

SEX OFFENDER ISSUES

LAURA A. PETERSON

Humphreys & Peterson Law Firm, P.L.L.C.

5502 Broadway Boulevard

Garland, Texas 75043

972-303-4529 (o)

972-303-1673 (f)

Laura@HumphreysandPetersonLawFirm.net

State Bar of Texas

26th ANNUAL ROBERT O. DAWSON

JUVENILE LAW INSTITUTE

February 11-13, 2013

San Antonio

CHAPTER 11

SPEAKER INFORMATION

Laura A. Peterson
Humphreys & Peterson Law Firm, P.L.L.C.
5502 Broadway Boulevard
Garland, Texas 75043
972-303-4529 (o)
972-303-1673 (f)
Laura@HumphreysandPetersonLawFirm.net

BIOGRAPHICAL INFORMATION

Laura Peterson received her B.S. with honors in Business Administration from the University of North Carolina, Chapel Hill in 1986 and her J.D. from the University of Virginia School of Law in 1989. During the first five years of her career, she focused on criminal appeals. From 1994 to 1999, she worked for the Dallas County Public Defender's Office specializing in the areas of juvenile and criminal law. Since 1999, Laura has been in private practice in Dallas County focusing her efforts on representing children. She was elected to the Council of the State Bar of Texas Juvenile Law Section in 2005 and is currently Chair Elect. She is also the Chair of the Dallas Bar Association Juvenile Justice Committee. She is board certified in criminal law and juvenile law. Laura is on the Exam Commission for the Texas Board of Legal Specialization. She is a frequent author and lecturer on the issues of child sexual abuse.

TABLE OF CONTENTS

WHY WOULD THIS CHILD LIE? 1
 How memory works 1
 What Is Suggestibility?..... 2
 Interviews by Advocacy Centers..... 9

HANDLING THE OUTCRY WITNESS.....16

EXPERTS AND INEFFECTIVE ASSISTANCE OF COUNSEL.....22

MOTION FOR DISCOVERY OF EVIDENCE.....23

RELATING TO THE PRIOR INTERVIEWS OF THE CHILD WITNESSES23

MOTION FOR DISCOVERY AND INSPECTION OF EVIDENCE25

MOTION FOR AUTHORIZATION OF FUNDSFOR EXPERT WITNESSES31

MOTION FOR DISCOVERY OF EXPERTS AND FOR COURT TO CONDUCT HEARING TO TEST RELIABILITY OF
EXPERT TESTIMONY33

FORM GRAND JURY LETTER – DETERMINE SENTENCE CASE.....34

EXPERT TESTIMONY CHECKLIST35

SEX OFFENDER ISSUES

To successfully defend a child sex abuse case, you must be prepared to answer two questions:

1. How does this child know so much about sex if it didn't happen?
2. Why would this child lie about this?

The first question will be answered through your investigation. In the vast majority of cases, child complainants and alleged perpetrators know each other; only a small minority of cases involves strangers.¹ Therefore, your client should be able to provide a great deal of information about the complainant and the complainant's background and family to enable you to conduct a thorough investigation. This investigation will enable you to show the jury how this child knows so much about sex.

The second question will be answered by the use of an expert knowledgeable about suggestibility. In order to effectively use an expert and effectively cross-examine the State's witnesses, you must understand the dynamics of interviewing children and the concept of suggestibility.

WHY WOULD THIS CHILD LIE?

How memory works

Memory is an active process. We do not record events like a video camera and then recall them at will. Because of this constructive nature of memory, reports may be inaccurate because of a number of factors that intrude at the time of the initial recording (encoding) of the event, during the storage of the event, or at the time of the retrieval of the event. We sometimes add, delete and shape memories of our experiences. These transformations can occur at the encoding, storage and retrieval stages. Thus, what gets retrieved is rarely a direct match of the original event. The primary factor that affects the quality of our memories is our previous knowledge, our assumptions and our biases about the world.

Encoding refers to the process by which a trace of an experience becomes registered in memory. There is selectivity in this process, which reflects the limits of the human brain to attend to everything at one time. We focus on certain aspects of an event and ignore others. For example, you may remember the face of the foreman of your last jury but not what they were wearing when you made your closing argument. Factors that influence what enters the memory system include the amount of prior knowledge about the events (usually, the more knowledge, the more easily events are encoded), the interest value of the events, the duration and repetition of the original event, and the stress level at the time of encoding the original event.²

An encoded event enters short-term memory. Not all events survive the short-term memory's limited storage capacity. Those that do survive enter long-term memory. This stage is not passive. The passage of time, the number of times that the event has been re-experienced, and the number and types of intervening experiences, which have also become encoded and stored, can have a strong impact on the strength and organization of the stored information. Memories can increase or decrease in strength as a function of how long they have been stored and of the number of times that the original event has been recalled. It is also true that knowledge and expectancies can change the composition of memory during the storage phase, thus transforming the trace to make it more consistent with one's attitudes and expectations.³

There is no perfect retrieval of stored memories. A variety of cognitive as well as social factors influence the retrievability of stored memories. First, the condition of the original memory trace is important. Creating conditions

¹ Mian, M., Wehrspann, W., Klajner-Diamond, H., LeBaron, D., & Winder, C. (1986). Review of 125 Children 6 years of age and under who were sexually abused. *Child Abuse & Neglect*, 10, 223-229.

² Ceci, J. & Bruck, M. (1995). *Jeopardy in the courtroom: a scientific analysis of children's testimony* (pp.41-42). Washington, DC: American Psychological Association.

³ Ceci, J. & Bruck, M. (1995). *Jeopardy in the courtroom: a scientific analysis of children's testimony* (p. 42). Washington, DC: American Psychological Association.

that parallel those of encoding (e.g. returning to the location) can facilitate retrieval of the memory. Sometimes an interviewer provides cues, reminding the subject about parts of the actual event or inducing emotional states that match those present at the time of encoding. Further, there are many constructive factors that enter into the retrieval stage. For example, when asked to recall a faded event, we may use our knowledge about what “typically” happens to fill gaps in our memory. If an event is highly congruent with our prior knowledge, then it is likely to be retrieved. Additionally, if an event is highly incongruent with our prior knowledge, it is likely to be retrieved because of its bizarreness.⁴

What Is Suggestibility?

Suggestibility refers to the unconscious alteration of memories by subtle suggestions, expectations, stereotypes, and leading questions, as well as the false reports of children as an effect of explicit bribes, threats and other forms of social inducement that do not alter memories.⁵

The First Problem: The Interview

Obtaining detailed and accurate accounts from children about events that may have happened weeks, months or even years ago can be a difficult task. Adults encounter this difficulty whether they ask children about everyday events, special events or stressful events in which the child was a participant or a victim. For example, when parents ask their young children about what happened at school or at their friend’s birthday party, they typically receive answers such as “nothing” or “we played.” These non-informative responses to open-ended questions are very common among young children.

In order to obtain more detailed information, adults use a variety of strategies. On the most general level, they ask many questions. These questions serve as probes or prompts to assist the child in reporting the appropriate information.⁶ Additionally, adults attempt to structure the interaction around their own knowledge of the topic. If the adult does not receive a satisfactory answer, she may repeat the questions. The adult may reward the child for his responses. When the child goes off-topic and makes unrelated remarks, the adult frequently tries to pull him back into the topic by ignoring the unrelated comments or promising to talk about them at a later time, shaping the content of the child’s responses. This often has the intended effect of extinguishing the child’s production of extraneous remarks and focusing on the topic at hand. Of course, when the adult does not have full knowledge of the actual events, she may have difficulty interpreting a child’s statements and come to make an inaccurate assessment of the actual event.

Children are generally cooperative and compliant participants in verbal interactions. As a result, when questioned by adults, children sometimes attempt to make their answers consistent with what they see as the desire of the questioner, rather than consistent with their knowledge of the event.⁷ Studies have shown that from an early age, children perceive their adult conversational partners as cooperative, truthful, and not know.”⁸ These data suggest that children perceive adults as cooperative conversational partners who ask honest and logical questions that must have real answers.

In other words, the very structure of the interview with young children contributes to a number of pitfalls and dangers when parents or others attempt to obtain information from a child that will later be used in a courtroom context. These interviews take place generally because the parent or other adult believes something has happened. There is no syndrome or constellation of behaviors, such as depression, anxiety, or nightmares that are diagnostic of sexual abuse. In fact, there is much overlap in the behavioral symptoms shown by abused and non-abused children.

⁴ Ceci, J. & Bruck, M. (1995). *Jeopardy in the courtroom: a scientific analysis of children’s testimony* (pp. 42-44). Washington, DC: American Psychological Association.

⁵ Ceci, J. & Bruck, M. *Jeopardy in the courtroom: a scientific analysis of children’s testimony* (p. 45). Washington, DC: American Psychological Association. (1995).

⁶ Fivush, R. (1993). Developmental perspectives on autobiographical recall. In G. S. Goodman & B. Bottoms (Eds.), *Child victims and child witnesses: Understanding and improving testimony* (pp. 1-24). New York: Guilford Press.

⁷ Read B., & Cherry, L. (1978). Preschool children’s productions of directive forms. *Discourse Processes*, 1, 233-245.

⁸ Hughes, M., & Grieve, R. (1980). On asking children bizarre questions. *First language*, 1, 149-160.

Approximately one-third of child victims have no symptoms at all.⁹ The fact that the interviewer believes something has happened and fails to take a forensic approach to the interview can have disastrous results.

deceptive.¹⁰ Children also attempt to provide answers to adults' questions even when the questions are bizarre. When asked nonsensical questions such as "Is milk bigger than water?" or "Is red heavier than yellow?" most 5- and 7-year-olds will reply "yes" or "no"; they only rarely respond "I don't

Interviewer Bias

For almost 100 years, we have known that an interviewer's biases and beliefs about an event can influence the conduct of their interviews and influence the accuracy of the reports. Interviewer bias characterizes those interviews where interviewers have prior beliefs about the occurrence of certain events and, as a result, mold the interview to elicit statements from the interviewee that are consistent with these prior beliefs. One of the hallmarks of interviewer bias is the single-minded attempt to gather only confirmatory evidence and to avoid all avenues that may produce negative or inconsistent evidence. The blind pursuit of a single hypothesis and failure to test alternate, equally believable explanations results in interviews containing false statements. A true forensic interview is one in which the interviewer has no bias or previous belief and more importantly, no stake in the outcome of the interview.

A. Homeless Men

One of the first studies of interviewer bias was conducted in 1929.¹¹ The research scientist studied 12 experienced interviewers from various social service agencies in New York City who were assigned to interview approximately 2,000 homeless men to ascertain the causes of their destitution. The scientist was struck by how some of the interviewers' beliefs influenced the contents of the reports they obtained from the homeless men. The most obvious example came from two interviewers who differed in their social orientations, one being known by co-workers as a "socialist," the other as an ardent "prohibitionist." The socialist was three times more likely to report that the men's destitution was due to industrial causes beyond their control (layoffs, plant closings, seasonal labor); whereas the prohibitionist was nearly three times more likely to report that the basis of the men's destitution was alcohol or drug related. Not only were the findings consistent with each interviewer's pet hypotheses, but the homeless men themselves incorporated the interviewer's biases into their own explanations of their homelessness.

