



Margaret Kelly Michaels

On October 8, 1984, 22-year-old Margaret Kelly Michaels, an aspiring actress, started work as a teacher's aide at the Wee Care Day Nursery, a facility that occupied several rooms in a church in Maplewood, New Jersey.

Less than a year later, on June 6, 1985, she was indicted on charges of performing sex acts on and with children as well as inserting knives and forks into their bodies and forcing them to eat human feces and to defecate on her.

The prosecution was one of several cases of child sexual abuse hysteria that swept the nation in the 1980's and 1990s in which coercive and suggestive interviewing techniques by social workers, therapists and law enforcement induced children by the score to say they were sexually abused in fantastical circumstances and to testify to bizarre and impossible behavior.

Michaels went on trial in 1987. Over a 10-month period, a jury heard children testify that she engaged in oral sex with them and forced nude children to pile on top of her while she was naked, or pile on top of each other while she played the piano. Some children testified that Michaels urinated in a bucket in front of them and then drank it.

Defense attorneys contended that Michael was the victim of a witch hunt and that the children's account of being abused, including being probed with a rectal thermometer, kitchen utensils and plastic blocks were fantasies generated by improper questioning.

On April 15, 1988, after 13 days of deliberation by the jury, Michaels was convicted of 115 of 163 counts of sexual abuse of 19 children between the ages of three and five.

On August 2, 1988, Michaels was sentenced to 40 years in prison and fined \$2,875.

The New Jersey Superior Appellate Court overturned the conviction on March 26, 1993, ruling that it was tainted by unreliable and inadmissible expert testimony. The court said that the prosecution expert "was permitted to lead the jury to believe that the (interviewing) process was rooted in science and thus was a reliable means of determining sex abuse."

As the court pointed out, the prosecution relied upon the expert's theory, called the "child sexual abuse accommodation syndrome," to establish the validity of the children's testimony.

Michaels was freed on bond on March 30, 1993, and on June 23, 1994, the New Jersey Supreme Court upheld the reversal. The court said, "We find that the interrogations that occurred in this case were improper and there is substantial likelihood that the evidence derived from them is unreliable."

On December 2, 1994, the Essex County Prosecutor's Office dismissed the charges.

State: New Jersey

County: Essex

Most Serious Crime: Child Sex Abuse

Additional Convictions:

Reported Crime Date: 1985

Convicted: 1988

Exonerated: 1994

Sentence: 47 years

Race: Caucasian

Sex: Female

Age: 22

Contributing Factors: Perjury or False Accusation

Did DNA evidence contribute to the exoneration? No

– Maurice Possley

Report an error or add more information about this case.

EXONERATION NEWS

[MORE NEWS...](#)

CONTACT US

We welcome new information from any source about the exoneration that are already on our list and about new cases that might be exoneration. And we will be happy to respond to inquiries about the Registry.

- + [Tell us about an exoneration that we may have missed](#)
- + [Correct an error or add information about an exoneration on our list](#)
- + [Other information about the Registry](#)

ABOUT THE REGISTRY

The National Registry of Exonerations is a joint project of the University of the Michigan Law School and the Center on Wrongful Convictions at Northwestern University School of Law.

Follow Us:  

Copyright 2012. All rights reserved.



judge that she was confident her conviction would be overturned on appeal."^[8]

Release

[[edit](#)]

After five years in prison Michaels' appeal was successful and she was released.^[1] The [New Jersey Supreme Court](#) overturned the lower court's decision and declared "the interviews of the children were highly improper and utilized coercive and unduly suggestive methods."^[9]

A three judge panel ruled she had been denied a fair trial, because "the prosecution of the case had relied on testimony that should have been excluded because it improperly used an expert's theory, called the [child sexual abuse accommodation syndrome](#), to establish guilt."^[10] The original judge was also criticized "for the way in which he allowed the children to give televised testimony from his chambers."^[10] In June 1993, the State Supreme Court refused to hear the prosecutor's appeal of the decision.^[11] In February 1994, "the court heard arguments...about the admissibility of evidence."^[1]

In December 1994, the prosecution dropped the attempt to retry the case "because too many obstacles had been placed in the way of a successful retrial."^[12] The major hurdle was that "if the state decided to re prosecute Ms. Michaels, it must produce 'clear and convincing evidence' that the statements and testimony elicited by the improper interview techniques are reliable enough to warrant admission."^[12] "While the Supreme Court stopped short of instructing the prosecutor to drop the case, the court made it clear that it believed the children's testimony would not hold up."^[12]

Interrogation methods

[[edit](#)]

Interviews from the Wee Care Nursery School and [McMartin preschool trials](#) were examined as part of a research project on the testimony of children questioned in a highly suggestive manner. Compared with a set of interviews from [Child Protective Services](#), the interviews from the two trials were "significantly more likely to (a) introduce new suggestive information into the interview, (b) provide praise, promises, and positive reinforcement, (c) express disapproval, disbelief, or disagreement with children, (d) exert conformity pressure, and (e) invite children to pretend or speculate about supposed events."^[13]

See also

[[edit](#)]

- [Day care sexual abuse hysteria](#)

References

[[edit](#)]

- ↑ ^{***a b c d***} Sullivan, J. (February 4, 1994). "In Retrying Abuse Case, A New Issue" [↗](#). *New York Times*. Retrieved 2007-01-21. "Just how to prevent fantasy from being presented as fact in sex-abuse cases is facing the New Jersey Supreme Court in the wake of one of the most sensational of the spate of cases involving day-care workers during the 1980's. The court heard arguments today about the admissibility of evidence in the case of Margaret Kelly Michaels, who was convicted of sexually molesting 19 children, many of them 3- and 4-year-olds, during her seven-month employment at Wee Care Nursery in Maplewood. She served 5 years of a 47-year sentence before her conviction was overturned early last year."
- ↑ "[New Jersey vs. Margaret Kelly Michaels](#)" [↗](#). Archived from [the original](#) [↗](#) on 2007-03-20. Retrieved 2007-08-26. "The accounts of sexual abuse obtained through interviews of the children ranged from relatively minor accounts of touching to virtually incomprehensible heinous and bizarre acts. A common act alleged by both boy and girl students was that Kelly inserted knives, forks, and spoons into their "butts," penises, or vaginas"
- ↑ ^{***a b c***} Rangel, J. (August 3, 1988). "[Ex-Preschool Teacher Sentenced To 47 Years in Sex Case in Jersey](#)" [↗](#). *New York Times*. Retrieved 2007-01-21. "A former preschool teacher was sentenced today to 47 years in today."

2. [^] ["Nightmare at the Day Care: The Wee Care Case"](#). Crime Magazine. Archived from the original on 2007-08-14. Retrieved 2007-08-21. "Kelly Michaels never intended to become a preschool teacher -- she had taken fine arts and drama in college -- but she wanted to live near [New York City](#) and was looking for something to pay the rent when she applied at Wee Care Day Care in [Maplewood, New Jersey](#). Although Kelly doubted if she had the qualifications, the director, Arlene Spector, had been encouraging and had persuaded her to give it a try. Once hired, Kelly was quickly promoted from teacher's aide to preschool teacher."
3. [^] ["The Kelly Michaels Case"](#). University of Missouri-Kansas City School of Law. Retrieved 2007-08-26. "Kelly Michaels' nightmare began on April 30, 1985 when a four-year-old boy who was a student of hers at the Wee Care Day Nursery said, when a nurse put a thermometer in his rectum, "That's what my teacher does to me at nap time at school." When asked what he meant, the boy replied, "Her takes my temperature.""
4. [^] ["Day Care Worker Held on Assault on Children."](#) New York Times. December 8, 1985. Retrieved 2007-01-21. "An employee of a day-care center in Maplewood, N.J., has been indicted for 229 offenses in connection with the sexual assault of 33 children between 3 and 6 years of age over a 6-month period."
5. [^] Narvaez, A. (February 28, 1988). ["Former Day-Care Teacher Denies Sexually Abusing Schoolchildren"](#). New York Times. Retrieved 2007-01-21. "A former day-care center teacher being tried on charges of sexually abusing 20 children in her care testified in her defense this week and denied ever having had sexual contact with the 3- 4- and 5-year-old youngsters."
6. [^] ["Legal Arguments End in Jersey Child-Abuse Trial"](#). New York Times. Retrieved 2007-01-21. "Legal arguments in the nine-month trial of a day-care teacher accused of sexually abusing 20 children at a center in Maplewood ended here prison for sexually assaulting 19 children and endangering the welfare of another child in a day-care center in Maplewood"
9. [^] [Seth Mydans](#) (June 3, 1994). ["Prosecutors Rebuked in Molestation Case"](#). *New York Times*. Retrieved 2007-08-21. "In March 1993, a New Jersey appeals court overturned the conviction of Margaret Kelly Michaels, who began serving a 47-year sentence in 1988 after being convicted of abusing 19 children at the Wee Care Nursery School in [Maplewood, New Jersey](#)."
10. [^] ["Child-Abuse Conviction Of Woman Is Overturned"](#). New York Times. Retrieved 2007-01-21. "A New Jersey appeals court yesterday overturned the conviction of Margaret Kelly Michaels, who was accused of sexually abusing 19 children at a day-care center in Maplewood, and who was sentenced to 47 years in prison after a celebrated trial in 1988."
11. [^] ["Court Rejects Bid to Restore Abuse Verdict"](#). *New York Times*. June 10, 1993. Retrieved 2007-01-21. "The State Supreme Court today refused to hear the Essex County Prosecutor's appeal of a decision that overturned the child sex-abuse conviction of a former day-care center teacher, Margaret Kelly Michaels."
12. [^] ["Prosecutors Drop Charges In Abuse Case From Mid-80's"](#). *New York Times*. Retrieved 2007-01-21. "Ending one of the most sensational child sex-abuse scandals in the nation, prosecutors today formally dropped their case against Margaret Kelly Michaels, the former day care teacher who spent five years in prison before her 1987 conviction was overturned on appeal last year."
13. [^] Schreiber, Nadja; Lisa Bellah, Yolanda Martinez, Kristin McLaurin, Renata Stok, Sena Garven and James Wood (2006). ["Suggestive interviewing in the McMartin Preschool and Kelly Michaels daycare abuse cases: A case study"](#). *Social Influence* (Psychology Press) 1 (1): 16–46. doi:10.1080/15534510500361739.

External links

[[edit](#)]

- [Frontline: Innocence Lost](#)
- [Wee Care Nursery School](#) at the [Ontario Consultants on Religious Tolerance](#)

V · T · E ·	Satanic ritual abuse	[hide]
List of satanic ritual abuse allegations		
Cleveland child abuse scandal · Faith Chapel Church ritual abuse case ·		

Cases and accused	Fells Acres Day Care Center preschool trial · Kern County child abuse cases · Little Rascals day care sexual abuse trial · Martensville satanic sex scandal · McMartin preschool trial · Oak Hill satanic ritual abuse trial · South Ronaldsay child abuse scandal · Thurston county ritual abuse case · Wee Care Nursery School abuse trial ·
People	Gerald Amirault · Anne Johnson Davis · Mary de Young · Paul and Shirley Eberle · Peter Hugh McGregor Ellis · Stephen A. Kent · Kee MacFarlane · Liz Mullinar · Debbie Nathan · Cathy O'Brien · Richard Ofshe · Lawrence Pazder · Valerie Sinason · Ralph Underwager · Mike Wanke ·
Publications and media	<i>Michelle Remembers</i> · <i>The Courage to Heal</i> · Pace memorandum · <i>Indictment: The McMartin Trial</i> · <i>Treating Survivors of Satanist Abuse</i> · <i>Cult and Ritual Abuse</i> · <i>Speak of the Devil</i> · <i>No Crueler Tyrannies</i> ·
Related topics	Believe the Children · Blood libel · Children's Institute International · Child sexual abuse accommodation syndrome · Conspiracy theory · Day care sex abuse hysteria · Dissociative identity disorder · False memory syndrome · Franklin child prostitution ring allegations · Moral panic · National Center for Reason and Justice ·

Categories: [New Jersey state case law](#) | [Day care sexual abuse allegations](#)
| [Education in Essex County, New Jersey](#) | [Overturned convictions in the United States](#)

This page was last modified on 28 February 2013 at 03:56.

