a critical fact. As will be discussed below, both of these fact patterns are realistic; indeed, both have occurred in recent cases.[15]

Given potentially significant consequences, a coherent justification should exist for treating statements to medical experts under rule 803(4) as a hearsay exception and giving them substantive effect, when, on the other hand, statements to all other experts are received under rule 703 only to support the expert's opinion if one is elicited in trial testimony. However, the Advisory Committee Note provides no affirmative explanation for why these statements to medical experts should be substantively received.[16] One must therefore search for justifying principles.

Weinstein and Berger in their treatise suggest generally that "the particular facts relied on will be trustworthy because the integrity and specialized skill of

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13. M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 703.1, at 629 & nn.19 & 20 (2d ed. 1986).

14. In Cassidy v. State, 74 Md. App. 1, 536 A.2d 666, *cert. denied*, 312 Md. 602, 541 A.2d 965 (1988), the court was harshly critical of the logic of the expansion of the hearsay exception to statements for the purpose of medical diagnosis alone. It identified the critical error as the abandonment of any examination of the declarant's subjective state of mind and an exclusive examination of the objective medical pertinence of the doctor's inquiry. The court argued that

> [F]or the first time in the history of hearsay law, the state of mind of the hearsay declarant is effectively ignored. . . . The mind of the declarant had been the "ever-fixed mark" from which our gaze never wandered. In *United States v. Renville*, 779 F.2d 430 (8th Cir. 1985), we are suddenly and unbelievably reckoning the value of the hearsay not upon the state of mind of the hearsay declarant, but upon the state of mind of the hearsay auditor.

Id. at 45, 536 A.2d at 687.

15. *E.g.*, State v. Jackson, 320 N.C. 452, 462, 358 S.E.2d 679, 684 (1987) (despite the fact that the declarant repudiated statement identifying the defendant as the perpetrator, hearsay statement received); State v. Oliver, 85 N.C. App. 1, 16-17, 354 S.E.2d 527, 536 (statements made to clinical psychologist by child to determine whether child could distinguish fact from fantasy and whether child could have easily been coached into false allegations admitted; opinions by expert on those issues apparently inadmissible under state authority), *disc. rev. denied*, 320 N.C. 174, 358 S.E.2d 64 (1987); State v. Nelson, 138 Wis. 2d 418, 434-35, 406 N.W.2d 385, 392 (Wis. 1987) (statements to psychologist need not be used to form medical opinion).

16. As noted above, see *supra* text accompanying note 12, the only justification is the general futility of limited admissibility of such statements, but such an argument does not explain why statements to medical experts should be treated differently than those to other experts under rule 703 where they are not admitted for their truth.

the expert will keep him from basing his opinion on questionable matter."[17] With regard to medical testimony in particular, they suggest that reliability

> is enhanced by procedural rules, and the hearsay dangers inherent in a rule like 803(4) are consequently diminished. Provisions in Rule 35 of the Rules of Civil Procedure and Rule 16 of the Rules of Criminal Procedure referred to by Congress . . . entitle the parties to obtain copies of their adversaries' medical reports prior to trial, thereby enabling them to prepare for effective cross-examination. In a civil case, the threat of one-sided medical testimony is further obviated by provisions authorizing the court to order a party to submit to a physical or mental examination.[18]

The McCormick treatise provides a related justification: "The general reliance upon 'subjective' facts by the medical profession and the ability of its members to evaluate the accuracy of statements made to them is considered sufficient protection against contrived symptoms."[19]

From the above authorities and on the basis of general principles, one can develop a number of plausible reasons why statements offered to medical experts would be received for their truth, while those made to other experts would not. First, procedural rules governing the discovery of opinions by such experts give a special guarantee of their reliability since such statements will be more thoroughly tested by the adversary process than others. Second, medical experts compose a group of highly skilled and carefully trained professionals. Third, because of the size and the maturity of the medical profession, an established group of experts will be available to both sides in the litigation to test thoroughly any opinion and the reliability of the statements forming its foundation.[20] Finally, arguably medical experts are part of a "harder" and more precise science than many of the fields in which individuals can presently be certified to give expert testimony[21] under the liberal standards of the Federal Rules.[22]

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17. 4 J. WEINSTEIN & M. BERGER, *supra* note 2, ¶ 803(4)[01], at 146.

18. 4 J. WEINSTEIN & M. BERGER, *supra* note 2, ¶ 803(4)[01], at 146-47.

19. MCCORMICK ON EVIDENCE, *supra* note 6, § 293, at 842.

20. An analogous argument has been made with regard to the receipt of new scientific evidence under the general scientific acceptance standard of Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). In United States v. Addison, 498 F.2d 741, 744 (D.C. Cir. 1974), the court argued that the general acceptance test protects both sides "by assuring that a minimal reserve of experts exists who can critically examine the validity of a scientific determination in a particular case. . . . [T]he ability to produce rebuttal experts, equally conversant with the mechanics and methods of a particular technique, may prove to be essential."

21. *See, e.g.*, United States v. Andersson, 813 F.2d 1450, 1458 (9th Cir. 1987) (paid informant entitled to testify as expert witness in drug operations as result of participation in 50 drug sales; drug investigator permitted to testify as expert that defendants engaged in "counter-surveillance" driving techniques associated with cocaine transactions); United States v. Kahn, 787 F.2d 28, 34 (2d. Cir. 1986) (drug agent may give expert testimony concerning mode of dress favored by Pakistani drug dealers); Reineke v. Cobb Co. School Dist., 484 F. Supp. 1252, 1256 (N.D. Ga. 1980) (teacher's affadavit as expert admitted concerning disruption of class in censorship case involving school newspaper).

22. Federal rule 702 only requires that the expert be able to "assist the trier of fact to understand the evidence or to determine a fact in issue." FED. R. EVID. 702. The test is " 'whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute.' " FED. R. EVID. 702 advisory committee's note (quoting Ladd, *Expert*

Each of these explanations has some plausibility, and unless there is in fact no affirmative justification for including statements that form the basis of a medical expert's opinion within this exception, they, or some similar arguments, must provide that rationale.[23]

B. *Statements of Causation, Fault, and Identity*

Federal Rule of Evidence 803(4) expanded the hearsay exception for statements given for medical diagnosis or treatment in a second major way. It generally admits statements of causation and fault, and, as this exception has been applied in child sexual abuse cases, identity of the perpetrator. This expansion of the scope of the exception raises major issues regardless of which of the two trustworthiness rationales is employed.

Under rule 803(4) statements concerning "the cause or external source" of a medical condition are admissible.[24] While the language of the rule itself includes statements of causation, the Advisory Committee Note indicates that statements concerning fault would generally fall outside the scope of the rule.[25] With regard to the admission of statements of causation and the exclusion of fault, the key analytical feature is the pertinency of each type of statement to diagnosis or treatment.[26] Rule 803(4) requires that all statements admitted

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Testimony, 5 VAND. L. REV. 414, 418 (1952)). As a result, the rule requires relatively little expertise, because in jury cases the expert need be only marginally more qualified to evaluate a set of facts by virtue of some specialized training or experience than the lay jury in order to provide some assistance as required by the rule. *See generally* 3 D. LOUISELL & C. MUELLER, *supra* note 8, § 382 (1979) (surveying cases admitting testimony of experts who assist the jury only minimally).

23. Alternatively one may conclude that no distinction between medical experts and those in other fields was presumed at all by the drafters of rule 803(4). Instead the assumption may have been that in most cases some element of selfish treatment interest will exist, although it may not be sufficiently separate to justify the hearsay exception. Given the generally insignificant difference between receiving the statement for its truth and for the limited purpose of supporting an opinion, the Committee may have concluded that drawing careful distinctions was not worth the judicial time and energy necessary. Whether or not intended by the drafters, the practical argument set out above has appeal in many situations. However, it seems insufficient to sustain application of the exception if in broad categories of situations, which could be identified relatively easily, the justification for receiving the statements is lacking. It is my premise that there are such readily identifiable situations in child sexual abuse prosecutions and that, when confronted with them, one should either be able to justify treating medical experts differently from those in other fields or should not receive statements made to medical experts under a hearsay exception.

I shall assume throughout the remainder of the Article that some form of these explanations for the different treatment of medical experts justifies the extension of rule 803(4) to receive statements made to them as a hearsay exception.

24. FED. R. EVID. 803(4). Admitting statements of cause expands the traditional common law formulation. United States v. Iron Shell, 633 F.2d 77, 83 n.8 (8th Cir. 1980) (majority rule prior to enactment of federal rule excluded statements concerning cause from the exception), *cert. denied*, 450 U.S. 1001 (1981).

25. The Advisory Committee Note provides a helpful example of the distinction between cause and fault. A statement that the patient was injured when struck by an automobile, a statement of cause of injury, would be admissible. A statement that the automobile which struck the patient ran a red light, a statement of fault, would not be received under the exception. FED. R. EVID. 803(4) advisory committee's note.

26. *Id.* The Advisory Committee's Note explains the dichotomy on the basis that the guarantee of trustworthiness "also extends to statements as to causation, reasonably pertinent to the same purposes . . . . Statements as to fault would not ordinarily qualify under this latter language." *Id.* (citations omitted).

under it be pertinent to diagnosis or treatment.[27] Statements of causation generally pertinent to diagnosis and treatment are accordingly admissible; statements of fault, which as a class are typically irrelevant to diagnosis or treatment, are excluded.

While medical pertinency is required under both rationales, the focus and function of the pertinency requirement differs between the two. Under the selfish treatment interest rationale, pertinency to diagnosis or treatment is an indirect, medically objective standard designed to ensure that the declarant's statement serves his selfish treatment interest. Because this rationale focuses on the declarant's state of mind, its substantive concern is not the actual medical pertinency of the statement since pertinency in not in fact required for the statement to be trustworthy. The real issue is the declarant's belief that an accurate and truthful statement is important to proper treatment. The critical question is whether this declarant, or a reasonable declarant, if an objective standard is to be used, would perceive the relevance of the statement to obtaining proper treatment.

As a result, a subject that the medical expert knows to be medically pertinent but which would not suggest pertinency to the layman would not satisfy the theory of trustworthiness under the selfish treatment interest rationale, even though it might satisfy its literal requirements. On the other hand, statements that might actually be irrelevant to diagnosis or treatment from the view of the trained medical professional should be admissible if a lay declarant would reasonably believe the statement important to such treatment.[28] In summary, under the selfish treatment interest rationale, reasonable pertinency is not a substantive requirement but is rather a somewhat imprecise, although rather easily applied, objective standard used to indicate a subjective belief of the declarant.[29]

As noted above, rule 803(4) and the Advisory Committee Note provide some general guidelines in ruling on admissibility of two issues—general causation and fault. The definition of statements covered by rule 803(4) includes general cause. This definition apparently reflects the judgment of the drafters that declarants generally subjectively view cause as relevant to proper treatment. And the statement in the Advisory Committee Note that, in the main, statements of fault should be excluded suggests the opposite conclusion concerning the typical subjective perceptions of declarants as to this issue. While these guidelines are useful, greater clarity in the function of reasonable medical pertinency under the two trustworthiness rationales would have been helpful. Given that the medical importance of statements of cause, fault, or identity is not generally obvious to the layman, if the medical expert does not explain the medical relevancy of the inquiry, such subjects might well as a general category have been excluded under the selfish treatment interest rationale.

27. For the text of rule 803(4), see *supra* note 1.

28. 4 D. LOUISELL & C. MUELLER, *supra* note 8, § 444, at 598.

29. Even though the focus under this rationale is on the perception of the declarant, using a standard of reasonable medical pertinency that is viewed from the perspective of the doctor could be justified in some cases where no reasonable determination of the declarant's actual or likely perception could be made. Such cases, however, should be rare.

Admitting that ease of application is an important concern for any rule, it remains difficult to justify using a general objective rule to decide classes of cases if the assumptions that guide the objective standard do not hold true. For instance, either because of the subject matter or the characteristics of the declarant, a child may have no subjective appreciation of the importance of the inquiry to medical treatment. When the statement concerns matters related only to psychological well being, subjective appreciation of the treatment implications of a statement are likely as a class to be weak, and are likely to be particularly weak under some circumstances, such as when the statements are made by very immature children or when children are questioned in the context of play.[30]

While reasonable medical pertinency acts only as a proxy for the subjective understanding of the declarant under the selfish treatment interest rationale, it plays a different role when a statement is admitted because it forms a basis for the medical expert's opinion. Reasonable medical pertinency is here a direct limitation on admissibility. Its function is to assure a linkage between the statement and an opinion of the medical expert which is based upon the statement. The pertinency requirement guarantees that the statement is relevant to a subject matter about which the medical expert is qualified to give an opinion. The focus under the second rationale is properly and directly upon the expert's opinion of what is pertinent.[31] It is an objective determination of the reasonable relationship between the statement and the opinion that is at issue, not the subjective perception of the patient.

Thus, within the two trustworthiness rationales, the reasonable medical pertinency requirement has different roles. It is important to note that the testimony of the expert as to medical pertinency is decisive under the basis-of-the-expert's-opinion rationale but does not itself determine whether a statement is trustworthy with regard to the selfish treatment interest rationale. Under the latter rationale, the expert's testimony as to what is medically pertinent serves

30. *See* State v. Nelson, 138 Wis. 2d 418, 448, 406 N.W.2d 385, 397 (1987) (Heffernan, C.J., dissenting) (method for eliciting information was to simulate play, which was at odds with operation of selfish treatment interest rationale). In granting habeas corpus relief, the district court relied heavily upon this dissenting opinion. Nelson v. Ferrey, 688 F. Supp. 1304, 1322-24 (E.D. Wis. 1988).