B. Simon Says

A more recent study involved preschoolers who played a game similar to "Simon Says". One month later, the preschoolers were interviewed by a trained social worker. Before the interview, the social worker was given a one-page report containing two types of information about the play episode: accurate information and erroneous information. For example, if the event involved one child touching his own stomach and then touching another child's nose, the social worker would be correctly told that the child touched his own stomach but incorrectly told that he touched another child's toe. The interviewer was not told that some of the information in the report was inaccurate. She was merely told that these actions *might* have occurred during the play episode. The social worker was asked to conduct an interview to determine what the child could still recall. The only instruction given to the social worker was that she should begin by asking the child for a free narrative of what had transpired, avoiding all forms of suggestions and leading questions. Following this, she was allowed to use any strategies that she felt necessary to elicit the most factually accurate recall from the child.

The information provided to the social worker influenced the interviewer's hypotheses about what had transpired, and powerfully influenced the dynamics of the interview, with the social worker eventually shaping some of the children's reports to be consistent with her hypothesis, even when it was inaccurate. When the social worker was accurately informed, she got the children to correctly recall between 70-100% of all events. However, when she was misinformed, 34% of the 3- to 4-year-olds and 18% of the 5- to 6-year-olds corroborated one or more events that the social worker falsely believed had occurred, even though they had not. Interestingly, the children seemed to become more credible as their interviews unfolded. Many children initially stated details inconsistently or reluctantly, but as the interviewer persisted in asking leading questions about non-events that were consistent with her hypothesis, a

⁹ Kendall-Tackett, K. A., Williams, L. M., & Finkelhor, D. (1993). Impact of sexual abuse on children: A review and synthesis of recent empirical studies. *Psychological Bulletin*, *113*, 164-180.

¹⁰ Garvey, C. (1984). *Children's talk*. Cambridge, MA: Harvard University Press.

¹¹ Rice, S. A. (1929). Interviewer bias as a contagion. *American Journal of Sociology*, *35*, 421-423.

significant number of these children abandoned all contradictions and hesitancy, and endorsed the interviewer's erroneous hypothesis.

One month later, the social worker's notes from this interview were given to another social worker and she was asked to re-interview the children. The second interviewer not only got the children to continue to assent to erroneous hypothesis-consistent statements, but many children did so with increasing levels of confidence and in increasing numbers. After two such interviews, children gave detailed, but false, accounts of bodily touching (e.g., their knees being licked and marbles inserted into their ears).¹²

C. Class Visit

Another study showed how interviewers' beliefs about a certain event affect their style of questioning children and the accuracy of children's subsequent reports. Two actors, posing as park rangers, visited the classes of preschool children to ask them to help a bird find a nest for her eggs. During the presentation, one of the rangers accidentally knocked over a cake perched on top of a piano. When the cake fell and splattered on the floor, there was an abrupt silence and a halt to all activities. Two weeks later, all of the children were questioned about the event.

Interviewer's beliefs about the event were manipulated in the following manner. Some interviewers were provided with full, accurate knowledge of the event, whereas others were given inaccurate information. Finally, some interviewers were told to question each child until they found out what happened, and they were also asked to avoid the use of leading questions.

Despite the warning to avoid leading questions, 30% of all interviewers' questions were leading, and half of these were misleading. Interviewers with inaccurate knowledge asked four to five times as many misleading questions as the other interviewers. Overall, children agreed with 41% of the misleading questions, and those interviewed by the misled interviewers gave the most inaccurate information. Thus, when an interviewer's belief was contrary to what the child actually experienced, the interview was characterized by an overabundance of misleading questions, which, in turn, resulted in children providing highly inaccurate information.¹³

D. Chester the Molester/Chester the Cleaner

In a study with 5- and 6-year-olds, children interacted with Chester, "the janitor." Some children interacted with Chester as he cleaned dolls and toys in a playroom. Other children interacted with Chester as he handled the dolls and toys roughly and in a mildly abusive manner. The children were questioned about this event several times on the same day, by different interviewers who differed in their interpretations of the event. One interviewer was accusatory, suggesting Chester was behaving inappropriately by playing with toys rather than cleaning. One interviewer was exculpatory, suggesting Chester was just cleaning the toys. The third interviewer was neutral.

In the first interview, when the children were questioned by the neutral interviewer or by an interviewer whose interpretation of the events was consistent with activities actually viewed by the child, the children's accounts were both factually correct and consistent with what happened. However, when the interviewer contradicted the activity actually viewed by the child, the children's stories conformed to the suggestions or beliefs of the interviewer: 75% of the children's remarks were consistent with the beliefs of the interviewer and 90% answered questions in agreement with her point of view, as opposed to what actually happened.

At the second interview, the children changed their stories if the second interviewer contradicted the first interviewer. The majority of the children changed their stories to fit the suggestions of the second interviewer. If the interviewer's interpretation was consistent across the two interviews but inconsistent with what the child had actually observed, the child in the second interview incorporated the suggestions planted in the first interview. Further, when questioned by parents who were neutral, the children's answers were consistent with the interviewers' biases rather than the actual event. While most of the errors by the children were in response to questions, 20% of the children made up facts about events that had not occurred or been suggested but were consistent with the bias of the interviewer.

¹² Ceci, S.J., Leichtman, M., & Putnick, M. (Eds.) (1992). *Cognitive and social factors in early deception*. Hillsdale, NJ: Erlbaum.

¹³ Pettit, F., Fegan, M., & Howie, P. (1990, September). *Interviewer effects on children's testimony*. Paper presented at the International Congress on Child Abuse and Neglect, Hamburg, Germany.

Repeated Questioning

A. Repeated Interviews

In a free recall interview, both children and adults remember more with additional interviews. However, their reports also become more inaccurate over time (i.e. they recall both more accurate and more inaccurate details over repeated interviews). Some recent studies suggest that this decline in accuracy over a long delay may be most apparent in children. This research involved re-testing children and adults 2 years after their initial observation and recall of a staged event. Children between the ages of 6 and 10 years at the time of follow-up questioning provided many more inaccurate details in response to open-ended questions compared with adults. The children's responses to direct yes/no questions were only right 50% of the time (random chance) and 21% of the children confused which actors performed certain actions 2 years earlier.¹⁴ This study involved neutral repeated interviews.

When repeated interviews contain misleading information, the result is an impaired and inaccurate recall of events. In one study, children visited their pediatrician when they were 5 years old. During that visit, a male pediatrician gave each child a physical examination, an oral polio vaccine, and an inoculation. During that same visit, a female research assistant talked to the child about a poster on the wall, read the child a story, and gave the child some treats. One year later, the children were re-interviewed four times over a period of 1 month. During the first three interviews, some children were falsely reminded that the male pediatrician showed them the poster, gave them treats, and read them a story and that the female research assistant gave them the inoculation and the oral vaccine. Other children were given no misinformation about the actors of these events. During the fourth and final interview, when asked to recall what happened during the original medical visit, children who were not given any misleading information gave highly accurate final reports. They correctly recalled which events were performed by the male pediatrician and by the female research assistant. In contrast, the misled children were very inaccurate; not only did they incorporate the misleading suggestions into their reports, with more than half of the children falling sway to these suggestions (e.g., claiming that the female assistant inoculated them rather than the male pediatrician), but 38% of these children also included non-suggested but inaccurate events in their reports. They falsely reported that the female research assistant had checked their ears and nose. These statements are inferences that are consistent with the erroneous suggestion that the research assistant had administered the shot. None of the control children made such inaccurate inferences. Thus, young children use suggestions in highly productive ways to reconstruct and at times distort reality.¹⁵

The highest ratio of accurate-to-inaccurate testimony is obtained in the first interview. As the delay between the event and the interview increases and/or as the number of misleading interviews increase, the chance for serious misreporting also appears to increase. Thus, if an initial interview is neutral, it seems to have the effect of reinforcing the memory, perhaps providing a rehearsal. As a consequence, subsequent interviews that are suggestive result in less alteration than might be the case if the initial interview was either suggestive or absent.

B. Repeated Questioning During Same Interview

A related concern is the degree to which repeating a question within an interview can taint a child's report.¹⁶ When children are asked the same question more than once, they often change their answers. They appear to interpret the repeated questions as "I must not have given the correct response the first time, therefore to comply and be a good conversational partner, I must try to provide new information."¹⁷ Unfortunately, when children are witnesses to or victims of a crime, they must tell and retell their story many times, to many different people. Some authorities estimate that the average child witness may be questioned up to 12 times during the course of an investigation. However, this figure may actually be an underestimate if one considers the number of times that parents, friends, and mental health professionals may question these children "off the record."¹⁸

¹⁴ Poole, D., & White, L. (1993). Two years later: Effects of question repetition and retention interval on the eyewitness testimony of children and adults. *Developmental Psychology*, 29, 844-853.

¹⁵ Bruck, M., Ceci, S. J., Francoeur, E., & Barr, R. J. (1995). "I hardly cried when I got my shot!": Influencing children's reports about a visit to their pediatrician. *Child Development*, 66, 193-208.

¹⁶ Ceci, S. J., & Bruck, M. (1993). The suggestibility of the child witness: A historical review and synthesis. *Psychological Bulletin*, 113, 403-439.

¹⁷ Gelman, R., Meck, E., & Merkin, S. (1986). Young children's numerical competence. *Cognitive Development*, 1, 1-29.

¹⁸ Whitcomb, D. (1992). *When the child is a victim* (2nd ed.). Washington, DC: National Institute of Justice.

In one study, the effects of repeated questioning within and across sessions were studied. Adults, as well as 4-, 6-, and 8-year-olds witnessed an ambiguous event. Half of the subjects were interviewed immediately after the event as well as 1-week later. The remaining subjects were interviewed only once – one week after the event. Within each session, all questions were asked three times. Repeated open-ended questions had little effect on responses. However, on repeated yes/no questions, 4-year olds were most likely to change their responses, both within and across sessions. Also, when children were asked a specific question about a detail for which they had no information, many answered with sheer speculations. Furthermore, both children and adults used fewer qualifiers with repeated questions (they omitted phrases such as “it might have been”) and consequently sounded more confident about their statements over time. The danger of repeatedly asking specific questions is that children will often cooperate by guessing, but after several repetitions, their uncertainty is no longer apparent.

Thus, the major finding of this study is that repeated questioning may affect very young children’s responses to specific questions. Whereas repeating open-ended questions may merely signal a request for additional information, repeating specific questions that have a limited pool of responses (yes/no) may signal to young children that their first response was unacceptable to the interviewer. This finding is important because young children tend to give limited responses to open-ended questions, and interviewers therefore often resort to specific questions to elicit additional information. To confirm a child’s answer, interviewers frequently repeat the question.

