IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I, Respondent/Plaintiff-Appellee,

vs.

WILLIAM MCDONNELL, Petitioner/Defendant-Appellant.

SCWC-14-0000355

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-14-0000355; FC-CR. NO. 13-1-0002)

AUGUST 28, 2017

DISSENTING OPINION BY POLLACK, J.,
IN WHICH WILSON, J., JOINS

The State's expert witness, who testified "in the dynamics of child sexual abuse," informed the jury that a prerequisite to obtaining his Ph.D. was completion of his dissertation. This dissertation, noted the expert, compared a group of convicted child molesters to non-child molesters to distinguish traits "child molesters have that normal men don't have." The expert told the jury that child molesters are

defined by their behaviors and that the typical child abuser lives in the child's home as part of a familial relationship; has a pre-existing, non-sexual relationship with the child; initially begins a healthy touching relationship with the child in advance of the sexual conduct; frequently commits the sexual abuse in the molester's home; commonly engages in the sexal abuse with others present in the home; often commits the sexual abuse when the child is asleep in bed; does not use physical force in perpetrating the abuse; and usually obtains sexual contact from the child in exchange for gifts or benefits.

All of these behaviors and characteristics of the typical child molester, as described by the expert, matched the allegations made by the child in this case. The majority concludes that the expert's testimony, which provided a template for the jury to evaluate and compare the child's allegations, was not profile evidence and was admissible as proferred by the State. I believe that this conclusion is incorrect and that the evidence as it was admitted by the family court was unfairly and overly prejudicial.

Additionally, when the defense challenged the expert testimony in this case, the family court declined to evaluate the probative value of the evidence against its unfair prejudicial effect as required by Hawaiʻi law. Instead, the family court applied a categorical rule that the evidence was

admissible based on its misunderstanding of this court's decision in State v. Batangan, 71 Haw. 552, 799 P.2d 48 (1990). However, Batangan and the Hawaii Rules of Evidence require the exercise of judicial discretion in assessing the admissibility of such evidence, and, as noted by many courts, the existence of discretion requires its exercise. By failing to apply its discretion in this case, the family court prejudicially deprived the defendant to what he was statutorily entitled--a reasoned exercise of judicial discretion as to whether all or part of the expert's testimony should have been excluded. I would therefore hold that the family court prejudicially erred in failing to exercise its independent judgment as to whether to admit or exclude all or part of the expert testimony in this case.

I also disagree with the majority's unwarranted expansion of the ruling of this court in Batangan, 71 Haw. 552, 799 P.2d 48. The Batangan court did not contemplate the type of evidence presented in this case. The expert psychological testimony that the court sanctioned in Batangan pertained to the behavior of child victims of sexual abuse, which testimony the court determined was relevant and helpful to the jury in assessing the credibility of the child complainant in that case. 71 Haw. at 557-58, 799 P.2d at 51-52. Evidence that assists the jury in assessing a child witness's credibility must be distinguished from evidence that involves testimony regarding

patterns of behavior or characteristics of a "typical molester," which was admitted against the defendant in this case. The Batangan court cautioned that any decision with respect to the admissibility of expert psychological testimony must be addressed with great care so as not to admit expert testimony that usurps the basic function of the jury, unduly influences the trier of fact, fails to meaningfully assist the jury, or does not make a fact of consequence to the proceedings more or less probable. Id. at 558, 562, 799 P.2d at 52, 54. Because the majority's decision in this case permits the admission of expert testimony contrary to these fundamental considerations and as evidence of a defendant's guilt, I also dissent for this reason.

## I. The Family Court Did Not Make a "Judgment Call" Regarding the Admissibility of the Challenged Evidence

Over the defense's objection that the proffered expert testimony was unfairly prejudicial, the family court admitted the expert testimony, reasoning, "It's already been ruled by the Supreme Court, our very own Supreme Court in [Batangan] that it's admissible because Dr. Bivens' testimony is relevant and assist[s] the jury on this new found phenomena of child abuse." But this was not the ruling in Batangan, and, in fact, Batangan expressly required the family court to consider unfair prejudice in determining the admissibility of the expert testimony under

Hawaii Rules of Evidence (HRE) Rule 403.[1] 71 Haw. at 558, 799 P.2d at 52.

In Batangan, this court considered the admissibility of expert testimony regarding the behavior of child victims of sexual abuse that may undermine a child witness's credibility. 71 Haw. at 555, 799 P.2d at 50. Batangan explained that "the common experience of a jury, in most cases, provides a sufficient basis for assessment of a witness' credibility," and thus, the court observed, "expert testimony on a witness' credibility is inappropriate." Id. at 556-57, 799 P.2d at 51. Nonetheless, the court recognized that child victims of sexual abuse exhibit behavior that, although normal, may be interpreted by the jury as a sign that the child witness is not being truthful. Id. at 557-58, 799 P.2d at 51-52. The behavior discussed by the court in Batangan involved delayed reporting of the offenses and recantation of allegations of abuse. Id. The

[1] The Hawaii Rules of Evidence were adopted by the legislature and set forth in chapter 626 of the Hawaii Revised Statutes to "codify the law of evidence, to promote informed judicial rulings on evidence points, and to achieve uniformity in the treatment of evidence among the courts of this State." HRE Rule 100 cmt. (1993).

HRE Rule 403 specifies when relevant evidence may be excluded from admission:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

HRE Rule 403 (1993).

court noted that such behavior would normally "be attributed to inaccuracy or prevarication." Id. at 557, 799 P.2d at 51. "In these situations," the court concluded, "it is helpful for the jury to know that many child victims of sexual abuse behave in the same manner" when assessing the child witness's credibility. Id. at 557, 799 P.2d at 52.

Although Batangan recognized that expert testimony regarding the behavior of child victims of sexual abuse that undermine the child witness's credibility may be admitted under HRE Rule 702,[2] id. at 558, 799 P.2d at 52, such evidence is not indiscriminately admissible. Rather, testimony of this nature remains subject to the applicable requirements of the Hawaii Rules of Evidence, including HRE Rules 702, 401, and 403. Id. at 562, 799 P.2d at 54. Indeed, recognizing "that even this type of expert testimony carries the potential of bolstering the credibility of one witness and conversely refuting the credibility of another," Batangan advised that "[c]ourts must

[2] HRE Rule 702 provides the following:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. In determining the issue of assistance to the trier of fact, the court may consider the trustworthiness and validity of the scientific technique or mode of analysis employed by the proffered expert.

HRE Rule 702 (1993).

proceed with caution in admitting expert testimony in these cases." Id. at 558, 562, 799 P.2d at 52, 53-54. The Batangan court noted that, in evaluating such testimony under HRE Rule 702, the trial court must find that the witness is an expert, the testimony is relevant, the testimony will assist the jury in comprehending something not commonly known or understood, and the testimony does not include opinions that "in effect usurp the basic function of the jury." Id. at 562, 799 P.2d at 54. Additionally, Batangan emphasized that "[t]he pertinent consideration is whether the expert testimony will assist the jury without unduly prejudicing the defendant." Id. at 558, 799 P.2d at 52 (emphasis added); see also State v. Kony, 138 Hawaiʻi 1, 11, 375 P.3d 1239, 1249 (2016) (emphasizing that "Batangan does not exempt expert testimony concerning child sexual abuse victims from the weighing required by HRE Rule 403").

Notwithstanding these strong warnings from the Batangan court and the mandatory applicability of HRE Rule 403, the family court in this case admitted expansive expert testimony relating both to the credibility of child victims of sexual abuse and the types of "child molestation behaviors" exhibited by typical offenders, reasoning in a motion in limine proceeding that it had already been ruled on by this court and was thus automatically admissible under Batangan:

> THE COURT: It's already been ruled by the Supreme Court, our very own Supreme Court in Batingang [sic] that it's admissible because Dr. Bivens's testimony is relevant and assist[s] the jury on this new found phenomena of child abuse.

When the defense renewed its objection to Dr. Bivens' testimony as unduly prejudicial at trial, the court overruled the objection and likewise stated that the testimony had "some relevance":

> THE COURT: In following Batangan and State versus Silva . . . the expert testimony in Silva explained the girl's, perhaps, bizarre behavior like going back into the room. I don't know. So, over your objection, there is some relevance in some expert testimony to assist the jurors with scientific and complex type of issue. Okay. So over your objection.