To note that interviewing a child in the context of play undermines the basis of admitting statements made under the selfish treatment interest rationale does not mean that the questioning technique is inappropriate, particularly at the initial phases of an investigation. Social scientists have long recognized that different questioning methods have different strengths and weaknesses. For example, witnesses who describe events in narrative form are highly accurate but omit much detail. On the other hand, those questioned with specific inquiries recall much more detail, but they much more frequently err in recalling those details. Lipton, *On the Psychology of Eyewitness Testimony*, 62 J. APPLIED PSYCHOLOGY 90, 93 (1977). Even leading questions, which have the greatest potential to distort, have their purposes, such as prompting a witness to recite unpleasant facts. D. BINDER & S. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH 47 (1977).

The questioning technique used in *Nelson* clearly has its place in the information gathering process. However, the circumstances of the questioning put it outside the guarantees of trustworthiness of the selfish treatment interest rationale.

31. *See* Cook v. Hoppin, 783 F.2d 684, 690 (7th Cir. 1986) (in case in which declarant was someone who brought injured person to the hospital but where her precise relation to patient was uncertain, court looked exclusively to whether the statements were "of the type reasonably pertinent to a physician in providing treatment [and observed that] much will depend on the treating physician's own analysis").

only to indicate indirectly the declarant's state of mind. Accordingly, objective medical pertinency should logically be abandoned as a decision rule for statements under the latter rationale when, as to a general class, it produces results of questionable validity.

C. *Two Different Rationales—Different Dimensions and Limitations for the Exception*

Two distinct theories guarantee the trustworthiness of statements under the expanded hearsay exception for the purpose of medical diagnosis *or* treatment. As a result, the exception produced is, or at least ought to be, of varying dimension depending upon the operative theory. The differences in the proper scope of the exception have important implications for admission of statements in typical fact patterns that arise in child sexual abuse cases.

1. Statements Forming Basis for Relevant, Admissible Opinion

Under the rationale that statements are admissible because they form the basis of the expert's opinion, the only explicit justification for the hearsay exception, albeit a limited, largely negative one, is that the statements would be heard by the jury in any event since they would be admitted for the limited purpose of showing the basis of the expert's opinion. Logically, then, a prerequisite to admission of the statement should be that the expert testify in the case, giving a relevant, admissible opinion as to which the statement provides a basis.[32]

By contrast, under the selfish treatment interest rationale, the exception should not impose a requirement that the auditor testify or render an opinion to which the hearsay statement must relate. Such requirements are unnecessary and indeed erroneous where the selfish interest of the declarant in receiving proper care operates. Trustworthiness exists separately from whether the statement is used by the auditor, who need not be an expert, and the jury should properly hear it because of that trustworthiness regardless of whether the auditor testifies and gives an opinion based on the statement.

2. Statements Relating to Physical or Psychological Condition

Rule 803(4) provides no definition for the term *medical* diagnosis or treatment. In this regard, the federal rule differs from the uniform rule in that mental conditions are not explicitly eliminated, as they were under the uniform rule's requirement that the statement relate to "an issue of declarant's bodily condition."[33]

Under the basis-of-the-expert's-opinion rationale, the special reliability of the medical expert's evaluation provides the guarantee of trustworthiness. This

32. "It should be noted that Rule 803(4) does not require the diagnosing physician to testify. In light, however, of the rationale . . . for including within Rule 803(4) statements made for purposes of obtaining a diagnosis, it would be well to restrict receipt of such statements to those cases in which the diagnosing physician in fact testifies, and in which his diagnosis is relevant." 4 D. LOUISELL & C. MUELLER, *supra* note 8, § 444, at 596.

33. UNIF. R. EVID. 63(12)(b) (1953).

reliability may derive from the particular skill, the special expertise, and perhaps the "hard science" nature of the profession. A substantial argument may therefore be made that the exception should be limited to the generally more precise and objective determination of physical, as opposed to mental, condition. In any case, the term "medical" as used in the exception should be defined with care to assure that the statements made to medical experts relating to diagnosis or treatment have sufficient trustworthiness.

The appropriate result here is complicated by the fact that psychiatrists hold medical degrees and some mental disorders have clear physiological causes.[34] Others in the field, clinical psychologists, for example, render similar opinions and provide similar treatment but are not medical doctors. The courts, however, often receive their opinions into evidence just as those of psychiatrists.[35] Nevertheless, there can be little argument that as a class psychological maladies are less subject to verification than physical maladies.

Under the selfish treatment interest rationale, while clearly all statements made for the purpose of receiving treatment of psychological, as opposed to physical, ills do not necessarily lack a selfish treatment interest, it is difficult to contend that as a group they are made with the same degree of selfish interest in preventing inappropriate treatment as when the statements relate to somatic ailments.[36] Admission should rest upon the actual perception of the declarant that her well being is likely to be affected as a result of the statement made. Because of the difficulty of making this determination in each case, it might be reasonable, although not theoretically imperative, to limit the hearsay exception to statements with apparent significance to treatment of a physical malady. As a minimum, some limits should be placed on the exception to exclude the more esoteric psychological issues where the statements have no apparent treatment implications likely to affect the health of the declarant.

3. Identity of the Expert

If, as developed above, statements to medical experts are treated as a hear-

34. For example, in the criminal context see Shah & Roth, *Biological and Psychophysiological Factors in Criminality* in HANDBOOK OF CRIMINOLOGY 101 (D. Glasser ed. 1974). *See generally* Bonnie & Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 VA. L. REV. 427 (1980) (dealing with the use of expert testimony by mental health professionals).

35. For example, clinical psychologists with suitable experience have been permitted to render opinions concerning many mental conditions in insanity cases. *See* Jenkins v. United States, 307 F.2d 637, 642-46 (D.C. Cir. 1962). Indeed, because they are trained in administering objective tests, their data and opinions are arguably more reliable than those rendered by psychiatrists. For example, the Minnesota Multiphasic Personality Inventory (MMPI), used by many clinical psychologists, has several scales that reveal malingering by the subject. Bonnie & Slobogin, *supra* note 34, at 506 n.233.

36. *See* Cassidy v. State, 74 Md. App. 1, 536 A.2d 666 (1987), *cert. denied*, 312 Md. 602, 541 A.2d 965 (1988). There the court concluded that a two-year-old lacked the maturity to understand or appreciate the link between her statements and proper treatment. *Id.* at 29-30, 536 A.2d at 680. The court concluded generally that, once the statement left the subject of physical injuries, the reason to have confidence in the trustworthiness of the statement—the patient's fear that, unless accurate information is supplied, proper treatment for injury or disease will not be forthcoming—was substantially diminished. *Id.* at 30, 536 A.2d at 682-83.

say exception because of the special skill and expertise and the established nature of this specialized profession that provides an assurance of trustworthiness to statements relied upon, then the required qualifications of those receiving such statements should be carefully prescribed.[37] The exception might logically be limited exclusively to statements made to physicians or at least to a limited, highly trained group of health care professionals.[38]

On the other hand, if trustworthiness flows from the subjective desire of the patient to receive treatment and not from the expertise of the auditor of the statement, then the identity of the immediate auditor is far less critical.[39] The Advisory Committee's Note asserts that statements under the exception might include statements to "hospital attendants, ambulance drivers, or even members of the family."[40] Clearly the Committee's explanation makes sense regarding statements in which the subjective selfish interest of the declarant is involved and she believes the statement will be transmitted to medical personnel to secure proper treatment. It would, however, not apply to statements admitted because

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37. While this Article contends that the specific expertise of the auditor should be a concern under this second rationale, this restriction results only because of the need to rationalize special hearsay treatment for statements made to medical experts. In general, specific formal training and advanced academic degrees are not required when the only concern is whether an individual qualifies to give expert testimony. Under rule 702 an expert may be qualified "by knowledge, experience, training or education." FED. R. EVID. 702. The Commentary to the federal rule notes specifically that "within the scope of the rule are not only experts in the strictest sense of the word, e.g. physicians . . . , but also the large group sometimes called 'skilled' witnesses." FED. R. EVID. 702 advisory committee's note.

38. Different measures of qualifications might be imposed. Among the criteria are: training in the "hard" science of medical care; medical or other advanced degrees, if the extensiveness of training were seen as the key factor; and a professional label that brings the expert within certain discovery rules, if those discovery rules are seen as ensuring effective adversarial testing. A combination of these criteria might properly be used, since the legislative history gives no guidance on the exact basis of the distinction between medical experts and others. The lack of clear definition, however, is not adequate reason to require no rational basis to distinguish between the groups.

The failure of courts to limit either the types of experts to whom admissible statements may be made, discussed above, or the types of maladies to which such statements may relate, examined here, renders the validity of the exception's expansion extraordinarily tenuous. *See infra* note 105.

39. [S]tatements made to a nurse, a medical student, an ambulance driver, someone masquerading as a physician or a member of one's family would probably qualify under this exception if the patient thought the statements were for purpose of treatment or diagnosis. Under the theory of the exception, *at least as it relates to treatment*, this makes sense, for it is the patient's belief in making the statement which provides a guarantee of truthfulness.

R. LEMPERT & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE 421 (2d ed. 1982) (emphasis added).

State v. Maldonado, 13 Conn. App. 368, 536 A.2d 600, *cert. denied*, 207 Conn. 808, 541 A.2d 1239 (1988), presents an excellent factual pattern demonstrating the insignificance of the identity of the person receiving the statements when the declarant makes them with the belief that they will be transmitted to a physician. There the examining physician, who could not speak Spanish, enlisted the aid of a security guard fluent in the language to take the medical history from a child who spoke no English. *Id.* at 369, 536 A.2d at 601. Clearly those statements satisfied the purposes of the rule's requirement. While the doctor was absent, the child also indicated that her father had molested her, but she would not repeat that statement in the presence of the physician. *Id.* at 370, 536 A.2d at 601. Whether these latter statements should be admitted under the selfish treatment interest rationale is far less clear since the intention of the child in sharing them only with her confidant is ambiguous and there is some reason to believe they were not provided for treatment purposes at all. *See also* State v. Smith, 315 N.C. 76, 84-85, 337 S.E.2d 833, 839-40 (1985) (statements to grandmother admitted under selfish interest rationale); *infra* text accompanying notes 48-51 (discussing the *Smith* decision).

40. FED. R. EVID. 803(4) advisory committee's note.

they form the basis of an expert's opinion, since a family member, for instance, would have no expertise to form an opinion for which the declaration would provide a relevant basis.[41]

III. Application Of The Hearsay Exception Under Rule 803(4) To Issues In Child Sexual Abuse Prosecutions

This section examines the major issues with which courts have grappled in applying rule 803(4) to child sexual assault and abuse cases. This section uses opinions from North Carolina, Wisconsin, and the United States Court of Appeals for the Eighth Circuit to illustrate the confusion in analysis that has resulted from the failure of courts to appreciate that two separate theories of trustworthiness underlie the exception. These three jurisdictions have generally given the exception a liberal and expansive interpretation, although they remain within the mainstream of current judicial analysis.

A. *Statements for the Purpose of Treatment or Diagnosis: Confusion of Rationales*

In *State v. Smith*,[42] the North Carolina Supreme Court analyzed for the first time the state's new hearsay rule covering statements made for the purpose of diagnosis or treatment.[43] In *Smith* the defendant was charged with sexual offenses against the daughter and niece of the woman with whom he was living. The two girls were four and five years old. The prosecution sought to admit under rule 803(4) statements by the two children to their grandmother and to two counselors at the local Rape Crisis Center.[44]

The incident came to light when, approximately three days after the assault, the younger girl told her grandmother about the assault. The grandmother had a similar conversation with the other child upon the child's return from school. As a result of these conversations both children were taken to the hospital by their mothers.[45] In addition, the younger child told a volunteer with the Rape Task Force about the incident. The volunteer, who was a registered nurse, had

41. *Cf.* People v. Wilkins, 134 Mich. App. 39, 46, 349 N.W.2d 815, 818 (1984) (the breadth of the subject matter covered by the exception depends on whether the statement is made directly to a doctor or to a layman since, if not made directly to a physician, the hearer would generally need only limited information for the purpose of securing medical assistance).

42. 315 N.C. 76, 337 S.E.2d 833 (1985); *see* Note, *Evidence—North Carolina Allows Admission of the Unthinkable: Hearsay Exceptions and Statements made by Sexually Abused Children*—State v. Smith, 9 CAMPBELL L. REV. 437, 470-71 (1987) (applauding accommodation of rule 803(4) to child sexual abuse situation to permit maximum admission of evidence to convict assailants); Note, State v. Smith: *Facilitating the Admissibility of Hearsay Statements in Child Sexual Abuse Cases*, 64 N.C.L. REV. 1352, 1362-63 (1986) (noting possible distorting effects of using traditional hearsay exceptions to treat child sexual abuse cases and suggesting enactment of special hearsay statute).

43. North Carolina adopted rules of evidence modeled on the Federal Rules in 1984, and while some states modified the federal model, *see supra* note 2, N.C. R. EVID. 803(4) and the federal rule are identical.

44. 315 N.C. at 79-81, 337 S.E.2d at 837.

45. *Id.* at 81, 84, 337 S.E.2d at 837, 839. In one instance, the grandmother told her daughter, one of the girls' mothers, what the child had said and instructed the mother to take the child to the hospital. *Id.*

first met the child in the hospital emergency room after the child had received treatment. She had been called to the hospital in her capacity as counselor from the Task Force, not as a nurse, and was not involved in diagnosing the child's condition but in "treating the emotional effects" of the incident.[46] Another volunteer, who apparently had no formal medical training, had similar conversations with the second child, whom she first met two days after the child's treatment at the hospital.[47]

The court first held that the statements of the children to their grandmother concerning what had happened were admissible under rule 803(4).[48] The basis for admitting these statements was the patient's selfish treatment interest rationale. Courts have long recognized that this selfish interest rationale is applicable when the declarant made the statement to someone who is not a doctor if made for the purpose of having that information relayed to the doctor.[49] While the children did not specifically request medical treatment, the court argued that small children would not be expected independently to seek out or specifically to request medical treatment but instead would rely on their caretakers to obtain treatment if it was considered necessary.[50] In addition, circumstantial evidence corroborated that these statements were made for medical treatment purposes. First, the statements themselves concerned physical condition—bleeding and pain.[51] Second, as an immediate result of the statements, the children were taken to the hospital.[52]

The court concluded, however, that the statements made to the two Rape Task Force volunteers were not admissible.[53] The analysis here was not clear. It either confuses the rationales supporting the exception or reflects an indirect attempt to impose sophisticated limitations on the exception where statements relate to psychological well being. The court noted that the witnesses were not "licensed as medical doctors or psychologists."[54] They "did not pretend to diagnose the girls' medical 'condition' as Rape Task Force volunteers, but worked with them in treating the emotional effects of the events described by the girls."[55] The court stated that, while there was some possibility that the younger child might have confused the volunteer with the hospital personnel who were treating her injuries since she first met the counselor in the emergency room, it was unwilling to extend the exception to statements made to persons acting as volunteers after the victims had received treatment and diagnosis at the

46. *Id.* at 86, 337 S.E.2d at 840.