Stereotype Induction

There are a number of powerful suggestive interview techniques that are more subtle than leading questions. One such technique is the induction of stereotypes. Stereotype induction refers to the attempt on the part of interviewer to transmit to a child a negative characterization of an individual or an event, whether it is true or false. Telling children that the suspect “does bad things” is an example of negative stereotype induction.

Incrimination of Dale

In one study, children ranging in age from 4 to 6 years played some games with a man called Dale.¹⁹ Dale played with some of the toys in a researcher’s testing room, and he also asked the child to help him take off his sweater. Later, an interviewer asked the child to tell her everything that happened when Dale was in the room. For half of the children, the interviewer maintained a neutral stance whenever they recalled an action. For the remaining children, the interviewer reinterpreted each of the child’s responses in an incriminating way by stating, “He wasn’t supposed to do or say that. That was bad. What else did he do?” At the conclusion of these incriminating procedures, the children were asked three highly suggestive/misleading questions (“Didn’t he take off some of your clothes, too?” “Other kids have told me that he kissed them, didn’t he do that to you?” and “He touched you and he wasn’t supposed to do that, was he?”). All children were then asked a series of direct questions, requiring yes or no answers about what had happened with Dale.

Children in the incriminating condition gave many more inaccurate responses to the direct yes/no questions than did children in the neutral condition. This was largely because these children made errors on items related to “bad” actions that had been suggested to them by the interviewer. A third of the children in the incriminating condition embellished their incorrect responses to these questions and the embellished responses were always in the direction of the incriminating suggestions. The question that elicited the most frequent embellishments was “Did Dale ever touch other kids at the school?” Embellishments to this question included information about who Dale touched (e.g., “He touched Jason, he touched Tori, and he touched Molly”), where he touched them (e.g., “He touched them on their legs”), how he touched them (e.g., “... and some he kissed...on the lips”), and how he took their clothes off (“Yes, my shoes and my socks and my pants. But not my shirt”). When they were re-interviewed one week later, children in the incriminating stereotype condition continued to answer the yes/no questions inaccurately, and they continued to embellish their answers.

Finally, the incriminating condition had a very powerful effect on children’s interpretation of Dale’s character and actions. In comparison with children in the neutral interview condition, children in the incriminating interview condition were more likely to spontaneously make negative statements about Dale (e.g., “The guy came in and did

¹⁹ Lepore, S. J., & Sescio, B. (1994). Distorting children’s reports and interpretations of events through suggestion. *Applied Psychology*, 79, 108-120.

some bad things”) and to agree that Dale intended during the play session to be bad, be mean, fool around, and not do his job.

Stereotype Induction and Suggestion

Sam Stone, the Klutz

This study involved children ages 3 to 6 years who were placed into four categories: control, stereotype, suggestion and stereotype-plus-suggestion.²⁰ The children all observed a visit to their classroom by a stranger, Sam Stone. Sam Stone merely said “hello,” walked around the room, then said “goodbye.” The children were interviewed over a 10-week period on four different occasions.

The control group children were simply asked during the first four interviews to recall what happened during the visit. They were given no suggestions about the visit or Sam Stone’s activities.

The stereotype category children received considerable information about Sam Stone’s personality before his visit to the school. Each week for a month the teacher described Sam as a well-meaning but very clumsy person. After the visit, these children had four neutral interviews as in the control group.

The children in the suggestion condition received post-event suggestions during their interviews following their encounter with Sam Stone. They were provided with two suggestions during their interviews that Sam Stone had ripped a book and that he had soiled a teddy bear. These suggestions were embedded in questions such as “When Sam Stone got that bear dirty, did he do it on purpose or was it an accident?” or “Was Sam Stone happy or sad that he got that bear dirty?”

The children in the fourth group stereotype-plus-suggestion were exposed to both the pre-event stereotype (Sam is clumsy) and the post-event suggestions (Sam ripped a book and soiled a teddy bear).

All of the children were interviewed a fifth time by a new interviewer who was not present during the visit or the first four interviews. The interview consisted of free recall and probing questions about specific events. The probes were directed at the events that had not happened namely, ripping the book and soiling the teddy bear. In addition, for children whose answers to the probes indicated that they actually saw one of these events occur, the interviewer posed questions to gauge the strength of their statements (e.g. “You didn’t really see him do this, did you?”).

The results show that no child in the control group made any false allegations in the free narrative. In response to the prompt about the book or teddy bear, only 10% of the youngest said anything happened. Further only 5% claimed to have actually seen this happen and only 2.5% continued after gently challenged with counter-suggestions.

In the stereotype group, none of the children made any false allegations in the free narrative. However, in the responses to the prompts, 37% of the children claimed Sam had either ripped the book or soiled the teddy bear. Of these children, 18% claimed to have seen him do one of these misdeeds and 10% persisted even after being gently challenged. Older children were more resistant to the influence of the stereotype than the younger children.

In the suggestion group, 21% of the younger children and 14% of the older children made spontaneous claims in their free narratives about the book or the teddy bear. In response to the probe questions, 53% of the younger and 38% of the older children indicated that Sam Stone had done one or both of these misdeeds. Moreover, 35% of the younger children claimed to have seen him do this, with 12% continuing to assert so after the counter-suggestion. Of the older children, 9% continued to claim they saw him do the misdeeds after being challenged.

In the final stereotype-plus-suggestion group, 46% of the youngest and 30% of the oldest children volunteered that Sam Stone had ripped the book or soiled the teddy bear in the free narrative. In response to the probes, these numbers rose to 72% of the youngest and 44% of the oldest children. Additionally 21% continued to insist they had seen these acts even when gently challenged.

²⁰ Leichtman, M. D. & Ceci, S. J. (1995). The effects of stereotypes and suggestions on preschoolers’ reports. *Developmental Psychology*, 4, 568-578.

The researchers of the Sam Stone study were surprised at the number of details the children in the stereotype-plus-suggestion group provided to embellish their reports of nonevents. To determine whether adults can detect inaccurate reports, they showed an audience of 119 researchers and clinicians who work in the area of children's testimonial issues the videotapes of the fifth interview to determine if they could discriminate between the erroneous reports and the accurate ones. The results were that the majority could not reliably tell whether the events described by the children had occurred or not, nor could they identify which children were most accurate. Interestingly enough, the audience rated the child who was completely accurate in her account as the least credible and the child whose account contained by far the most inaccurate assertions as the most credible.

Macias v. State

While young children are particularly susceptible, older children are not immune. In the emotionally charged context of an investigation and a trial, any child may be in danger of being the victim of bad questioning. A real life example would be *Macias v. State*,²¹ a 1987 capital murder.

Frederico Macias, a worker in the Old Baltimore Spice Factory in El Paso, Texas was charged with the armed robbery and murder of an elderly couple. The sole basis for Frederico's arrest came from a claim by Pedro Luevanos. When Pedro was arrested he was in possession of the elderly couple's stolen property. Pedro agreed to plead guilty to armed robbery and testify against Frederico. He claimed Frederico used a machete to slash the elderly couple to death. Needing corroboration, the state gave a reduced sentence to Frederico's cellmate for testimony that Frederico had told him about his role in the murder.

For the first six months of the investigation, the police had very little on which to proceed in a capital case. Then they happened upon their star witness, 9-year-old Jennifer, who claimed she was playing at Frederico's trailer on the afternoon of the murders. She told police that she remembered Frederico returning home with blood splattered on his shirt and hands, toting a long BB gun or a rifle.

Although an effective witness at trial, her pretrial accounts were contradictory and filled with implausible claims. As in the studies, Jennifer used fewer qualifiers ("I think?") and consequently sounded more confident about her statements over time with repeated questioning even though her pretrial accounts contained guessing. At trial, her uncertainty was no longer apparent. Jennifer's testimony was critical to the State. The foreman of the jury acknowledged this when he stated, "During the trial, the testimony of Jennifer F., the little girl, had a great impact and proved crucial for the prosecution. Her testimony was given considerable weight by the jury and was important in our deliberations."²² The jury sentenced Frederico to death.

Jennifer's accounts were colored by a pre-event stereotype, which came from Jennifer's mother. The mother had told her on numerous occasions that Frederico was a bad man and had warned her against being friendly with him. From interviews with Jennifer, it was clear that she possessed a deeply held negative stereotype about Frederico and her statements to police as well as her trial testimony were in concert with this stereotype. Jennifer falsely attributed crime-consistent actions to Frederico because of her mother's pre-event suggestions that he was bad. In addition, Jennifer was subjected to relentless inquiries in pursuit of her event-relevant memories in a series of highly suggestive interviews that stretched over an extended period of time.

Several years after the trial, Jennifer gave a sworn deposition recanting her trial testimony. She testified in the deposition as follows:

When I first saw Fred with red stuff on his shirt, I didn't think it was that important. At first, I didn't really know if it was blood or chili. [The defendant worked in a salsa factory, as did Jennifer's mother and the sight of red on people's clothing was common.] Later, when I saw Fred had a gun or knife, it caught my attention, and I thought that it must be blood. Because different people asked me so many different questions about what I saw, I became confused. I thought I might have seen something that would be helpful to the police. I didn't realize that it would become so important. I thought they wanted me to be certain, so I said I was certain even though I wasn't. Originally, I think I told the police just what I saw.

²¹ 733 S.W.2d 192 (Tex. Crim. App. 1987).

²² Ceci, J. & Bruck, M. (1995). *Jeopardy in the courtroom: a scientific analysis of children's testimony* (p. 125). Washington, DC: American Psychological Association.

But the more questions I was asked, the more confused I became. I answered questions I wasn't certain about because I wanted to help the adults.

The deposition was made 12 days before Frederico's scheduled execution, resulting in a stay of execution. The court ruled that Frederico was entitled to a new trial on the grounds that the defense's expert witness on children's suggestibility had not been allowed to testify. Frederico was ultimately freed.

Interviews by Advocacy Centers

The stated role of Child Advocacy Centers is to coordinate the efforts of the police, the district attorney's office and the Department of Family and Protective Services (referred to herein as Child Protective Services or CPS) in the disposition of child abuse cases and to coordinate the delivery of services to child abuse victims and their families.²³ Advocacy Centers are not charged with the responsibility of investigating allegations of abuse. Advocacy Centers are to assess victims of child abuse and their families to determine their need for services relating to the investigation of child abuse.²⁴ Unfortunately, what has evolved is the use of the Advocacy Centers by law enforcement and prosecutors as an intrinsic part of child abuse investigations. Equally dangerous is the fact that Advocacy Centers have adopted this role.

The lesson of the research is that interviewers should follow the same principles as scientific investigators. They should arrive at the truth by ruling out rival hypotheses and by attempting to falsify their favored hypothesis.²⁵ If this is not done, it cannot be said that the interview is forensic. In a bad interview, it is just as likely the child is answering questions or making up facts about events that are consistent with the bias of the interviewer. This is often seen when a child has made some vague claim or has engaged in ambiguous conduct and then is quickly sent to the advocacy center for an interview. Notwithstanding the fact that the Advocacy Centers describe their interviews as forensic, the interviewers always approach the interviews with the premise that the child *is* a victim of abuse and it is their job to get the abuse story.