Thus, in response to McDonnell's objections that the evidence was unfairly prejudicial, the family court admitted the evidence on relevancy grounds without addressing its potential of producing an unfairly prejudicial effect.

However, relevancy analysis inquires only whether the evidence has "any tendency" to prove a fact of consequence, which is "an exceedingly low threshold for this initial . . . barrier to admissibility." Addison M. Bowman, Hawaii Rules of Evidence Manual § 401-3[1] (2014-2015 ed.). In pointed contrast, evidentiary decisions that assess the risk of unfair prejudice of evidence under HRE Rule 403 require a careful "judgment call" based on an application of a court's informed discretion. Costales v. Rosete, 133 Hawai'i 453, 466, 331 P.3d

431, 444 (2014) (quoting Tabieros v. Clark Equip. Co., 85 Hawai'i 336, 350-51, 944 P.2d 1279, 1293-94 (1997)).

Moreover, "'[t]he existence of discretion requires its exercise[,]' and a court fails to properly exercise its discretion when it bases a decision on categorical rules, and not on the individual case before it." State v. Hern, 133 Hawai'i 59, 65, 323 P.3d 1241, 1247 (App. 2013) (second alteration in original) (quoting United States v. Miller, 722 F.2d 562, 565 (9th Cir. 1983)); accord State v. Martin, 56 Haw. 292, 294, 535 P.2d 127, 128 (1975) ("Discretionary action must be exercised on a case-by-case basis, not by any inflexible [blanket] policy of denial."). By extension, once HRE Rule 403 is invoked, "the trial judge has no discretion as to whether or not to engage in the balancing process." Montgomery v. State, 810 S.W.2d 372, 389 (Tex. Crim. App. 1990) (en banc) (quoting 22 Charles A. Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure: Evidence § 5250, at 544-45 (1978)).

This case does not involve an incorrect or faulty HRE Rule 403 analysis, but, rather, a failure to engage in the requisite balancing altogether. Both during the motion in limine proceeding and at trial, the family court did not address McDonnell's contention that the probative value of the testimony would be substantially outweighed by its unfair prejudicial effect. Rather, the trial court applied the "exceedingly low

threshold" of relevancy, Bowman, supra, § 401-3[1], and found that the testimony had "some relevance" and was therefore admissible. Although the defense's objection was based on HRE Rule 403 rather than rules relating to relevancy, the family court did not mention or address the potentially unfairly prejudicial nature of the testimony. And the court further compounded its error by basing its evidentiary ruling on a categorical misapplication of the Batangan decision, stating, "It's already been ruled by the Supreme Court, our very own Supreme Court in Batingang [sic] that it's admissible". Thus, in response to McDonnell's HRE Rule 403 objection, the family court failed to exercise its discretion based on an appraisal of probative value and unfair prejudice in favor of applying a categorical rule that the evidence was relevant and admissible based on its misreading of Batangan.

The majority agrees that the trial court "must apply HRE Rule 403, weighing the probative value of [the] testimony against the risk that it will prejudice the defendant." Majority at 39. However, the majority contends that the court's reliance on Batangan "does not mean that it abdicated its discretion" but, rather, indicates that "the court considered relevant precedent" in deeming Dr. Bivens' testimony admissible. Majority at 23. It also seeks to distinguish this case from Hern, 133 Hawai'i at 65, 323 P.3d at 1247, and Martin, 56 Haw. at

294, 535 P.2d at 128, arguing that the court in this case did not "rely on a blanket policy." Majority at 22.

The family court's reference to Batangan demonstrates that it cited applicable legal authority in rendering its admissibility determination. However, rather than heed the Batangan court's instruction that the "pertinent consideration is whether the expert testimony will assist the jury without unduly prejudicing the defendant," 71 Haw. at 558, 799 P.2d at 52, the court failed to consider or weigh the unfairly prejudicial nature of Dr. Bivens' testimony. Instead of "exercising its discretion based on the particular circumstances" of McDonnell's case, id., the court based its determination on a categorical rule that Batangan deemed such evidence to be somewhat relevant and thus admissible. Such automatic "adherence to predetermined rigid conduct," Martin, 56 Haw. at 294, 535 P.2d at 128, is precisely what Hern and Martin prohibit.

Because the family court did not make a judgment call when it admitted Dr. Bivens' testimony, there is no discretionary decision for this court to review.[3] It is

[3] When a trial court fails to exercise its discretion, there is no "judgment call" for an appellate court to defer to, and the appropriate conclusion is a determination that the trial court committed error. See, e.g., Fassberg Constr. Co. v. Hous. Auth. of L.A., 60 Cal. Rptr. 3d 375, 416 (Cal. Ct. App. 2007); State v. Starr, 718 S.E.2d 362, 365 (N.C. 2011) ("[T]here is error when the trial court refuses to exercise its discretion in (continued . . .)

elementary that we cannot defer to the trial court's discretion in admitting evidence where the court made no "judgment call" regarding the evidence. See Martin, 56 Haw. at 294, 535 P.2d at 128. The family court did not exercise its discretion regarding whether to limit Dr. Bivens' testimony or to exclude it entirely pursuant to a Rule 403 balancing, thereby depriving McDonnell of a critical statutory requirement designed to ensure a fair trial. Consequently, the conviction should be vacated and the case remanded for a new trial.

**II. The Court Erred in Admitting Profile Evidence**

"Scientific and expert testimony, with their 'aura of special reliability and trustworthiness,' courts the danger that the triers of fact will 'abdicate their role of critical assessment' and 'surrender their own common sense in weighing testimony.'" State v. Batangan, 71 Haw. 552, 556, 799 P.2d 48, 51 (1990) (alterations omitted) (first quoting United States v. Amaral, 488 F.2d 1148, 1152 (9th Cir. 1973); second quoting

(. . . continued)
the erroneous belief that it has no discretion as to the question presented." (alteration in original)). A failure to exercise discretion, such as in failing to apply a Rule 403 balancing, therefore requires that the conviction be vacated and the case remanded for a new trial unless the error is harmless beyond a reasonable doubt. See, e.g., State v. Shippee, 839 A.2d 566, 571 (Vt. 2003) (stating that a party challenging a court's Rule 403 decision would prevail if the party can prove that the trial court "completely withheld its discretion," and vacating and remanding); Contemporary Mission, Inc. v. Famous Music Corp., 557 F.2d 918, 928 (2d Cir. 1977) (concluding that because the trial judge did not engage in Rule 403 balancing in the first instance, the case must be remanded to the district court for the purpose of making a Rule 403 determination).

State v. Brown, 687 P.2d 751, 773 (Or. 1984); and then quoting United States v. Azure, 801 F.2d 336, 341 (8th Cir. 1986)). Although expert testimony may be admissible in child sexual abuse cases to explain the seemingly bizarre behavior of child victims that would otherwise reflect poorly on a complaining witness's credibility, see Batangan, 71 Haw. at 557-58, 799 P.2d at 51-52, courts must be cautious in admitting expert psychological testimony that crosses the line into impermissible profile evidence relating to behaviors and characteristics of "the typical offender." The position taken by the majority in this case broadens the scope of Batangan significantly in a manner that invades the province of the jury and allows for consideration of profile evidence that is unfairly and overly prejudicial to defendants. Such extension of Batangan is contrary to the prudent advisement that courts "must proceed with caution in admitting expert testimony in these cases," which, although difficult to prove, "are equally difficult to defend against." Id. at 562, 799 P.2d at 53-54 (emphasis added).

**A. Expert Testimony and Profile Evidence**

Profile evidence "describes sets of observable behavioral patterns" specific to a "typical offender." 3 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 7:11 (4th ed. Supp. 2016) [hereinafter, Mueller & Kirkpatrick,

Federal Evidence]; see also People v. Robbie, 112 Cal. Rptr. 2d 479, 484 (Cal. Ct. App. 2001) (defining "profile" as "a collection of conduct and characteristics commonly displayed by those who commit a certain crime"). Although "profiles" may be most commonly used by law enforcement as an investigative tool in identifying crime suspects, "testimony describing profiles of typical offenders . . . should generally be excluded" at trial.[4] Mueller & Kirkpatrick, Federal Evidence, supra, § 7:11. Exclusion is particularly important where "the evidence relates to the defendant . . . and is offered to prove guilt." Id.