Text is available under the [Creative Commons Attribution-ShareAlike License](#); additional terms may apply. By using this site, you agree to the [Terms of Use](#) and [Privacy Policy](#).

Wikipedia® is a registered trademark of the [Wikimedia Foundation, Inc.](#), a non-profit organization.

[Contact us](#)

[Privacy policy](#) [About Wikipedia](#) [Disclaimers](#) [Mobile view](#)



The Michaels Decision

A Case Review

An article by Kenneth E. Blackstone

President, Blackstone Polygraph, Inc.
Member ACFEI, APA, ATSA

Abstract: Margaret Kelly Michaels was accused of sexually abusing children she had been caring for as a nursery school teacher at the Wee Care Day Nursery. Michaels was convicted by a jury of aggravated sexual assault, sexual assault, endangering the welfare of children, and terroristic threats. On appeal, the convictions were reversed and remanded for retrial. Among other things, the Appellate Division concluded that the investigatory interrogations of the alleged child victims were highly improper because certain interview practices were “sufficiently coercive or suggestive to alter without remedy the perception of the child-abuse victims.”

Allegations appear in different forms -- some allegations are based on fact; some are made maliciously; some are made out of genuine concern for the child or children; and some allegations are a mixture of truth, deception, misconception, and panic. False allegations are frequently enabled by outside influence and poor forensic interviewing. This report covers a specific case biased by flawed interviewing and outside influence supported in trial by questionable expert witness testimony. The Michaels case spanned nine years and included five years of incarceration. The damage done to the defendant and to the alleged victims is both unfathomable and irreparable.

One of the more tragic aspects of this case is the fact that Kelly Michaels was cleared by a polygraph examination in the early stages of this investigation and the results were ignored – making the subsequent errors in this investigation completely avoidable.

The Kelly Michaels Case:

In September 1984, twenty-five year-old Margaret Kelly Michaels was hired by Wee Care Day Nursery in Maplewood, New Jersey. Located in St. George's Episcopal Church, Wee Care served approximately fifty families with an enrollment of about sixty children, aged three to five. Michaels had recently moved from Pittsburg, was a few credits shy of a degree in drama and planned to get into the theater business in nearby Manhattan. She started as an aide at Wee Care and within three weeks became a teacher. Her classroom was located in the Church basement -- separated from an adjacent class by a vinyl curtain. Michaels resigned on April 22, 1985 and later told how she disliked taking children up and down stairs to the bathroom at Wee Care.

On April 26, 1985, the mother of four-year-old Jonathan noticed that he was covered with spots and took him to his pediatrician to be examined. During the examination, a pediatric nurse rubbed the boy's back as she took his temperature rectally. In the presence of the nurse and his mother, the boy stated, "this is what my teacher does (to) me at nap time at school." Whether he was referring to the back rubbing or rectal penetration was unclear. He indicated that his teacher (Kelly Michaels) did this to him and two other boys at Wee Care daily. The pediatrician was not told of the remark and no further examination was done.

Jonathan's mother took him home, questioned him further, and then contacted his grandfather -- a prominent local judge. Both Wee Care and the Department of Youth and Family Services (DYFS) were contacted and Jonathan was soon repeating his allegations to Sara McArdle, an assistant District Attorney (D.A) at the Essex County Prosecutor's Office. McArdle and Lou Fonolleras, an investigator with the DYFS, then interviewed the other two boys, Evan and Sean. Evan denied that Michaels had put anything in his rectum or had abused him in any other way and Sean also denied having his temperature taken. But Sean, described as "agitated, hostile, rushing around the room, almost trapped," during questioning, came up with a new charge -- he alleged that Kelly Michaels had touched his penis (State v Michaels, 1993).

The D.A. and DYFS interviewed several more Wee Care children and their parents and found there had been no prior concerns or complaints about Kelly Michaels. On May 6 Michaels submitted to approximately nine hours of questioning and took a polygraph test that verified her denial of sexual molestation at Wee Care. The prosecution concluded their initial investigation on May 8, 1985 (State v Michaels, 1993).

Peg Foster of the Child Abuse Diagnostic and Treatment Center at Children's Hospital of New Jersey, in Newark, met with Wee Care parents the week after Michaels was questioned. Foster then provided the parents with "symptom charts" -- a listing of "behavioral indicators" that their children might be displaying if, in fact, they had been sexually abused. The list included common behaviors such as stomach aches, fear of being separated from parents, and bed-wetting. She also told the parents that their children would probably deny being molested "until they trusted the interviewer" (State v Michaels, 1995).

Dr. Susan Esquilin, a child therapist, presided over two heavily attended parent meetings when allegations were first made. She suggested group therapy for the children and stated that her goal was to induce the children to discuss sexual abuse. In the first group therapy session, she told the children that they were assembled together because of some of the things that had happened at the Wee Care and with Michaels. She conducted five group therapy sessions with the Wee Care children and eventually assessed or treated 13 of the 20 child witnesses. Based on courtroom testimony, it seems that four children made allegations after their contacts with Esquilin (Campbell, 1998). This led to repeated interviews of Wee Care children by DYFS and prosecution, in addition to questioning by the parents.

On June 6, 1985 Michaels was charged in a three-count indictment involving the alleged sexual abuse of the three boys. The interviewing continued with Lou Fonolleras, the DYFS investigator, conducting 82 interviews with Wee Care children and 19 interviews with Wee Care parents, between May 22 and July 8, 1985. During the resultant trial, Fonolleras described his interviewing as follows, "The interview process is in essence the beginning of the healing process." He rationalized his persistent questioning with "it is my professional and ethical responsibility to alleviate whatever anxiety has arisen as a result of what happened to them" and justified his telling children about other children's allegations with . . . (The children) needed some reassurance . . . (that) they were not alone" (State v Michaels, 1995).

It is also important to note that Fonolleras was himself abused as a child, and in at least one recorded interview he used this to lead the child's testimony. His personal background may explain his bias and pursuit of a single hypothesis. At least 10 children made initial allegations after their interviews with Fonolleras (Campbell, 1998).

Fonolleras and other investigators repeatedly exposed the children to stereotyping and false information about what "had already been revealed." One investigator told 15 of the 34 interviewed children that Kelly Michaels was in jail because she had done bad things and "(they) need(ed) their help to keep Kelly in jail." The investigators also promoted fear by asking leading questions about whether Kelly Michaels had threatened them or their families. Sometimes the investigators suggested that she had claimed to have supernatural powers. "Kelly said a lot of things to some kids and I think that she might have said them to you too, like she had some special powers like she can come through a wall and she could lift our bed and stuff like that . . . you are safe as long as she is in jail" (Campbell, 1998).

Positive reinforcement was given by interviewers when the children made accusatory statements. The children who cooperated were given mock police badges and called "little detectives" while the children who denied being molested were introduced to the police officer who arrested Kelly and were shown the handcuffs that were used (Schreiber, 2006).

The initial interviews of the Wee Care children were not recorded and any comparison between initial and subsequent interviews is suspect. It is possible that some of the allegations that occurred in these follow-up interviews reflect suggestions implanted from earlier conversations with Fonolleras,

Foster and Esquilin as well as by concerned parents who were urged to look for signs of abuse in their children (Campbell, 1998).

It is also important to note that these interviews did not end in July 1985 with the completion of the investigation. Children were subsequently interviewed before they appeared before the grand jury, questioned by therapists, and additionally questioned by members of the prosecutors' office leading up to trial. Add to that, questioning by both the prosecution and the defense attorneys at the trial. An objective consideration of these tactics suggests that even if the children had not been abused, these repeated suggestive interviews could have resulted in false reports (State v Michaels, 1995).

A second indictment on 174 counts was filed July 30, 1985, involving 20 Wee Care boys and girls. A third indictment on 55 counts was filed November 21, 1985, involving 15 Wee Care children. By the start of the trial on June 22, 1987 the prosecution had dismissed 72 counts and Kelly Michaels was prosecuted on the remaining 160 counts. During the resultant trial, another 32 counts were dismissed, leaving 128 counts.

The bulk of the State's evidence consisted of the testimony of the children; only half of the interviews were recorded. The state had no physical evidence and no witnesses. Disclosures like "Kelly made a cake (out of urine and feces) on the piano bench and made us eat it with wooden spoons . . . she cut off my penis . . . stuck a sword in my rectum . . . made us eat boiled babies" were unsupported by physical evidence (Ceci & Bruck, 1999). Coarse behaviors that would have generated smells and sounds in a basement behind a vinyl curtain were never witnessed.

In a gross conflict of interest, the state's main expert witness, Eileen Treacy, helped the prosecution choose which of the children would testify and then functioned as the "independent" expert vouching for their credibility. The children were also powerful witnesses for the state. They sat in the Judge's lap and he whispered in their ear as they were questioned by counsel.

Eileen Treacy worked as a therapist in a New York clinic for sexually abused children. She had a Masters degree in psychology and had no license in New York or any other state. She testified for a total of eight days. Her testimony relied on what she considered 32 "behavioral indicators" of child sexual abuse. These included: 1) eating problems, 2) sleep problems, 3) needs to sleep with light on, 4) won't sleep alone, 5) comes into others' beds at night, 6) nightmares, 7) cries out in sleep, 8) accident prone, 9) sucks thumb, 10) baby talk, 11) toilet accidents, 12) clinging behavior, 13) separation problems, 14) won't dress self, 15) won't feed self, 16) excessive bathing/fear of bathing, 17) won't toilet by self, 18) seems to be in a fog, 19) serious temper tantrum, 20) daydreams, 21) aggressive to small children/animals, 22) stares blankly, 23) talks about sex a lot, 24) touches self excessively in private spots, 25) postures body sexually, 26) sexually acting out with toys, and children/animals, 27) crying spells, 28) hyperactive, 29) withdrawn, 30) change in school behavior, 31) over-compliant behavior, 32) fear of men. Treacy stated that only five of these indications were enough to conclude that a child had been sexually abused (Campbell, 1998).

The defense expert, Dr. Ralph Underwager, pointed out how Treacy's "behavioral indicators" were common behaviors amongst children and none of them could be attributed specifically to the effects of sexual abuse (Underwager & Wakefield, 1990). In short, his testimony was impressive, but this was a trial about emotion, not evidence.

On April 15, 1988, after a nine-month trial and thirteen days of deliberation, the jury returned guilty verdicts on 115 counts; aggravated sexual assault (38 counts), sexual assault (31 counts), endangering the welfare of children (44 counts), and terroristic threats (two counts). The trial court sentenced Kelly Michaels to a term of 47 years with a minimum of 14 years of incarceration.

The verdict was immediately appealed and a group of 45 social scientists prepared an amicus brief. The brief was an impressionistic summary of the tactics used by the Michaels interviewers between April 26, 1985 and June 22, 1987. The group concluded this lengthy brief with ". . . the procedures of interviewing these children were so faulty . . . that the children's subsequent reports were mere reflections of the interviewers' suggestions . . . the failure to record the initial interviews with any of the child witnesses rules out the possibility of ever reaching any firm conclusion as to whether any abuse actually occurred. In other words, *the primary evidence has been destroyed*" (emphasis added) (State v Michaels, 1995).

The Appellate Court deliberated the case from February 1 until March 26, 1993, when the conviction was reversed and remanded. Kelly Michaels was then released after five years in prison -- with 18 months in solitary confinement for her own safety. The Appellate Court based its decision on two extremely important facts: 1) The Judge should not have allowed the jury to hear testimony from Eileen Treacy. The Court stated that "(Treacy) was permitted to lead the jury to believe that the process (she used) was rooted in science and was a reliable means of determining sexual abuse" and 2) the Judge's behavior during the trial. "For all appearances the state's witnesses (children) became the Judge's witnesses . . . The required atmosphere of the bench's impartiality was lost in this trial."