The Interview

Prior to talking to the child, the interviewer spends time with the police officer in charge of the case. The interviewer is given the gist of the allegation from the perspective of the police officer. Sometimes the interviewer will speak with the parent or caretaker. Almost all Advocacy Center interviews follow a format. First, the interviewer spends a few minutes trying to establish rapport. Then some time is spent trying to determine if the child is able to distinguish between a truth and a lie. The fact that the child cannot tell the difference between a truth and a lie generally has no bearing on whether the interview continues or whether criminal charges are filed. Then the interviewer shows the child sketches of naked people and some time is spent naming the body parts of both boys and girls. This is all done prior to asking the child any open-ended questions about why they are there for the interview or attempting any type of open-ended free recall about events.

Here is a sample interview:

Three year old Leslie was taken to the Advocacy Center by her father. Her parents have recently divorced and she lives with her mother. She also has a half-brother Tommy with whom she lives and is very close to. Since the separation of her parents, Leslie's behavior has regressed tremendously. The allegation arose when she was spending time on the weekend with her father. The father strongly dislikes Tommy and this was one of the principle reasons for the divorce. Since the allegation, the father has been successful in his efforts of obtaining custody of his daughter.

The interview begins with coloring. Some time is spent by the interviewer drawing a face and having the child list the parts of the face.

²³ Texas Family Code §264.405.

²⁴ Texas Family Code §264.405(1).

²⁵ Dawes, R. (1992, Spring). The importance of alternative hypothesis and hypothetical counterfactuals in general social science. *General Psychologist*, pp. 2-7.

The relevant questions begin:

Leslie do you know the difference between a truth and a lie?

Yeah.

What is it?

Um. I don't know.

If someone walked in and said that is a purple bean bag would that be a truth or a lie?

Um. A lie.

Why?

What do people mean that is a purple bean bag?

What color is the bean bag?

Green.

If someone walked in and said that's a blue bean bag, would that be a truth or a lie?

What is telling the truth?

The interviewer moves on. Sketches of naked children are shown. Leslie identifies boy and girl. She is then asked to identify body parts. She calls the female sexual organ a "body" and the male sexual organ a "long-body."

Who gives you kisses?

My mommy.

What part of your body does she kiss you on?

On the mouth.

Do you get hugs?

Yes.

Who gives you hugs?

Mommy and Daddy.

Everyone has parts of the body that are not okay to touch. Can you put an X on the parts of the body that are not okay to touch? (uses drawings/child complies).

Are there any more parts of the body that are not okay to touch?

No.

Is it okay to touch the boobies?

No.

Then put an X there too.

Has anyone ever touched you on any of those parts? (*First time asked*).

No.

Have you ever had to touch someone else on any of those parts of the body? (*First time asked*).

No.

Do you remember the first part when we talked about telling the truth and telling a lie?

Yeah.

And you told me that you were going to tell me the truth while we were in here? (*This is a false statement; the child never stated she would tell the truth. In fact, she indicated she did not know the difference.*)

Are you a new person?

How do you mean a new person?

I don't know, just kidding. (*This is the child's way of saying, Weren't you listening, stupid?*).

Has anyone ever touched you on your body? (*Second time asked*).

No.

Has anyone ever touched you on your boobies? (*Variation, third time asked*).

No.

Has anyone ever touched you on your bottom? (*Variation, fourth time asked*).

Yes.

Who?

My Mommy.

Have you ever had to touch a boy on their long-body? (*Second time asked*).

Yeah

Who?

Tommy.

What happened?

He just touched his bottom.

Did you have to touch Tommy's long-body? (*Third time asked*).

Yeah.

What did you touch Tommy's long-body with?

A pencil.

You touched his long-body with a pencil or he touched your body with a pencil?

I touched his body with a pencil.

Did you write on it?

Yeah. I write on it.

What did his long-body look like?

I don't know.

Did you see his long-body?

Yeah.

What was he doing with his long-body?

He was pulling his long-body out.

Where were you all?

I don't know.

Were you at home?

Yeah.

Do you live in a house?

I live in a house.

When you were in your house with Tommy and he had you touch his long-body with a pencil, what room were you in? (*Interesting she never said Tommy had her touch his long-body with a pencil, only that she did it.*)

I was at home.

Were you in your room, Tommy's room, your mom's room?

I was in my room.

What were you all doing in your room?

Um. I was just in my room.

And Tommy was in your room?

Yeah.

And what happened?

He wanted to lie down in my bed. (*According to the mother, Tommy puts Leslie down for her nap.*)

And what happened?

And then he went downstairs and made lunch and then I came downstairs and ate lunch.

Did he touch his long-body? (*Fourth time asked*).

Yeah.

Did he touch his long-body on top of his clothes or under his clothes? (*Fifth variation of this question*).

So this is Tommy? (indicating naked boy drawing).

Okay. Do you want to put Tommy's name on there?

Yeah.

Okay we'll put Tommy's name on there. And he was touching his long-body? (*Sixth time asked*).

Yeah.

And what was he touching his long-body with?

A Kleenex.

Why was he touching his long-body with a Kleenex?

Because he wanted to.

Did something happen to his long-body?

Um. Yeah.

What happened to his long-body?

He pulled it out.

He pulled it out of where?

Um. I don't know.

Did something come out of his long-body?

Yeah.

What came out of his long-body?

A crack did.

Did something else come out of his long-body?

Know what I have at my house, I have Madeleine books.

Neat. Did something else come out of his long-body? (*Third time asked*).

No.

Did you ever have to touch his long-body with anything but the pencil? (*Seventh time asked*).

No. Nothing.

Did you have to touch his long-body with your hand? (*Eighth variation*).

Um. Um. Yeah.

How did you touch Tommy's long-body with your hand?

That's enough talking.

Can you take my marker and show me how you had to touch his long-body? (Child ignores request).

He just touched his body with the pencil.

Did you have to touch his long-body? (*Ninth time*).

Yeah.

Did you have to touch his long-body with any other part of your body? (*Tenth time*).

No.

Did you put your mouth on his long-body? (*Highly suggestive, does a three year old know about oral sex?*).

No I didn't. I just pinched him on his elbow.

Did he put his long-body against your body?

No.

Did Tommy ever touch your body? (*Fifth time asked*).

No.

Did Tommy ever touch your boobies? (*Another variation of same question*).

No.

Did Tommy touch any other part of your body? (*Seventh time asked*).

No. He didn't touch nothing.

He didn't touch nothing but he touched himself?

Yeah.

When he had his long-body out was it standing up, was it laying down?

It was laying down.

And something came out of his long-body?

Yeah.

What color was the stuff that came out of his long-body?

It was (pause) black.

It was black?

Yeah.

Something came out of his long-body and it was black?

Yeah and his body was black.

Okay. What I'm going to do is go out of the room for just a second and you can draw a picture. I'll be right back. *(Clearly the interviewer wants to end this line of questioning as the answers are damaging to the prosecution. Leslie and Tommy are Caucasian. The answers that the long-body was black and something came out that was black indicate that Leslie is making up answers to the highly suggestive questions of the interview.)*

What are you going for?

I'm going to talk to Mr. Jim for just a minute.

Okay, I'll color you a pretty picture.

Interviewer re-enters the room.

Leslie, when you saw Tommy's long-body did you see anything around his long-body?

Um. No.

Leslie, when you had to touch Tommy's long-body, was it hard, soft or something else?

Something else.

What was it?

It was just his long-body.

What did it feel like?

It didn't feel like nothing.

But you said something came out of it?

Yeah.

What came out of it?

I don't know.

Did anybody else have you touch their long-body?

Um. Yeah.

Who else?

I don't know.

Was it your daddy?

Yeah.

Your daddy had you touch his long-body?

Yeah. *(This was the mother's theory, that Leslie was really being abused by her father, not her brother. The father, not the mother, took Leslie to the interview. Therefore, the interviewer does not know this is the mother's theory of the case. The interviewer again fails to follow this line of questioning because it is damaging to his original theory that the half-brother is the perpetrator. Perhaps this is good for the prosecution. But what if the father is really the perpetrator and not the brother? Have the interests of the community been served?).*

Is there anything else that's happened with Tommy that you need to tell me about?

Yeah.

What else has happened?

Happening is nothing.

You remember at the beginning we talked about a truth and a lie and you promised to tell me the truth. Has everything you told me today been the truth?

No.

What hasn't been the truth?

I don't know what is the truth.

If someone was to say I made you touch my long-body would that be true?

No.

Have you told somebody that you had to touch Tommy's long-body?

No.

You didn't tell your Mommy?

No. I didn't tell anybody.

You didn't tell your Daddy?

No.

Interview ends.

This interview was conducted in Dallas County. The criminal judges of Dallas County routinely allow Advocacy Center interviewers to testify in trial. With an open mind, could a forensic interviewer really tell what had happened in this case? Can you? Is this evidence beyond a reasonable doubt? Why weren't other avenues pursued, like did the father touch her? Was this child even the victim of sexual abuse? What else could have been happening here?

HANDLING THE OUTCRY WITNESS

Article 38.072 provides a statutory exception to the hearsay rule that allows the State to introduce outcry statements, which would otherwise be considered inadmissible hearsay, made by a child victim of certain offenses. TEX. CODE CRIM. PROC. art. 38.072 (Vernon 2011). The outcry witness is the first adult to whom the child made a statement about the alleged offense.

The courts have held that hearsay testimony from more than one witness may be admissible under 38.072, but only if the witnesses testify about different events. *Broderick v. State*, 35 S.W.3d 67, 73-74 (Tex. App.—Texarkana 2000, pet. ref'd).

Foreman v. State, 995 S.W.2d 854, 858-59 (Tex. App.—Austin 1999, et. ref'd) — Article 38.072 allows the first adult who can “remember and relate at trial” the child’s statement to be the outcry witness.

Thomas v. State, 309 S.W.3d 576, 579 (Tex. App.—Houston [14th Dist.] 2010, no pet.). A victim’s statement in aggravated sexual assault prosecution that the defendant touched her private area did not describe the offense. The Court held that general allusions that some type of sexual abuse occurred do not fall within the purview of Article 38.072.

Carty v. State, 178 S.W.3d 297, 306 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd) — The trial court did not err in allowing CPS investigator to testify as the outcry witness even though victim first informed her mother that the defendant was molesting her; record did not indicate that the victim told her mother details of the charged offenses, and her mother refused to admit that victim made outcry statement to her.

In *Lopez v. State*, 343 S.W.3d 137 (Tex. Crim. App. 2011), the State presented outcry testimony from 3 different witnesses in an aggravated sexual assault trial. All 3 testified about the same events with no objection by the defense. The First Court of Appeals reversed the conviction for ineffective assistance of counsel, finding there was no reasonable trial strategy for failing to object to the additional 2 witnesses. *Id.* at 140. The Court of Criminal Appeals reversed the COA, holding the record was silent as to why counsel failed to object under 38.072; thus, the defendant could not show he received deficient performance to prevail on his ineffective assistance of counsel claim. *Id.* at 142-144.