The admission of profile evidence against a defendant raises serious concerns about the proper role of expert psychological testimony in criminal prosecutions. "[A] criminal trial is concerned with individual guilt, and not with 'the sort of person' that certain behavioral patterns often describe." id.; see also United States v. Banks, 36 M.J. 150, 161 (C.M.A. 1992) (rejecting use of profile evidence as evidence of defendant's substantive guilt and noting that "[o]ur system of justice is a trial on the facts, not a litmus-paper test for

[4] Notably, even the use of profile evidence as a purely investigative tool by law enforcement is subject to strict limitations in this jurisdiction. See, e.g., State v. Trainor, 83 Hawai'i 250, 258-59, 925 P.2d 818, 826-27 (1996) (holding that law enforcement may not initiate investigative stops based solely on the conclusion that the suspect's characteristics and behaviors match a "drug courier profile," in part because the profile described "an enormous set of presumably innocent travelers").

conformity with any set of characteristics, factors, or circumstances"). "Every defendant has a right to be tried based on the evidence against him or her," and the use of profile evidence by the State may encourage a jury to infer guilt based solely on the fact that the defendant is alleged by the complainant to have engaged in behaviors or exhibited characteristics that match the relevant profile. United States v. Hernandez-Cuartas, 717 F.2d 552, 555 (11th Cir. 1983); see also State v. Kony, 138 Hawaiʻi 1, 12, 375 P.3d 1239, 1250 (2016) ("[T]he idea of reasonable doubt requires proof connecting the defendant to the crime and does not permit proof that a defendant is more likely to be guilty because he or she may share characteristics or traits with discrete populations of offenders."). Indeed, profile evidence "implies that criminals, and only criminals, act in a given way" and often belies the fact that "certain behavior may be consistent with both innocent and illegal behavior." Robbie, 112 Cal. Rptr. 2d at 485. Use of profile evidence against a defendant may therefore erode the presumption of innocence in criminal trials and impede the defendant's ability to mount a defense.

Profile evidence may also be used to impermissibly enhance the credibility of the complaining witness, insofar as jurors may infer that the witness is telling the truth regarding abuse because certain behaviors or characteristics of the

defendant, as testified to by the complainant, match the "typical offender" behaviors described by an expert witness. See Kony, 138 Hawaiʻi at 12, 375 P.3d at 1250 (observing that "expert testimony regarding the common behavior of child sexual abuse victims 'carries the potential of bolstering the credibility'" of the witness (quoting Batangan, 71 Haw. at 556, 799 P.2d at 51)); see also People v. Williams, 987 N.E.2d 260, 263 (N.Y. 2013) (eliciting testimony from an expert witness to show that the victim's version of events matches that of a typical abuse scenario has "the prejudicial effect of implying that the expert found the testimony of this particular complainant to be credible--even though the witness began his testimony claiming no knowledge of the case before the court"); State v. Transfiguracion, No. SCWC-11-0000048, 2013 WL 1285112, at *6 (Haw. Mar. 28, 2013) (Order Rejecting Application for Writ of Certiorari) (Acoba J., dissenting) (observing that expert testimony on patterns of committing child sexual abuse and the characteristics of child molesters may bolster the complaining witnesses' credibility because "the expert's testimony could 'guide the jury to a conclusion' that the complaining witnesses were telling the truth by demonstrating that the details in their testimony matched the details in a typical child abuse case").

In addition to increasing the credibility of the complaining witness, the near or perfect match of the behaviors testified to by the complainant and those related by the expert may serve to bolster the expert's own credibility. Jurors may be particularly struck when an expert witness asserts having no direct knowledge of the asserted facts in the case but testifies to behaviors that provide nearly an exact match to the complainant's testimony of events, thereby increasing the "possibility that the jury may be unduly influenced by the expert's opinion." See Batangan, 71 Haw. at 556, 799 P.2d at 51 (quoting State v. Kim, 64 Haw. 598, 607, 645 P.2d 1330, 1337 (1982), overruled in part by Batangan, 71 Haw. 552, 799 P.2d 48).

The inherent prejudice stemming from the admission of profile testimony as substantive evidence of a defendant's guilt has been analogized to the prejudice that inheres when character evidence or prior bad acts are used to show that a defendant has a propensity to engage in certain criminal behaviors. See Mueller & Kirkpatrick, Federal Evidence, supra, § 7:11 (noting that "a criminal trial is concerned with individual guilt" and that "profile evidence is very much like character evidence" when offered to prove guilt).[5] Reliance on a defendant's

[5] With a few limited exceptions, HRE Rule 404(a) prohibits the admission of character evidence to prove propensity, while HRE Rule 404(b) (continued . . .)

character or prior acts to establish that the defendant committed the offense charged is generally prohibited under state and federal rules of evidence, because although such facts might "logically be persuasive that [the defendant] is by propensity a probable perpetrator of the crime," the evidence may "so overpersuade [the jury] as to prejudge one with a bad general record and deny [the defendant] a fair opportunity to defend against a particular charge." Christopher B. Mueller & Laird C. Kirkpatrick, Evidence § 4.11, at 183 (4th ed. 2009) [hereinafter, Mueller & Kirkpatrick, Evidence] (quoting Michelson v. United States, 335 U.S. 469, 475-76 (1948)).

Authoritative expert testimony regarding child sexual abuse may likewise encourage jurors to "abdicate their role of

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excludes evidence of other acts to prove that the defendant acted in conformity therewith. See HRE Rule 404 (1993). HRE Rule 404 provides in relevant part as follows:

> (a) Character evidence generally. Evidence of a person's character or a trait of a person's character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . . .
>
> . . . .
>
> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible where such evidence is probative of another fact that is of consequence to the determination of the action, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, modus operandi, or absence of mistake or accident.

HRE Rule 404 (1993).

critical assessment," Batangan, 71 Haw. at 556, 799 P.2d at 51 (alterations omitted) (quoting Brown, 687 P.2d at 773). An invitation by an expert witness to reason that "criminals act in a certain way; the defendant acted that way; therefore, the defendant is a criminal,"[6] risks usurping the role of the jury and denying the defendant a fair opportunity to defend against the government's case in the same way that use of character or prior acts evidence risks "ovepersuad[ing]" the trier of fact and impeding the defendant's ability to defend against the charge. Mueller & Kirkpatrick, Evidence, supra, § 4.11, at 183 (quoting Michelson, 335 U.S. at 475-76). Indeed, the policy concerns with regard to character evidence and profile evidence are so similar that several courts have deemed profile evidence inadmissible on the ground that it constituted improper character or prior acts evidence.[7]

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[6] Robbie, 112 Cal. Rptr. 2d at 485.

[7] See, e.g., State v. Hester, 760 P.2d 27, 33-34 (Idaho 1988) (expert testimony regarding the common traits of child molesters and that the defendant exhibited those traits was inadmissible character evidence, because the "evidence that [the defendant] exhibited character traits similar to those of known child abusers" was used to "prove that [the defendant] acted in conformance with those traits in this particular instance"); State v. Nelson, 501 S.E.2d 716, 718, 720-22 (S.C. 1998) (concluding that evidence of children's toys and other similar evidence seized from defendant's bedroom combined with expert testimony that pedophiles often "have a pretty good stash" of childlike items was excludable character evidence, and rejecting State's argument that this evidence was "relevant to show motive or intent" and observing that this argument was "a cleverly disguised way of asserting [that the defendant] committed the crimes because [the defendant] has a propensity to commit sexual offenses"); Ballard v. Hunt, 772 S.E.2d 199, 204 (W. Va. 2015) (holding "that the opinion evidence of an expert witness proffered by the State in a criminal prosecution, merely to show that the

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Accordingly, the use of profile evidence as indicative of a defendant's substantive guilt is "inherently prejudicial." Robbie, 112 Cal. Rptr. 2d at 485. Decisions of other jurisdictions that have considered expert psychological testimony in sexual abuse cases are instructive of when such testimony takes on the form of impermissible profile evidence. These cases recognize that expert testimony becomes profile evidence when the testimony describes the behavioral patterns of offenders, rather than relaying the psychological characteristics of victims, and the courts have precluded the evidence's admission at trial.