The Essex County prosecution was persistent and took this ruling to the New Jersey State Supreme Court on January 31, 1994. This Court stated that it was obligated to determine whether "the interview techniques used by the prosecution were so coercive or suggestive that they had the capacity to substantially distort the children's recollections of actual events" and compromise the reliability of future testimony (State v Michaels, 1994).

The Appellate Court's ruling was upheld on June 23, 1994. In its ruling the State Supreme Court noted that there was little if any incriminating evidence against Kelly Michaels and pointed out numerous errors in the Wee Care interviews. These included blatantly leading questions, a failure to challenge outrageous claims and an obvious lack of objectivity and impartiality. The Court's primary example was Fonolleras and his narrow-minded approach. This Court also noted how the earlier interviews of the children were not electronically recorded and in some cases the original notes had been destroyed (Davies, 1995).

The New Jersey Supreme Court summarized its concern with: “The United States Supreme Court (U.S. v. Wade, 1967) has insisted that a pretrial hearing be held to determine the reliability and admissibility of proffered in-court testimony based on unduly suggestive identification procedures . . . we conclude that the need to deter prosecutorial misbehavior will be adequately fulfilled by the clear and convincing-evidence standard . . . *if it is determined by the trial court that a child’s statements or testimony, or some portion thereof, do retain sufficient reliability for admission at trial*, then it is for the jury to determine the probative worth and to assign the weight to be given to such statements . . . Experts may thus be called to aid the jury by explaining the coercive or suggestive propensities of the interviewing techniques employed, but not, of course, to offer opinions as to the issue of a child-witness’s credibility, which remains strictly a matter for the jury” (U.S. v Wade, 1967).

In December 1994 Essex County dropped the indictments and in due course Kelly Michaels asked the courts for the right to sue the investigators and prosecutors in her case. She claimed that they had violated her constitutional rights by using unreliable evidence that resulted from improper interviews of the alleged victims. While the New Jersey Supreme Court called the investigation “inept,” saying that evidence from investigators’ interrogations was unreliable, the U.S. Supreme Court rejected her request on January 16, 2001.

In effect, the New Jersey Supreme Court ordered that if the State decided to retry the Michaels case, a pretrial “taint hearing” would be necessary to determine whether the statements and testimony of the alleged victims were contaminated. While the Michaels case was never re-tried, taint hearings are now common in all states. As in all evidentiary hearings, the success or failure of the taint hearing will normally rest with the quality of the expert who will offer testimony. “Many considerations will bear on the (trial judge’s) inquiry (during a Daubert challenge), including whether the theory or technique in question can be (and has been) tested, whether it has been subjected to peer review and publication, its known or potential error rate, and the existence and maintenance of standards controlling its operation, and whether it has attracted widespread acceptance within a relevant scientific community. The inquiry is a flexible one, and its focus must be solely on principles and methodology, not on the conclusions that they generate” (Daubert v Merrill Dow Pharmaceuticals, 1993).

Conclusion:

Assuming that the polygraph examination given to Kelly Michaels was administered correctly – in a standardized manner - there was no need for further investigation. Instead the results were ignored and the case persisted for over ten years. During this time Kelly Michaels was incarcerated for five years for non-existent crimes. To name all of the factors that led to this miscarriage of justice is beyond the scope of this report - - and to consider it a unique situation would be an even greater mistake.

In setting aside the convictions, the Appellate Division ordered that if the State decided to retry Michaels, a pretrial or “taint hearing” would be necessary to determine whether the statements and the testimony of the child-sex-abuse victims had to be excluded because improper questioning by State investigators had irremediably compromised the reliability of that testimonial evidence.

Forensic interviewing continues to be a problem -- although some professional organizations have produced guidelines for child interviewing there is neither a consensus in these guidelines nor a mechanism beyond integrity to enforce their use. Today, the only quality assurance mechanism is the taint hearing. The taint hearing expert can show the Court how biological, cognitive and social immaturities can influence the alleged victim and show how suggestive or otherwise contaminating interviewing techniques can be avoided.

References:

1. Campbell, T.W. (1998). *Smoke and Mirrors-The devastating effect of false sexual abuse claims.*
2. Ceci, S.J., Bruck, M. (1999). *Jeopardy in the courtroom: A scientific analysis of children's testimony.*
3. Ceci, Bruck, et al., New Jersey v. Michaels (1995) Amicus brief presented by Committee of Concerned Social Scientists.
4. Ceci, S.J., Bruck, M. (1993). Suggestibility of the child witness: A historical review and synthesis. *Psychological Bulletin*, 113, 403-439.
5. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).
6. Davies, G.M., Wilson, C., Mitchell, R., & Milsom, J. (1995). Videotaping children's evidence: An evaluation. London: Home Office.
7. Hershkowitz, I., Lamb, M.E., Sternberg, K.J., & Esplin, P. W. (1997). The relationships among interviewer utterance type, CBCA scores, and the richness of children's responses. *Legal and Criminological Psychology*, 2, 169-176.
8. Jones, L. & Finkelhor, D. (2004). Explanations for the decline in child sexual abuse cases Bulletin. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention.
9. Lamb, M.E., Herschkowitz, I., Sternberg, K.J., Esplin, P.W., Hovav, M., Manor, T., et al. (1996). Effects of investigative utterance types on Israeli children's responses. *International Journal of Behavioral Development*, 19, 627-637.
10. Lewis, E. (1996 Summer). Reliability rather than zealotry. *Kentucky Bench & Bar*, 60, 23-30.
11. Myers, J. E. B., Saywitz, K. J., & Goodman, G. S. (1996). Psychological research on children as witnesses: Practical implications for forensic interviews and courtroom testimony. *Pacific Law Journal*, 28, 3-9112.
12. Poole, D. A., & Lamb, M. E. (1998). *Investigative interviews of children: A guide for helping professionals.* Washington, DC: American Psychological Association Press.
13. Schreiber, Nadja, et al. (2006). Suggestive interviewing in the mcmartin pre-school and kelly michaels day-care abuse cases: a case study. *Social Influence*. 1(1) 16-47.
14. State v. Margaret Kelly Michaels (264 N.J. Super. at 629, 625 A.2d 489. 1993).

15. Sternberg, K.J., Lamb, M.E., Hershkowitz, I., Esplin, P.W., Redlich, A., & Sunshine, N. (1996). The relation between investigative utterance types and the informativeness of child witnesses. *Journal of Applied Developmental Psychology*, 17, 439–451.
16. Underwager, R., & Wakefield, H. (1990). *The real world of child interrogations*. Springfield, IL: Charles C. Thomas.
17. United States v. Wade, 388 U.S. 218, 230, 87 S. Ct., 1926, 1932, 18 L.Ed.2d 1149, 1158 (1967).
18. Warren, A. R., & McGough, L. S. (1996). Research on children's suggestibility: Implications for the investigative interview. *Criminal Justice & Behaviour*, 23, 269–303.

About the author:

Mr. Blackstone is recognized as an expert in the fields of sexual offense investigation, proper forensic interviewing techniques and pre and post conviction testing of alleged offenders. He is a polygraph examiner, forensic consultant and expert witness regarding the proper use of polygraph in civil, clinical and criminal testing settings with a focus on child molestation and child abuse. With over twenty-seven years of experience, over fifteen thousand examinations and more than one hundred court appearances as an expert witness, Mr. Blackstone's expertise is well respected.

The Fallibility of Forensic Interviewing

Understanding the Michaels Decision and the Taint Hearing

Kenneth E. Blackstone, President, Blackstone Polygraph, Inc.

Member ACFEI, APA, ATSA

Abstract

Due to allegations of physical, emotional, and sexual abuse, millions of American children are interviewed each year by law enforcement, child protective services, mental health, and other professionals. The outcome of these interviews is frequently tendered as uncorroborated, yet compelling evidence in a criminal trial, increasing its significance and the need for dependability. With 30 years of experience in this field, this author realizes that child sexual abuse (CSA) is a horrific crime and this paper is in no way an attempt to ignore or minimize its importance. The purpose of this short report is to 1) review an investigative case of child abuse biased by flawed interviewing that resulted in a wrongful jury verdict and 2) outline one of few existing remedies; the taint hearing.

Key Words: Child Sexual Abuse, Forensic Interviewing, Michaels Decision, Taint Hearing

Learning Objectives: The readers of this article will better understand the fallibility of forensic interviewing, the concept of the taint hearing, and the need for a specialized forensic examiner to aid defense and prosecution.

CAPTA and NCCAN

Until 1961, when the medical field first recognized the “Battered Child Syndrome,” child sexual abuse was a relatively silent issue in American society. Paradoxically, within two decades, medical opinions were of no great importance and almost anything was considered a sign of abuse. In 1974, the passage of the Child Abuse Prevention and Treatment Act (CAPTA) (Federal law, P.L. 93-247) established a National Center on Child Abuse and Neglect (NCCAN). The many aims of CAPTA included starting child maltreatment programs and establishing standards by which states could become eligible for federal money to help them establish their own child protective agencies. One of the measurable effects of CAPTA was the increase in reports: In 1976, about 6,000 confirmed reports of abuse were made to child protective agencies. By 1985, the number had risen to about 113,000 each year. And, in 1993, the number had risen to about 152,000. (Besharov, 1994)

The Flood of Unfounded Allegations

Douglas Besharov, the first director of NCCAN (1975-1979) reported in 1994 that depending on the community, as many as 65% of all CSA reports were closed after an initial investigation revealed no evidence of maltreatment. (Besharov, 1994) He wrote in an article: “We now face an imminent social tragedy: the nationwide collapse of child protective efforts caused by a flood of unfounded reports.” In testimony before Congress, Besharov stated: “For fear of missing even one abused child, workers perform extensive investigations of vague and apparently unsupported reports . . . As a result; children in real danger are getting lost in the press of inappropriate cases.” (Besharov, 1994)

Innocent until proven guilty or guilty until proven innocent?

It is true that the presumption of innocence, an ancient principle of criminal law, is actually a misnomer. According to the U.S. Supreme Court, the presumption of the innocence of a criminal defendant is in fact an assumption of innocence that is “indulged in the absence of

contrary evidence” (*Taylor v. Kentucky*, 1978). Nonetheless, what some see as a righteous attempt to protect children is seen by others as a disregard for the presumption or assumption of innocence. And, in my opinion the notion of ‘innocent until proven guilty’ has gone out the window in child sexual abuse cases.

How many falsely accused people must be sacrificed to protect innocent children?

According to Blackstone’s formulation, the legal system should be more concerned with the accused than the children, but we all know that the reverse is true. Is this a catch-22 – a situation where the innocent must be ignored to protect the innocent? While this dilemma exists today, a powerful example comes from 25 years ago:

The Kelly Michaels Case

In September 1984, twenty-five year-old Margaret Kelly Michaels was hired by Wee Care Day Nursery in Maplewood, New Jersey. Located in St. George’s Episcopal Church, Wee Care served approximately fifty families with an enrollment of about sixty children, aged three to five. Michaels had recently moved from Pittsburg, was a few credits shy of a degree in drama and planned to get into the theater business in nearby Manhattan. She started as an aide at Wee Care and within three weeks became a teacher. Her classroom was located in the Church basement -- separated from an adjacent class by a vinyl curtain. Michaels resigned on April 22, 1985 and later told how she disliked taking children up and down stairs to the bathroom at Wee Care.

On April 26, 1985, the mother of four-year-old “Jonathan” was preparing him for Wee Care; noticed that he was covered with spots and took him to his pediatrician to be examined. During the examination, a pediatric nurse rubbed the boy’s back as she took his temperature rectally. In the presence of the nurse and his mother, the boy stated, “this is what my teacher does (to) me at nap time at school.” Whether he was referring to the back rubbing or rectal penetration was unclear. He indicated that his teacher (Kelly Michaels) did this to him and two other boys at Wee Care daily. The pediatrician was not told of the remark and no further examination was done.