The State must provide notice in writing to the defendant at least 14 days prior to trial, and the notice must include a written summary of the statement. TEX. CODE CRIM. PROC. art. 38.072 §2(b)(1)(C) (Vernon 2011). The written summary must give the defendant adequate notice of the content and scope of the outcry testimony. *Gottlich v. State*, 822 S.W.2d 734, 737 (Tex. App.—Fort Worth 1992, pet. ref'd). The First Court of Appeals reversed an aggravated sexual assault conviction because the defendant was not given sufficient notice of the outcry testimony; the notice stated only that the defendant “kissed and touched” complainant, which failed to state an offense. *Gay v. State*, 981 S.W.2d 864, 866 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd).

Outcry Do Not Accurately Recall the Statement

Article 38.072 presupposes that adults always accurately recall earlier conversations with children. This premise is a myth. Adults generally do *not* accurately recall earlier conversations with children or even adults. Specifically, research studies have shown that while adults typically remember the gist of conversations, they do not have good verbatim recall. In other words, adults cannot accurately recall “who said what” during conversations. As a result, any written statement or testimony by an adult that the adult recalls the outcry statement of a child witness can be shown to be unreliable.

Adult Recall of Statements Made by Other Adults

Studies regarding adult recall of statements made by other adults have questioned whether actual sentences are remembered verbatim or whether only the gist or meaning of the sentence can be remembered. The research studies presented a target sentence orally to adults and then tested whether they would select the identical sentence, a paraphrase of the original or a sentence with a different meaning from the target sentence on a written recognition test. Researchers concluded that within seconds of hearing the statement, adults have poor verbatim but good gist recall of the statement.²⁶ Researchers have concluded that soon after verbal material is encoded and semantically represented, the surface details fade from memory leaving only the meaning of the sentence. Long after the original conversation, adults can accurately access the meaning of sentences, but not the actual sentences themselves.²⁷ In the context of free-recall as opposed to recognition of statements, adult ability to recall is even worse. One study found

²⁶ Garrod, S. & Trabasso, T. (1973). A Dual Memory Information Processing Interpretation of Sentence Comprehension. *Journal of Verbal Learning and Verbal Behavior*, 12 155-168.

Sachs, J. (1967). Recognition memory for syntactic and semantic aspects of connected discourse. *Perception & Psychophysics*, 2 437-444.

²⁷ Bransford, J.D. & Franks, J. (1971). The abstraction of linguistic ideas. *Cognitive Psychology*, 2 231-380.

Gernsbacher, M.A. (1985). Surface information loss in comprehension. *Cognitive Psychology*, 17 324-363.

that immediately after a conversation, adults could recall only about 10% of its content. One month later, recall dropped to 4%.²⁸

Adult Recall of Statements Made by Preschool-age Children

One certain study of adult recall of statements made by preschoolers was conducted in an attempt to determine if the hearsay testimony of adults (e.g. parents or therapists) was accurate in the context of criminal trials.²⁹ Specifically, the concern expressed by the researchers was stated as follows:

In short, adults must be able to reconstruct the context of the interview that led to a child's statement not merely what that statement was. Otherwise, there is no basis for evaluating the validity of the child's statements because it is unknown if these were highly prompted or coached in some way. If adults who provide hearsay testimony cannot accurately recall the interrogative context in which children's statements were elicited, then this might render the reliability of the child's statement both unknown and unknowable.

A parent may testify or write in a report that a child said that he had been sexually assaulted or touched inappropriately by a defendant. To evaluate the reliability of this testimony it is critical to understand the context in which the statement was elicited. The researchers then gave the following examples:

Context A

Adult: What happened at school today?
Child: The man with a moustache touched me.

Context B

Adult: What happened at school today?
Child: Nothing.
Adult: Tell me.
Child: Nothing happened.
Adult: Did you see the man?
Child: No.
Adult: Did you see the man with the moustache?
Child: Yes.
Adult: Did he touch you?
Child: What?
Adult: He touched you didn't he?
Child: Yeah, the man with a moustache touched me.

These examples demonstrate that while the adult may remember what the child said, it is equally important to remember how the statement actually fit into the conversation. For example, was the statement spontaneous, made in response to several questions, and how were those questions worded.

Further, an adult-child conversation has a different structure than adult-adult conversations. Adults must use a variety of methods to keep the child on task and to elicit conversation. Young children typically provide little information in response to open-ended questions, and adults must use different strategies to obtain the desired information.³⁰ This makes the adult's task of remembering the verbatim content of the conversation that much more difficult. Adults use questions to serve as prompts or probes to keep the child on task. Often the adult will ask leading questions, incorporating information into the question the adult thinks is important or reflects what the adult believed happened. Generally, if the child does not respond satisfactorily to the question, the question is repeated or

²⁸ Stafford, L., Burggraf, C. & Sharkey, W. (1987). Conversational memory: The effects of time, recall, mode, and memory expectancies on remembrances of natural conversations. *Human Communicative Research*, 14 203-229.

²⁹ Bruck, M. & Ceci, S. (1999). The Accuracy of Mothers' Memories of Conversations with Their Preschool Children. *Journal of Experimental Psychology: Applied*, 5 89-106.

³⁰ Ceci, S. & Bruck, M. (1995). *Jeopardy in the courtroom: A scientific analysis of children's testimony*. Washington, D.C.: American Psychological Association.

the adult may provide the response. For example, “Did you see the man with the moustache? The man with the moustache touched you, didn’t he?” Research has repeatedly shown all of these practices taint the child’s recollection of events.³¹

Additionally, in the context of a parent suspecting the child has been sexually abused and then attempting to verify this suspicion, suggestive questions will likely be used. Studies have shown that a single suggestive interview or an interview with a few suggestive questions will have devastating effects on the quality and evidential value of a later statement.³² Further, once tainted, even an appropriate interview with a trained psychologist is likely to be tainted.³³ In other words, if the first interview with the parent was suggestive, the inaccuracies in the child’s report will persist over time.³⁴ Further, when the suggestion comes from a credible source, such as a parent, children more readily accept misleading suggestions.³⁵

It might be argued that a conversation with a child regarding abuse is of such importance that a parent or therapist would be more likely to remember not only the gist but also the verbatim content. The research does not support this supposition. In one study where the participant was warned that remembering the conversation verbatim was important, there was an improvement in short-term free recall.³⁶ However, in another study, the researchers found no advantage of forewarning in evaluating short-term memory.³⁷

The Study: The Accuracy of Mothers’ Memories of Conversations with Their Preschool Children

The study of mothers’ recall of their preschoolers’ reports also found that forewarning had no impact on the ability of a child’s own mother to recall conversations verbatim. In the experiment, some mothers were warned that it was a memory experiment and that they would be asked to recall exactly what was said during the interview with their child. The control group of mothers were not given this warning but were told only that it was a study of mother-child interaction. All of the mothers were told the purpose of the study was to examine how mothers obtain information from their children about events for which the children have knowledge but the mothers do not.

During the study, the children were taken individually to a room to engage in a variety of play activities with a research assistant. In addition, a staged surprising event occurred. The surprising event was that a man came in during the coloring activity claiming to be looking for his fire hat, which he found. Afterward, he noticed the research assistant using his favorite crayon and asked for it back. The assistant asked if she could keep it until the child left and the man acquiesced. He then blew the child a kiss and left the room.

Immediately after the play session, the mothers interviewed their children. The mothers were told to try to find out as much information from their children, in as much detail as possible, what had happened during the play period. In addition to attempting to interview the children about the play activities, the mothers were also told it was important to interview the child about the surprising event. The mothers were all interviewed again several days later to assess the mothers’ gist memories relative to their verbatim memories.

³¹ Ceci, S. (1994). Cognitive and social factors in children’s testimony. Sales, B. & VandenBos, G. (Eds) *Psychology in litigation and legislation*, pp. 15-54.

³² Leichtman, M. & Ceci, S. (1995). The Effects of Stereotypes and Suggestions on Preschoolers’ Reports. *Developmental Psychology*, 31 568-578.

³³ Memon, A., Holley, A., Wark, L., Bull, R. & Kohnken, G. (1996). Reducing Suggestibility in Child Witness Interviews. *Applied Cognitive Psychology*, 10 503-518.

³⁴ Brainerd, C. & Poole, D. (1997). Long-term survival of children’s false memories: A review. *Learning & Individual Differences*, 9 125-151.

³⁵ Poole, D. & Lindsay, S. (1995). Interviewing Preschoolers: Effects of nonsuggestive techniques, parental coaching and leading questions on reports of nonexperienced events. *Journal of experimental Child Psychology*, 60 129-154.

³⁶ Stafford, L. & Daly, J. (1984). Conversational memory: The effects of recall mode and memory expectancies on remembrances of natural conversations.

³⁷ Kausler, D. & Hakami, M. (1983). Memory or topics of conversation: Adult age differences and intentionality. *Experimental Aging Research*, 9 153-157.

Interestingly, the study showed there was no difference in ability to remember gist and structure of the conversation between the mothers who were forewarned to remember context as well as gist and the mothers who were not. Further, a few days after the interview only 5% of the total conversation was recalled by the mothers and only 35% of relevant details of the play session were recalled. In order to estimate mothers' recall of the structure of the conversation, the mothers' memory of the number of questions they asked was assessed. Mothers in the memory group recalled 16% of the questions they asked, mothers in the control group remembered 17% of their questions.

In the initial interview, whenever the child did not spontaneously reveal the event of the man coming into the room for his fire hat, the mother was reminded to find out about the special event. If this attempt was not successful, the fire hat was brought into the room as a cue. Most of the mothers required the verbal prompt as well as the fire hat prompt. Only 67% of the mothers were able to find out about the surprising event in the initial interview with their children. Generally, when they did find out, the mothers were themselves surprised, (e.g. "You mean a strange man came into the room?"). In spite of this, only 50% of mothers who found out about the event reported it in the subsequent interview. Further, 67% of the mothers who did report made it appear as if the child spontaneously mentioned that a man came into to the room to look for his fire hat, never mentioning the verbal prompt or the fire hat prompt during the interview.

The study concluded that adults have difficulty keeping track of the source of utterances, the spontaneity of the utterances, and, at times, even their gist, only 3 to 4 days following the conversation. Further, the reports of prior conversations are not very complete, many details are omitted that may be important. Further, if probed about the context of certain utterances, a mother may not be able to accurately recall whether the words came from the child or if the statement is a reconstruction of a conversation in which the child provided one-word answers to a series of direct and possibly leading questions from the mother. A concern raised by the study was whether a mother might accurately report the gist of a child's disclosure but fail to recognize that the disclosure resulted from a host of repeated or leading questions. Because of concerns raised about the *reliability* of children's disclosures made under conditions of repeated prompting and suggestion, it is important for judges to be given not only the gist of a child's disclosure but also the interrogative context in which it was elicited. As shown in the study, adults are typically not able to accurately reconstruct a conversation.