In Robbie, a California appellate court addressed testimony of an expert qualified in "the behaviors and conduct of persons who commit sexual assaults." 112 Cal. Rptr. 2d at 483. The expert testified about the behaviors of sexual assault offenders, focusing particularly on the common absence of force and the lack of physical resistance on the part of victims. Id. at 483-84. The expert in Robbie never directly opined on whether the defendant was a sex offender but instead responded to a series of hypothetical questions posed by the prosecution that correlated with the complaining witness's description of

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accused has the character trait of a pedophile . . . is inadmissible . . . to prove that on a particular occasion the accused acted in accordance with that character trait").

the events. Id. The court concluded that the expert's testimony amounted to improper profiling testimony. Id. at 488. The Robbie court observed that reliance on profile evidence is "unfair[]" and "inherently prejudicial" because "[t]he jury is improperly invited to conclude that, because the defendant manifested some characteristics, he committed a crime." Id. at 485, 487. The effect of the expert testimony in Robbie was not to help the jury evaluate the prosecution's evidence; rather, the testimony led the jury to the conclusion that "[the] defendant was guilty because he fit the profile." Id. at 487. This "significantly bolstered" the complaining witness's testimony and was thus "highly prejudicial" to the defendant. Id. at 488.

The Supreme Court of Kentucky has similarly ruled that expert testimony regarding the typical habits and characteristics of child sexual abuse perpetrators was inadmissible in Kurtz v. Commonwealth, 172 S.W.3d 409, 413 (Ky. 2005). The expert in Kurtz testified that perpetrators of sexual abuse of a child tend to be a family member or close friend of the victim and that it is common for the perpetrator to groom the victim by providing praise, gifts, and economic assistance as a way to break down the victim's defenses. Id. at 413. The expert further testified that it was not unusual for perpetrators to abuse only some of the children of a household,

which makes it more likely that the victim would keep it secret. Id. The court concluded that the testimony "regarding the typical sex abuse perpetrator unmistakably touched on both the habits and the profile characteristics of that class of individuals which we have held is not relevant or permissible for the jury to consider during the Commonwealth's case-in-chief."[8] Id. at 414.

Likewise in Hall v. State, an Arkansas appellate court considered expert testimony regarding the dynamics of child sexual abuse, including the percentage of cases in which the perpetrator is known to the child ahead of time, is a relative or friend of the family, and has authority over the children. 692 S.W.2d 769, 770-71 (Ark. Ct. App. 1985); see State v. Ketchner, 339 P.3d 645, 648 (Ariz. 2014) (citing Hall approvingly for the proposition that courts have precluded expert testimony relating to persons who sexually abuse children). The expert also testified regarding the percentage of child sexual abuse cases that occur in the home and common characteristics of perpetrators. Hall, 692 S.W.2d at 770, 773. The expert stated that she had not personally examined any of

[8] The court also rejected the prosecution's contention that a portion of the expert testimony was offered in rebuttal of anticipated arguments and evidence to be presented by the defendant; the court noted that "there is absolutely no authority for the concept of 'preemptive rebuttals.'" Kurtz, 172 S.W.3d at 414.

the individuals involved in the case and that the information she would give was based primarily on national statistics. Id. at 771. The Arkansas court concluded that "this type [of] evidence was not of proper benefit to the jury in this case" and that "it was not introduced to rebut a misconception about the presumed behavior of a rape victim but to prove . . . that the circumstances and details in this case match the circumstances and details usually found in child abuse cases." Id. at 773. The court noted that although testimony concerning the vocabulary used by young children was beneficial to the jury, much of the expert's testimony concerning the dynamics of child abuse was "distractive and prejudicial." Id.

The Oregon Supreme Court has also held that expert testimony offered to explain a child's denial of the alleged abuse could not include testimony regarding grooming techniques used by child abusers. State v. Beauvais, 354 P.3d 680, 693 n.14 (Or. 2015) (discussing approvingly the court's decision in State v. Hansen, 743 P.2d 157 (Or. 1987)). Although testimony pertaining to the typical responses of sexually abused children may assist the trier of fact in understanding a child complainant's behavior, "the specific techniques used by some child abusers 'to get close to the victim,' which may result in the child's emotional dependence on the abuser, are irrelevant to the effect the dependence has on the child's willingness to

implicate the abuser." Id. (quoting Hansen, 743 P.2d at 157). This is so because "[i]t is the emotional dependence, not the specific acts that produce it, that helps to explain the child's behavior." Id. (quoting Hansen, 743 P.2d at 157). Because an expert may describe the common behaviors of victims without reference to the "victimization process" and the typical behaviors of offenders, such evidence is irrelevant "and, as such, rarely will pass the balancing test" for prejudice, confusion, or delay. Id. (quoting State v. Stevens, 970 P.2d 215, 223 (Or. 1998)).

Similarly, a Washington appellate court deemed inadmissible expert testimony that a majority of child abuse cases involved a biological, male parent. State v. Maule, 667 P.2d 96, 99 (Wash. Ct. App. 1983); accord State v. Petrich, 683 P.2d 173, 180 (Wash. 1984) (citing Maule approvingly and holding that expert testimony regarding the percentage of cases involving a perpetrator with a preexisting relationship with the child was highly prejudicial even when made in the context of explaining delayed reporting), modified on other grounds by State v. Kitchen, 756 P.2d 105 (Wash. 1988). The Washington court rejected the State's contention that the evidence was merely buttressing the expert's qualifications, observing that the testimony was offered as substantive evidence to help persuade the jury that the defendant was guilty. Maule, 667

P.2d at 99. The court noted that the expert testimony matched the circumstances of the defendant and complaining witness in the underlying case and explained that "[s]uch evidence invites a jury to conclude that because the defendant has been identified by an expert with experience in child abuse cases as a member of a group having a higher incidence of child sexual abuse, it is more likely the defendant committed the crime." Id. The court noted that, like all relevant evidence, the admissibility of the testimony must be determined pursuant to Washington's evidence rule relating to prejudice, confusion, and waste of time. Id. at 99-100.

The Florida Supreme Court has similarly rejected expert evidence "about common characteristics of the home environment where child sexual abuse occurs and about the characteristics of abusers." Flanagan v. State, 625 So. 2d 827, 828 (Fla. 1993). The court concluded that the evidence was not permitted as "background information," noting that "the courtroom is not a classroom to be used to educate a jury on an entire field only tangentially related to the issues at trial." Id. at 829. It also concluded that the testimony was "completely inappropriate as substantive evidence of guilt." Id. The court observed that "[i]f anything, [the] profile evidence tended to show that because [the defendant] and his house had certain traits which fit [the expert's] child sex

offender profile, [the defendant] necessarily sexually abused his daughter." Id. The court observed that this mode of proof would be akin to establishing that a defendant has a certain character trait in order to show that he acted in conformity with that trait, which is "forbidden by the rules of evidence." Id.

These cases and many others establish that expert evidence explaining psychological characteristics or behaviors of victims must be distinguished from profile evidence that describes behavioral patterns of offenders. Courts have precluded the admission of such profile evidence against a defendant on a variety of grounds, including on the basis that the evidence lacks relevancy, that it is unfairly prejudicial, that it constitutes impermissible character or prior bad acts evidence, or that it does not assist the trier of fact to understand the evidence or determine a fact in issue under rules relating to expert witness testimony. See Mueller & Kirkpatrick, Federal Evidence, supra, § 7:11 (observing that profile evidence is "condemned sometimes on relevancy grounds" but noting its similarity to character evidence); Burnette v. Commonwealth, 729 S.E.2d 740, 749 n.5 (Va. Ct. App. 2012) (noting that "numerous jurisdictions have held that profile evidence is categorically inadmissible, though the underlying rationales differ widely" and identifying relevancy, unfair

prejudice, and impermissible character evidence as possible grounds).

**B. Dr. Bivens' Testimony Included Profile Evidence**

In its motion in limine to admit Dr. Bivens' testimony, the State initially proffered Dr. Bivens as an expert who would testify regarding the characteristics and conduct of child sexual abuse victims to assist the jury in assessing Minor's credibility as it related to her "delayed and inconsistent reporting." At the subsequent hearing on the parties' motions in limine, however, the State identified the scope of Dr. Bivens' testimony as much broader and stated that he would testify to "the general dynamics of child sexual abuse." Thereafter, in response to McDonnell's renewed objection to the admission of Dr. Bivens' testimony at trial, the State indicated that Dr. Bivens would testify to "the process of child molestation" in general.