47. *Id.* at 80, 337 S.E.2d at 837.

48. *Id.* at 84-85, 337 S.E.2d at 839-40. In another portion of the opinion, the *Smith* court held admissible statements of one of the children to her grandmother concerning the identity of the defendant as the perpetrator of the crime. *Id.* at 85, 337 S.E.2d at 840; *see infra* note 98.

49. "Under the exception the statement need not have been made to a physician. Statements to hospital attendants, ambulance drivers, or even members of the family might be included." FED. R. EVID. 803(4) advisory committee's note (quoted verbatim in N.C. R. EVID. 803(4) commentary).

50. *Smith*, at 84, 337 S.E.2d at 840.

51. *Id.* at 84-85, 337 S.E.2d at 839-40.

52. *Id.*

53. *Id.* at 86, 337 S.E.2d at 840.

54. *Id.* at 85-86, 337 S.E.2d at 840.

55. *Id.* at 86, 337 S.E.2d at 840.

hospital.[56]

One reading of this portion of the opinion is that the auditor must be a member of a profession with specialized expertise and specific types of formal training—such as psychologists and medical doctors.[57] Alternatively the opinion may be suggesting that the treatment involved must be medical, as opposed to psychological, treatment. More narrowly, the opinion suggests that statements concerning psychological well being have a sufficient guarantee of trustworthiness only if the record gives an affirmative indication that the declarant believes the statements she makes will be used for her treatment.[58] Each of these points deserved careful attention, but the court did not clarify its reasoning further.

The North Carolina Supreme Court's second treatment of the exception came in a confusing opinion in *State v. Stafford*.[59] There the court excluded statements made to a pediatrician by a thirteen-year-old child three days before defendant's trial for criminal sexual assault of the child began. The child's statements concerned weight loss, vomiting, emotional reactions, and decrease in school performance in the six-month period since the doctor had first seen the child. The court concluded the statements were not admissible: "As the prosecuting witness did not visit [the doctor] for diagnosis or treatment and [the doc-

56. *Id.* at 85-86, 337 S.E.2d at 840.

57. The analysis suggests confusion between rationales in that the opinion ostensibly focuses on the selfish interest of the declarant at the same time it applies restrictions that should be relevant only to the rationale for statements serving as the basis of an expert's testimony. However, under the general principles that govern expert testimony, no reason is apparent why these two witnesses might not be qualified as experts in the treatment of psychological trauma resulting from rape. *See supra* note 22. Perhaps the court was recognizing implicitly a need to limit the types of medical expertise considered sufficient under the exception to highly trained experts in the medical field.

Alternatively, the testimony may have been rejected on the basis that psychological treatment is not within the exception. This is a point that may have relevance under both rationales of the rule. Such a general limitation does not appear to be a correct reading of the opinion, however, since the court seemed to suggest that holding a formal degree as a psychologist would have mattered. 315 N.C. at 86, 337 S.E.2d at 840; *see* State v. Bullock, 320 N.C. 780, 783, 360 S.E.2d 689, 690-91 (1987) (holding admissible statement to psychologist). The more accurate reading may be that psychological treatment performed by persons not holding formal degrees will not be received. This may be a reasonable, practical limitation, but it appears without substantial foundation in an exception based on the selfish treatment interest of the declarant. Accordingly, the distinction drawn by the court appears to be based on the second rationale for the rule the basis of the expert's opinion—a rationale never explicitly relied upon by the court in its opinion.

58. A distinction should be drawn, for example, between statements made for the purpose of giving the psychotherapist information to determine future treatment and statements which are made as part of the give and take process of therapy. Statements in the former category provide information. Those in the latter are tools of treatment. One might wonder whether every statement made during the process of therapy has a sufficient guarantee of trustworthiness.

Such a distinction might have been intended by the court in *Smith*. Statements made during the diagnostic process, even relating to psychological injury and treatment were admissible, but those made during the treatment process itself, particularly where those administering the treatment are volunteers, were not found admissible. *Cf.* State v. Black, 109 Wash. 2d 336, 342-48, 745 P.2d 12, 15-18 (1987) (en banc) (drawing distinction between rape truama syndrome, a nonjudgmental therapeutic tool, and other more reliable scientific methods of proof that were devised to determine existence of event); People v. Bledsoe, 36 Cal. 3d 236, 681 P.2d 291, 300-01, 249-51, 203 Cal. Rptr. 450, 458-60 (1984) (same). *But see* Department of Social Servs. v. Freiburger, 153 Mich. App. 251, 256-58, 395 N.W.2d 300, 302-03 (1986) (statements to psychiatric social worker during therapy concerning identification of perpetrator held admissible).

59. 317 N.C. 568, 346 S.E.2d 463 (1986).

tor] neither diagnosed nor treated her, the motivation to tell the truth is simply not present."[60]

The physician's trial testimony consisted, as the court described it, of his listing some of the symptoms of the "rape trauma syndrome" and various symptoms the victim told him she had experienced.[61] However, the doctor never diagnosed the prosecuting witness as suffering from the syndrome.[62] Accordingly, the court's exclusion of the statements is easy to rationalize, although such a result is hardly trivial.[63] The court's apparent rationale is that where no treatment is sought or intended, hearsay statements may be received only when used to form the basis of the doctor's opinion.[64] Because the doctor rendered no opinion—indeed, it was unclear whether the North Carolina courts would receive testimony concerning the "rape trauma syndrome"[65]—the statements of the victim were not properly admissible.[66]

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60. *Id.* at 575, 346 S.E.2d at 467.

61. *Id.* at 571-72, 346 S.E.2d at 465-66.

62. *Id.* at 574, 346 S.E.2d at 467.

Under North Carolina law, there appears to be an additional basis for excluding the testimony. North Carolina's rule 702 differs from federal rule 702 in that it does not authorize the expert to testify both in the form of an opinion "or otherwise" as permitted under the federal rule. N.C. R. EVID. 702; FED. R. EVID. 702. The words "or otherwise" in the federal rule are intended to allow an expert to testify without giving an opinion, authorizing the expert to "give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts." FED. R. EVID. 702 advisory committee's note. While the North Carolina commentary does not explain the omission of that language, it appears to mean that the expert's testimony was inadmissible if it recited the general characteristics of the rape trauma syndrome and repeated the victim's description of her symptoms under North Carolina rule 702.

63. *See infra* notes 95-98 and accompanying text.

64. There is some support for this reading of the case in State v. Aguallo, 318 N.C. 590, 350 S.E.2d 76 (1986), which notes that "*Stafford* is distinguishable from the present case, in which the victim visited [the pediatrician] several months prior to trial. [The doctor here] diagnosed the patient's condition, whereas in *Stafford* no diagnosis was made when the victim visited the physician three days prior to trial." *Id.* at 596, 350 S.E.2d at 80. The court's reasoning in *Aguallo*, however, is not entirely clear since it seemed to put great weight on its determination that the purpose of the examination in *Stafford* was the preparation of the state's case for trial, not medical diagnosis and treatment. *Id.*

65. 317 N.C. at 575-76, 346 S.E.2d at 468.

Courts differ sharply as to the admissibility of expert testimony concerning the rape trauma syndrome and, if admissible, the permissible uses of such testimony. *See generally* Massaro, *Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*, 69 MINN. L. REV. 395 (1985) (surveying California, Minnesota, and Missouri cases); McCord, *The Admissibility of Expert Testimony Regarding Rape Trauma Syndrome in Rape Prosecutions*, 26 B.C.L. REV. 1143 (1985) (surveying early rape trauma syndrome cases; arguing in general for admissiblity of expert testimony).

A court's position on the admissibility of expert testimony on the rape trauma syndrome where the victim is an adult is not necessarily dispositive of the admissibility of apparently similar expert testimony concerning child sexual abuse. Some courts are more restrictive in admitting testimony about the rape trauma syndrome. State v. Myers, 359 N.W.2d 604, 610 (Minn. 1984) (expert testimony concerning child sexual abuse admissible whereas testimony concerning rape trauma syndrome inadmissible because of greater juror ignorance of victim behavior in the former situation). *Cf.* State v. Castro, 756 P.2d 1033, 1044 (Haw. 1988) (similar distinction drawn between juror appreciation of conduct of child sexual abuse victim versus adult victim of attempted murder).

66. The result is not trivial, because other states have squarely ruled that statements are admissible even when no opinion is rendered. State v. Nelson, 138 Wis. 2d 418, 434-35, 406 N.W.2d 385, 392 (Wis. 1987) (statements to psychologist need not be used to form medical opinion); *see also* State v. Oliver, 85 N.C. App. 1, 16-17, 354 S.E.2d 527, 536 (statements made to clinical psychologist by child to determine whether child could distinguish fact from fantasy and whether child could have

Unfortunately the court did not stop with this analysis but went further and, in the process, confused and combined the rationales for the exception. The court suggested restrictions on the exception contrary to the legislative intent of the rule and which, if applied, would create problems of application in other areas. It gave as a reason for exclusion that the examination was "not for the purposes of diagnosis or treatment but for the purpose of preparing and presenting the state's 'rape trauma syndrome.' "[67] It further emphasized that the exception was based on the indicia of reliability produced by the declarant's selfish interest in obtaining appropriate medical treatment. The court appeared to say that, when such a selfish treatment interest is absent, the testimony may not be received.[68]

The result in *Stafford* was correct. However, unless one carefully untangles the rationales for the exception and separately treats certain criminal cases, there is a real danger of badly confusing and distorting accepted law. One of the major changes in the law worked by rule 803(4), as noted above, was to permit admission of statements made to doctors consulted only for diagnosis.[69] The accepted meaning of that expansion is that it permits receipt of statements made to physicians consulted exclusively for the purpose of testifying in personal in-

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easily been coached into false allegations admitted although such opinions if directly given concerning child would be appear to be inadmissible). *disc. rev. denied*, 320 N.C. 174, 358 S.E.2d 64 (1987).

67. 317 N.C. at 574, 346 S.E.2d at 467.

In State v. Jones, 89 N.C. App. 584, 367 S.E.2d 139 (1988), the North Carolina Court of Appeals, relying on *Stafford*, set out a four-part test for determining whether statements are admissible under rule 803(4). The factors are:

> (1) whether the examination was requested by persons involved in the prosecution of the case; (2) the proximity of the examination to the victim's initial diagnosis; (3) whether the victim received a diagnosis or treatment as a result of the examination; and (4) the proximity of the examination to the trial date.

Id. at 591, 367 S.E.2d at 144 (citations omitted); *see also* United States v. Deland, 22 M.J. 70, 75 (C.M.A.) ("We will not condone efforts to extend [Military Rule of Evidence] 803(4) to include the testimony of a psychiatrist whose examination of an alleged victim was more oriented to his testifying than to medical diagnosis or treatment."), *cert. denied*, 479 U.S. 856 (1986).

While these factors were apparently chosen to help assure trustworthiness under the selfish interest rationale, the factors identified as relevant tell us little, if anything, about the subjective perception of the child. Instead they focus on the intent of the expert, which is relevant only if one assumes that the expert's intention will be communicated in some way to the child. Thus, the tests set out above determine the existence of a selfish treatment interest only in a very crude and indirect way, and they could hardly be justified as an effective objective method of identifying when the child's selfish treatment interest was likely to be absent.

68. 317 N.C. at 574-75, 346 S.E.2d at 467. The error committed here of joining the two requirements is a relatively common one with the courts, arising typically from the same mistake in two highly influential opinions from the United States Court of Appeals for the Eighth Circuit, United States v. Iron Shell, 633 F.2d 77 (8th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981) and United States v. Renville, 779 F.2d 430 (8th Cir. 1985). *See, e.g.*, Morgan v. Foretich, 846 F.2d 941, 949-50 (4th Cir. 1988) (in civil case, the court described a "two-part test," treating in the conjunctive both rationales, but ruling irrelevant whether the doctor was consulted for treatment purposes or only in order to testify); United States v. Deland, 22 M.J. 70, 74-75 (C.M.A.) (in criminal case, the court treated the test as requiring satisfaction of both rationales and warned that such evidence should not be received when psychiatrist's examination is more oriented to his testifying at trial than to medical diagnosis or treatment), *cert. denied*, 107 S. Ct. 196 (1986).

69. O'Gee v. Dobbs Houses, Inc., 570 F.2d 1084, 1089 (2d Cir. 1978) ("[r]ule 803(4) clearly permits the admission into evidence of what [plaintiff] told [her doctor] about her condition, so long as it was relied on by [the doctor] in formulating his opinion").

jury cases.[70]

Accordingly, Justice Martin, who dissented in *Stafford*, was properly disturbed. He warned that the decision would render inadmissible statements made to doctors appointed in worker's compensation-type cases, since they are also made for trial preparation. Yet such statements have been routinely admitted.[71] They are admitted because the physician offers a relevant diagnosis for which the statements form a basis, but there has been no requirement, as suggested by the court in *Stafford*, that the declarant also be motivated by selfish interest in receiving appropriate treatment. The reliability of statements made solely as part of trial preparation is guaranteed only by the medical expert's reliance upon them to form her opinion.[72]

B. *Statements of Identification of the Perpetrator*

An issue of critical importance in the application of rule 803(4) to child sexual abuse cases is whether statements of the victim concerning the identity of the perpetrator are admissible. Most courts that have recently examined the issue have found that unlike statements of fault, which are generally excluded from the exception, statements of identification are admissible because of the special character of diagnosis and treatment issues in child sexual abuse cases.