The Investigation

Jonathan's mother took him home, questioned him further, and then contacted his grandfather -- a prominent local judge. Both Wee Care and the Department of Youth and Family Services (DYFS) were contacted and Jonathan was soon repeating his allegations to Sara McArdle, an assistant District Attorney (D.A) at the Essex County Prosecutor's Office.

McArdle and Lou Fonolleras, an investigator with the DYFS, then interviewed the other two boys, "Evan" and "Sean". Evan denied that Michaels had put anything in his rectum or had abused him in any other way and Sean also denied having his temperature taken. But Sean, described as "agitated, hostile, rushing around the room, almost trapped," during questioning, came up with a new charge -- he alleged that Kelly Michaels had touched his penis. (State v Michaels, 1993)

The news of these allegations spread like wildfire in the Maplewood community and parents were concerned, regardless of the fact that Michaels no longer worked at Wee Care. At the onset of this firestorm Dr. Susan Esquilin, a child therapist, presided over two heavily attended parent meetings. Esquilin suggested group therapy for the children and stated that her goal was to induce the children to discuss sexual abuse. In the first group therapy session, she told the children that they were assembled together 'because of some of the things that had happened at Wee Care and with Michaels'. She conducted five group therapy sessions with the Wee Care children and eventually assessed or treated 13 of the 20 child witnesses. Based on courtroom testimony, it seems that four children made allegations after their contacts with Esquilin (Campbell, 1998). Consequently, there were repeated interviews of children by their parents, by DYFS, and by investigators for the prosecution.

On May 1, 1985, the Essex County Prosecutor's office officially took over the investigation. The Prosecutor's office interviewed several Wee Care children and their parents, concluding their initial investigation on May 8, 1985. Also, Michaels submitted to approximately nine hours of questioning and took a polygraph examination. The prosecution found there had been no prior complaints about Michaels and the polygraph test verified her denial of sexual molestation at Wee Care. The only incriminating "evidence" was gathered during interviews with parents and children and that was more than enough.

The week after Kelly Michaels was first questioned, Peg Foster of the Child Abuse Diagnostic and Treatment Center at Children's Hospital of New Jersey, in Newark, met with

Wee Care parents. In her presentation Foster warned parents that their children would probably deny being molested “until they trusted the interviewer.” Foster then provided the parents with “symptom charts” -- a listing of “behavioral indicators” such as stomach aches and bedwetting, which children might display if they had in fact been sexually abused. Subsequently, when children denied being sexually abused by Kelly Michaels, the concerned parents now had reason to believe that this was a scientifically proven indicator of the opposite.

In his book, “Smoke and Mirrors,” Campbell describes the “leveling and sharpening” that takes place when concerned parents compare notes during an investigation. When Foster met with parents during the Michaels’ investigation and showed them her 32 behavioral indicators their memories improved and they began to recall ordinary behaviors and realized they were actually symptoms of abuse. (Campbell, 1998) This phenomenon can also apply to the interviewer who listens to a policeman, a parent and then to one or more children. The interviewer sees that stories differ, re-interviews the children and by “leveling and sharpening” is able to put the proverbial “square peg in a round hole.” While forensic interviewers are capable of avoiding this by limiting communications with third parties and maintaining objectivity within the interview, the social structure outside the interview is likely to increase susceptibility to suggestive interviewing techniques (Poole, 1998).

On June 6, 1985, Michaels was charged in a three-count indictment involving the alleged sexual abuse of three Wee Care boys. The interviewing continued with Lou Fonolleras, the DYFS investigator, conducting 82 interviews with Wee Care children and 19 interviews with Wee Care parents, between May 22 and July 8, 1985. It is also important to note that Fonolleras was himself abused as a child, and in at least one recorded interview he used this to lead the child’s testimony. His personal background may explain his bias and pursuit of a single hypothesis. At least 10 children made initial allegations after their interviews with Fonolleras (Campbell, 1998).

During these interviews the children were repeatedly told that “Kelly is in jail because she was bad.” They were also given specifics as to “what the other kids told us she did.” During the upcoming trial Fonolleras justified his telling children about other children’s allegations with . . . (The children) needed some reassurance . . . (that) they were not alone” (State v Michaels, 1995).

Positive reinforcement was then given when children made statements about Kelly Michaels. For example, they were told that the investigators "needed their help," that they could be "little detectives," and were given mock police badges when they cooperated. Children were also introduced to the police officer who had arrested Kelly, shown the handcuffs used during her arrest, and told that 'this is what happens when you don't cooperate.'

A second indictment was returned July 30, 1985, containing 174 counts of various charges involving twenty Wee Care boys and girls. A third indictment on fifty-five counts was filed November 21, 1985, involving fifteen Wee Care children.

The bulk of the State's evidence supporting these charges consisted of a high volume of testimony (actual number is unknown to this author) accumulated over a 28-month period (April 1985 – June 1987). Initial interviews were not recorded, only half of the interviews were recorded and the state had no witnesses and no corroborating physical evidence. Coarse behavior that reportedly took place behind a vinyl curtain was never witnessed – alleged acts such as urination on the piano bench or eating a cake made of feces had left no physical evidence. Disclosures like "*she cut off my penis*" . . . "*stuck a sword in my rectum*" . . . "*made us eat boiled babies*" were also unsupported by physical evidence.

The Trial

By June 22, 1987 the prosecution had dismissed seventy-two counts and Kelly Michaels was prosecuted on the remaining 163 counts in what was a ten-month long trial.

The state's main expert witness, Eileen Treacy, testified for 8 days. Treacy worked as a therapist in New York at a clinic for sexually abused children. She was 8 years away from obtaining her PhD in psychology and was not licensed as a therapist, either in New York or New Jersey. In a gross conflict of interest, Treacy helped the prosecutor choose which of the children would testify and then presented herself as an "independent" expert as to their credibility.

During the resultant trial, another thirty-two counts were dismissed, leaving 131 counts. On April 15, 1988, after thirteen days of deliberation, the jury returned guilty verdicts on 115 counts, including aggravated sexual assault (thirty-eight counts), sexual assault (thirty-one

counts), endangering the welfare of children (forty-four counts), and terroristic threats (two counts).

The trial court sentenced Kelly Michaels to a term of forty-seven years with a minimum of fourteen years of incarceration.

The Appeal

Kelly Michaels was incarcerated and an appeal was immediately pursued. Attorneys were aided by forty-five social scientists: they studied the forensic interviewing and demonstrated the causative link between suggestive interview techniques and the malleable memories of children. In an amicus brief these social scientists (Ceci, 1995) wrote:

“In the past decade, there has been an exponential increase in research on the accuracy of young children's memories and the degree to which young children's memories and reports can be molded by suggestions implanted by adult interviewers. As will be explained, these same interview conditions, which have a high risk of contaminating young children's reports, characterize the available investigative interviews carried out with the 20 child witnesses in the Kelly Michaels case . . . “

The Appellate Court's decision was consistent with the amicus brief. *“Our decision today should make clear that the investigatory techniques employed by the prosecution in this case are unacceptable and that prudent prosecutors and investigatory agencies will modify their investigatory practices to avoid those kinds of errors . . . “*

In its ruling the Court noted numerous faults in interviews of Wee Care students -- for example; a failure on the part of the interviewer to challenge outrageous claims. Another weakness cited was an obvious lack of objectivity and impartiality on the part of the interviewer. In example: Investigator Fonolleras testified that his interview techniques had been based on the premise that the *“interview process is in essence the beginning of the healing process”* and that it was his *“professional and ethical responsibility to alleviate whatever anxiety has arisen as a result of what happened to them.”*

On January 6, 1993 -- after five years in prison -- with 18 months in solitary confinement for her own safety -- the Appeals Court of New Jersey reversed the conviction of Kelly Michaels without prejudice. In effect, the New Jersey Courts ordered that if the State decided to retry the Michaels case, a pretrial “taint hearing” would be necessary to determine whether the statements and testimony of the alleged victims were contaminated.

New Jersey’s Appeal

On January 31, 1994, the State of New Jersey appealed to the State Supreme Court, seeking review of the Appellate Division's adverse rulings. The Appellate Court’s ruling was upheld on June 23, 1994. Essex County chose to drop the indictments and Kelly Michaels was as free as any wrongly accused and convicted person can be. On February 27, 1995 she filed a tort claim against several defendants and her claim was denied. This effort ended with the U.S. Supreme Court rejecting her claim on January 16, 2001.

Taint Hearings

The New Jersey Supreme Court held in the Michaels decision that (1) interrogations of alleged child sex abuse victims were improper and (2) given substantial likelihood the evidence derived from them was unreliable a pretrial hearing was required. At that “taint hearing” the state would be required to prove by clear and convincing evidence that statements and testimony retained sufficient degree of reliability to warrant admission at trial. (*State v. Michaels*, 1994, p. 1372)

The court laid out the following parameters for a taint hearing:

1. When a defendant has made a showing of "some evidence" that the alleged victim's statements were a product of suggestive or coercive interview techniques, a taint hearing will be held.
2. At the taint hearing, the burden of proof will be on the state to prove the reliability of the proffered statements by clear and convincing evidence.

3. Such proof may include the testimony of experts which may be countered by defense expert testimony. Such testimony may not extend to the ultimate issue which is the credibility of the child.

4. If under the totality of the circumstances, the statements do not retain a sufficient degree of reliability, the statements will not be admissible at trial.

5. If under the totality of the circumstances, the statements retain a degree of reliability sufficient to outweigh the effects of the improper interview techniques, then the statements may be introduced at trial. The duty will therefore be on the jury to weight the statements' probative value and credibility.

6. If the statements are introduced at trial, experts may be called to aid the jury by explaining the coercive or suggestive propensities of the interviewing techniques employed.

Taken from (Underwager & Wakefield, 1997) the above parameters show that the ultimate issue of credibility is not to be addressed at the taint hearing. The court was clear that the issue was one of reliability and the purpose of the taint hearing was to establish the reliability of evidence admitted at trial. *"Experts may thus be called to aid the jury by explaining the coercive or suggestive propensities of the interviewing techniques employed, but not of course, to offer opinions as to the issue of a child-witness's credibility, which remains strictly a matter for the jury."* (State v Margaret Kelly Michaels)

Precursors to Taint Hearings

The United States Supreme Court has long recognized that pretrial inquiry may be made when certain challenges are asserted to the reliability of evidence for which the government seeks introduction at trial. The Supreme Court has acknowledged that once an identification has been derived from coercive or suggestive police action, such perception is unlikely to be changed or altered at a later date: "Once the witness has picked out the accused . . . he is not likely to go back on his word later." U.S. v. Wade, 388 U.S. 218, 229 (1967).

Hawaii vs. McKeller (1985) In this case, Judge Klein, the trial court judge stated that he doubted whether the alleged incident ever happened and that the girls' accusations more likely were the result of "layers and layers of interviews, questions, examinations, etc., which were fraught with textbook examples of poor interview techniques."

Idaho vs. Wright (1990) In this case the prosecution sought the admission of statements made by a 2 ½ year old child to a pediatrician. The trial court admitted the statements by finding that the doctor's testimony of the child's statements satisfied the requirements of the residual hearsay exception. The United States Supreme Court affirmed the state Supreme Court's finding that the child's statements did not fall within a traditional hearsay exception and lacked "particularized guarantees of trustworthiness". The admission of such statement was determined to be in violation of Wright's confrontation clause guarantees.

Minnesota vs. Huss (1993) In this case, after the mother made allegations of sexual abuse during a custody dispute; she took her three-year-old daughter to a psychologist. The psychologist questioned the child about the alleged abuse and used a book and tape about sexual abuse. The mother then checked out the book and the tape from the library, used it often and encouraged her child to say that her father had abused her. After six months, the child made an allegation of abuse. The Minnesota Supreme Court held that because of the highly suggestive book and tape and inappropriate interview techniques, there was sufficient reason to question the reliability and validity of the statements such that the evidence was insufficient to be sent to the jury.