At trial, Dr. Bivens was qualified as an expert in clinical psychology with a subspecialty in child sexual abuse. In qualifying Dr. Bivens as an expert witness, the testimony focused on his expertise in the common characteristics and methods of "child molesters." Dr. Bivens described his Ph.D. dissertation as follows:

> So my dissertation compared a group of convicted child molesters to a group of men who were matched for the same age and same ethnicity and same general background but were not child molesters, and then we administered test data to

> distinguish some of the traits that child molesters have that normal men don't have.

Consistent with his expertise in identifying "the traits that child molesters have that normal men don't have" and in child sexual abuse generally, Dr. Bivens gave testimony regarding three general areas: the characteristics and conduct of child sexual abuse victims, the behaviors and characteristics of "child molesters," and the child sexual abuse process. As illustrative of the difference between evidence allowable under Batangan in contrast to profile evidence that should be excluded, each of these three categories of testimony will be discussed.

**i. Testimony on Characteristics and Behaviors of Child Sexual Abuse Victims**

Dr. Bivens testified as to the "typical response for a child who is in a sexually abusive situation" and the reasons underlying delayed reporting and incomplete disclosures by such children. Dr. Bivens further explained the common experience of "tunnel memory" that causes a child victim's recollection of a traumatic event to be blurred or incomplete.[9]

This testimony falls within the general parameters of evidence found admissible in Batangan, insofar as it may have

[9] McDonnell challenged Dr. Bivens' testimony regarding delayed reporting, incompleteness of reporting, and tunnel memory on relevancy grounds.

helped dispel the jurors' misconceptions regarding child sexual abuse victims resulting from an imposition of "standards of normalcy on child victim/witnesses who consistently respond in distinctly abnormal fashion." 71 Haw. 552, 557, 799 P.2d 48, 51 (1990) (quoting State v. Moran, 728 P.2d 248, 251 (Ariz. 1986)). Such evidence may have assisted the trier of fact in assessing Minor's testimony, as delayed reporting and incomplete reporting may be "seemingly inconsistent with behavioral norms of other victims of assault." Id. at 557, 799 P.2d at 51. Accordingly, Batangan suggests that this testimony may have been admissible at trial subject to HRE Rule 403 and other rules of evidence. Id. at 558, 799 P.2d at 52.

**ii. Testimony on Characteristics of Child Molesters**

Dr. Bivens also testified regarding identifiable characteristics of child sexual abuse offenders. Specifically, Dr. Bivens discussed the following with respect to the typical individual most likely to be culpable for sexually abusing a child:

- In "the vast majority" of cases, or "85 percent of the time," the child has a "pre-existing nonsexual relationship with their molester."
- Abused children "generally know[] the abuser."

- There is a "documented phenomenon" of incest that occurs when "the molester is living in the child's own home" and "is somehow affiliated with the family, whether they're a direct blood member or stepparent."

- "100 percent of incest offenders report molesting in their own home," and child sexual abuse in general "usually" occurs in the child's home or the offender's home.

Thus, Dr. Bivens identified that in the vast majority of child sexual abuse cases, the perpetrator is likely an individual who has a preexisting relationship with the child, is affiliated in some way with the child's family, is living in the child's home, and will abuse the child in the offender's home. Dr. Bivens further stated that it "is not possible" to look at an individual's "demographic[s]" to determine whether or not the individual is a "child molester," but that "[c]hild molesters are defined by" the attendant behaviors. In other words, child molesters cannot be identified by demographics such as age, ethnicity, or race; rather, child molesters are defined by their behaviors, such as where the offender lives, where the abuser commits the offense, and other patterns of behavior discussed in greater detail below.

This testimony of Dr. Bivens does not relate to or explain the "seemingly bizarre" behavior of child sexual abuse

victims to address issues relating to a child witness's credibility. Batangan, 71 Haw. at 558, 799 P.2d at 52. Rather, Dr. Bivens' testimony describes behaviors and characteristics common to child sexual abuse offenders. See People v. Robbie, 112 Cal. Rptr. 2d 479, 484 (Cal. Ct. App. 2001) (defining "profile" as "a collection of conduct and characteristics commonly displayed by those who commit a certain crime").

The profile testimony in this case goes far beyond the type of evidence recognized by Batangan as admissible. Relying on the "aura of special reliability and trustworthiness" of Dr. Bivens' testimony,[10] the jurors may well have concluded that

> (1) child sexual abuse offenders typically have a preexisting relationship with the child, are related to the child, and have access to or live in the child's home;
>
> (2) McDonnell had a preexisting relationship with Minor, was related to Minor, and lived in the home together with Minor; therefore,
>
> (3) McDonnell may have, possibly, or likely sexually abused Minor.

See Robbie, 112 Cal. Rptr. 2d 479 at 487; see also State v. Petrich, 683 P.2d 173, 180 (Wash. 1984) (rejecting testimony that in "eighty-five to ninety percent of our cases, the child

[10] Batangan, 71 Haw. at 556, 799 P.2d at 51 (quoting United States v. Amaral, 488 F.2d 1148, 1152 (9th Cir. 1973)).

is molested by someone they already know" because it "invite[d] the jury to conclude" that a defendant was "statistically more likely to have committed the crime"), modified on other grounds by State v. Kitchen, 756 P.2d 105 (Wash. 1988). Expert testimony of this nature invades the province of the jury to evaluate the evidence and creates a risk of confusion, as it focuses the jury's attention on innocuous circumstances as evidence that the abuse occurred.[11] It also invites the jury to conclude that because McDonnell was identified by an expert with experience in child abuse cases as "a member of a group having a higher incidence of child sexual abuse," State v. Maule, 667

[11] The majority acknowledges that the "risk of profiling" McDonnell as an abuser based on Dr. Bivens' testimony relating to the characteristics of a typical offender was "high" because its use of probabilities "implied a high statistical likelihood that abusers would exhibit certain characteristics, and those characteristics happened to fit McDonnell." Majority at 42. Thus, according to the majority, this evidence "presented a risk of misleading the jury." Majority at 42.

The majority contends, however, that Dr. Bivens could have "testified generally" to the characteristics of abusers, such as "abusers are often related to their victims and . . . such abuse normally occurs in the home," so long as he did not rely on statistics. Majority at 42 (emphases added). Though such testimony would not include numerical percentages, statements of typical offender characteristics or that offenders "often" or "normally" engage in particular conduct inherently make generalizations regarding molester behavior based on the science of statistics. See, e.g., State v. Kony, 138 Hawai'i 1, 12 n.15, 375 P.3d 1239, 1250 n.15 (2016) (recounting Dr. Bivens' testimony in that case that percentages are used to "give[] a general idea of, you know, how the phenomenon most often occurs"). Had Dr. Bivens stated that "abusers are often related to their victims" and that the abuse "normally occurs in the home," Majority at 42 (emphases added), the jury may still have been misled "into believing that, since McDonnell was both related to Minor and lived with her, McDonnell must have abused her in their home." Majority at 42. Therefore, replacement of statistical percentages in an expert's testimony with adjectives intended to convey the same information (i.e., "often" or "normally" in lieu of "85%") serves only to make a change in form, and the testimony's inherently prejudicial substance remains.

P.2d 96, 99 (Wash. Ct. App. 1983), it is more likely that McDonnell committed the offenses charged. Thus, this portion of Dr. Bivens' testimony falls well outside the scope of the evidence deemed admissible in Batangan, and its unfair, overly prejudicial nature required its exclusion at trial under HRE Rule 403.

**iii. Testimony on the Abuse Process**

Dr. Bivens also testified regarding "the abuse process," identifying four primary methods "being typical of most molestations," including: "[s]educing and testing, masking sex as a game, emotional and verbal coercion, and taking advantage of a child in a vulnerable position." As the source of his understanding of these four primary methods, Dr. Bivens cited to "convicted molesters themselves . . . describing how they go about doing the abuse." Dr. Bivens then went on to describe each of the four methods in detail.

Dr. Bivens testified that "[s]educing and testing refers to how a molester will establish a healthy touching relationship with a child" and then slowly incorporate sexual touching into that relationship. The child may "simply allow the touching." In this scenario, the molester will "tell [himself]" that "the child likes it" and "the child wants [him] to continue."