In this analysis courts have relied chiefly on the United States Court of Appeals for the Eighth Circuit's opinion in *United States v. Renville*.[73] Like the

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70. *Id.* at 1088-89. *See generally* 4 D. LOUISELL & C. MUELLER, *supra* note 8, § 444, at 594-95 (expansion consistent with general liberal principles governing expert testimony); 4 J. WEINSTEIN & M. BERGER, *supra* note 2, ¶ 803(4)[01], at 146-47 (hearsay will be trustworthy "because the integrity and specialized skill of the [diagnosing] expert will keep him from basing his opinion on a questionable matter").

71. 317 N.C. at 576-77, 346 S.E.2d at 469.

72. A potential basis for the result in *Stafford*, although undeveloped by the court, is that the opinions admissible under rule 803(4) might be restricted to those relating to traditional medical, and perhaps psychological, diagnosis and treatment. This may be what the court meant when it said that there was no testimony that the physician was seen "for the purpose of treatment or obtaining a diagnosis." 317 N.C. at 574, 346 S.E.2d at 467. Instead, he was developing an opinion on the rape trauma syndrome, which in some jurisdictions is a subject on which a doctor, as an expert, can give an opinion, but not a subject of traditional medical diagnosis where such diagnosis is aimed ultimately at treatment. *See supra* note 58.

One might be tempted to suggest that the appropriate basis for the court's standard in *Stafford* may be derived from the confrontation clause, which is discussed below. *See infra* notes 109-32 and accompanying text. Where the only selfish interest of the declarant, and presumably the expert retained by the prosecution, is to provide effective trial testimony, the statement might lack the trustworthiness required by the confrontation clause. However, as discussed below, when the declarant testifies, *see infra* note 114, as she did in *Stafford*, 317 N.C. at 575, 346 S.E.2d at 468, and may be cross-examined effectively, no sixth amendment obstacle exists to admission of her out-of-court statement. This should be true even though the hearsay statement went "far beyond" the substance of the in-court testimony. *Id.*

73. 779 F.2d 430 (8th Cir. 1985).

The *Renville* opinion has had a major impact on the the admission of statements of identification in child sexual abuse cases. A number of jurisdictions have relied heavily upon its analysis in admitting such statements. *See* State v. Robinson, 153 Ariz. 191, 200, 735 P.2d 801, 810 (1987); Stallnacker v. State, 19 Ark. App. 9, 11-12, 715 S.W.2d 883, 884-85 (1986); State v. Maldonado, 13 Conn. App. 368, 373, 536 A.2d 600, 603, *cert. denied*, 207 Conn. 808, 541 A.2d 1239 (1988); State v. Vosika, 83 Or. App. 298, 306-07, 731 P.2d 449, 454-55, *modified on other grounds*, 85 Or. App. 148, 735 P.2d 1273 (1987); State v. Aguallo, 318 N.C. 590, 596-97, 350 S.E.2d 76, 80 (1986); *see* cases cited in *supra* note 68.

North Carolina Supreme Court in *Stafford*, the Eighth Circuit in *Renville* confused and ultimately amalgamated the two rationales underlying rule 803(4).[74] The *Renville* court first noted that in sexual abuse cases there are psychological and emotional components to the injuries that cause diagnosis and treatment concerns to differ from situations where "the injury is purely somatic."[75] These additional types of harms mean that statements of identity are "reasonably relied on by a physician in treatment or diagnosis."[76] The court, however, was not content to rest admissibility exclusively on expert reliance on the statements.

Renville turned to an earlier Eighth Circuit case, *United States v. Iron Shell*,[77] where the court had created a two-part test for admission of statements under rule 803(4) derived from the dual rationale of the exception. *Iron Shell* had recognized the two rationales underlying the exception, and instead of considering them separately, it had joined them into a single test for admissibility: "first, is the declarant's motive consistent with the purpose of the rule; and second, is it reasonable for the physician to rely on the information in diagnosis or treatment."[78] The *Renville* court required that the statement of identity satisfy also the first part of the test—a selfish treatment interest consistent with the purpose of the exception.[79]

The *Renville* court noted that typically statements of fault have not satisfied the selfish interest criterion:

> Ordinarily, when an individual identifies the person responsible for his injuries or condition, he does so without reasonable expectation that the information will facilitate treatment.
>
> . . . [However,] [t]his assumption does not hold where the physician makes clear to the victim that the inquiry into the identity of the abuser is important to diagnosis and treatment, and the victim manifests such an understanding. In such circumstances, the victim's motivation to speak truthfully is the same as that which insures reliability when he recounts the chronology of events or details symptoms of somatic distress.[80]

The record in *Renville* establishes a somewhat atypical set of facts. Before questioning the child, the physician explained to her "that the examination and his prospective questions were necessary to obtain information to treat her and help her overcome any physical and emotional problems which may have been caused by the recurrent abuse."[81] Concluding both that there were sufficient indicia of the declarant's proper self-interested motivation and that the statements were of a type reasonably relied upon by physicians in treatment or diagnosis, the court held the statement of the identity admissible under rule 803(4).[82]

74. This error in analysis is a common one. *See supra* note 68.
75. 779 F.2d at 437.
76. *Id.*
77. 633 F.2d 77 (8th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981).
78. *Id.* at 84.
79. 779 F.2d at 438.
80. *Id.* at 438.
81. *Id.* at 438-39.
82. *Id.* at 439.

Renville is a very puzzling case. The problem lies not in the result. That result is certainly defensible, if not beyond question, assuming that the eleven-year-old child in the case understood that her statement of identity had something to do with her treatment.[83] Both the meaning of the rule *Renville* creates and the way other courts have used it as precedent, however, are troubling. The court's two-part test, stated in the conjunctive and thus requiring that a statement satisfy both of the exception's trustworthiness rationales, is an erroneous analysis of the requirements of the hearsay exception under rule 803(4).

As noted above, a statement motivated by the patient's selfish interest in receiving treatment must be reasonably pertinent to diagnosis or treatment in order to assure that the selfish treatment interest is in fact present, but the rule imposes no additional requirement that the statement also be reasonably relied upon by an expert—here a doctor—in rendering an opinion. More importantly, it is *generally* not correct that when a statement is made to a doctor for diagnosis only—the statement being both pertinent to that medical diagnosis and forming part of the basis for the diagnosis—there is a second requirement that the declarant's motive be "as a patient seeking treatment."[84] If the case is read to impose such an additional requirement, it, like *Stafford*, would have the effect of undoing a significant intended effect of the federal rule—to render admissible statements made to doctors consulted for diagnosis only.

C. *Evidentiary Limitations on Admissibility of Statements under Rule 803(4) in Child Sex Abuse Cases*

Section II of this Article develops several general limitations that should be placed on the admission of statements under rule 803(4) in fact patterns that

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83. On the other hand, whether the record need demonstrate the patient's appreciation of the selfish interest as to every fact is not clear. A court might reasonably require that the patient generally appreciate the significance of the inquiry to securing appropriate treatment but not necessarily require her to appreciate the significance of every fact for treatment. Interstitial or related information has been received in other areas, as under the hearsay exception for statements against interest, rule 804(b)(3). Statements that are "collateral" to those actually against interest are often received if it is clear that the statement as a whole is one that a reasonable person would perceive as against his interest. *See, e.g.*, United States v. Barrett, 539 F.2d 244 (1st Cir. 1976) (statement exculpating defendant as coparticipant within statement inculpating declarant admissible even though identity of coparticipant was largely "collateral" because the exculpatory element tended to fortify the overall disserving quality of the statement and since some latitude permitted in admitting contextual statements).

A similar test could reasonably apply to the instant exception. In this context, such a test might also properly admit additional information not clearly within the trustworthiness guarantee of the exception. The court in United States v. Deland, 22 M.J. 70, 74 (C.M.A.), *cert. denied*, 479 U.S. 856 (1986) stated the test in what would appear to be acceptable terms: "nothing in the record indicates that [the child] would have believed this [identification] information to be less relevant to treatment than the other information she was providing [the psychiatrist]."

Before identification statements, for example, are included as ancillary to other statements motivated by the declarant's selfish interest, the prosecution should make a real showing that the declarant had such a subjective recognition of the overall significance of her statements. In the absence of an initial clear showing that the selfish treatment interest is present, bootstrapping statements of identification would be particularly inappropriate since such statements will almost of necessity stretch the limits of the rationale.

84. *Iron Shell*, 633 F.2d at 84. *See also Renville*, 779 F.2d at 439 ("Nothing in the record indicates that the child's motive . . . was other than as a patient responding to a physician questioning for prospective treatment.").

frequently arise in child sexual abuse cases. *State v. Nelson*[85] presents a fact situation in which a number of these limitations would appear warranted.

In *Nelson* the defendant, who was charged with sexually abusing his three-year-old daughter, challenged the admission of statements made by the child to a clinical psychologist. The statements concerned both the fact of sexual abuse and defendant's identity as the perpetrator.[86] The statements were made during a series of fifty-nine evaluation and treatment sessions over an eight-month period. While the psychologist and the child would occasionally speak in the psychologist's office, sessions were generally conducted in a play therapy room.[87] This room was equipped with games, puzzles, coloring books, dolls, and other toys "which allow a child to express [herself] through play."[88] According to the psychologist, the child expressed herself only gradually throughout the sessions.[89]

The court began by focusing on the selfish treatment interest as providing the guarantee of trustworthiness under the exception[90] and concluded that the statement satisfied this rationale. Even though many of the statements were made in the play therapy room, the court noted that the sessions were scheduled on a regular, formal basis with many of the trappings of a professional consultation. The sessions began with a series of tests and evaluations, and the psychologist made clear that he was not a playmate but was an authority figure.[91] While acknowledging the difficulty of determining whether the child understands the purpose of the statements, the court reached the broad general conclusion that children have such appreciation:

> [W]e do not believe that, because a child is only three or four years of age at the time he or she goes to a doctor, the child is unable to comprehend that the child is involved in the process of receiving diagnosis or treatment. A child is no less aware of the existence of emotional or mental pain than physical pain and, thus, is equally aware of the necessity and beneficial nature of therapy. . . . Just as a child three or four years of age understands that statements made to a physician will be used by that physician to ease the physical pain of the child, we conclude that such a child also understands that statements made to a psychologist will be used by the psychologist to ease the emotional or psychological injuries of the child.[92]

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85. 138 Wis. 2d 418, 406 N.W.2d 385 (Wis. 1987). Federal habeas corpus relief was granted on confrontation grounds. Nelson v. Ferry, 688 F. Supp. 1304 (E.D. Wis. 1988).

86. 138 Wis. 2d at 433, 406 N.W.2d at 391.

87. *Id.* at 431, 406 N.W.2d at 390.

88. *Id.* at 424-25, 406 N.W.2d at 387.

89. *Id.* at 429, 406 N.W.2d at 389.

90. *Id.* at 430-31, 406 N.W.2d at 390.

While it did not so state, the court may have felt compelled by its previous confrontation clause analysis to require the statement to satisfy the selfish treatment interest rationale. *See infra* note 120.

91. *Nelson*, 138 Wis. at 432, 406 N.W.2d at 390.

92. *Id.* at 432, 406 N.W.2d at 391.

Other courts have reached very different conclusions when addressing the issue of whether a child recognizes the significance of similar statements. The Colorado courts have placed an evidentiary burden on the prosecution as the proponent of the evidence to establish the foundation for admission—that the child, in spite of her testimonial incompetence, appreciates the need to provide

In dealing with the admission of the statements of identification, the court, without acknowledgment, changed its focus from the subjective appreciation of the child to the basis-of-the-expert's-opinion rationale. It concentrated exclusively upon the psychologist's need to know the identity of the perpetrator for effective treatment, and on that basis found the statements admissible.[93]

The court then examined the defendant's argument that because the psychologist had rendered no opinion, the statements were not admissible. The court rejected this argument on the basis that it applied when the statement was offered solely for the purpose of the expert testifying at trial and did not apply in the case at hand because of the presence of the child's selfish treatment interest.[94]

1. Requirement that the Expert Testify and Be Permitted to Give an Opinion as to Which the Statement Formed a Basis

A major justification for extending the exception for statements for medical treatment to statements received for diagnostic purposes alone is that such statements would be received in any case for the limited purpose of forming the basis for the expert's opinion. The distinction between admissibility as a hearsay exception and for such a limited purpose was believed to be largely lost on a lay jury, and therefore the distinction was determined to be a needless formalism. Yet, if the expert is not permitted to give the opinion to which the statement is relevant, and the statement is not made out of the patient's selfish interest in receiving appropriate treatment because none is anticipated, both the needless formalism argument and the independent basis for trustworthiness disappear. Accordingly, admission of the statement under these circumstances is extraordinarily problematic.

In the typical personal injury case that provided the impetus for this expansion of the exception,[95] the doctor would generally testify in court to an admissible diagnosis. The injured person's statement to the doctor, which under the explicit requirement of the exception had to be pertinent to the diagnosis, would be admitted as a basis of the opinion. Therefore treating the statement made to

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accurate information for medical diagnosis or treatment purposes. Oldsen v. People, 732 P.2d 1132, 1135 & n.7 (Colo. 1986); W.C.L. v. People, 685 P.2d 176, 181 (Colo. 1984); People *ex rel.* W.C.L., 650 P.2d 1302, 1304 (Colo. Ct. App. 1982). In State v. Robinson, 153 Ariz. 191, 199, 735 P.2d 801, 809 (1987), the Arizona Supreme Court recognized that young children do not always grasp the relationship between their statements and treatment. As a result, it did not assert as a matter of faith that the child perceived the significance of the statements to her treatment but instead found the rationale that the statements were relied on by the medical expert to be critical to admissibility. *Id. Cf.* State v. D.R., 214 N.J. Super. 278, 288-90, 518 A.2d 1122, 1127-28 (1986) (child's inexperience with sexual matters removes the "stress of nervous excitement" and therefore spontaneous utterance exception inapplicable), *rev'd on other grounds*, 109 N.J. 348, 537 A.2d 667 (1988).