Argument Against Reliability of Outcry Witness Statements

The burden is on the State to demonstrate reliability of outcry witness testimony.³⁸ At a hearing outside the presence of the jury, the trial court must find the statement reliable based on time, content and circumstance before the statement can be admitted.³⁹ The court may consider the following indicia of reliability:

1. whether the child victim testifies at trial and admits making the outcry statement;
2. whether the child understands the need to tell the truth and has the ability, to observe, recollect, and narrate;
3. whether other evidence corroborates the statement;
4. **whether the child made the statement spontaneously in his own terminology or whether evidence exists of prior prompting or manipulation by adults;**
5. whether the child's statement is clear and unambiguous and rises to the needed level of certainty;
6. whether the statement is consistent with other evidence;
7. whether the statement describes an event that a child of the victim's age could not be expected to fabricate;
8. whether the child behaves abnormally after the contact;
9. whether the child has a motive to fabricate the statement;
10. whether the child expects punishment because of reporting the conduct; and,
11. whether the accused had the opportunity to commit the offense.⁴⁰

At the conclusion of the hearing, the trial court should make written findings regarding the reliability of the outcry statement. Failure of defense counsel to object at trial will waive error on this ground.⁴¹

³⁸ *Holland v. State*, 802 S.W.2d 696 (Tex. Crim. App. 1991); *Buckley v. State*, 786 S.W.2d 357 (Tex. Crim. App. 1990).

³⁹ *Norris v. State*, 788 S.W.2d 65 (Tex. App. – Dallas 1990, pet. ref'd)(citing *Buckley v. State*, 758 S.W.2d 339, 343–44 (Tex. App.—Texarkana 1988), *aff'd*, 786 S.W.2d 357 (Tex. Crim. App. 1990)); see *In re M.R.*, 243 S.W.3s 807, 813 (Tex. App.—Fort Worth 2007, no pet.).

⁴⁰ *Id.* at 71.

If mothers cannot provide reliable accounts of outcry statements or the conversations with the children who made the outcry statements, then it should be argued that the State is unable to demonstrate reliability of such statements. At least one Texas court has held that the spontaneity of the child's statement is a factor in determining reliability.⁴² This holding indicates that the courts accept the notion that manipulation or prompting by adults can yield statements that are not reliable. If an adult is unable to reconstruct the context of the interview that led to a child's statement, there is no basis for evaluating the validity of the child's statements. It is unknown if the statements were highly prompted or coached in some way. If adults who provide hearsay testimony cannot accurately recall the interrogative context in which children's statements were elicited, then this might render the reliability of the child's statement both unknown and unknowable. As a result, the State's ability to demonstrate the reliability of the statement must fail.

Challenges to Expert Testimony

The use of an expert in the challenge of outcry statements is a necessity. The defense must offer a qualified expert who can speak knowledgeably of the matters contained in this article. Where expert testimony concerns novel scientific evidence three criteria must be met by clear and convincing evidence:

1. the underlying scientific theory must be valid;
2. the technique applying the theory must be valid; and,
3. the technique must have been properly applied on the occasion in question.⁴³

Factors that could affect the trial court's determination include, but are not limited to:

1. the extent to which the underlying scientific theory and technique are accepted as valid by the relevant scientific community, if such a community can be ascertained;
2. the qualifications of the expert testifying;
3. the existence of literature supporting or rejecting the underlying scientific theory and technique;
4. the potential rate of error of the technique
5. the availability of other experts to test and evaluate the technique;
6. the clarity with which the underlying scientific theory and technique can be explained to the court; and,
7. the experience and skill of the person(s) who applied the technique on the occasion in question.⁴⁴

Since the courts are beginning to recognize the disastrous effects suggestion and prompting have on children's reports of the abuse,⁴⁵ overcoming any challenge to expert testimony in this context should be easier. In arguing this testimony is admissible, it should be noted that all of the studies mentioned in this article have been published in peer reviewed journals. Further, these were research studies conducted by research psychologists who are top in their field. The United States Supreme Court itself has cited the work of Stephen Ceci (who conducted the study on Mothers' Recall).⁴⁶ The results of the studies are not merely clinical observations. The underlying scientific theories and the technique used to conduct the studies are explained in the body of the studies, as well as the potential rate of error. If a qualified psychologist familiar with the studies were questioned, he or she should be able to withstand any challenges regarding the reliability of his or her findings.

The reliability of outcry statements should always be questioned. Defense attorneys should force the State to prove the reliability of any outcry statement by questioning not only the statement, but also the context in which the statement was produced. Studies have shown that adults have particular problems remembering conversations verbatim. If the outcry witness cannot demonstrate for the court that the outcry was spontaneous and not a result of

⁴¹ *Id.* at 68.

⁴² *Id.*

⁴³ See *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992). See also *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

⁴⁴ *Id.* at 573.

⁴⁵ See generally *Norris*, *supra*.

⁴⁶ *Maryland v. Craig*, 497 U.S. 836, 868 (1989)(Scalia, J. dissenting).

prompting or suggestion, then the statement should not be admitted at trial. Likewise, where the conversation is not remembered verbatim, it is impossible for the court to hold the statement is reliable as required by Article 38.072.

EXPERTS AND INEFFECTIVE ASSISTANCE OF COUNSEL

An attorney was deficient for failing to ask the right questions of the defense expert in a sexual assault of a child case. In *Ard*, trial counsel consulted with an expert in forensic psychology regarding how false memories may be implanted through repetitious suggestion; however, though the expert did testify at trial, counsel failed to elicit such favorable testimony from him. *Ex parte Ard*, 2009 Tex.Crim.App. Unpub. LEXIS 181, at **6-7. The Texas Court of Criminal Appeals concluded that this failure on the part of trial counsel was below any objective standard of reasonableness and that there was a reasonable probability that but for counsel's deficient performance, the result of the trial would have been different. *See id.*

In *Ex parte Briggs*, 187 S.W.3d 458 (Tex. Crim. App. 2005), a case involving injury to a child, the court of criminal appeals concluded that counsel's performance was ineffective and deficient because his failure to obtain and review medical records and retain a medical expert was not a strategic decision, but an economic one. *See id.* at 467. Counsel was retained and he failed to seek a court appointed expert.

In *Wright v. State*, 223 S.W.3d 36 (Tex. App.—Houston [1st Dist.] 2006, pet. dismiss'd), the First Court of Appeals reversed the defendant's conviction for aggravated sexual assault of a child based on trial counsel's failure to contact an expert in forensic psychology to assist him in preparing his case for trial and failure to present evidence that supported the only plausible theory of defense. *Id.* at 44–45. The defendant contended that, although his attorney's theory of defense was that the allegations were false and were the result of acrimony that resulted from appellant's divorce, counsel nevertheless did not introduce any evidence other than defendant's own testimony that his ex-wife was upset with him to support his theory of defense and refute the allegations. *Id.* Counsel testified that he did not retain an expert in psychology because (1) he was told that any expert he hired would not be able to interview the complainant, and (2) by the time he had received notes taken by the complainant's therapist, he did not have time to contact an expert. *Id.* at 44.

**MOTION FOR DISCOVERY OF EVIDENCE
RELATING TO THE PRIOR INTERVIEWS OF THE CHILD WITNESSES**

Now comes Respondent herein and moves this Court to order discovery of the following evidence, pursuant to Article 39.19 Texas Code of Criminal Procedure and the due process clauses of the Fourteenth Amendment of the United States Constitution and Article 1, Section 19 of the Texas Constitution. Respondent would show the Court:

I.

Respondent is charged by petition with the offense of aggravated sexual assault, a first degree felony. Respondent has received information that the complainant, _____ and his sister, _____, both children, have been repeatedly interviewed concerning the alleged incidents of sexual activity by agents of the Hutchins Police Department, Child Protective Services, the Child Advocacy Center, the Dallas County District Attorney's Office and other persons. It is unknown whether any of these persons have had training in interview techniques of child witnesses or validation investigations. It is believed the children may have given conflicting statements concerning the alleged offense.

II.

Respondent, for the reasons stated, requests discovery of the following matters:

1. Copies of all video tape or audio tape interviews conducted by the District Attorney's office, any Police Department, the Texas Department of Family and Protective Services, any child advocacy center or any other agency of the State, as well as any other video taped or audio taped interviews of the child witnesses by any person, which are in the possession of or under the control of the District Attorney's office or its agents. A videotaped interview of a child made at an advocacy center is the property of the prosecuting attorney involved in the criminal prosecution of the case involving the child. §264.408 Texas Family Code.
2. Copies of medical or psychological reports concerning the physical or mental condition of the child witnesses which are in the possession of or under the control of the District Attorney's Office or other agents of the State, including therapy notes. It is believed that both child witnesses are in the custody of the Texas Department of Family and Protective Services and have been seen repeatedly by a caseworker. It is further believed that both children have received psychological examinations and/or therapy. Respondent has no independent means of discovering the identity of any psychologist or therapist and requests that the State disclose this information.
3. The names and addresses of all persons known to the District Attorney's Office or other agents of the State to have interviewed the child witnesses in this cause concerning the conduct alleged in the petition, or who have discussed the conduct with the children.
4. The substance of any statements made by the child witnesses which are inconsistent either with the conduct alleged in the petition or with other statements of the child witnesses and the names and addresses of the person or persons to whom such statements were made. It is known that _____ has recanted her previous statements to employees of the Texas Department of Family and Protective Services.
5. All written memoranda, written statements by any witness or notes of interviews with the child witnesses which reflect the subject matter of the question and/or the verbatim or substantially verbatim response of the witnesses.
6. Copies of all records of the Texas Department of Family and Protective Services regarding their investigation of these allegations, including but not limited to interviews with witnesses, including the children, any notes or documentation generated as a result of services offered to the complainant or his family or services offered to Respondent or his family and any documentation with regard to the findings of the Department.

III.

In support of this motion Respondent would show the Court that the alleged victim in this cause has been interviewed on numerous occasions by agents of the state and possibly private psychologists concerning the conduct alleged in the petition. Scientific studies reveal that improper interview techniques of child witnesses will create a substantial likelihood that the memory of the witness will become so tainted as to render his or her testimony untrustworthy.

IV.

An analysis of the interview techniques used can reveal whether there is a likelihood that the witness' memory of events has been affected by improper interviewing techniques. Discovery of the requested information concerning the interviews is therefore essential to the analysis.

MEMORANDUM

The Courts have long recognized that improper interview techniques by law enforcement in the context of lineups and photo-line-ups may be so impermissibly suggestive as to lead to a substantial likelihood of misidentification. Such procedures, therefore render the testimony of the identification witness so untrustworthy that introduction of the evidence constitutes a violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution. See, Foster v. California 394 U.S. 440 (1969); Stovall v. Denno, 388 U.S. 293 (1967).

In Ex Parte Brandley, 781 S.W.2d 886 (Tex.Crim.App. 1989), the Court of Criminal Appeals observed that improper investigative techniques in contexts other than identification procedures may so affect the trustworthiness of the proceeding as to constitute a violation of the Due Process Clause of the Fourteenth Amendment and of Article 1 Sec. 19 of the Texas Constitution. Ex Parte Brandley, at 891 of 781 S.W.2d.