Dr. Bivens elaborated that masking sex as a game is similar to seducing and testing, except that this method starts with a "playful touch relationship," such as "tickling" and "wrestling." Thereafter, the abuser incorporates sexual touching into the relationship. Dr. Bivens stated that "[t]he molesters often report that, Well, I would have stopped if the child objected, but they didn't object, and so I just kept going."

With respect to emotional and verbal coercion, Dr. Bivens described that the child molester will bargain with or bribe the child for sexual contact. The molester may give the child treats or gifts or withhold punishment as a sort of "quid pro quo exchange." The child may "feel like [he or she is] part of" the bargaining process and "willing[ly] participate[s] in the sex in order to either get the reward or avoid the punishment." The molester may also rely on "guilt tripping" to obtain sex from the child.

Finally, Dr. Bivens testified that that the fourth method, whereby an abuser will "tak[e] advantage of a child in a vulnerable position," "most often" refers to approaching and sexually abusing a sleeping child. Dr. Bivens described that the child victim may in fact be awake, but that the victim "play[s] possum because [the child] didn't know what to do, and the sex offense continues in that fashion." Dr. Bivens related

that "the offenders frequently report that they would have stopped if the child had put up a fight," but because the child victim does not resist, the perpetrator "continue[s] offending."

During his testimony, Dr. Bivens stated that child victims will "frequently acquiesce to what the molester is doing and they will tend to go along with it." He also stated that in general, "probably 80 percent of the time there's not any real physical force involved" in child sexual abuse situations and that "more than half of child molesters who were willing to talk about their crime admitted to committing acts of molestation with other people present."

Dr. Bivens' testimony on the abuse process "describe[d] sets of observable behavioral patterns" specific to a "typical [child sexual abuse] offender," thus constituting profile evidence. Mueller & Kirkpatrick, Federal Evidence, supra, § 7:11 (emphasis added). Significantly, a primary source for the "typical" abuse process was information provided directly by child sex molesters who had disclosed their own personal crimes in a research study. Such evidence did not properly assist the trier of fact in this case in determining whether McDonnell committed the crimes with which he was charged. See State v. Clements, 770 P.2d 447, 454 (Kan. 1989) (stating that expert testimony detailing the characteristics and behaviors "of the individual who typically sexually abuses

children did not assist the jury in determining if the child was sexually abused," and "the only inference which can be drawn from such evidence, namely that a defendant who matches the profile must be guilty, is an impermissible one"); State v. Stevens, 970 P.2d 215, 223 (Or. 1998) (concluding that expert testimony on child sexual abuse may not "provid[e] details of the victimization process" because they are "irrelevant . . . and, as such, rarely will pass the balancing test" of probative value versus risk of unfair prejudice).

Rather, Dr. Bivens' testimony on the abuse process facilitated a showing that "the circumstances and details in this case match[ed] the circumstances and details usually found in child abuse cases." Hall v. State, 692 S.W.2d 769, 773 (Ark. Ct. App 1985). While Dr. Bivens may not have been aware of the facts of this case, the prosecution was. By the nature of the questions asked on direct examination, the State was able to line up Dr. Bivens' testimony with Minor's testimony; indeed, as McDonnell forcefully describes in his appellate brief, Dr. Bivens' description of the abuse process established a near blueprint of the conduct charged by the State.[12]

[12] McDonnell gave multiple examples of consistencies between the facts of this case and Dr. Bivens' testimony in his opening brief:

> This case involved no physical force. Dr. Bivens testified that "probably 80 percent of the time there's no physical force involved" in molestation.

(continued . . .)

Further, Dr. Bivens' testimony on the typical abuse process invited the jury to "abdicate [its] role of critical assessment"[13] and to assume that because "criminals act in a certain way," and because the defendant was alleged to have "acted that way," "the defendant is a criminal." Robbie, 112

(. . . continued)

> McDonnell had a pre-existing non-sexual relationship with [Minor]. Dr. Bivens testified that "85 percent of the time . . . the child has a pre-existing non-sexual relationship with their molester."
>
> McDonnell was [Minor]'s adoptive father. Dr. Bivens testified that "there's a documented phenomenon called incest when the molester is living in the child's own home [and] is somehow affiliated with the family, whether they're a direct blood member or stepparent or an uncle that's living in the home[.]"
>
> [Minor] testified to assaults that all happened at home. Dr. Bivens testified that "100 percent of incest offenders report molesting in their own home."
>
> [Minor] testified that McDonnell assaulted her when her mother was at home. Dr. Bivens testified that "more than half of child molesters . . . admitted to committing acts of molestation with other people present[.]"
>
> [Minor] described having a healthy relationship with McDonnell. Dr. Bivens testified that "a molester will establish a healthy touching relationship with a child in advance of any sexual contact."
>
> [Minor] alleged that McDonnell would trade sexual contact for "benefits." Dr. Bivens testified that molesters use emotional and verbal coercion, "if you give me this, I'll give you that," to "obtain sex from the child."
>
> [Minor] alleged that the first time McDonnell assaulted her, she was asleep in his bed. Dr. Bivens testified that molesters will take advantage of a child in a vulnerable position, which "most often refers to approaching a sleeping child."

(Internal citations omitted) (formatting altered).

[13] Batangan, 71 Haw. at 556, 799 P.2d at 51 (quoting State v. Brown, 687 P.2d 751, 773 (Or. 1984)).

Cal. Rptr. 2d 479 at 485. The near identical match between Dr. Bivens' testimony on the typical abuse process and Minor's account of events also unquestionably bolstered Minor's credibility as a complaining witness. In turn, Minor's description of the abuse may have also bolstered the credibility of Dr. Bivens himself, as the jury was presented with the testimony of a child alleged to have been sexually abused that matched the testimony of the psychologist who was qualified by the court as an expert in identifying patterns of sexual abuse. The jury may also have considered Minor's statements to give more credence to Dr. Bivens' qualifications as an expert in the dynamics of child sexual abuse or otherwise found it to enhance his "aura of special reliability and trustworthiness." Batangan, 71 Haw. at 556, 799 P.2d 48, 51 (1990) (quoting United States v. Amaral, 488 F.2d 1148, 1152 (9th Cir. 1973)).

In summary, the profile evidence in this case was pervasive within, and a significant part of, Dr. Bivens' abuse process testimony. The testimony provided a near identical match to the allegations of Minor, which increased the risk that the jury would improperly assume McDonnell's guilt because he was alleged to have acted in a manner consistent with a "typical child molester." The matching testimony also posed a danger that Minor's credibility as a complaining witness would be inappropriately bolstered, that Dr. Bivens' testimony would be

given greater weight, and that the jury would be unduly influenced by the expert's testimony. Accordingly, the profile evidence testified to by Dr. Bivens presented an unacceptable risk of unfair prejudice to McDonnell, and HRE Rule 403 required its exclusion.

**a. The Majority Erroneously Concludes that the Abuse Process Testimony Was Admissible in This Case**

The majority contends, however, that Dr. Bivens' testimony on the abuse process did not constitute profile evidence. Majority at 38. To support this conclusion, the majority relies on Dr. Bivens' statements that there is not a typical child molester profile and that it is not possible to look at an individual's "demographic characteristics" to "determine whether someone is a child molester." Majority at 39.