Felix vs. Nevada (1993) The Nevada Supreme Court held that statements of children about alleged sexual abuse in a day care center were unreliable because of numerous interviews, the use of leading questions, allegations never being made to the child's parents but only to a therapist, and several of the allegations being clearly false or incredible. The Court determined that the trial court had failed to adequately assess the reliability of the statements before allowing their admission.

Taint Hearings – Advantages and Disadvantages

The taint hearing is intended to provide a forum to review possibly flawed interviews and many people believe that these hearings provide a much-needed safeguard to defendants. Dugas (1995) reported that the Due Process Clause of the Fourteenth Amendment protects the defendant by ensuring he receives a fair trial. He used the due process concept to show how the procedures used against Kelly Michaels violated her fundamental fairness rights. Another advantage is that the knowledge of the possibility of a taint hearing may increase the quality of interviews by decreasing the likelihood of coercive interviews, assuming the interviews are documented by audiotape or videotape.

Some, however, worry about negative effects. Myers (1995, 1996, 1996a), for example, feared that taint hearings would be overused by defense attorneys and generate unwarranted skepticism. This would, in his opinion, weaken the state's ability to protect children. He believed that taint hearings would create new avenues for appeal and felt they were unnecessary because the defense has ample opportunities to challenge suggestive interviews in trial.

Experts and Taint Hearings

Taint hearings will involve expert testimony by investigators and mental health professionals. As in all evidentiary hearings, the success or failure of the taint hearing will normally rest with the quality of the expert who will offer testimony. The burden of proof and rules of evidence differ per jurisdiction. Some states follow the Daubert standard, some pursue the Frye rule, and some have their own version or mixture of the two (Kelly), but in any case, that expert must be knowledgeable as to the technique used; whether it has been “subjected to peer review and publication, its known or potential error rate, and the existence and maintenance of standards controlling its operation, and whether it has attracted widespread acceptance within a relevant scientific community.” (Daubert, 1993)

The Analysis of Child Interviews

The New Jersey Supreme Court found nine factors sufficient to justify a pretrial taint hearing:

- (a) Absence of spontaneous recall;
- (b) Interviewer bias against defendant - a preconceived idea of what the child should be disclosing;
- (c) Repeated leading questions;
- (d) Multiple interviews;
- (e) Incessant questioning;
- (f) Vilification of defendant;
- (g) Ongoing contact with peers and references to their statements;
- (h) Use of threats, bribes and cajoling; and
- (i) Failure to videotape or otherwise document the initial interview sessions.

The above factors were to be considered, if a hearing is held, in determining whether a child's testimony is tainted and should be suppressed. Other indicators of faulty interviewing not only exist, but they can be quantified – allowing for an objective analysis.

The Schreiber Analysis

One of the more recent studies on child interviewing is a 2006 paper entitled “Suggestive interviewing in the McMartin Preschool and Kelly Michaels daycare abuse cases: A case study.” The Schreiber analysis compared two of the most notorious cases in child sexual abuse to unrelated CPS interviews. Both were day care cases during the Satanic Scare and both were based on forensic interviewing that generated a mass of allegations and alleged victims. (Nathan, 1995)

The most costly criminal case in the history of the United States, the McMartin case was based on the multiple interviews of 400 former students - 384 of whom were diagnosed by the same Los Angeles agency (Children’s Institute International) as having been sexually abused. The Michaels case was based on multiple interviews of over a two-plus year period. This analysis reviewed and compared a total of 54 transcripts - 20 from the Michaels case, 14 from the McMartin Preschool case, and 20 from the Child Protective Service of a city in the western

United States. The ages of the 14 children in the McMMartin sample ranged from 4 to 9.5 years. The mean age was 6.89. A total of 36% (5) of the sample was male and 64% (9) was female. The ages of the children in the Michaels sample are unknown, although apparently all or nearly all were less than 7 years old. A total of 50% (10) of the sample was male and 35% (7) was female. The gender of the remaining three children was not clear from the interview transcripts. (Schreiber, 2006)

Scores in this quantitative analysis fell into 3 previously researched categories: (1) interview length, (2) form of questions, and (3) suggestive techniques (Schreiber, 2006; Warren, 1996; Ceci, 1993; Myers, 1996).

Interview Length

The length of interview time studied in the Schreiber analysis was an estimate due to the fact that transcripts were used, but it is interesting to note how the McMMartin interviews were more than three times as long (1 hour, 14 minutes) as the Michaels (24 minutes) and CPS (22 minutes) interviews (Schreiber, 2006). This difference can be explained by the “let’s have fun and play with puppets” atmosphere in the McMMartin interviews where play therapy was used for supposedly forensic purposes.

Form of Questions

The form of questions used in the McMMartin, Michaels and CPS interviews can be categorized as (1) open-ended questions, (2) yes/no questions, (3) multiple-choice questions, and (4) focused/specific questions. These four categories partially reflect the way that an interviewer has exerted control and influence during the interview by limiting the conversation to certain topics and constraining responses to questions (Schreiber, 2006). In the Schreiber study it appeared that the McMMartin interviewers used a significantly higher proportion of yes/no questions and a lower proportion of focused/specific questions, than the Kelly Michaels and CPS interviewers. Other differences regarding the form of question used in each group were not statistically significant (Schreiber, 2006). While studies have shown that law enforcement and CPS personnel tend to rely heavily on yes/no, choice, and focused/specific questions, open-ended questions are deemed more desirable because they are less likely to be suggestive than

other forms of questions and are more likely to be answered accurately by children (Campbell, 1998; Underwager, 1990).

Suggestive Interviewing

When compared to the CPS interviews, the McMartin and Michaels interviewers were significantly more likely to use five suggestive interview techniques. These interviewers were more likely to (a) introduce suggestive information into the interview, (b) provide reinforcement (negative or positive), (c) repeat questions that have been asked and answered, (d) exert conformity pressure, and (e) invite children to pretend or speculate about supposed events. Schreiber compared the two day-care cases and found that they were identical as to introduction of information. The McMartin interviewers were more likely to use positive reinforcement, conformity pressure, and invitation to speculate, while the Michaels interviewers used more repeated questions and more negative reinforcement. (Schreiber, 2006)

It has also been suggested that a high ratio of interviewer words to child words may serve as a rough indicator of unskillful or suggestive interviewing (Sternberg, 1996). The ratio of interviewer words to child words was approximately twice as high for the McMartin (ratio = 4.60) and Michaels (ratio = 4.67) as for the CPS interviews (ratio = 2.31) (Schreiber, 2006; Hershkowitz, 1997; Lamb 1996).

Has the climate changed since 1985?

The National Child Abuse and Neglect Data System (NCANDS) is a national data collection and analysis system created in response to the amended Child Abuse Prevention and Treatment Act (Public Law 93-247) and it serves as an excellent source of statistics. The number of reported incidents of child abuse in the United States is now roughly about 3.6 million assaults per year (Pangborn 2009) and child sexual abuse is one of the greatest problems in today's society. In 2007 CPS agencies received an estimated 3.2 million referrals, involving the alleged maltreatment of approximately 5.8 million children. NCANDS reported that 794,000 children were confirmed victims of abuse in fiscal year 2007, with 7.6 % (6,034) being victims of sexual abuse. All 50 states have mandatory reporting laws and over 57% of these referrals came from professionals (teachers, doctors, police, and social service.) Nonetheless, approximately 38

percent of the initial referrals were screened-out. Of the remainder, approximately 25 percent of the investigations or assessments determined at least one child who was found to be a victim of abuse or neglect. (Child Maltreatment, 2007)

Remember, CPS may act as an arm of the police, but being screened-out or “unfounded” by an agency does not erase the possibility of prosecution. The greater majority of child sexual abuse cases I am involved in started with a CPS investigation and more than half of them were ruled as “unfounded.” This, however, did not stop the police from making an arrest and re-interviewing the child.

Conclusion

As a result of faulty interviewing, Kelly Michaels was convicted and served five years in prison. Everyone who has seen the transcripts of these interviews since the conviction agrees that the children’s statements were unreliable because of suggestive and coercive interviews and as a result, her conviction was overturned.

Why was this not seen before her trial?

While the Kelley Michaels case was a horrible miscarriage of justice, it was not exclusive; anyone can be falsely accused of a sexual offense against a child and no falsely accused person is immune to poor interviewing techniques. In Joseph Heller’s novel “Catch 22” the catch was that "anyone who wants to get out of combat duty isn't really crazy". (Heller, 1999) Today, the ‘catch’ is that anyone accused of child sexual abuse is guilty if they deny it.

Are interviewers improving?

Although some professional organizations such as the National Center for Prosecution of Child Abuse have produced guidelines for proper child interviewing (Carnes, 2000, 2001) there is no mechanism beyond integrity to enforce their use. The training of police and child protective investigators has improved with respect to the decrease of overt, heavy-handed questioning and badgering that was common a decade ago, but confirmatory bias, while less obvious today, continues and innocent persons continue to be charged. (Pangborn, 2009)

Many jurisdictions, in a laudatory effort to increase objectivity, have adopted the RATAC protocol recommended by Walters, et al (2003) in “Finding Words”. (Campbell, 2009) RATAC is an acronym for different interview stages: **R**apport, **A**natomy Identification, **T**ouch Inquiry, **A**buse Scenario, and **C**losure. Lamb, et al, (2007) suggest that forensic interviews require a structure and standardization and the National Institute of Child Health and Human Development (NICHD) approach appears to be a well-researched protocol, but “no research has been done regarding what interviewers actually do who have been trained in this approach” (Lamb, 2007 p. 1211).

Do Defense Attorneys need to be specialized in this area?

Regardless of the setting, criminal or civil, child sexual abuse cases require a specific expertise to develop both a case theory and a defense strategy to reach a favorable outcome. It is this author’s opinion that child sexual abuse cases are unique in that they require a special burden of proof of the defense. In these cases the defense must be aggressive and show:

- that the alleged victim's testimony is false
- how the false allegations were developed, and
- why the false allegations were made

While all interviews will have some elements of suggestiveness in them; defense attorneys must persuade the judge that the interview was so unnecessarily suggestive that the child's statements cannot be considered reliable and prosecutors must present evidence that the interview was not so suggestive as to make the child's statements unreliable. To provide the best possible representation, defense teams need to incorporate specialized forensic examiners.

How common are taint hearings?

While the practice of taint hearings started in New Jersey, it has spread into Federal and military courts as well as into a number of other states. Several states have considered the propriety of conducting a pretrial taint hearing; some have adopted and some declined the procedure and instead rely on preliminary hearings to afford due process. In *Fishbach v. Delaware* (1996), for example, the court declined to adopt the formal procedures mandated in

Michaels. In that decision the court determined that if the witness's statement was obtained by use of impermissible interviewing techniques, the trial court must determine whether the statement is reliable after considering the totality of the circumstances.

While there is a dearth of statistical information specific to taint hearings, it appears that states with legislation supporting taint hearings are a minority. However, attorneys in all states are able to address forensic interviewing; either in a taint hearing or in a preliminary hearing that concentrates on motions to exclude evidence.

Can interview errors be eliminated?

With proper videotaping (Ceci, 2000, Davies, 1995, McGough, 1995) errors such as suggestive questioning can be categorized, quantified, and therefore controlled, but confirmatory bias, in this author's opinion, is the root of all interviewing errors for it prompts an interviewer to become a "validator" on a mission to extract information necessary to successfully prosecute the accused. (Pangborn, 2009) In so doing the interviewer takes the role of interrogator and ignores information that does not fit into a preconceived notion.

For example; I recently watched an interviewer who repeated the same question 11 times during an 18 minute interview, even though she got a clear No answer each time. The interviewer later reported that "based on scientifically-based techniques" she had "concluded that the child was in denial because she was afraid."

Shouldn't good investigators see through poor interviewing?

Investigators should be able to screen out 1) allegations that are untrue, and 2) poor interviewing, but the above mentioned factors tend to encourage false allegations that misdirect investigators and eventually lead to a fraudulent conviction.