93. 138 Wis. 2d at 434, 406 N.W.2d at 391.

94. *Id.* at 435, 406 N.W.2d at 392 (citing Klingman v. Kruschke, 115 Wis. 2d 124, 126, 339 N.W.2d 603, 604 (Wis. Ct. App. 1983)).

95. *See, e.g.*, Uberto v. Kaufman, 348 Mass. 171, 172-73, 202 N.E.2d 822, 823 (1964) (expert, who gave opinion that heart attack caused by lifting heavy bundles, could recite hearsay statements relied upon by him in reaching that conclusion).

the doctor as a hearsay exception had relatively little substantive impact on the trial of cases and no impact on the testimony actually heard by the jury.

By contrast, the child sexual abuse cases, particularly those cases involving statements of identity, often do not include circumstances similar to those giving rise to expansion of rule 803(4). An expert who diagnoses the child's psychological problems may discuss the incident and receive statements identifying the perpetrator. These statements may arguably be relevant to a "treatment" for the condition—the removal of the child from the presence of the perpetrator if he is a family member or friend who had access to the child.[96] However, the expert will typically not be permitted as part of her testimony to express the opinion that the child was sexually assaulted by a given individual or that removal of the child from the presence of that individual is appropriate treatment.[97] Nevertheless, under the hearsay exception, experts are permitted in cases such as *Nelson* to testify to the statements made by the child.

Under these circumstances, viewing the exception as having two distinct supporting rationales has an important impact which the court in *Nelson* entirely ignored. The basis-of-the-expert's-opinion rationale provides little justification for admitting statements going to identity when the expert may not give an opinion as to which statements of identity are relevant. The only valid justifi-

96. Courts have recognized, in addition to a treatment purpose, a legal duty of the expert to prevent the reoccurrence of the incident. *See* United States v. Renville, 779 F.2d 430, 438 & n.13 (8th Cir. 1985); Goldade v. State, 674 P.2d 721, 725-27 (Wyo. 1983), *cert. denied*, 467 U.S. 1253 (1984). While that clearly is a duty the expert may be bound to follow, it does not make the statement pertinent to diagnosis or treatment. Instead, it makes the statement relevant to the performance of a legal duty by the auditor of a hearsay statement, not the basis of any generally recognized hearsay exception. *See* Cassidy v. State, 74 Md. App. 1, 46-47, 536 A.2d 666, 688-89, *cert. denied*, 312 Md. 602, 541 A.2d 965 (1988).

97. Courts in a number of states permit an expert to testify that a child has been sexually abused or has had sexual intercourse. State v. Hester, 114 Idaho 688, 760 P.2d 27, 31-32 (1988) (expert testimony concluding that child abuse properly admitted); Townsend v. State, 734 P.2d 705, 708 (Nev. 1987) (proper for expert to give an opinion that child had been sexually abused where opinion within the expertise of witness and where probative value outweighed prejudice); State v. Bailey, 89 N.C. App. 212, 219, 365 S.E.2d 651, 655-56 (1988) (expert may testify that child had been sexually abused, which does not violate rule against giving opinion on credibility of witness or concerning guilt of defendant). *See* McCord, *supra* note 3, at 12-17. The expert, however, is not permitted to give an opinion that the child was abused or had intercourse with a particular individual for a variety of reasons, including that such opinions are excessively prejudicial or not within the expertise of the particular expert. *See* State v. Hester, 114 Idaho 688, 760 P.2d 27, 34-35 (1988); Townsend v. State, 734 P.2d 705, 709 (Nev. 1987); State v. Jackson, 320 N.C. 452, 460, 358 S.E.2d 679, 683 (1987); State v. Logue, 372 N.W.2d 151, 157 (S.D. 1985); *see also* Note, *Expert Testimony in Child Sexual Abuse Prosecutions: A Spectrum of Uses*, 68 B.U.L. REV. 155, 190-91 (1988) (arguing that expert testimony should be admitted in child sexual abuse cases where relevant in virtually all circumstances *except* to identify the defendant as the perpetrator).

In those states where an opinion may be given that sexual abuse occurred, the statement of the child as to who committed the act in some situations may be relevant to the admissible opinion. In those situations, the statement of identification may be disclosed as a basis of the expert's opinion. The mere fact that a statement forms the basis of an expert's opinion does not mean that it is automatically admissible. Such a statement, like the opinion that a particular individual committed the act, may be excluded under rule 403. *See* People v. Coleman, 38 Cal. 3d 69, 92, 695 P.2d 189, 203, 211 Cal. Rptr. 102, 116 (1985) (typically an expert may give his reasons for his opinion on direct examination and ordinarily a limiting instruction that the statements relied upon are not admitted for the truth cures any hearsay problem, but these procedures are not adequate where inadmissible evidence is recited in detail and where it is highly prejudicial); M. GRAHAM, *supra* note 13, § 703.1, at 631 & n.27; Carlson, *Collision Course in Expert Testimony: Limitations on Affirmative Introduction of Underlying Data*, 36 U. FLA. L. REV. 234, 251 (1984).

cation for receiving such statements would be that they are relevant to the purpose of securing medical or perhaps psychological treatment as perceived by the declarant. In *Nelson* the court, while asserting that the child's selfish treatment interest operated in general as to the consultations, abandoned that focus when dealing with the statements of identification. As to the child's identification of defendant as the perpetrator, the court found no selfish interest and the expert offered no opinion. Accordingly, the statements of identification should not have been received.

In summary, the expansion of the exception that appropriately operates in civil cases involving personal injury does not warrant receiving statements of identity in criminal cases of child sexual abuse. The statements should be receivable, as they would have been under common law formulations, only if they are relevant to the perceived selfish interest of the declarant to receive treatment.[98]

2. Limitations on Rule 803(4) Based on Psychological Subject Matter and Nature of Auditor's Expertise

Neither of the exception's trustworthiness rationales provides particularly strong support where the subject of a statement offered under rule 803(4) concerns psychological ailments or, more narrowly, statements of identification. It is far from clear that child victims of sexual assault, particularly very young declarants, recognize a selfish interest related to treatment in speaking accurately about psychological concerns.[99] The weakness of the child's subjective appreciation of the impact of the statement upon his health is especially clear when compared to the degree of selfish interest found in the typical case of an adult speaking to a treating doctor about an existing physical condition that prompted the patient to seek such treatment. Statements concerning the identity of the person who committed the assault raise similar issues—indeed often even more substantial ones—concerning the existence of any perceived treatment interest by the declarant.[100]

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98. The exception might be extended in appropriate cases to statements of identity that are closely related to statements made for the purpose of receiving medical treatment even if the identifying statement itself cannot be shown to be within the selfish interest rationale. The statements as a whole, however, should be shown with clarity to be motivated by a selfish treatment interest rather than a court simply asserting its general, result-oriented judgment to that effect. *See supra* note 83.

Such an analysis would often prohibit a result like that in State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985) in which a statement of identification made by a child to her grandmother was admitted. A small child's statements to a close relative concerning an injury is likely, but not unquestionably, motivated by a selfish treatment interest. When the child's statement concerns the identity of the attacker, however, the motivation is almost certainly not based on a selfish treatment interest. As a result, even if combined with other statements more likely related to treatment, identification statements to laymen should still be excluded because the statements as a whole would lack sufficient trustworthiness guarantees. *See supra* notes 39-41 and accompanying text.

99. The court in *Nelson* avoided this difficulty by accepting the child's selfish interest a matter of faith. *See supra* text accompanying note 92. As noted above, other courts have reached very different conclusions when faced with the same general issue in the absence of a specific factual showing that the child appreciated the significance of her statements to proper treatment. *See supra* note 92.

100. An apparently reasonable response to these points is that children, particularly young children, do not lie to authority figures concerning important matters. This may be an excellent argument for creating a general exception for statements by young children to authority figures, but it

Under the rationale that admits a statement forming a basis for the expert's opinion, several factors simultaneously operate to undermine the statement's trustworthiness when that opinion concerns an issue of psychological, as opposed to physical, well being. First, professionals from a number of fields typically provide psychological treatment,[101] and the quality of their credentials and

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proves far too much to sustain a statement made for medical diagnosis or treatment. *See* Cassidy v. State, 74 Md. App. 1, 536 A.2d 666, *cert. denied*, 312 Md. 602, 541 A.2d 965 (1988). There the court rebuffed the state's argument that a two-year-old child was too young to fabricate and therefore her statements were reliable. In the court's view, while this might be a basis for admission under a "tender years" exception to the hearsay rule, it was inconsistent with the selfish treatment interest rationale. *Id.* at 30-32, 536 A.2d at 680-81; *see also* State v. Aguallo, 318 N.C. 590, 601-02, 350 S.E.2d 76, 83 (1986) (Billings, C.J., dissenting) (where no showing that child has heightened interest in truthfulness to facilitate treatment, general belief that young children are truthful would support legislative creation of tender years exception but not admission under rule 803(4)); State v. Nelson, 138 Wis. 2d 418, 448, 406 N.W.2d 385, 397 (1987) (Heffernan, C.J., dissenting) ("The assertion that the interrogator was an authority figure is irrelevant to the rationale of the exception. There is no hearsay exception for statements made to authority figures.").

On the other hand, the fact that a statement is not made with a perception that it will serve the child's selfish treatment interest does not mean it is unreliable and therefore necessarily inadmissible. Oldsen v. People, 732 P.2d 1132, 1135 n.4 (Colo. 1986) (statements admitted under catchall exception even though excluded under rule 803(4)). It does mean, however, that the statement should not be admitted under rule 803(4).

101. Many courts have found statements to persons who are not medical doctors admissible under rule 803(4). Their analysis is generally not very clear and often takes no note of the two distinct rationales supporting the exception. For instance, in United States v. Welch, 25 M.J. 23, 25 (C.M.A. 1987), the court held that statements made to a clinical psychologist and senior psychotherapist were admissible. It first noted that the military rule and its federal rule counterpart contain no language limiting applicability to medically licensed doctors. *Id.* The court argued that the commentary explicitly envisioned that statements need not be made to physicians. *Id.* It then cited a number of cases admitting statements to psychologists. *Id.* (citing United States v. DeNoyer, 811 F.2d 436 (8th Cir. 1987); Oldsen v. People, 732 P.2d 1132 (Colo. 1986); People v. Skinner, 153 Mich. App. 815, 396 N.W.2d 548 (1986); *In re* Helms, 77 N.C. App. 617, 335 S.E.2d 917 (1985)). The court at no point noted that the cited reference in the rule's commentary related only to statements made under the victim's selfish treatment interest rationale. *See also* Department of Social Servs. v. Freiburger, 153 Mich. App. 251, 257, 395 N.W.2d 300, 302 (1986) (statement to psychiatric social worker admitted under similar argument).

In State v. Robinson, 153 Ariz. 191, 199 n.9, 735 P.2d 801, 809 n.9 (1987), the court undertook some limited analysis to support receiving the statement of a clinical psychologist under the exception. It noted that a certified psychologist is authorized under state law "to 'diagnose, treat and correct human conditions ordinarily with the scope of the practice of a psychologist,' " and concluded that the psychologist was treating the patient for a "medical" purpose as required by the rule. *Id.* (quoting ARIZ. REV. STAT. § 32-2084 (1986)).

In State v. Jones, 89 N.C. App. 584, 591-93, 367 S.E.2d 139, 144-45 (1988), the court approved admission of statements by the child victim to a social worker with the Duke Child Protection Team under this exception, characterizing the exception as applying to "[s]tatements made to a medical worker." *See also* United States v. DeNoyer, 811 F.2d 436, 438 (8th Cir. 1987) (statements to social workers admissible).

By contrast, Weinstein and Berger in their treatise take a very conservative approach: "Statements made to a psychiatrist *or to someone like a psychologist, who would relay them to a medical doctor,* fall within rule 803(4) . . . ." 4 J. WEINSTEIN & M. BERGER, *supra* note 2, ¶ 803(4)[01], at 150 (emphasis added). Perhaps this conservative approach is related to the authors' appreciation of the tremendous range of relevant statements in such fields: "As a general rule all statements made in this context, regardless of their content, are relevant to diagnosis or treatment since experts in the field view everything relating to the patient as relevant to his personality." *Id.* (citing United States v. Lechoco, 542 F.2d 84 (D.C. Cir. 1976)); *see also* Graham, *supra* note 3, at 529, n.26 (asserting that the exception should not extend to statements made to social workers); Cassidy v. State, 74 Md. App. 1, 47-48, 536 A.2d 666, 688-89 (1987) (finding no justification for limiting the exception to medical personnel and excluding highly trained specialists from other disciplines if declarant's selfish treatment interest is not involved and medical workers are permitted to testify to statements received for purposes of social disposition), *cert. denied*, 312 Md. 602, 541 A.2d 965 (1988).

expertise is neither consistent nor necessarily excellent. Second, the breadth of the information considered relevant to the treatment of a psychological malady is expansive.[102] The combination of these two factors means that, as a group, statements relied upon by these experts should be received only after particularized inquiry into the trustworthiness of the statements, especially since statements of all other experts are received only for a limited purpose.