The majority thus maintains that despite Dr. Bivens informing the jury that his dissertation compared a group of convicted child molesters to non-child molesters to distinguish traits "child molesters have that normal men don't have," and despite providing the jury with a template of the typical behaviors of molesters that matched the allegations in this case, Dr. Bivens' testimony did not constitute profile evidence. Majority at 38—41. However, Dr. Bivens' testimony indisputably described to the jury in great detail the behaviors and

characteristics of a typical child molester, and, as such, constituted profile evidence. See Mueller & Kirkpatrick, Federal Evidence, supra, § 7:11 (defining profile evidence); Robbie, 112 Cal. Rptr. 2d at 483 (same).[14]

Additionally, profile evidence is not limited to demographic characteristics, and although Dr. Bivens indicated that it is not possible to look at a person's demographic or personality characteristics to determine whether that person is a child abuse offender, he was definitive in his testimony that child sexual abusers are defined by a common set of "behaviors." As stated, "profile evidence" describes both characteristics and "sets of observable behavioral patterns," Mueller & Kirkpatrick, Federal Evidence, supra, § 7:11 (emphasis added), or "a collection of conduct" engaged in by a typical offender, Robbie, 112 Cal. Rptr. 2d at 484 (emphasis added). Although there may be differences between profile evidence based on behaviors rather than on demographic or immutable personal characteristics, both types of profile evidence present a serious risk of bolstering the complaining witness's credibility and invading the province of the jury. This is particularly

[14] See also supra Part II.A. (defining profile evidence as evidence of the behaviors and characteristics of a typical offender, discussing its inherently prejudicial nature, and analyzing cases from multiple jurisdictions that have determined profile evidence to be inadmissible in sexual abuse cases).

true where, as was the case here, the profile behaviors testified to by the expert provided nearly an exact match to the child complainant's testimony. Thus, the fact that the profile evidence contained in Dr. Bivens' abuse process testimony was derived from behaviors rather than demographic characteristics is of no import in regard to its classification and its underlying nature as inherently prejudicial profile evidence.[15]

Instead of identifying extensive portions of Dr. Bivens' testimony as improper profile evidence, the majority finds that Dr. Bivens' testimony on the abuse process was admissible because it touched on the "behavior exhibited by some offenders and the ways in which children react to that behavior." Majority at 36. The majority elaborates that testimony on child sexual abuse will "inevitably make reference" to both victim and abuser, and it further argues that the fact that "expert testimony describes the behavior of child sex abuse offenders does not automatically render the testimony inadmissible." Majority at 39.

However, Dr. Bivens' abuse process testimony predominantly centered on the conduct and thought processes of

[15] As additional support for its argument that Dr. Bivens' testimony was not profile evidence, the majority states that the prosecution "did not argue in closing that McDonnell was a child molester because he had certain characteristics or exhibited certain behaviors." Majority at 39. However, the prosecution need not identify testimony as "profile evidence" for it to be, in fact, such evidence. Further, the admissibility of evidence does not depend on how the State characterizes it in closing argument.

the typical offender as related by child sexual abusers. Although the testimony may have inferentially provided information on how a child sexual abuse victim responds to an offender's actions, Dr. Bivens' description of the abuse process unquestionably focused on "convicted molesters themselves . . . describing how they go about doing the abuse."

Further, the mere fact that expert testimony may reference the general ways in which children react to abuse does not render testimony regarding the abuse process categorically or presumptively admissible. Although the Batangan court deemed admissible evidence of the behavior of child sexual abuse victims that would otherwise be "attributed to inaccuracy or prevarication" and reflect poorly on a complaining witness's credibility, the court emphasized that "[t]he pertinent consideration is whether the expert testimony will assist the jury without unduly prejudicing the defendant." 71 Haw. at 558, 799 P.2d at 52 (emphasis added). In this case, the expert testimony regarding the abuse process overwhelmingly centered on the molester's behaviors and thought processes, was relayed from the molester's point of view, and only tangentially referred to behaviors of child victims that could be "attributed to inaccuracy or prevarication." Id. at 557, 799 P.2d at 51. These aspects of Dr. Bivens' abuse process testimony are highly

significant in conducting an analysis of probative value versus risk of unfair prejudice under HRE Rule 403.

The majority asserts, however, that the need for evidence on the abuse process was "strong" in this case and that the testimony was "highly probative of Minor's credibility," thus suggesting that the probative value of the testimony would not be substantially outweighed by the risk of unfair prejudice under HRE Rule 403. Majority at 36, 38. Specifically, the majority contends that "there was no other evidence available to explain Minor's behavior of not actively resisting the abuse, and indeed, seemingly acquiescing by engaging in a pattern of trading sexual contact for things she wanted." Majority at 36. The majority also analogizes Dr. Bivens' statements to expert testimony on delayed and inconsistent reporting of child sexual abuse victims and to expert testimony on recantations of abuse by domestic violence victims. See Batangan, 71 Haw. at 557, 799 P.2d at 51; State v. Clark, 83 Hawai'i 289, 298-99, 926 P.2d 194, 203-04 (1996) (permitting an expert in domestic violence to testify that victims of domestic violence commonly recant their allegations against their accuser).

The majority's analysis is problematic for several reasons. First, as discussed above, although Dr. Bivens' abuse process testimony included tangential references to the behavior

of victims,[16] this portion of the testimony indisputably focused on the behavioral patterns specific to a "typical offender." See Mueller & Kirkpatrick, Federal Evidence, supra, § 7:11. Indeed, the references to victims' responses to typical molester conduct were overwhelmingly relayed from the viewpoint of the perpetrator. The majority gives little consideration to the inherently and unfairly prejudicial nature of these aspects of Dr. Bivens' testimony, which identified sets of observable behavioral patterns specific to a "typical offender" and was used against McDonnell as evidence of substantive guilt. Any balancing analysis assessing profile evidence under HRE Rule 403 must account for the high risk of unfair prejudice resulting from such evidence, and, given the nature of the profile evidence in this case, HRE Rule 403 required its exclusion for the reasons discussed.[17] Second, the scope of Dr. Bivens' abuse

[16] See Batangan, 71 Haw. at 557, 799 P.2d at 51; Clark, 83 Hawai'i at 298-99, 926 P.2d at 203-04.

[17] Even if a court determines that expert testimony containing characteristics and behaviors of a typical offender is admissible under HRE Rule 403, the court would be required to give a limiting instruction to the jurors informing them that the testimony may only be used to assist their understanding of the complaining witness's testimony and may not be used as evidence of the defendant's guilt. See HRE Rule 105 (1993) (authorizing the court to issue a limiting instruction upon request when the jury is authorized to consider evidence for one purpose but not another); State v. Murray, 116 Hawai'i 3, 18-19, 21, 169 P.3d 955, 970-71, 973 (2007) (stating that a limiting instruction pursuant to HRE Rule 105 may be necessary "to prevent potential prejudice to a defendant" and concluding that although the defendant did not request such an instruction, the trial court erred in failing to instruct the jury that certain evidence could only be relied on for a limited purpose); see also United States v. Lui, 941 F.2d 844, 847-48 (9th Cir. 1991) (district court abused its discretion when it admitted

(continued . . .)

process testimony was far broader than reasonably necessary to explain Minor's behavior of acquiescing to the abuse. Rather than detailing at length how "convicted molesters" "describ[e] how they go about doing the abuse," Dr. Bivens could have simply testified that it is not uncommon for victims of child sexual molestation to not resist the abuse.

Finally, the majority submits that other jurisdictions have found expert testimony on the "phenomena of child abuse" to be admissible, and it points to several decisions in which courts have concluded that such testimony is admissible as evidence relating to the modus operandi of criminal offenders. See United States v. Long, 328 F.3d 655, 666-67 (D.C. Cir. 2003) (determining that expert testimony on the common characteristics and patterns of sexual abuse offenders was admissible as modus operandi evidence); United States v. Romero, 189 F.3d 576, 584-87 (7th Cir. 1999) (same); United States v. Hayward, 359 F.3d 631, 636-37 (3rd Cir. 2004) (same). Majority at 40—41.

Although evidence of an individual's prior acts are generally prohibited as evidence of a propensity to engage in certain criminal behaviors, see supra note 5, the Hawaii Rules

(. . . continued)
prejudicial drug courier profile evidence as substantive evidence of defendant's guilt and failed to provide the jurors with a "limiting instruction to prevent them from using the profile evidence as a basis for finding guilt").

of Evidence permit the use of modus operandi testimony regarding a prior act, crime, or wrong in order to prove that the same individual committed the act at issue in the present litigation. See HRE Rule 404(b) (1993); see also Bowman, supra, § 404-3[2][E] (noting that modus operandi testimony "typically 'goes to identity'" (quoting State v. Veikoso, 126 Hawaiʻi 267, 277, 270 P.3d 997, 1007 (2011))). Evidence of modus operandi includes proffers where the features and methods attendant to a prior act are so "strikingly similar" to those of the act being litigated that a reasonable inference could be made that both were committed by the same individual. Bowman, supra, § 404-3[2][E] (quoting HRE Rule 404 cmt.). The admission of evidence under the modus operandi exception requires "much more . . . than crimes of the same class, such as armed robberies of banks," and "[t]he similarities must be 'so unusual and distinctive as to be like a signature.'" Bowman, supra, § 404-3[2][E] (first quoting HRE Rule 404 cmt.; then quoting McCormick, Evidence 190 (2d ed. 1972)).