Why do children make false allegations?

There is no universal answer, but when you combine the biological, cognitive and social immaturity of children with suggestive, repetitive and otherwise contaminating questioning techniques, you have a constellation of factors that can damage, if not destroy, the ability of a

child to disclose the truth. When you multiply these factors by society's hatred for perpetrators of child sexual abuse the likelihood of a false accusation increases even more.

Today, the legal system's only quality assurance mechanism is the taint hearing and defense attorneys should request a taint hearing whenever they believe suggestive and coercive interviews may have destroyed the child's ability to testify truthfully or when they believe that the child's statements to others are unreliable because of defective interviewing.

Case law cited:

- Commonwealth v. Callahan, 1998 WL 808850 *5 (Mass.Super. 1998).
- Felix v. State. 849 P.2d 220 (Nev. 1993).
- Fishbach v. Delaware, 1996. DE. 19415
- Hawaii vs. McKellar (1985, January 15). Circuit court of the first circuit, State of Hawaii. Criminal No. 85-0553.
- Idaho vs. Wright (110 S. Ct., 3139, 1990).
- Jackson v. Denno, 378 U.S. 368 (1964)
- Manson v. Brathwrite, 432 U.S. 98, 114 (1977).
- Minnesota v. Huss. No. C4-92-282. (Sup. Ct. Oct 1, 1993).
- New Jersey v. Michaels (1994, June 23). 642 A.2d 1372 (N.J. 1994).
- Pennsylvania vs. Delbridge, No. 150 MAP 20012 PA Sup. Ct. 2003 Filed September 25, 2003. 2003. LEXIS 1754
- United States v. Wade, 388 U.S. 218, 230, 87 S. Ct., 1926, 1932, 18 L.Ed.2d 1149, 1158 (1967).
- State v. Margaret Kelly Michaels (264 N.J.Super. at 629, 625 A.2d 489. 1993).
- *Taylor v. Kentucky*, 436 U.S. 478, 98 S. Ct. 1930, 56 L. Ed. 2d 468 [1978].
- Washington vs. Doggett. Court of Appeals Division III, State of Washington, 15014-3-III, 12/09/97.

References:

1. Besharov, D.J. (1994). The Future of Children. Sexual Abuse of Children, Vol. 4 – No. 2 – Summer/Fall 1994
2. Campbell, T.W. (1998). *Smoke and Mirrors-The devastating effect of false sexual abuse claims.*

3. Campbell, T.W. (2009) *A private conversation*.
4. Carnes, C.N. (2000). *Forensic evaluation of children when sexual abuse is suspected*, 2nd ed., National Children's Advocacy Center, Huntsville, AL.
5. Carnes, C.N., Nelson-Gardell, D., Wilson, C., & Orgassa, U.C. (2001). Extended forensic evaluation when sexual abuse is suspected: A multisite field study. *Child Maltreatment*, 6, 230-242.
6. Ceci, Bruck, et al., New Jersey v. Michaels (1995) Amicus brief presented by Committee of Concerned Social Scientists.
7. Ceci, S.J., Bruck, M. (1993). Suggestibility of the child witness: A historical review and synthesis. *Psychological Bulletin*, 113, 403–439.
8. Ceci, S.J. & Bruck, M. (Spring 2000). Why judges must insist on electronically-preserved recordings of child interviews. *Court Review*, 37, 10-12.
9. Davies, G.M., Wilson, C., Mitchell, R., & Milsom, J. (1995). Videotaping children's evidence: An evaluation. London: Home Office.
10. Dugas, C. (1995). State of NJ v Michaels: The due process implications raised in interviewing child witnesses. *Louisiana Law Review*, 1205-1234.
11. Heller, Joseph (1999). *Catch-22: A Novel*. Simon and Schuster. p. 52. [ISBN 9780684865133](https://www.amazon.com/Catch-22-Novel-Joseph-Heller/dp/0312264378).
12. Hershkowitz, I., Lamb, M.E., Sternberg, K.J., & Esplin, P. W. (1997). The relationships among interviewer utterance type, CBCA scores, and the richness of children's responses. *Legal and Criminological Psychology*, 2, 169–176.
13. Lamb, M. E. (1994). The investigation of child sexual abuse: An interdisciplinary consensus statement. *Child Abuse & Neglect*, 18(12), 1021-1028.
14. Lamb, M.E., Hershkowitz, I., Sternberg, K.J., Esplin, P.W., Hovav, M., Manor, T., et al. (1996). Effects of investigative utterance types on Israeli children's responses. *International Journal of Behavioral Development*, 19, 627–637.
15. Lamb, M.E., Orbach, Y., Hershkowitz, Esplin, P.W. & Horowitz, D. (2007). A structured forensic interview protocol improves the quality and informativeness of investigative interviews with children: A review of research using the NICHD investigative interview protocol. *Child Abuse & Neglect*, 31, 1201-1231.
16. McGough, L. S. (1995). For the record: Videotaping investigative interviews. *Psychology, Public Policy, and Law*, 1(2), 370-386.
17. Myers, J. E. B. (1996). Taint hearings to attack investigative interviews: A further assault on children's credibility. *Child Maltreatment*, 1(3), 213-222.
18. Myers, J. E. B. (1995). Taint hearings for child witnesses? A step in the wrong direction. *Baylor Law Review*, 46, 873-945.

19. Myers, J. E. B., Saywitz, K. J., & Goodman, G. S. (1996). Psychological research on children as witnesses: Practical implications for forensic interviews and courtroom testimony. *Pacific Law Journal*, 28, 3–9112.
20. Nathan, D., & Snedeker, M. (1995). Satan's silence: Ritual abuse and the making of a modern American witch hunt. New York: Basic Books.
21. Pangborn, K. (2009). Identifying and Correcting Problems with Forensic Interviews of Alleged Child Sexual Abuse Victims: A Holistic Environmental Approach. *IPT Journal*, 18.
22. Schreiber, Nadja, et al (2006). Suggestive interviewing in the McMartin pre-school and Kelly Michaels day-care abuse cases: a case study. *Social Influence*. 1(1) 16-47.
23. Sternberg, K.J., Lamb, M.E., Hershkowitz, I., Esplin, P.W., Redlich, A., & Sunshine, N. (1996). The relation between investigative utterance types and the informativeness of child witnesses. *Journal of Applied Developmental Psychology*, 17, 439–451.
24. Underwager, R., & Wakefield, H. (1990). *The real world of child interrogations*. Springfield, IL: Charles C. Thomas.
25. Underwager, R., & Wakefield, H. (1997) The Taint Hearing, presented at the 13th Annual Symposium in Forensic Psychology, Vancouver, B.C. (April 17, 1997)
26. U.S. Department of Health and Human Services, Administration on Children, Youth and Families. *Child Maltreatment 2007* (Washington, DC: U.S. Government Printing Office, 2009). found at: <http://www.acf.hhs.gov/programs/cb/pubs/cm07/cm07.pdf>
27. Walters, S., Holmes, L., Bauer, G. & Vieth, V. (2003). Finding words: Half a nation by 2010: Interviewing children and preparing for court: Alexandria, VA: National Center for Prosecution of Child Abuse.
28. Warren, A. R., & McGough, L. S. (1996). Research on children's suggestibility: Implications for the investigative interview. *Criminal Justice & Behaviour*, 23, 269–303.

Other suggested readings include:

- Anderson, D. D. (1996). Assessing the reliability of child testimony. *Southern California Law Review*, 69, 2117-2161.
- Bottoms, B. L., & Epstein, M. A. (1994, June). Taint hearings for suggestible witnesses? The case for Kelly Michaels. *APA Monitor*, 26(6).

- Bruck, M. & Ceci, S.J. (2000). Reliability and suggestibility of children's statements: From science to practice. In D. Schetkey & E. Benedict (Eds.), *Comprehensive Textbook in Child and Adolescent Forensic Psychiatry*.
- Bruck, M., Ceci, S. J., & Francouer, E. (2000). Children's use of anatomically detailed dolls to report on genital touching in a medical examination: Developmental and gender comparisons. *Journal of Experimental Psychology: Applied*, 6(1):74-83.
- Bruck, M., Ceci, S.J., & Hembrooke, H. (2002). The nature of children's true and false narratives. *Developmental Review*, 22, 520-554.
- Bruck, M., Melnyk, L., & Ceci, S. J. (2000). Draw it again Sam: The effect of drawing on children's suggestibility and source monitoring ability. *Journal of Experimental Child Psychology*, 77, 169-196.
- Ceci, S.J., Bruck, M. (1999). *Jeopardy in the courtroom: A scientific analysis of children's testimony*.
- Ceci, S.J., Bruck, M., & Battin, D. (2000). The suggestibility of children's testimony. In Bjorklund, D. (Ed). *False-memory creation in children and adults* (pp. 169-201). Mahwah, NJ: Erlbaum.
- Ceci, S. J., Crossman, A., L., Scullin, M., Gilstrap, L., & Huffman, M. (2001). Children's suggestibility research: Implications for the courtroom and the forensic interview. In Westcott, H.L., Davies, G.M. & Bull, R. (Eds) *Children's Testimony: A Handbook of Psychological Research and Forensic Practice*. Chichester: Wiley.
- Ceci, S. J., & Friedman, R. D. (2000). The suggestibility of children: Scientific research and legal implications. *Cornell Law Review*, 86, 33-108.
- Ceci, S. J., Huffman, M. L., Crossman, A., Scullin, M., & Gilstrap, L. (2000). How reliable are children's memories? (pp. 27-44). In Krasnegor, N. A., Anderson, N. B., & Bynum, D. R. (Eds.), *Health & Behavior*, Vol. 1. Bethesda, MD: NIH, Office of Behavioral and Social Sciences.
- Ceci, S.J. & Kanaya, T. (2000). Motivated forgetting. In W.E. Craighead & C.B. Nemeroff (Eds.) *The Corsini Encyclopedia of Psychology and Behavioral Science*, 3rd ed. (pp. 979-980). New York: John Wiley & Sons.
- Daly, L.W. (2004). Police officers do not receive adequate training to prepare them to handle child sexual abuse investigations *Journal of Issues in Child Abuse Allegations*, 14 (1). [Electronic Version].
- Dewhurst, S.A. & Robinson, C.A. (2004). False memories in children: Evidence for a shift from phonological to semantic associations. *Psychological Science*, 15 (11), 782-786.
- Faller, K.C. (2007). *Interviewing children about sexual abuse: Controversies and best practices*. New York: Oxford University Press.
- Gilstrap, L. & Ceci, S. J. (2004). Reconceptualizing children's suggestibility: bidirectional and temporal properties. *Child Development*, Vol. 75(6).
- Howe, M.L. (2006). Developmentally invariant dissociations in children's true and false memories: not all relatedness is created equal. *Child Development*, 77(4), 1112-23.
- Howe, M.L., Cicchetti, D., Toth, S.L. & Cerrito, B.M. (2004). True and false memories in maltreated children. *Child Development*, 75(5), 1402-17.
- Howe, M.L., Cicchetti, D. & Toth, S.L. (2006). *Children's basic memory processes, stress, and maltreatment*. *Developmental Psychopathology*, 18(3), 759-69.