Moreover, courts have expanded the subject matter of the opinions that may form the predicate for admission of the hearsay statements. The decided cases impose no explicit requirement that the expert's opinion be limited to a matter relevant to treatment of a psychological malady.[103] Under the theory of the exception, the statement should be relevant to an opinion related to possible treatment of the declarant, although treatment need not be intended or in fact result. Simply because the expert is one who typically gives opinions related to psychological condition and because the expert is competent to form an opinion relevant to some aspect of the case should not be sufficient reason to receive the statement.[104]

At this point, the anomalous nature of the exclusion of statements to all other experts when offered for their truth becomes painfully obvious. When the exception is extended to include statements that provide the basis for opinions not related to treatment, the exception has lost its general integrity. In order to provide some meaningful assurance of actual trustworthiness, the exception should be construed to require a special level or type of expertise for the auditor of the statement or to limit the subject matter of the expert opinion.[105]

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102. *See supra* notes 10 & 96.

103. *See* State v. Oliver, 85 N.C. App. 1, 15-17, 354 S.E.2d 527, 535-36, *disc. rev. denied*, 320 N.C. 174, 358 S.E.2d 64 (1987). The court in *Oliver* contended that an expert's determinations whether a child could distinguish between fact and fantasy and whether a child could have easily been coached into alleging sexual assault were relevant to treatment of her psychological condition. *Id.* at 15-16, 354 S.E.2d at 536. That claim, however, seems either farfetched or to suggest such a flexible standard as to cover virtually any opinion that a psychologist might render concerning the child.

104. Generally the expert may give an opinion that the complaining witness exhibits symptoms consistent with sexually abused children that may help explain to the jury aspects of the child's behavior that otherwise would appear to undermine the credibility of the accusation. McCord, *supra* note 3, at 58-60; *see* State v. Black, 537 A.2d 1154, 1156 (Me. 1988) (given attack on credibility by defense questioning victim's actions following incident, testimony of expert concerning usual pattern of child's behavior in sexual abuse cases admissible); People v. Beckley, 161 Mich. App. 120, 409 N.W.2d 759 (1987) (same), *review granted*, 430 Mich. 857, 420 N.W.2d 827 (1988); State v. Kennedy, 320 N.C. 20, 31-32, 357 S.E.2d 359, 366-67 (1987) (same); State v. Bailey, 89 N.C. App. 212, 217-19, 365 S.E.2d 651, 654-55 (1988) (same).

The fact that a doctor, psychologist, or social worker can give such testimony as an expert, however, should not mean that statements received by the expert are admissible under this hearsay exception. The language of the rule, which requires that such statements be "reasonably pertinent to diagnosis or treatment" should be read to mean that as far as *subject matter* is concerned, the opinion must be relevant to a treatment-type issue, even though under the rule no treatment need actually be anticipated. Medical treatment is reintroduced here into the requirements of the rule, not as a limitation that would exclude testimony by a doctor who is expected only to provide trial testimony, but as a restriction on the appropriate subject of expert testimony since, unlike other expert testimony, the statements made for medical purposes are substantively admissible. *Cf.* State v. Heath, 316 N.C. 337, 343, 341 S.E.2d 565, 569 (1986) (mental health professional's testimony concerning child's truthfulness irrelevant to mental state or health of child).

105. Professor Graham argues that, since almost anything is relevant to diagnosis or treatment of psychological well being, too many untrustworthy statements would be admissible under an un-

Strict limitations on the type of expert involved appear less warranted as a general matter than tight restrictions on subject matter of the permissible opinions to which the statements may relate. The identity of the expert, however, should be a factor in determining whether to admit the statement in some cases. Perhaps all statements to social workers should not be excluded from the exception.[106] On the other hand, a statement made to a social worker should not be admitted simply because it is relevant to some opinion the social worker is competent to render concerning a psychological condition.[107]

If a selfish treatment interest is indeed required to sustain admissibility—whether under the confrontation clause or under the hearsay rule when the statement pertains to esoteric psychological or identification issues—courts should not simply invent such an interest from the facts and circumstances of the case, as appears to be the tendency of some courts in this highly charged area.[108] Particularly in the criminal context, where the confrontation clause

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restricted application of rule 803(4). He advocates limiting the rule to statements pertinent to physical medical diagnosis or treatment, and would admit other statements having adequate indicia of trustworthiness under either the residual exceptions or special exceptions created for application in child sexual abuse cases. Graham, *supra* note 3, at 529 n.26.

106. Exclusion of statements to social workers is entirely inappropriate where the patient's selfish treatment interest is present. *See supra* notes 39-40 and accompanying text. This means that where an examination is performed for the purpose of treatment and that purpose is communicated to the child, there is no reason to draw distinctions between doctors, psychologists, and social workers. The child is not likely to be able to distinguish between these professionals. Recognizing that the child is not likely to note these differences between professionals does not render the distinctions between experts without significance. If the declarant does not perceive that the examination as a whole or a specific subject, such as the identity of the perpetrator, implicates her selfish treatment interest, then the statements must be admitted under the basis-of-the-expert's-opinion rationale, and under this rationale, the expert's qualifications should be an important factor.

Even if excluded from rule 803(4), statements to social workers might be admissible in appropriate circumstances under the residual exception, and in such cases, attention would be directly paid to the types of factors that support the trustworthiness of the statement. *See* State v. Sorenson, 143 Wis. 2d 226, 242-51, 421 N.W.2d 77, 83-87 (1988).

107. In Cassidy v. State, 74 Md. App. 1, 536 A.2d 666, *cert. denied*, 312 Md. 602, 541 A.2d 965 (1988), the court strongly criticized and rejected the expansion of the exception beyond treatment of physical condition to psychiatric counseling and what it termed "realms of social disposition." Once the treatment of physical injuries is left behind, the reason for the exception—the patient's fear that unless she supplies accurate information she will not receive proper treatment for injury or disease—is greatly diminished. *Id.* at 34, 536 A.2d at 682-83. Then when the purpose moves to recommendations of social disposition, such as removal of the child from the perpetrator's home, the integrity of an exception restricted to medical personnel, and in turn the rationality of the exception, ceases to exist altogether. Highly trained specialists in all sorts of fields have a legal duty to prevent continued child abuse, but statements made to them are not substantively admissible. The court concluded that the hearsay exception could not logically be limited to medical personnel if statements for the purpose of social disposition were included within the exception. *Id.* at 47-48, 536 A.2d at 688-89.

The issues discussed above are not of major concern when statements concern solely physical maladies. When such statements are received under the selfish treatment interest, only statements to physicians or persons who received statements for the purpose of transmitting them to physicians would satisfy the exception. As to either, the declarant's selfish treatment interest provides the guarantee of trustworthiness regardless of the auditor's expertise. When admissibility of a statement is based on its use by a medical expert to form an opinion and the statement concerns the declarant's physical condition, only physicians would be qualified to render such opinions. Here the high degree of professional competence enjoyed by doctors gives a real measure of assurance to the trustworthiness of the statements.

108. *Nelson* appears to be a case where the selfish treatment interest was improperly "invented." *See supra* notes 85-98 and accompanying text (discussing the *Nelson* decision). In *Nelson* the court concluded, without any specific factual basis in the record to support its result, that

makes the patient's subjective interest a critical factor in rendering such statements admissible, courts should require a concrete indication that the declarant subjectively appreciates that the statement has potential treatment consequences.

IV. CONSTITUTIONAL LIMITATIONS IMPOSED BY THE CONFRONTATION CLAUSE IN CRIMINAL CASES ON STATEMENTS UNDER RULE 803(4)

In addition to the limitations on the application of the rule discussed in the preceding section, the confrontation clause should have an important impact on the operation of rule 803(4) in some criminal cases. In cases where the child does not testify,[109] the confrontation clause should result in exclusion of testi-

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> Just as a child of three or four years of age understands that statements made to a physician will be used by that physician to ease the physical pain of the child, we conclude that such a child also understands that statements made to a psychologist will be used by the psychologist to ease the emotional or psychological injuries of the child.

138 Wis. 2d at 432, 406 N.W.2d at 391. One is hard pressed to find any basis for the court's assertion. Indeed, because much of the information was elicited by simulating play, the child's consciousness of a treatment purpose appears unlikely. *See id.* at 447-48, 406 N.W.2d at 397 (Heffernan, C.J., dissenting).

109. Whether the declarant must be unavailable before hearsay statements under rule 803(4) are admissible is presently an open issue. The answer depends largely upon how broadly the Supreme Court's decision in United States v. Inadi, 475 U.S. 387 (1986), is construed. Read broadly, *Inadi* eliminates the necessity of producing the declarant for all hearsay exceptions under rule 803.

In Ohio v. Roberts, 448 U.S. 56 (1980), the Supreme Court articulated what appeared to be a general requirement of unavailability under the confrontation clause before hearsay statements could be admitted. It stated, "In the usual case, . . . the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." *Id.* at 65. The Court in *Inadi* stated that the *Roberts* requirement of unavailability applied only to hearsay in the form of prior testimony, which the court found to be merely a weaker substitute for live testimony. *Inadi*, at 392-94. It held that the government need not show unavailability before introducing coconspirator statements. *Id.* at 400.

The *Inadi* Court stated that coconspirator statements were superior to live testimony. *Id.* at 395. First, because such statements are made during the conspiracy, their context cannot be replicated. *Id.* While the court did not put it in these terms, it was treating the statements much like verbal acts. Second, because of changes in the legal interest between the coconspirators and the context, any in-court version of the statements is not likely to recapture fully the significance of the contemporaneous conspiratorial statement. *Id.*

At least part of the Court's logic applies generally to exceptions under rule 803, since, like the statements of coconspirators at issue in *Inadi*, they have independent justifications for admission that make such hearsay statements theoretically superior to the available in-court testimony of the witness. *See* FED. R. EVID. 803 advisory committee's note ("The present rule proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available."). Indeed, some lower court cases have begun to apply the *Inadi* analysis to other circumstances. *See, e.g.*, Reardon v. Manson, 806 F.2d 39, 41-42 (2d Cir. 1986) (court employed *Inadi* analysis to excuse failure of state to call available chemists who performed some tests reported by expert who did testify), *cert. denied*, 107 S. Ct. 1903 (1987); United States v. Quick, 22 M.J. 722 (A.C.M.R. 1986) (*Inadi* principles apply in sexual abuse cases), *aff'd*, 26 M.J. 460 (C.M.A. 1988); Johnson v. State, 292 Ark. 632, 643-44, 732 S.W.2d 817, 822-23 (1987) (*Inadi* applicable to statements by youthful sex offense victim under special hearsay exception); People v. Hughey, 194 Cal. App. 3d 1383, 1392-93, 240 Cal. Rptr. 269, 275 (1987) (*Inadi* applies to spontaneous utterance exception). *But see* State v. Kerley, 87 N.C. App. 240, 245, 360 S.E.2d 464, 467 (1987) (without citing *Inadi*, court finds unavailability showing required for excited utterance), *disc. review denied*, 321 N.C. 476, 364 S.E.2d 661 (1988); Long v. State, 742 S.W.2d 302, 320-21, 323 (Tex. Crim. App. 1987) (statute which placed onus on defendant to call available child victim violates both the defendant's confrontation and due process rights by altering the fairness of the trial in requiring defendant

mony which would otherwise be admissible exclusively under the basis-of-the-expert's-opinion rationale.

The confrontation clause presents an obstacle to admitting hearsay statements only when the child does not testify in the state's case either because of unavailability[110] or by choice of the prosecution.[111] Under *California v.*

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to choose between calling the child or foregoing cross-examination), *cert. denied*, 108 S. Ct. 1301 (1988).

If the question is viewed as simply one of predicting how the Supreme Court will rule on requiring a showing of unavailability under rule 803(4), the answer is quite unclear. When it comes to the right to confront a witness whose hearsay statement is offered at trial, the Court has recently shown little interest in reading the right expansively. *See* United States v. Owens, 108 S. Ct. 838, 845 (1988) (right to confront satisfied as to witness who had lost all memory of underlying event); Bourjaily v. United States, 107 S. Ct. 2775, 2782-83 (1987) (no showing of reliability required of coconspirator statements); *Inadi*, 475 U.S. 387. On the other hand, the Court has protected what would appear substantively to be a far less important right of the defendant to "stare down" a witness, ruling unconstitutional on confrontation grounds a state procedure to screen the victim from viewing the defendant. Coy v. Iowa, 108 S. Ct. 2798, 2802-03 (1988).

Commentators have suggested tests that would require unavailability before at least some statements under rule 803(4) are admitted. Professor Kirkpatrick has fashioned a test based largely on Dutton v. Evans, 400 U.S. 74 (1970) (plurality opinion), which looks to the questions of importance of the statement, its reliability, its susceptibility to testing by cross-examination, and the adequacy of alternatives to cross-examination. Kirkpatrick, *Confrontation and Hearsay: Exemptions from the Constitutional Unavailability Requirement*, 70 MINN. L. REV. 665, 682-86 (1986). He specifically opines that the exception in rule 803(4) would probably fail his test. *Id.* at 690 & n.132. Professor Michael Graham argues that the test for unavailability should be whether the "circumstances surrounding the making of the statement indicate that it was accusatory when made." Graham, *supra* note 3, at 593; *see* Graham, *The Confrontation Clause, the Hearsay Rule, and the Forgetful Witness*, 56 TEX. L. REV. 151, 192 (1978). Under Graham's test, many statements made to experts involved in the investigation of potential criminal conduct would be admissible only after a showing of unavailability. Graham, *supra* note 3, at 585.

It is hard to go much further in this murky area, however, than to note the great uncertainty and to suggest that, if unavailability remains a requirement for any of the hearsay exceptions under rule 803, it is likely to be imposed as to statements admitted under the basis-of-the-expert's-opinion rationale under rule 803(4). *Cf.* Nelson v. Ferrey, 688 F. Supp. 1304, 1324-26 (E.D. Wis. 1988) (testimony of child witnesses may be admissible under nontraditional hearsay exceptions where child testifies or prosecution unable to produce her).