While studies on the effect of improper interview techniques of child witnesses are a recent innovation, their conclusions indicate a real danger of irreparable damage to the child victim's ability to relate accurately the occurrences in question.

Respondent requests discovery of the above listed evidence in order that the propriety of the interview techniques may be determined.

Further the above requested evidence is exculpatory in nature or is relevant to mitigation of punishment and disclosure is therefore required by the due process clause of the Fourteenth Amendment of the United States Constitution and Brady v. Maryland, 373 U.S. (1963).

MOTION FOR DISCOVERY AND INSPECTION OF EVIDENCE**TO THE HONORABLE JUDGE OF SAID COURT:**

COMES NOW the Respondent in the above styled and numbered cause, pursuant to the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Article 1, Sections 10 and 19 of the Constitution of the State of Texas, the Texas Rules of Criminal Evidence, and under the authority of Article 39.14, C.C.P., and makes this his motion for discovery and inspection of evidence, and in support thereof would show the Court as follows:

The Respondent moves the Court to order the District Attorney to produce and permit the inspection of and the copying and/or photographing of, by or on behalf of the Respondent, the following designated items:

1. All confessions, admissions and statements, in writing, signed by the Respondent, in connection with this offense with which the Respondent is herein charged.

GRANTED:

DENIED:

2. All confessions, admissions and statements, oral in nature and set down and preserved made by the Respondent in connection with the offense with which the Respondent is herein charged.

GRANTED:

DENIED:

3. All oral, written and recorded statements and memoranda of said statements made by the Respondent to any investigating officer, to any member of any law enforcement agency, to any employee of the Department of Family and Protective Services, or to any third party which is in the possession of or within the knowledge of the District Attorney's Office or any agent thereof, including any law enforcement agency.

GRANTED:

DENIED:

4. All oral and written statements made by any witnesses and/or the Respondent before the Grand Jury or transcribed by a reporter, in connection with the offense with which the Respondent is herein charged.

GRANTED:

DENIED:

5. All statements made by any party or witness to this alleged offense, in the possession of or within the knowledge of the District Attorney or any of his agents, including any law enforcement agency and the Department of Family and Protective Services, whether such statements were written or oral, which might in any manner be material to either the guilt or innocence of the Respondent or to the punishment, if any, to be set in this case.

GRANTED:

DENIED:

- 6. All videotapes, audiotapes or other electronically produced statements or pictures, photographs or films of the complainant, the Respondent or any witness in this cause, made by, for, or in the care, custody or control of any law enforcement agency or the District Attorney's Office or any office of the Department of Family and Protective Services and any child advocacy center.

GRANTED:

DENIED:

- 7. All photographs, drawings or charts made by the District Attorney's Office or any agent thereof, including any law enforcement agency, the Department of Family and Protective Services, or any child advocacy center which were made with reference to this case, including but not limited to all photographs, drawings and charts of the scene of the crime and the scene of the Respondent's arrest.

GRANTED:

DENIED:

- 8. All reports of psychological tests, experiments, evaluations, treatment of the complaining witness and any State's witness and all data and diagrams or drawings produced as a result and all other reports of experts who conducted such tests, experiments or evaluations regarding the complaining witness.

GRANTED:

DENIED:

- 9. The name, address and telephone number of each person who made the reports and conducted the tests, experiments or evaluations requested in the foregoing paragraph.

GRANTED:

DENIED:

- 10. Any written or electronically recorded waiver alleged by the State to have been signed by the Respondent concerning the Respondent's right to counsel prior to the making of any written or oral statements when the Respondent was under arrest.

GRANTED:

DENIED:

- 11. All handwritten or typed notes of the police officers or Department of Family and Protective Services or child advocacy center employees who investigated and participated in any manner in this case or a Department of Family and Protective Services case arising from the same events.

GRANTED:

DENIED:

12. All medical reports or evidence that show or tend to show the physical condition of the complainant at any time relevant to the allegations alleged in the petition.

GRANTED:

DENIED:

13. The prior criminal record of each State's witness, including all arrests and convictions, whether as a juvenile or as an adult, including but not limited to: (a) all final convictions for all felonies and all misdemeanors involving moral turpitude which have occurred in the last ten years measured from the date of conviction or the date of release from incarceration whichever is latest; and (b) all felony convictions and misdemeanor convictions involving moral turpitude which have resulted in a suspended sentence which has not been set aside; and (c) all felony convictions and misdemeanor convictions involving moral turpitude which have resulted in the person being placed on probation, wherein the period of probation has not expired; and (d) all pending felony and misdemeanor offenses.

GRANTED:

DENIED:

14. The prior criminal record of the Respondent, including all detentions and adjudications.

GRANTED:

DENIED:

15. The prior criminal record of all persons who have aided in the investigation and prosecution of this case against the Respondent, including any Hutchins police officer, including all arrests and convictions, whether as a juvenile or as an adult, including but not limited to: (a) all final convictions for all felonies and all misdemeanors involving moral turpitude which have occurred in the last ten years measured from the date of conviction or the date of release from incarceration whichever is latest; and (b) all felony convictions and misdemeanor convictions involving moral turpitude which have resulted in a suspended sentence which has not been set aside; (c) all felony convictions and misdemeanor convictions involving moral turpitude which have resulted in the person being placed on probation, wherein the period of probation has not expired and (d) all pending felony and misdemeanor charges.

GRANTED:

DENIED:

16. All video tapes, documents, papers, books, accounts, letters, objects and tangible things which are the property of the Respondent and which are in the possession, custody and control of the State.

GRANTED:

DENIED:

17. All reports of psychological tests, experiments, evaluations, treatment of the Respondent done under the direction of the State or any of its agents and all other reports of experts who conducted such tests, experiments or evaluations regarding the Respondent which are now in the possession of the State.

GRANTED:

DENIED:

18. The name, address and telephone number of each person who made the reports and conducted the tests, experiments or evaluations requested in the foregoing paragraph.

GRANTED:

DENIED:

19. A list of names, addresses and telephone numbers of all prospective prosecution witnesses who have knowledge of the facts of the present cause, and who in reasonable likelihood will be used at any stage of the trial as witnesses in any capacity for the prosecution.

GRANTED:

DENIED:

20. A list of names, addresses and telephone numbers of all persons interviewed by any employee, agent, or official of the State of Texas or subdivision thereof or the United States government, concerning this case who in reasonable likelihood may not be used as a witness at the trial of this case, but who may have knowledge of facts material to the guilt or innocence of the Respondent or his reputation or criminal record, if any and would potentially give testimony favorable to the Respondent if called as a witness.

GRANTED:

DENIED:

21. Any evidence as to the competency of any prospective witness including a history of mental illness or psychiatric care which the State may have or any information that any child witness may not understand the solemnity of the oath.

GRANTED:

DENIED:

22. Any agreement between the State and any prospective witness in this case which could in any manner affect the testimony, attitude, or conduct of the witness.

GRANTED:

DENIED:

23. All warrants of arrest, search warrants and affidavits in support thereof exhibited at the time of the detention of the Respondent or in the investigation of the alleged offense herein.

GRANTED:

DENIED:

24. Any outcry statements made by a witness and purportedly admissible in evidence under the provisions of V.A.C.C.P., art. 38.07.

GRANTED:

DENIED:

25. Any recording of an oral statement of a child victim purportedly made under the provisions of V.A.C.C.P., art. 38.071.

GRANTED:

DENIED:

26. Notice pursuant to V.A.C.C.P., art. 38.072 of any child victim's statement.

GRANTED:

DENIED:

In support hereof, the Respondent would show the Court that production of the foregoing items is necessary to insure that the Respondent has adequate time to inspect, examine and test all such evidence for its respective validity, authenticity and identity, such that the Respondent may adequately prepare to defend the charges against him.

II.

In support of this Motion, the Respondent would show the Court as follows:

1. The items requested are in the exclusive possession, custody and control of the State of Texas by and through its agents, the police or the prosecuting attorney's office, the Department of Family and Protective Services or the Child Advocacy Center and the Respondent has no other means of ascertaining the disclosures requested.
2. The items requested are not privileged.
3. The items and information are material to a determination of the issues of guilt or innocence, and the punishment to be determined in this cause, if any.

4. The Respondent cannot safely go to trial without such information and inspection, nor can the Respondent adequately prepare the defense to the charges against him.

5. That absent such discovery the Respondent's rights under Article 39.14, C.C.P., Article 1, Sections 10 and 19 of the Constitution of the State of Texas, and the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States of America will be violated, to his irreparable injury and thus deprive the Respondent of a fair trial herein.

WHEREFORE, PREMISES CONSIDERED, the Respondent respectfully prays that this Honorable Court will grant this the Respondent's Motion for Discovery and Inspection of Evidence in all things, or in the alternative, that this Court will set this matter down for a hearing prior to trial on the merits and that at such hearing this Motion will be in all things granted.

MOTION FOR AUTHORIZATION OF FUNDS FOR EXPERT WITNESSES

NOW COMES, Laura Peterson, attorney of record in the above entitled and numbered cause and files this motion for appointment of expert witness, and in support thereof, would respectfully show as follows:

I.

Respondent is charged with the second degree felony offense of indecency with child.

II.

The attorney in this case is of the opinion that the appointment of an expert witness is absolutely essential to allow effective representation of the Respondent for the following reasons:

a) The Complainant in this case was three years at the time the case was filed. In addition to making an outcry against Respondent, she made an outcry against “a handful of men” known by her mother not to be around complainant unsupervised. See the outcry statement filed on December 17, 2004 by the Assistant District Attorney. There is much literature to support a child age 3 may not be able to differentiate between reality and fiction. Further, it must be demonstrated that the complainant can understand the significance of the oath and be subject to meaningful cross-examination to be deemed competent to testify. Respondent requests that the complainant be examined by a forensic psychologist to determine if she is competent to testify.

b) The State has the burden of demonstrating the reliability of an outcry statement before it may be admitted. Further the child must testify or be available to testify. If the child is unable to testify, then the outcry statement may not be used. *Rodriguez v. State*, 802 S.W.2d 716 (Tex. App.—San Antonio 1991), *aff’d* as reformed, 819 S.W.2d 871 (Tex. Crim. App. 1991)(Where the child is not available due to a lack of intelligence or for another reason, the statement is not admissible under Article 38.072).