- Jones, L. & Finkelhor, D. (2004). Explanations for the decline in child sexual abuse cases. Bulletin. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention.
- Kaplan, H. J. (2003). An alternate hypothesis for People v Kaplan: The alliance of fact, research, and reason. *Journal of Issues in Child Abuse Allegations*, 13 (1). [Electronic Version].
- Lamb, M. E., & Fauchier, A. (2001). The effects of question type on self-contradictions by children in the course of forensic interviews. *Applied Cognitive Psychology*, 15, 483–491.
- Lamb, M. E., & Garretson, M. E. (2003). The effects of interviewer gender and child gender on the informativeness of alleged child sexual abuse victims in forensic interviews. *Law and Human Behavior*, 27(2), 157–171.
- Lewis, E. (1996 Summer). Reliability rather than zealotry. *Kentucky Bench & Bar*, 60, 23-30.
- London, K., Bruck, M., Ceci, S. J. & Shuman, D. W. (2005). Disclosure of child sexual abuse: What does the research tell us about the ways that children tell? *Psychology, Public Policy, and the Law*, 11(1), 194-226.
- Myers, J. E. B. (1994, July). Child victim witness investigative pilot projects: Research and evaluation final report. Sacramento, CA: California Department of Justice.
- Paine, M.L., & Hansen, D.J. (2002). Factors influencing children to self-disclose sexual abuse. *Clinical Psychology Review*, 22, 271-295.
- Poole, D.A., & Lindsay, D.S. (2002). Children's suggestibility in the forensic context. In M.L. Eisen, J.A. Quas, & G.S. Goodman, (Eds). *Memory and suggestibility in the forensic interview. Personality and clinical psychology series* (pp. 355-381). Mahwah, NJ: Erlbaum.
- Poole, D. A., & Lamb, M. E. (1998). *Investigative interviews of children: A guide for helping professionals*. Washington, DC: American Psychological Association Press.
- Rabinowitz, D. (1990, May). From the mouths of babes to a jail cell. *Harper's Magazine*, pp. 52-63.
- Powell, M.B., Thompson, D. M., & Ceci, S. J. (2003). Children's memory of recurring events: Is the first event always the best remembered? *Applied Cognitive Psychology*, 17, 127-146.
- Principe, G. & Ceci, S. J. (2002) I saw it with my own ears: The effects of peer conversations on preschoolers' reports of nonexperienced events. *Journal of Experimental Child Psychology* 83, 1-25.
- Salekin, K. L. (2005). The suggestive interview and the taint hearing: How much is too much? *Journal of Forensic Psychology Practice*, 5(4), 49-64.
- Sas, L. (2003, November). The interaction between children's developmental capabilities and the courtroom environment: The impact on testimonial competency. *Research and Statistics*. Department of Justice, Canada. Retrieved online June 21, 2005 from: http://canada.justice.gc.ca/en/ps/rs/rep/2002/interaction/inter_sum.html

- Saywitz, K. J., Goodman, G. S., & Lyon, T. D. (2002). *Interviewing children in and out of court: Current research and practice implications*. In J. E. B. Myers, L. Berliner, J. Briere, C. T. Hendrix, C. Jenny, & T. A. Reid (Eds.), *The APSAC handbook on child maltreatment* (2nd ed.). Thousand Oaks, CA: Sage Publications.
- Scullin, M. H. & Ceci, S. J. (2001). A suggestibility scale for children. *Personality & Individual Differences*, 30, 843-856.
- Scullin, M, Kanaya, T., & Ceci, S. J. (2002). Measurement of individual differences in children's suggestibility across situations. *Journal of Experimental Psychology: Applied*, 8 (4), 233-246.
- Sjöberg, R.L., & Lindblad, F. (2002). Delayed disclosure and disrupted communication during forensic investigation of child sexual abuse: A study of 47 corroborated cases. *Acta Paediatrica*, 91, 1391-1396.
- Somer, E., & Szwarcberg, S. (2001). Variables in delayed disclosure of childhood sexual abuse. *American Journal of Orthopsychiatry*, 71, 332-341.
- Stanziano, M. J. (1998, May). **Taint** hearings: Looking for reliability amidst incompetence while searching for the "truth." *The Advocate*, 20(3), 45-50.
- Wakefield, H., & Underwager, R. (1998). The **Taint** hearing. *Issues in Child Abuse Accusations*, 10, 99-103.
- Wood, J.M., & Garven, S. (2000). How sexual abuse interviews go astray: Implications for prosecutors, police, and child protection services. *Child Maltreatment: Journal of the American Professional Society on the Abuse of Children*, 5

Biography

A Life member of ACFEI and a Diplomate of the ABFE, Mr. Blackstone is recognized as an expert in the field of sexual offense investigation, proper forensic interviewing techniques, pre-conviction testing of alleged offenders, and post-conviction management of sex offenders. A certified forensic consultant, Mr. Blackstone is licensed in several states as a polygraph examiner and has testified as an expert witness in federal and state courts regarding the proper use of polygraph in civil, clinical and criminal testing settings -- with a focus on child molestation and

other sexual offenses. With over thirty years of experience, involvement in over twenty thousand examinations and over one hundred court appearances as an expert witness, Mr. Blackstone's expertise is well respected.

Multiple Choice Questions:

1. What Court Decision provided the foundation for Taint Hearings?
 - a. U.S. v Wade
 - b. U.S. v Michaels
 - c. New Jersey v. Michaels
 - d. U.S. v. Harris

2. Of the following, which is not a common defect in child interviewing?
 - a. repetitive questioning
 - b. objectivity
 - c. play therapy
 - d. failure to challenge illogical responses

3. How long did it take for Kelly Michaels to have her conviction overturned?
 - a. It wasn't
 - b. Fifteen years
 - c. One year
 - d. Five years

4. How many social scientists signed the Amicus Brief that preceded Kelly Michael's appeal?
 - 7
 - 10
 - 25
 - 45

5. Four-hundred children were interviewed by CII prior to the McMartin trial. How many of them were diagnosed as "sexually abused."
 - 3
 - 100
 - 384
 - 255

6. The taint hearing is intended to:
 - Focus on mitigating circumstances
 - Determine competency
 - Determine reliability
 - Determine credibility

NEW JERSEY SUPREME COURT DECISION

STATE of New Jersey, Plaintiff-Appellant,
v.
Margaret Kelly MICHAELS, Defendant-Respondent.

Supreme Court of New Jersey.

Argued Jan. 31, 1994.

Decided June 23, 1994.

The opinion of the Court was delivered by HANDLER, J.

In this case a nursery school teacher was convicted of bizarre acts of sexual abuse against many of the children who had been entrusted to her care. She was sentenced to a long prison term with a substantial period of parole ineligibility. The Appellate Division reversed the conviction and remanded the case for retrial. 264 N.J.Super. 579, 625 A.2d 489 (1993).

The Appellate Division based its reversal on several major errors that occurred in the prosecution of the case. Only one of those errors is the subject of this appeal. In setting aside the conviction, the Appellate Division ordered that if the State decided to retry the case, a pretrial hearing would be necessary to determine whether the statements and testimony of the child-sex-abuse victims must be excluded because improper questioning by State investigators had irretrievably compromised the reliability of that testimonial evidence.

The State filed a petition for certification seeking review of all the Appellate Division's adverse rulings. This Court denied the petition with respect to all issues except for one concerning the necessity for a pretrial hearing to assess the reliability of anticipated trial testimony because of the improper interrogations. On that issue, this Court denied the petition without prejudice, allowing the State to file a motion for reconsideration of its petition limited to that issue in the event it decided to retry the case. Having determined that it will retry the case, the State filed a motion for reconsideration of its petition for certification, limited to the pretrial hearing issue. The Court granted the motion for reconsideration and the limited petition for certification. 134 N.J. 482, 634 A.2d 528 (1993).

I

In September 1984, Margaret Kelly Michaels was hired by Wee Care Day Nursery ("Wee Care") as a teacher's aide for preschoolers. Located in St. George's Episcopal Church, in Maplewood, Wee Care served approximately fifty families, with an enrollment of about sixty children, ages three to five.

Michaels, a college senior from Pittsburgh, Pennsylvania, came to New Jersey to pursue an acting career. She responded to an advertisement and was hired by Wee Care, initially as a teacher's aide for preschoolers, then, at the beginning of October, as a teacher. Michaels had no prior experience as a teacher at any level.

Wee Care had staff consisting of eight teachers, numerous aides, and two administrators. The nursery classes for the three-year-old children were housed in the basement, and the kindergarten class was located on the third floor. During nap time, Michaels, under the supervision of the head teacher and the director, was responsible for about twelve children in one of the basement classrooms. The classroom assigned to Michaels was separated from an adjacent occupied classroom by a vinyl curtain.

During the seven month period that Michaels worked at Wee Care, she apparently performed satisfactorily. Wee Care never received a complaint about her from staff, children, or parents. According to the State, however, between October 8, 1984, and the date of Michaels's resignation on April 26, 1985, parents and teachers began observing behavioral changes in the children.

On April 26, 1985, the mother of M.P., a four-year old in Michaels's nap class, noticed while awakening him for

school, that he was covered with spots. She took the child to his pediatrician and had him examined. During the examination, a pediatric nurse took M.P.'s temperature rectally. In the presence of the nurse and his mother, M.P. stated, "this is what my teacher does to me at nap time at school." M.P. indicated to the nurse that his teacher, Kelly (the name by which Michaels was known to the children), was the one who took his temperature. M.P. added that Kelly undressed him and took his temperature daily. On further questioning by his mother, M.P. said that Kelly did the same thing to S.R.

The pediatrician, Dr. Delfino, then examined M.P. He informed Mrs. P. that the spots were caused by a rash. Mrs. P. did not tell Dr. Delfino about M.P.'s remarks; consequently, he did not examine M.P.'s rectum. In response to further questioning from his mother after they had returned home, M.P., while rubbing his genitals, stated that "[Kelly] uses the white jean stuff." Although M.P. was unable to tell his mother what the "white jean stuff" was, investigators later found vaseline in Wee Care's bathroom and white cream in the first-aid kit. During the same conversation, M.P. indicated that Kelly had "hurt" two of his classmates, S.R. and E.N.

M.P.'s mother contacted the New Jersey Division of Youth and Family Services ("DYFS") and Ms. Spector, Director of Wee Care, to inform them of her son's disclosures. On May 1, 1985, the Essex County Prosecutor's office received information from DYFS about the alleged sexual abuse at Wee Care. The Prosecutor's office assumed investigation of the complaint.

The Prosecutor's office interviewed several Wee Care children and their parents, concluding their initial investigation on May 8, 1985. During that period of investigation, Michaels submitted to approximately nine hours of questioning. Additionally, Michaels consented to taking a lie detector test, which she passed. Extensive additional interviews and examinations of the Wee Care children by the prosecutor's office and DYFS then followed.

Michaels was charged on June 6, 1985, in a three count indictment involving the alleged sexual abuse of three Wee Care boys. After further investigation, a second indictment was returned July 30, 1985, containing 174 counts of various charges involving twenty Wee Care boys and girls. An additional indictment of fifty-five counts was filed November 21, 1985, involving fifteen Wee Care children. Prior to trial the prosecution dismissed seventy-two counts, proceeding to trial on the remaining 163 counts.

After several pretrial hearings, the trial commenced on June 22, 1987. The bulk of the State's evidence consisted of the testimony of the children. That testimony referred extensively to the pretrial statements that had been elicited from the children during the course of the State's investigations. The State introduced limited physical evidence to support the contention that the Wee Care children had been molested.

By the time the trial concluded nine months later, another thirty-two counts had been dismissed, leaving 131 counts. On April 15, 1988, after twelve days of deliberation, the jury returned guilty verdicts on 115 counts, including aggravated sexual assault (thirty-eight counts), sexual assault (thirty-one counts), endangering the welfare of children (forty-four counts), and terroristic threats (two counts). The trial court sentenced Michaels to an aggregate term of forty-seven years imprisonment with fourteen years of parole ineligibility.

II

The focus of this case is on the manner in which the State conducted its investigatory interviews of the children. In particular, the Court is asked to consider whether the interview techniques employed by the state could have undermined the reliability of the children's statements and subsequent testimony, to the point that a hearing should be held to determine whether either form of evidence should be admitted at re-trial.

The question of whether the interviews of the child victims of alleged sexual abuse were unduly suggestive and coercive requires a highly nuanced inquiry into the totality of circumstances surrounding those interviews. Like confessions and identification, the inculpatory capacity of statements indicating the occurrence of sexual abuse and the anticipated testimony about those occurrences requires that special care be taken to ensure their reliability.