110. Unavailability typically occurs in child sexual abuse cases as a result of incompetence resulting from the child's age and immaturity, *see, e.g.*, State v. Robinson, 153 Ariz. 191, 203-04, 735 P.2d 801, 813-14 (1987) (trial court ruled that complaining witness was incapable of testifying based on testimony by expert that child would be uncommunicative if asked about the assault and would be traumatized by testimony and based on review of transcripts of child's previous unsuccessful efforts to testify); State v. Myatt, 237 Kan. 17, 24-25, 697 P.2d 836, 843 (1985) (child incompetent to testify); State v. Drusch, 139 Wis. 2d 312, 321-22, 407 N.W.2d 328, 332-33 (Wis. Ct. App.) (child, who was unresponsive and cried while on stand, unavailable), *rev. denied*, 140 Wis. 2d 874, 416 N.W.2d 66 (1987); *cf.* State v. Kuone, 243 Kan. 218, 757 P.2d 289 (1988) (child unavailable where court found grave risk that psychological injury would result from testifying); State v. Slider, 38 Wash. App. 689, 688 P.2d 538 (1984) (child with no memory of event at time of trial unavailable).

111. Some states have chosen as a legislative judgment to spare the child the trauma of testimony, admitting the child's pretrial statement and placing the onus on the defense to call her. *See, e.g.*, Johnson v. State, 732 S.W.2d 817 (Ark. 1987) (Arkansas Rule of Evidence 803(25) establishes "tender years" exception that permits hearsay statements of child to be admitted even if child is available). *Cf.* State v. Nelson, 138 Wis. 2d 418, 442-43, 406 N.W.2d 385, 395 (1987) (court weighed social interest in protecting the child, finding unavailability where expert testified that testimony would "exact considerable toll on [child's] well-being" and where court itself questioned efficacy of cross-examination), *habeas corpus relief granted*, Nelson v. Ferrey, 688 F. Supp. 1304, 1318-20 (E.D. Wis. 1988) (district court found testimony concerning duration and severity of likely trauma insufficient to constitute unavailability).

Under the confrontation clause, a generalized legislative judgment that trauma will result from the child testifying is unlikely to be sufficient to satisfy an unavailability requirement. In Coy v. Iowa, 108 S. Ct. 2798 (1988), the Court held unconstitutional under the confrontation clause a state

Green,[112] when the witness is available to be cross-examined at trial concerning her prior statements, the confrontation clause is not violated by use of such prior statements. And under the recent decision in *United States v. Owens*,[113] even the failure of the witness to remember the details of the statement would not violate the right.[114] If the child does not testify, however, the confrontation issue presented is both very substantial and difficult. The most serious of these issues arises in trials in which, without cross-examination, the hearsay exception is used as the exclusive vehicle for presenting the child's accusations against the defendant to the jury.[115]

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procedure which screened the child from seeing the defendant. The protective device was authorized on the basis of a general legislative judgment that complaining witnesses in child abuse cases should be protected. The Court found the procedure unconstitutional, reasoning that the right of face to face confrontation, explicitly guaranteed by the sixth amendment, could certainly not be denied where no individualized findings had been made that the witness needed special protection. *See also* Graham, *supra* note 3, at 558-62 (discussing adequacy of psychological injury to show unavailability).

112. 399 U.S. 149 (1970).

113. 108 S. Ct. 838 (1988).

114. *Id.* at 842-43. In *Owens* the Court noted that the confrontation clause guaranteed only an *opportunity* for effective cross-examination, and concluded that such opportunity is not denied when either (1) the witness testifies to his current belief but is unable to recollect the reason for the belief or (2) his belief is introduced through a hearsay statement and the witness testifies that he is unable to recollect the reason for that past belief. *Id.* at 842. In *Owens* the witness' hearsay statement was significant because it identified the defendant as the person who committed the crime. The Court stated:

> It is sufficient that the defendant has the opportunity to bring out such matters as the witness's bias, his lack of care and attentiveness, his poor eyesight, and even (what is often a prime objective of cross-examination, see 3A J. Wigmore, Evidence § 995, at pp. 931-32 (J. Chadbourn rev. 1970)) the very fact that he has a bad memory.

Id.

Owens clearly eliminates the confrontation clause issue in a case like State v. Stafford, 317 N.C. 568, 346 S.E.2d 463 (1986). In *Stafford* the complaining witness, who was 13 years old, testified in the state's case and was subject to cross-examination. *Id.* at 575, 346 S.E.2d at 468. While the statement was not admissible as a prior consistent statement because it "went far beyond" the in-court testimony, *id.*, such differences do not implicate the confrontation clause.

The situation in United States v. Iron Shell, 633 F.2d 77 (8th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981), presents a closer issue, but like *Stafford* appears to raise no confrontation issue under *Owens*. There the nine-year-old complaining witness testified and was subject to cross-examination but was unable to repeat the statement she had previously made. She was, however, able to provide facts supporting her prior statements. *Iron Shell*, 633 F.2d at 87.

Owens, however, should not mean that simply putting a child on the stand, regardless of his mental maturity, is sufficient to eliminate the confrontation clause concern. It should have no impact on a case like United States v. Nick, 604 F.2d 1199 (9th Cir. 1979), where the victim was three, and while he was not formally ruled incompetent, the court concluded he could not have been subject to cross-examination because of his extremely young age. *Id.* at 1202. While less clear, *Owens* should not alter the analysis in United States v. Dorian, 803 F.2d 1439, 1446 (8th Cir. 1986), in which the court described the five-year-old victim, called to testify by the prosecution, as "simply too young and too frightened to be subjected to a thorough direct or cross-examination." The Supreme Court in *Owens*, while indicating that a full cross-examination was not required by the confrontation clause, did indicate that it remained concerned that defense counsel not be deprived of all opportunity to demonstrate the weakness of the testimony. 108 S. Ct. at 842-43. That such opportunity is possible with a witness who is as described in *Dorian* is doubtful. Finally, *Owens* should certainly not render available for purposes of the sixth amendment a child who, under modern standards of competency takes the stand but is ruled unavailable as incompetent due to extreme mental immaturity or inability to answer questions caused by trauma.

115. *See* Graham, *supra* note 3, at 585 (arguing that statements made in preparation for litigation are unlikely to possess sufficient indicia of reliability to satisfy confrontation clause requirements under Ohio v. Roberts, 448 U.S. 56 (1980)). *Cf.* 4 J. WEINSTEIN & M. BERGER, *supra* note 2, ¶

Assuming the child does not testify, the issue under the confrontation clause is under what circumstances will a hearsay statement possess adequate "indicia of reliability" to serve as a substitute for the opportunity to confront the declarant and thereby satisfy the demands of the confrontation clause. In *Ohio v. Roberts*[116] the United States Supreme Court stated that such reliability "can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness."[117]

The Court provided no precise definition of what hearsay exceptions are "firmly rooted." The Court observed that "certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection.' "[118] It also cited cross-examined prior testimony and properly administered business and public records exceptions as examples of firmly rooted hearsay exceptions.[119] The Court, however, set out no clear guidelines for determining when an exception falls within the "firmly rooted" category.

Some courts and commentators have argued that the appropriate way to determine which exceptions are "firmly rooted," given the function of this concept under confrontation clause analysis, is to examine the reliability of the exception.[120] In *Bourjaily v. United States*,[121] however, the Supreme Court adopted a different test in holding that the coconspirator exception[122] is "firmly rooted" within the meaning of *Roberts* and concluding that no independent inquiry into the reliability of the statement was required. The Court reached this

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803(4)[01], at 147 (arguing that, where statement of available witness who does not testify is produced through rule 803(4) and contains critical fact, court may find evidence insufficient to support verdict).

It is somewhat ironic that the United States Court of Appeals for the Eighth Circuit, which has led the way in expanding the application of rule 803(4) in child sexual abuse cases, decided an often-cited case decrying the denial of the right to effective cross-examination if the declarant's statement could be produced exclusively through the testimony of an expert who was consulted only for the purpose of testifying. Aetna Life Ins. Co. v. Quinley, 87 F.2d 732, 733-34 (8th Cir. 1937).

116. 448 U.S. 56 (1980).

117. *Id.* at 66.

118. *Id.* (quoting Mattox v. United States, 156 U.S. 237, 244 (1895)).

119. *Id.* at 66 n.8.

120. State v. Wyss, 124 Wis. 2d 681, 709-10, 370 N.W.2d 745, 759 (1985); Goldman, *Not So "Firmly Rooted": Exceptions to the Confrontation Clause*, 66 N.C.L. REV. 1, 12-13 (1987).

In *Wyss* the court specifically addressed whether Wisconsin's rule covering statements for medical diagnosis or treatment, WIS. R. EVID. 908.03(4), was "firmly rooted" insofar as it admitted statements of the cause or external source of the symptoms described by the declarant. 124 Wis. 2d at 709-10, 370 N.W.2d at 758-59. The court acknowledged that admitting statements of cause constituted a change in state law and therefore would not satisfy a "firmly rooted" requirement based on longevity. *Id.* It concluded, however, that longevity was not the test, but rather considerations of reliability and trustworthiness, which were satisfied because under the theory of the exception such statements are motivated by the declarant's interest in proper treatment. *Id.*

121. 107 S. Ct. 2775 (1987).

122. Although this Article uses the term "coconspirator *exception*" throughout, "coconspirator *exclusion*" would be a somewhat more accurate term. Coconspirator statements are excluded from the definition of hearsay under FED. R. EVID. 801(d)(2)(E), and because they are not hearsay, they need not be admitted under an exception to the hearsay rule. Due to the awkwardness of the term "coconspirator exclusion," however, the more familiar terminology of the coconspirator "exception" is employed.

conclusion, not on the basis of an assessment of the reliability of the coconspirator exception,[123] but because of the long-standing acceptance of the exception. The Court observed that the exception was first explicitly adopted by the Supreme Court in 1827, it had been repeatedly reaffirmed as accepted practice, and, to the extent not superseded by the Federal Rules, it was demonstrably part of our jurisprudence.[124] Recently in *Coy v. Iowa*,[125] the Court again emphasized the longevity point. In holding constitutionally invalid a state practice of screening young victims from viewing the defendant, the Court stated that "[t]he exception created by the Iowa statute, which was passed in 1985, could hardly be viewed as firmly rooted."[126]

Even under the analysis of *Bourjaily* and certainly under a trustworthiness analysis, statements admissible only under the newly added rationale that admits statements forming a basis of the medical expert's opinion should not be found within the "firmly rooted" category. First, the Court in *Bourjaily* parenthetically explained its holding in *Dutton v. Evans*[127] as requiring a reliability analysis when the state evidentiary rule expanded the common-law approach by admitting coconspirators' hearsay statements made after termination of conspiracy.[128]

Furthermore, in *Bourjaily* it found the coconspirator exception under the federal rule "firmly rooted," placing similarly strong emphasis on the lack of deviation from the long-standing common law definition. The petitioner had argued that the change in the substantive dimension of the hearsay exception, approved in *Bourjaily*, that allowed a court to consider the putative coconspirator statement in determining whether a conspiracy existed[129] meant that the exception could no longer be considered "firmly rooted." The Court rejected the argument. It concluded that only the method of proving that a statement falls within the exception had been changed, not the dimensions of the exception, "which has remained substantively unchanged since its adoption in this country."[130]

123. Unlike statements admitted under traditional hearsay exceptions, the theory for admission of coconspirator statements is not based on the trustworthiness or reliability of the statements but instead on a characteristic of the adversary system. *See Bourjaily*, 107 S. Ct. at 2785-87 (Blackmun, J., dissenting) (setting out authorities and discussing theory of excluding admissions of party opponent, which includes coconspirator statements, from definition of hearsay). Accordingly, use of a trustworthiness test would have raised serious difficulties in admitting coconspirator statements.

124. *Id.* at 2783 (opinion of the Court).

125. 108 S. Ct. 2798 (1988).

126. *Id.* at 2803.

127. 400 U.S. 74 (1970).

128. *Bourjaily*, 107 S. Ct. at 2783.

129. *Id.* at 2782 ("[A] court, in making a preliminary factual determination under rule 801(d)(2)(E), may examine the hearsay statements sought to be admitted.").

130. *Id.* at 2783 n.4. Whether the analysis of State v. Wyss, 124 Wis. 2d 681, 709-10, 370 N.W.2d 745, 759 (1985) survives the United States Supreme Court's decisions in *Bourjaily* insofar as it rejects longevity as a central issue in determining that a hearsay exception is "deeply rooted" is questionable. For a discussion of *Wyss*, see *supra* note 120. Regardless, however, of the answer to that question, *Wyss* gives no affirmative indication that statements admissible solely under the basis-of-the-expert's-opinion rationale constitute a "firmly rooted" exception. Indeed, since *Wyss* relied on the fact that statements of cause are considered reliable and trustworthy because they are within the declarant's selfish interest in proper treatment, 124 Wis. 2d at 709-10, 370 N.W.2d at 758-59, the

The new rationale admitting statements made for medical diagnosis when no treatment is anticipated by the declarant admittedly has a firmer place in our jurisprudence than the exception created by the Iowa statute in *Coy*. On balance, however, admitting statements solely under this rationale more closely resembles the facts in *Dutton* than those in *Bourjaily*. In *Dutton*, as here, the State of Georgia had expanded the boundaries of the coconspirator exception to admit statements, which under the theory of the exception should be generally of a less trustworthy character than under the traditional common law formulation. The expansion of the instant hearsay exception to include statements that lack any selfish treatment interest is closely analogous. Accordingly, under the confrontation clause, statements falling within the new rationale of rule 803(4) must be shown to have "particularized guarantees of trustworthiness."

In summary, under the above analysis of the confrontation clause, when a statement is offered as substantive evidence exclusively on the basis that a medical expert has relied upon it to form her opinion, the statement is not within a firmly rooted hearsay exception. If not "firmly rooted," statements under this rationale do not automatically as a class possess the necessary "indicia of reliability," and the government must demonstrate that the statement in question has "particularized guarantees of trustworthiness."[131] While some statements under this second rationale will satisfy the required showing, others clearly will not.[132]

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case supports the position that statements admitted only as the basis of a medical expert's opinion are not within the "firmly rooted" category.