In Romero, for example, expert testimony on the methods of "modern child molesters" was deemed admissible as evidence of modus operandi. 189 F.3d at 585. According to the Romero court, the testimony constituted evidence of modus operandi because it "was helpful to the jury in understanding how child molesters operate--something with which most jurors

would have little experience." Id. However, characterizing such testimony as evidence of modus operandi is contrary to its application under Hawai'i law. See HRE Rule 404 cmt. (identifying modus operandi evidence as "a species of 'identity' proof" and noting that "the characteristics and methodology of the prior crime or act may be so strikingly similar to those of the crime or act being litigated as to support the inference that both were the handiwork of the very same person").

In this case, Dr. Bivens' expert testimony on the abuse process did not seek to prove that a prior sexual offense and the abuse of the complaining witness were "the handiwork of the very same person." Bowman, supra, § 404-3[2][E] (quoting HRE Rule 404 cmt.). Instead, Dr. Bivens' testimony sought to identify the behaviors of a class of typical offenders to prove the guilt of a defendant who is constitutionally presumed innocent. Thus, admission of Dr. Bivens' abuse process testimony as evidence of modus operandi is inconsistent with this jurisdiction's application of the Hawaii Rules of Evidence with regard to such evidence.

Further, even if the modus operandi exception of HRE Rule 404(b) were transformed by this court to expansively encompass behavioral patterns not of the same person but of the "typical child molester," expert testimony on the behaviors of offenders in the abuse process would not be helpful to the jury

under the circumstances of this case. For example, one of the most common types of expert testimony used to establish modus operandi is drug courier profile evidence. See generally United States v. Lim, 984 F.2d 331, 335 (9th Cir. 1993) (discussing the use of drug courier profile evidence). Such testimony "can describe historical background and patterns of organized crime in a relevant geographic area[] that can help appraising a series of criminal acts that would otherwise lack the context that is necessary for a complete understanding." Mueller & Kirkpatrick, Federal Evidence, supra, § 7:9. Although drug courier profile evidence has been deemed admissible on the basis that it assists the jury in understanding how a series of seemingly innocuous behaviors may in fact be a criminal act, the acts constituting the sexual abuse as alleged by the complaining witness in this case do not require context for an understanding of their illegality.

Moreover, evidence of modus operandi admitted under HRE Rule 404(b) requires an assessment of probative value versus risk of unfair prejudice under HRE Rule 403. See, e.g., State v. Renon, 73 Haw. 23, 31-32, 828 P.2d 1266, 1270 (1992) (when evidence of prior bad acts is determined to be relevant, the court must then balance the evidence's probative value against its "prejudicial impact" under HRE Rule 403); State v. Basham, 132 Hawaiʻi 97, 114, 319 P.3d 1105, 1122 (2014) (same). Thus,

even assuming that the modus operandi exception of HRE Rule 404(b) could be inordinately extended to encompass the profile evidence contained in Dr. Bivens' testimony, the testimony would nonetheless be subject to and excluded by the balancing required under HRE Rule 403 for the reasons stated.

Finally, the majority characterizes the position of this opinion as arguing for a "blanket prohibition on expert testimony regarding the behavior of child sexual abuse offenders." Majority at 40. However, as stated, evidence objected to on the basis that HRE Rule 403 mandates its exclusion requires the trial court to conduct a considered balancing of the evidence's probative value and risk of unfair prejudice. This balancing must be informed by "the particular circumstances" of each case, State v. Hern, 133 Hawaiʻi 59, 65, 323 P.3d 1241, 1247 (App. 2013), and the court must not rely on "any inflexible [blanket] policy" in determining admissibility, State v. Martin, 56 Haw. 292, 294, 535 P.2d 127, 128 (1975). However, in conducting this analysis as applied to proffered expert testimony on child sexual abuse, the court must be wary of the high risk of unfair prejudice which is inherent in

evidence of the typical behaviors and characteristics of child sexual abuse offenders.[18]

## III. CONCLUSION

The profile evidence admitted in this case was a near identical match to the complaining witness's testimony regarding the sexual abuse alleged and demonstrates the inherent dangers of admitting such evidence against a defendant. The evidence created an extreme risk that the jury would improperly conclude that Minor must be telling the truth based on Dr. Bivens'

[18] The majority further contends that other jurisdictions have upheld the admission of expert testimony on the child sexual abuse process "as more probative than prejudicial." Majority at 40. Of the decisions cited by the majority in support of this proposition, only three reference the relevant testimony's probative worth and risk of unfair prejudice. In State v. Stafford, the court deemed evidence of typical behaviors of child sexual abuse offenders "relevant" because it was used to rebut the defendant's defense at trial that his conduct "was not intended as grooming behavior"; the court did not, however, address the possible prejudice arising from the testimony. 972 P.2d 47, 52 (Or. 1998). The court in Long likewise rejected the possibility that such testimony was unduly prejudicial, but on grounds that did not speak to the testimony's unfairly prejudicial nature. 328 F.3d at 668 (noting that the testimony was "offered for a permissible purpose," that the prosecution "adduced considerable other evidence of [the defendant's] pedophilia," that the jury was instructed to independently determine the testimony's weight, and that a lack of statistics included in the testimony was of no import). Similarly, in Perez v. State, the court simply noted that "[a]s to unfair prejudice," the testimony "did not stray beyond the bounds set by this court and other jurisdictions for expert testimony," and it further stated that the expert "did not offer an opinion as to the victim's credibility or express a belief that she had been abused." 313 P.3d 862, 868-69 (Nev. 2013).

While it is true that some courts have admitted expert testimony on child sexual abuse over objections based on unfair prejudice, the decisions cited by the majority contain, at best, only a superficial analysis of the unfairly prejudicial nature of the testimony. It is imperative under our jurisprudence, however, that a trial court conduct a thorough inquiry into the relative probative value of the testimony as measured against its risk of unfair prejudice in light of the particular facts in a given case. Therefore, the majority's reliance on these cases is misplaced.

descriptions of the typical behaviors of a child molester, which were supported by studies and statistics. The use of profile evidence also redirected the focus away from "individual guilt" and towards "'the sort of person' that certain behavioral patterns" describe as typical of child sexual abusers. Mueller & Kirkpatrick, Federal Evidence, supra, § 7:11. Just as our courts would be hesitant to allow evidence of prior acts to demonstrate a defendant's propensity in a child sexual abuse case, we should also not permit evidence that seeks to link the prior acts of other offenders, as collected by psychological studies, to prove a particular defendant's guilt. In light of the high risk of unfair prejudice that resulted from the admission of the profile evidence in this case, its exclusion was required under HRE Rule 403. Permitting the admission of such profile evidence under the guise of this court's decision in State v. Batangan, 71 Haw. 552, 799 P.2d 48 (1990), constitutes an unwarranted and unwise expansion of the ruling in that case.

The conviction in this case should therefore be vacated on two grounds. First, the family court abdicated its discretion in analyzing and ruling on the admissibility of Dr. Bivens' testimony under HRE Rule 403, critically depriving McDonnell of that to which he was statutorily entitled: an informed discretionary ruling that balanced the probative value

of Dr. Bivens' testimony against its unfairly prejudicial effect. Second, the family court's indiscriminate admission of the entirety of Dr. Bivens' testimony, which focused in large part on the behaviors and thought processes of typical child molesters, was unfairly prejudicial to McDonnell and deprived him of a fair trial.[19] Accordingly, I dissent.

/s/ Richard W. Pollack

/s/ Michael D. Wilson

[19] The family court's errors in failing to conduct the balancing required by HRE Rule 403 and in admitting Dr. Bivens' testimony in its entirety were not harmless. As noted by Judge Reifurth in his concurring and dissenting opinion in this case, "the evidence against McDonnell was not overwhelming." At trial, the State presented no witnesses who observed the abuse, and its case depended almost entirely on the credibility of Minor. Given the enhancement of Minor's credibility by the perfect match between her allegations and the "typical" abuse process, as testified to by an expert witness "in the dynamics of child sexual abuse," there is a "reasonable possibility" that the court's errors regarding the admission of Dr. Bivens' testimony contributed to McDonnell's conviction. State v. Pauline, 100 Hawai'i 356, 378, 60 P.3d 306, 328 (2002) (quoting State v. White, 92 Hawai'i 192, 198, 990 P.2d 90, 96 (1999)).