Further, the questioning of the child by the outcry witness may render the statement unreliable. If the outcry witness used coercive or suggestive questioning techniques, the reliability of the statement is then in question. An expert is necessary to examine the statement and to discuss the questioning techniques used by the outcry witness to determine if the techniques were suggestive. An expert witness would be able to testify as to why the statement is reliable or unreliable based on this examination. See “Challenging Outcry Witness Statements in Child Abuse Cases,” *Voice for the Defense*, Vol. 29 No.11, February 2001.

c) The evidence in this case involves various “sexual acts” by the complainant. An expert witness is necessary to describe to the jury what “normal” sexual behavior is for three year olds. The State has taken the position that sexual acts by three year olds evidence some form of abuse to the three year old, abuse which must have been perpetrated by the Respondent. This position is not supported by the medical or psychological literature on normal sexual development of three year olds. Respondent needs an expert witness to offer an alternative explanation to the jury. See “Normative Sexual Behavior in Children: A Contemporary Sample,” *Pediatrics*, Vol. 101 No. 4, April 1998

d) The complainant was interviewed by the Irving Advocacy Center. Studies have shown that a proper interview conducted after suggestive interviews will not cure the damage done by the suggestive interviews. Respondent needs an expert to examine this interview and to determine if it was suggestive or to explain how prior suggestive interviewing, if any was conducted, would taint a subsequent good interview. Goodman, G.S., & Clarke-Stewart, A. (1991). Suggestibility in children’s testimony: Implications for child sexual abuse investigations. In J.L. Doris (Eds.), *The suggestibility of children’s recollections* (pp. 92-105). Washington, DC: American Psychological Association.

e) The Respondent is indigent. The undersigned counsel has been appointed by this Court to represent the Respondent. Respondent is a juvenile and Respondent's family does not have sufficient funds to procure the services of an expert witness

f) The State has all of the resources of all law enforcement officials to use in its investigation and various psychological experts on contract with the County, while the Respondent, being indigent, does not have adequate resources to hire an expert witness.

Respondent understands that any expert testimony will have to satisfy Rule 702 of the Texas Rules of Evidence to be admissible.

III.

Article 26.05(d) of the Texas Code of Criminal Procedure, provides for the reasonable expenditure of public funds for the expenses incurred for an expert witness. By virtue of *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L.Ed. 2d 53 (1985), the Respondent, if not indigent, would employ such expert witnesses as would be necessary to prepare the defense of the alleged offense.

Denial of this motion or a limitation of funds by this Court available for expert witnesses would be a deprivation of a fair trial, effective assistance of counsel, due process, and equal protection under the law in violation of his rights under Art. 1, § 10, 13, and 19 of the Texas Constitution; *Harper v. State*, 850 S.W.2d 736, 739 (Tex.App.-Amarillo 1993); *Rosales v. State*, 748 S.W.2d 451, 455 (Tex.Crim.App. 1987); *Abdnor v. State*, 712 S.W.2d 136, 141 (Tex.Crim.App. 1986).

WHEREFORE, PREMISES CONSIDERED, Respondent respectfully prays that this Motion be, in all things granted without further hearing; or in the alternative that the Court set a hearing to determine the foregoing motion.

**MOTION FOR DISCOVERY OF EXPERTS AND FOR COURT TO CONDUCT HEARING TO TEST
RELIABILITY OF EXPERT TESTIMONY**

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Defendant in the above entitled and numbered cause, by and through undersigned counsel, and makes this Motion for Notice of Experts and for Court to Conduct Hearing to Test Reliability of Expert Testimony, and, in support thereof would show unto the Court the following:

I.

Rule 702, Texas Code of Criminal Evidence states:

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.

II.

Pursuant to Article 39.14 Texas Code of Criminal Procedure, Defendant requests the attorney for the State disclose:

A list of the names, addresses and professions of all expert witnesses the prosecution intends to call at trial, along with each expert's qualifications, the subject and a description of his or her contemplated testimony, and his or her report.

III.

Further, Defendant requests prior to the testimony of any expert witness to be called by the State, the Court conduct a hearing in accordance with the requirements of Rule 705(b) to determine the reliability and relevance of the prospective testimony. Defendant requests that this hearing be conducted outside the presence of the jury.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that his Motion herein be granted and for any and all relief this Court deems appropriate.

FORM GRAND JURY LETTER – DETERMINE SENTENCE CASE

September 24, 2009

Dallas County Grand Jury
Frank Crowley Courts Building
133 N. Industrial Boulevard
Dallas, Texas 75207-4399

Re: IN THE MATTER OF BUDDY MILLER
JD-52129-W-304TH

PANEL _____ REPORT NO. _____

BURGLARY OF A HABITATION WITH INTENT TO COMMIT INDECENCY WITH A CHILD
(FIRST DEGREE FELONY)
INDECENCY WITH CHILD (SECOND DEGREE FELONY)

Dear Grand Jury Members:

I represent Mr. Buddy Miller in the above referenced case. The State is asking you to approve a Petition pending in the 304th District Court charging the first degree felony offense of burglary of a habitation with intent to commit indecency with a child and the second degree felony offense of indecency with a child (contact). Buddy Miller is a sixteen-year-old youth with no criminal history. He lives in Balch Springs with his mother, older brother and older sister. His father is deceased. Buddy has a close relationship with his grandparents and is staying with them until this case is over, having been released from detention by the District Judge of the 304th District Court. He is a good student at Spruce High School. His goal for next year is to make the varsity basketball team.

The relevant facts in this case are as follows:

On Monday, May 14, 2001, Buddy Miller and Ricky Smith were at Buddy's house after school. The neighbor across the street was Donna Gordon, the complaining witness. Donna had a crush on Buddy and asked Ricky Smith about him. She related to both Ricky and Buddy that she was sixteen years of age and attended West Mesquite High School. See the Affidavit of Ricky Smith attached hereto as Exhibit A. Further, Donna Gordon has a history of telling all of the residents in her neighborhood that she is sixteen years old. See the Affidavit of Nosy Neighbor attached hereto as Exhibit B. Contrary to the statements contained in the police report, Donna asked Buddy and Ricky over to her house. See the Affidavits of Gordon Goodpal and Devon Dependable attached hereto as Exhibits C and D.

While at Donna's home, Buddy and Ricky watched television and talked with Donna. Nothing of a sexual nature occurred. However, when Donna's mother arrived home unexpectedly, Donna knew she would be in trouble and attempted to hide the fact that she had friends over from her mother. When Donna's mother found out about the boys being over, Donna needed to concoct a story to keep her from getting into trouble. The only eyewitness to the offense is Ricky Smith and he vehemently denies anything took place in the home.

Based on the Affidavits, we ask that you not approve the Petition. If you do not approve the Petition, the State will not be able to seek penitentiary time for Buddy Miller. The allegations of Donna Gordon should not subject this sixteen-year-old boy to the possibility of penitentiary time. There is no other evidence except her word, which is highly suspect given the affidavits of other witnesses. Further, the 304th District Judge will still have available the full-range of punishment for these offenses should either of them be found to be true after a jury trial. Additionally, if adjudicated, Buddy Miller may have to register as a sex offender.

Buddy Miller is not guilty of the charges pending against him. His case is set for a jury trial in September. We are asking that you not make his case a determinate sentence case. He has never been in trouble before at home or at school and should not have to face the prospect of losing forty years of his life.

Thank you for your time in reviewing this letter and enclosed materials.

Sincerely,

EXPERT TESTIMONY CHECKLIST

F.R.E 702-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, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

“Hard Science” Testimony

Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993)

- Identified Judges as “gatekeepers” of scientific evidence
- States that expert testimony must be both relevant and reliable
- Sets out factors for determining scientific validity:
 - Is the subject of the testimony falsifiable or testable?
 - Is the testimony derived from techniques with known error rates?
 - Has the testimony been subjected to peer review?
 - Is the testimony generally accepted in the scientific community?

E.I. du Pont de Nemours v. Robinson, 923 S.W.2d 549 (Tex. 1995)

- Texas Supreme Court’s adoption of Daubert
- Burden lies with party seeking to admit expert testimony
 - 1) Witness must qualify as an expert
 - 2) Proposed testimony must be “scientific knowledge”
 - 3) Testimony must assist the trier of fact (non-exhaustive factors):
 - Can the theory be tested?
 - Extent of reliance on subjective interpretation?
 - Has the theory been subjected to peer review and/or publication?
 - Potential rate of error?
 - General acceptance by relevant scientific community?
 - Existence of non-judicial uses?

Scientific evidence which is not grounded in the methods and procedures of science is no more than subjective belief or unsupported speculation. Unreliable evidence does not assist the trier of fact and is therefore inadmissible under Rule 702.

Kelly v. State 824 S.W.2d 568 (Tex. Crim. App. 1992)

- Pre-Daubert case which applies almost identical factors toward the admissibility of expert testimony in criminal cases. (DNA evidence) The state courts have held that the *Kelly* test is substantially the same as the *Daubert* test and that the *Kelly* test is applicable to all scientific evidence. *Hartman v. State*, 946 S.W.2d 60 (Tex.Crim.App. 1997); *Jordan v. State*, 928 S.W.2d 550, 554 (Tex.Crim.App. 1996).

“Soft Science” Testimony

Court of Criminal Appeals has drawn some distinction between the hard sciences (physics and chemistry) and soft sciences (psychology and sociology).

Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713 (Tex. 1998)

- *Daubert* factors are germane to evaluating whether the expert is a hired gun or a person whose opinion in the courtroom will withstand the same scrutiny that it would among his professional peers.
- The court must evaluate the methods, analysis, and principles relied upon to reach the opinion. The court should ensure that the opinion comports with applicable professional standards outside the courtroom and that it will have a reliable basis in the knowledge and experience of the discipline. In other words, the expert must have the appropriate qualifications and have used reliable methodology.

General Electric Co. v. Joiner, 522 U.S. 136 (1997).

- Court must determine if there is an analytical gap between the existing data and the opinion of the expert. It is not so simply because an expert says it is so.

Nenno v. State, 970 S.W.2d 459 (Tex. Crim. App. 1998)

- Sets out factors to be considered when determining the reliability of soft science expert testimony:
 - Is the field of expertise a legitimate one?

- ❑ Is the subject matter of the expert's testimony within the scope of that field?
- ❑ Does the expert's testimony properly rely upon the principals involved in that field of study?

Kumho Tire Co. v. Carmichael, 119 S. Ct. 1167 (1999)

The objective of *Daubert* is to ensure the reliability and relevancy of expert testimony and to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.

Baldree v. State, 2007 Tex. App. LEXIS 5057 (Tex. App. 2007). Court excluded expert testimony as it was offered purely as "educational material" for the jury and was insufficient to demonstrate scientific principals which would assist the trier of fact.

Weatherred v. State, 15 S.W.3d. 540 (Tex. Crim. App. 2000). Claims by the expert that she was an expert and had conducted research in the related field were insufficient to permit her testimony without some corroboration of those claims.

Roise v. State, 7 S.W3d 225 (Tex. App.—Austin 1999). A degree alone is not enough to qualify a purported expert to give an opinion on every conceivable medical question, legal question or psychological question. The inquiry must be into the actual qualification. There must be a fit between the subject matter at issue and the expert's familiarity therewith. The proponent must establish that the expert has knowledge, skill, experience, training, or education regarding the specific issue before the trial court which would qualify the expert to give an opinion on that particular subject.

There are two parts to expert testimony

1. Subject matter of the testimony is legitimate
 - a. Is this a legitimate scientific field?
 - b. Is the proposed testimony within that field?
 - c. Does the proposed testimony rely upon the principals involved in that field of study?
2. Expert is qualified
 - a. Is this expert qualified to testify?
 - b. Does this expert have special knowledge, skill, experience, training, or education regarding the specific issue before the trial court?
 - c. Where did the special knowledge, skill, experience, training, or education come from?