131. Different tests have been used by the courts for determining when an exception has sufficient guarantees of trustworthiness to satisfy the requirements of the confrontation clause. Some cases look to Dutton v. Evans, 400 U.S. 74 (1970) as a model. *Dutton* identified four factors as important: (1) the statement contained no express assertion of past fact; (2) the declarant's personal knowledge was clearly established; (3) there was virtually no possibility that the statement was based on faulty recollection; and (4) the circumstances under which the statement was made supported the conclusion that the declarant did not have reason to misrepresent the facts. *Id.* at 88-89; *see* United States v. Ordonez, 737 F.2d 793, 802-03 (9th Cir. 1984). Other courts have found the appropriate issue to be whether, under the language of California v. Green, 399 U.S. 149, 161 (1970), the circumstances "afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement." *E.g.* United States v. Marchini, 797 F.2d 759, 764 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 1288 (1987); United States v. Barlow, 693 F.2d 954, 964 (6th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983). Yet others have used a test that replicates the evidentiary analysis of trustworthiness employed in assessing admissibility under the catchall hearsay exceptions. *See, e.g.*, United States v. Dorian, 803 F.2d 1439, 1447 (8th Cir. 1986); State v. Robinson, 153 Ariz. 191, 204, 735 P.2d 801, 814 (1987) (standards similar); State v. McCafferty, 356 N.W.2d 159, 163 (S.D. 1984) ("The 'indicia of reliability' referred to by the *Roberts* Court and the 'circumstantial guarantees of trustworthiness' language in the residual exception to the hearsay rule are synonymous."); Graham, *supra* note 3, at 563-64.

Perhaps more significant than differences in the general test, courts have been inconsistent in requiring a rigorous showing of trustworthiness and particularly so in the emotionally charged area of child sexual abuse. *Compare* State v. Robinson, 153 Ariz. 191, 204-05, 735 P.2d 801, 814-15 (1987) (noting that the need to prosecute child abusers provides no justification for admitting hearsay statements unless *Roberts* principles are fully satisfied but finding statements to psychologist automatically admissible) *with* United States v. Dorian, 803 F.2d 1439, 1447 (8th Cir. 1986) (confrontation clause should be applied in pragmatic fashion taking into account the very strong interest in protecting defenseless child abuse victims).

132. Admissibility should prove problematic if the circumstances indicate that because of age, maturity, or setting the patient's selfish treatment interest is not involved and the opinion goes to psychological maladies or statements of identity. Although the court in State v. Nelson, 138 Wis. 2d 418, 406 N.W.2d 385, 396 (1987) (discussed in text accompanying notes 85-94), found that the facts did not present "unusual circumstances which undercut . . . trustworthiness" under *Roberts*, the

V. CONCLUSION

In the above analysis, this Article argues that the hearsay exception for statements made for purposes of medical diagnosis or treatment is not a monolith and should not be treated by the courts as if it required uniform application regardless of the rationale supporting admission of the specific statement. The Article contends that the confrontation clause requires the exception to be applied most restrictively in criminal cases in which the declarant does not testify.

In civil litigation and criminal cases that do not implicate the confrontation clause because a competent complaining witness testifies in the state's case, the exception may properly be applied so as to admit statements under both rationales: the traditional trustworthiness rationale applicable to statements made for a selfish treatment purpose and the new rationale applicable to statements relied upon by medical experts to form their opinions. Yet, even in cases that do not implicate the confrontation clause, the exception should operate within the limitations developed in this Article.

First, when the statement is admitted exclusively under the rationale that it forms part of the basis for the expert's opinion, the expert must have in fact relied upon that statement in reaching an opinion relevant to the medical treatment of the declarant, and should actually testify to that opinion before the statement is admitted. Second, the application of the exception should be limited to classes of persons with some formally recognized expertise in a field closely allied with the medical field. Finally, courts should evaluate the facts realistically in determining whether the statement should be admitted under the selfish treatment interest rationale when it concerns matters relevant only to psychological well being. They should examine the subject matter of the inquiry and the circumstances of the conversation to determine if the declarant had any real perception that his health would likely be affected by the information provided.

The first of the above limitations is based on the principle that unless the expert actually relies on the statement, the basis for assuming the trustworthiness of the statement is lacking and, unless she is permitted to testify to that opinion, a major justification for admission of the statement is removed. If the expert does not in fact rely on the statement to form a medically relevant opinion, there is no reliability guarantee for the statement that would arise from the competence of the expert who is presumed not to rely on statements that lack trustworthiness. Furthermore, if she does not testify to that statement in the context of a relevant opinion, the finder of fact does not have an opportunity to judge the expert's power to evaluate the statement. Finally, since the jury, but

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Nelson case presents an example of the type of fact situation that should result in exclusion of the testimony under the confrontation clause. Therefore, the federal district court granted habeas corpus relief, while the state supreme court ruled otherwise. Nelson v. Ferrey, 688 F. Supp. 1304, 1326-27 (E.D. Wis. 1988). Moreover, since the statements in *Nelson* were elicited as part of preparation for litigation, unavailability is also likely to be required under the confrontation clause. *See supra* note 109.

for this extension of the hearsay exception, would never have heard the statement, any concern about the ineffectiveness of a limiting instruction is irrelevant.

The second limitation flows from the need to justify a treatment of statements received by medical experts different from those made to experts in other fields. If the declarant's subjective interest provides no guarantee of reliability, it makes little sense to admit a statement made to a social worker in the area of child abuse when a statement made to a more highly credentialed expert concerning other areas of important social concern would be admitted only for a limited purpose and only in support of that expert's opinion, if one is admitted at trial. If statements are to be received in the medical area in the absence of any selfish treatment interest by the declarant, then the specialized training of the expert involved must assure the trustworthiness of the statement.

Under the final point, courts should be wary of attributing a selfish treatment interest to statements made concerning psychological concerns and issues of identity. This is particularly true when the conversation occurs in informal settings and when the psychological expert is attempting to determine questions such as the truth-telling ability of the child which only indirectly relates to any possible treatment decision.[133]

In criminal cases in which the child is unavailable or is not called by the state, a different and more substantial pattern of limitations should apply because of the impact of the confrontation clause when the declarant, due to incompetence or other reasons, does not testify in the state's case and is not available for cross-examination. When the declarant does not testify for the state, the statement should be admitted generally only if it is justified under the subjective selfish treatment interest rationale. The confrontation clause requires either that the statement fall within a firmly rooted hearsay exception or that it bear special indicia of reliability. Neither is satisfied in the typical case when the statement is admitted under the expanded theory that the statement forms the basis of an expert's opinion.

Under the confrontation clause, a statement should be excluded even if it ostensibly comes within the selfish interest rationale when, in fact, the subject matter of the statement, the circumstances under which it was made, or the age or mental maturity of the declarant indicates that the perceived well being of the declarant is not implicated by the statement. The fact that the statement pertains to psychological concerns that bear little relationship to the physical condition of the declarant or that have no perceptible relationship to any medical

133. Rule 403 should be used by the courts to limit admission of statements that lack any substantial guarantee of trustworthiness. In Morgan v. Foretich, 846 F.2d 941, 952 (4th Cir. 1988), retired Justice Powell (sitting by designation) argued in dissent that while statements made to a "physician" consulted only for the purpose of testifying at trial are apparently admissible under rule 803(4), statements for this purpose are inherently less reliable than others under the exception. The professional witness may be less objective when so retained as a testifying expert, and more importantly, the declarant's veracity may be suspect because the statement serves no treatment purpose. The trial court could appropriately exercise its discretion in such cases to exclude the statement under rule 403 on the ground that prejudice outweighs probativity. *Cf.* 4 J. WEINSTEIN & M. BERGER, *supra* note 2, ¶ 803(4)[01], at 151 (rule 403 may be used to exclude statements involving extensive details over years of time and those made by mentally impaired declarants).

concern should be of critical importance and often should have decisive impact.[134]

In general, efforts to take statements in informal settings designed to put the child at ease and even to disguise the true purpose of the inquiry may prove useful information-gathering techniques, but those same techniques may eliminate the subjective concern for proper treatment that undergirds the trustworthiness of the statement.[135] Moreover, the age and mental maturity of the child may attenuate the selfish interest of the declarant so profoundly as to virtually eliminate any trustworthiness guarantee under the rationale of this exception. The response that children do not typically lie to authority figures cannot be a sufficient substitute for medical selfish interest. The argument, if accepted, would justify admitting statements about any important event in the child's life to any authority figure, regardless of whether they are made to a medical expert or concern a treatment issue.

In the end, the analysis presented here will not necessarily mean that large groups of statements now admitted under rule 803(4) will be excluded altogether. Many of them may be admitted through rule 803(24)[136] or through newly created exceptions specifically crafted to cover statements made by children concerning abuse or sexual assault.[137] If this is so, why does it matter what theory is used for admission?

One important difference is that, if an appropriate theory is used, efforts to admit such statements will not produce a distortion in the appropriate contours of the exception for statements made for medical diagnosis or treatment.[138] Dis-

134. One might reasonably argue that if the statement falls under the selfish interest rationale, even if only weakly shown, that the confrontation clause does not require exclusion of the statement. The constitutional limitation may not cut so finely as to require exclusion since generally statements motivated by such selfish interest are within a firmly rooted exception.

135. *See supra* note 30.

136. Some jurisdictions have virtually eliminated use of rule 803(24) if the declarant is available to testify at trial. These courts adopt the theory that the rule's "necessity" requirement is not satisfied, concluding that, given the availability of live testimony, the out-of-court statement is not " 'more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts.' " State v. Smith, 315 N.C. 76, 95, 337 S.E.2d 833, 846 (1985) (quoting FED. R. EVID. 803 (24)) (live testimony by the declarant will usually be more probative than the hearsay statement); *see* United States v. Mathis, 559 F.2d 294, 298-99 (5th Cir. 1977) (grand jury testimony of defendant's wife inadmissible because it was not shown to be best available evidence when witness was at court and never formally asserted she would refuse to testify); S. SALTZBURG & K. REDDEM, FEDERAL RULES OF EVIDENCE MANUAL 844 (4th ed. 1986) (in examining availability of other evidence, availability of declarant may be important). *But cf.* United States v. Leslie, 542 F.2d 285, 290 (5th Cir. 1976) (statement assisted in meeting trustworthiness requirement where declarant testifies at trial).

Because the catchall exceptions require the court to focus on the same types of reliability factors which if met will satisfy the confrontation clause, use of rules 803(24) and 804(b)(5) will help assure a consistent result in criminal cases under both evidentiary and constitutional analysis. If, however, the confrontation clause analysis is properly performed, the results should be roughly the same whether the court uses either the catchall exceptions or rule 803(4). This is true because the confrontation clause, like the catchall exceptions, should require an actual showing of trustworthiness rather than relying on a general presumption under rule 803(4) that will often be erroneous as to certain classes of statements.

137. *See* Graham, *supra* note 3, at 534 n.50 (citing newly enacted statutes in 20 states applicable in child sexual abuse prosecutions).

138. *Cf.* State v. Myatt, 237 Kan. 17, 23-24, 697 P.2d 836, 842 (1985) (tender years exception

tortion may occur when the exception is read too broadly in the child sexual abuse area and then the force of logic permits admission of statements in other areas in which no alternative theory would have justified admission.[139] Another type of distortion occurs when courts constrict the appropriate dimensions of the exception in one area to avoid a perceived improper expansion in another.[140]

More importantly, the results should be more accurate if a valid theory is used. Specifically, under the catchall exceptions, rules 803(24) and 804(b)(5), courts admitting statements would squarely face the issue of the trustworthiness of the statement under the individual circumstances presented,[141] presumably taking into account factors such as the age and mental maturity of the declarant, the circumstances of the making of the statement, and the purpose for which it was made.[142] These explicit judgments would permit an analysis more finely tuned than admitting all statements within the broad dimensions of the exception under circumstances in which the selfish treatment interest rationale is in fact inoperative or admitting statements made to a very broad category of experts concerning an expansive and amorphous subject matter as to which no general guarantee of trustworthiness exists. More accurate results should be achieved by applying the correct theory, which focuses on the key variables rather than trying to tease appropriate results from an exception poorly designed for the task.

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enacted by legislature to avoid pressure on courts to stretch existing hearsay exceptions in effort to meet child sexual abuse problem).

139. If the true motivating force behind admission of these statements is the general belief by many courts that children do not lie to adults, *see* State v. Aguallo, 318 N.C. 590, 601, 350 S.E.2d 76, 83 (1986) (Billings, C.J., dissenting), then statements by adult victims to psychologists should not be admitted; such statements nevertheless will meet the literal terms of the exception as it has been expanded to meet the child sexual abuse concern.

140. Precisely this type of problem may be brewing in North Carolina. The state supreme court, perhaps in an effort to limit admissibility in criminal cases in which an examination has been conducted for prosecutorial purposes, appears to be in the process of requiring that all statements admitted under this exception must satisfy the selfish treatment interest rationale and perhaps must not have been elicited exclusively for the purpose of the expert's trial testimony. *See* State v. Stafford, 317 N.C. 568, 576-77, 346 S.E.2d 463, 468-69 (1986) (Martin, J., dissenting).

141. Both catchall and residual exceptions require the court to determine that the statement has "equivalent circumstantial guarantees of trustworthiness" to the explicitly defined hearsay exceptions as a prerequisite to admissibility. FED. R. EVID. 803(24), 804(b)(5).

142. As noted above, *see supra* notes 131-32 and accompanying text, the confrontation clause properly applied will produce similar results. Use of a more appropriate hearsay exception will, however, reduce reliance on constitutional principles to decide questions more appropriately dealt with as part of the trustworthiness analysis of the hearsay exception. It will also avoid pressures to distort constitutional analysis, which may have lasting consequences, as evidentiary analysis has frequently been distorted in this highly charged setting.