The Appellate Division carefully examined the record concerning the investigatory interviews. It concluded that the interrogations that had been conducted were highly improper. 264 N.J.Super. at 629, 625 A.2d 489. The court

determined from the record that the children's accusations were founded "upon unreliable perceptions, or memory caused by improper investigative procedures," and that testimony reflecting those accusations could lead to an unfair trial. *Id.* at 631-32, 625 A.2d 489. Accordingly, it held that in the event of a re-trial, a pretrial hearing would be required to assess the reliability of the statements and testimony to be presented by those children to determine their admissibility. *Ibid.* The State appeals that determination.

Woven into our consideration of this case is the question of a child's susceptibility to influence through coercive or suggestive questioning. As the Appellate Division noted, a constantly broadening body of scholarly authority exists on the question of children's susceptibility to improper interrogation. *Id.* at 622, 625 A.2d 489. The expanse of that literature encompasses a variety of views and conclusions. *Ibid.* Among the varying perspectives, however, the Appellate Division found a consistent and recurrent concern over the capacity of the interviewer and the interview process to distort a child's recollection through unduly slanted interrogation techniques. *Ibid.* The Appellate Division concluded that certain interview practices are sufficiently coercive or suggestive to alter irremediably the perceptions of the child victims. *Id.* at 620-30, 625 A.2d 489.

A.

Like many other scientific and psychological propositions that this Court has addressed in different contexts, see, *State v. J.Q.*, 130 N.J. 554, 617 A.2d 1196 (1993) (noting the limited use to be made of Child Sexual Abuse Accommodation Syndrome); *In re Guardianship of J.C.*, 129 N.J. 1, 608 A.2d 1312 (1992) (considering effects of child-parent bonding in adoption cases); *Rubanick v. Witco Chemical Co.* 125 N.J. 421, 593 A.2d 733 (1991) (addressing scientific theories of causation in toxic torts); *State v. Kelly*, 97 N.J. 178, 478 A.2d 364 (1984) (determining availability of battered-women's syndrome as self-defense in criminal case); *State v. Hurd*, 86 N.J. 525, 432 A.2d 86 (1981) (considering practice of hypnosis in determining reliability of hypnotically refreshed testimony), the notion that a child is peculiarly susceptible to undue influence, while comporting with our intuition and common experience is in fact a hotly debated topic among scholars and practitioners. The recognition of that notion in a judicial proceeding, therefore, requires utmost circumspection.

Additional factors temper our consideration of whether children are susceptible to manipulative interrogation. This Court has been especially vigilant in its insistence that children, as a class, are not to be viewed as inherently suspect witnesses. We have specifically held that age per se cannot render a witness incompetent. *State in re R.R.*, 79 N.J. 97, 398 A.2d 76 (1979). We declined to require or allow, absent a strong showing of abnormality, psychological testing of child-victims of sexual abuse as a predicate to a determination of the credibility of the child-victim as a witness. *State v. R.W.*, 104 N.J. 14, 514 A.2d 1287 (1986). We have also recognized that under certain circumstances children's accounts of sexual abuse can be highly reliable. *State v. D.R.*, 109 N.J. 348, 360, 537 A.2d 667 (1988). Nevertheless, our common experience tells us that children generate special concerns because of their vulnerability, immaturity, and impressionability, and our laws have recognized and attempted to accommodate those concerns, particularly in the area of child sexual abuse. E.g., *State v. Bethune*, 121 N.J. 137, 143-44, 578 A.2d 364 (1990) (recognizing special vulnerability of child-victims in "fresh-complaint" jurisprudence); *D.R.*, supra, 109 N.J. at 360, 537 A.2d 667 (recognizing that child sexual-abuse victims, whose victimizers are often members of family or household, are particularly susceptible to pressure to recant prior to trial); see also *Evid.R. 803(c)(27)(b)* (providing standards for determining trustworthiness of child's out-of-court statement concerning sexual abuse).

The broad question of whether children as a class are more or less susceptible to suggestion than adults is one that we need not definitively answer in order to resolve the central issue in this case. Our inquiry is much more focused. The issue we must determine is whether the interview techniques used by the State in this case were so coercive or suggestive that they had a capacity to distort substantially the children's recollections of actual events and thus compromise the reliability of the children's statements and testimony based on their recollections.

We begin our analyses by noting, as did the Appellate Division, that the "investigative interview" is a crucial, perhaps determinative, moment in a child-sex-abuse case. 264 N.J.Super. at 622-23, 625 A.2d 489 (citing Gail S. Goodman and Vicki S. Helgeson, *Child Sexual Assault: Children's Memory and the Law*, 40 U.Miami L.Rev. 181, 195 (1985)). A decision to prosecute a case of child sexual abuse often hinges on the information elicited in the initial investigatory interviews with alleged victims, carried out by social workers or police investigators. Diana Younts, *Evaluating and*

Admitting Expert Opinion Testimony In Child Sexual Abuse Prosecutions, 41 Duke L.J. 691 (1991).

That an investigatory interview of a young child can be coercive or suggestive and thus shape the child's responses is generally accepted. If a child's recollection of events has been molded by an interrogation, that influence undermines the reliability of the child's responses as an accurate recollection of actual events.

A variety of factors bear on the kinds of interrogation that can affect the reliability of a child's statements concerning sexual abuse. We note that a fairly wide consensus exists among experts, scholars, and practitioners concerning improper interrogation techniques. They argue that among the factors that can undermine the neutrality of an interview and create undue suggestiveness are a lack of investigatory independence, the pursuit by the interviewer of a preconceived notion of what has happened to the child, the use of leading questions, and a lack of control for outside influences on the child's statements, such as previous conversations with parents or peers. Younts, *supra*, 41 Duke L.J. at 729-30, 730-31; see also, John E.B. Myers, *The Child Witness: Techniques for Direct Examination, Cross-Examination, and Impeachment*, 18 Pac.L.J. 801, 889 (1987) (stating that factors that influence child's suggestibility include: (1) whether interviewer believes in presumption of guilt; (2) whether questions asked are leading or non-leading; and (3) whether interviewer was trusted authority figure).

The use of incessantly repeated questions also adds a manipulative element to an interview. When a child is asked a question and gives an answer, and the question is immediately asked again, the child's normal reaction is to assume that the first answer was wrong or displeasing to the adult questioner. See Debra A. Poole and Lawrence T. White, *Effects of Question Repetition on Eyewitness Testimony of Children and Adults*, 27 *Developmental Psychology*, November (1991) at 975. The insidious effects of repeated questioning are even more pronounced when the questions themselves over time suggest information to the children. Goodman and Helgeson, *supra*, 40 U.Miami L.Rev. at 184-187.

The explicit vilification or criticism of the person charged with wrongdoing is another factor that can induce a child to believe abuse has occurred. *Ibid.* Similarly, an interviewer's bias with respect to a suspected person's guilt or innocence can have a marked effect on the accuracy of a child's statements. Goodman and Helgeson, *supra*, 40 U.Miami L.Rev. at 195. The transmission of suggestion can also be subtly communicated to children through more obvious factors such as the interviewer's tone of voice, mild threats, praise, cajoling, bribes and rewards, as well as resort to peer pressure.

The Appellate Division recognized the considerable authority supporting the deleterious impact improper interrogation can have on a child's memory. 264 N.J.Super. at 629-34, 625 A.2d 489. Other courts have recognized that once tainted the distortion of the child's memory is irremediable. See *State v. Wright*, 116 Idaho 382, 775 P.2d 1224, 1228 (1989) ("Once this tainting of memory has occurred, the problem is irredeemable. That memory is, from then on, as real to the child as any other."). The debilitating impact of improper interrogation has even more pronounced effect among young children. Maryann King and John C. Yuille, *Suggestibility and the Child Witness*, in *Children's Eyewitness Memory*, 29 (Stephen J. Ceci et al. eds., 1987) and Stephen J. Ceci, *Age Differences in Suggestibility*, in *Children's Eyewitness Memory* 82 (Stephen J. Ceci, et al. ed., 1987).

The critical influence that can be exerted by interview techniques is also supported by the literature that generally addresses the reliability of children's memories. Those studies stress the importance of proper interview techniques as a predicate for eliciting accurate and consistent recollection. See, Gail S. Goodman, et al., *Optimizing Children's Testimony: Research and Social Policy Issues Concerning Allegations of Child Sexual Abuse in Child Abuse, Child Development, and Social Policy* 1992, Dante Cicchetti & Sheree L. Toth (Eds.).

The conclusion that improper interrogations generate a significant risk of corrupting the memories of young children is confirmed by government and law enforcement agencies, which have adopted standards for conducting interviews designed to overcome the dangers stemming from the improper interrogation of young children. The National Center for the Prosecution of Child Abuse, in cooperation with the National District Attorney's Association and the American Prosecutor's Research Institute has adopted protocols to serve as standards for the proper interrogation of suspected child-abuse victims. Those interview guidelines require that an interviewer remain "open, neutral and objective." American Prosecutors Research Institute, *National Center for Prosecution of Child Abuse, Investigation and*

Prosecution of Child Abuse at 7 (1987); an interviewer should avoid asking leading questions, *id.* at 8; an interviewer should never threaten a child or try to force a reluctant child to talk, *id.* at 9; and an interviewer should refrain from telling a child what others, especially other children, have reported. *Id.* at 24. The New Jersey Governor's Task Force on Child Abuse and Neglect has also promulgated guidelines. It states that the interviewer should attempt to elicit a child's feelings about the alleged offender, but that the interviewer should not speak negatively about that person. Governor's Task Force on Child Abuse and Neglect, *Child Abuse and Neglect: A Professional's Guide to Identification, Reporting, Investigation and Treatment*, at 31 (1988). Further, multiple interviews with various interviewers should be avoided. *Id.* at 32.

Finally, we can acknowledge judicial recognition of the very same concerns expressed in the academic literature and addressed by the guidelines established by governmental authorities with respect to the improper interrogation of alleged child sex abuse victims. The United States Supreme Court in *Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990), noted with approval the conclusion of the Idaho Supreme Court that the failure to video tape interviews with alleged child victims, the use of blatantly leading questions, and the presence of an interviewer with a preconceived idea of what the child should be disclosing, in addition to children's susceptibility to suggestive questioning, all indicate the potential for the elicitation of unreliable information. *Id.*, at 812-13, 110 S.Ct. at 3145, 111 L.Ed.2d at 650; see also *State v. Hill*, 121 N.J. 150, 168, 578 A.2d 370 (1990) (noting potentially coercive effect of having authoritarian figure participate in investigatory interview); *State v. Bethune*, *supra*, 121 N.J. at 145, 578 A.2d 364 (expressing concern over leading questions used to elicit complaint of sexual assault of minor); *State v. R.M.*, 245 N.J.Super. 504, 516, 586 A.2d 290 (App.Div.1991) (noting potential for a partisan questioner to create a coercive environment); *State v. M.Z.*, 241 N.J.Super. 444, 451, 575 A.2d 82 (Law Div.1990) (ruling child's out-of-court statement inadmissible under Evid.R. 803(c)(27) because investigator could not distinguish between what child said and what was suggested to her).

We therefore determine that a sufficient consensus exists within the academic, professional, and law enforcement communities, confirmed in varying degrees by courts, to warrant the conclusion that the use of coercive or highly suggestive interrogation techniques can create a significant risk that the interrogation itself will distort the child's recollection of events, thereby undermining the reliability of the statements and subsequent testimony concerning such events.

B.

We next turn to an examination of the interrogations conducted in this case to determine if they were so suggestive or coercive that they created a substantial risk that the statements and testimony thereby elicited lack sufficient reliability to justify their admission at trial.

The interrogations undertaken in the course of this case utilized most, if not all, of the practices that are disfavored or condemned by experts, law enforcement authorities and government agencies.

The initial investigation giving rise to defendant's prosecution was sparked by a child volunteering that his teacher, "Kelly," had taken his temperature rectally, and that she had done so to other children. However, the overwhelming majority of the interviews and interrogations did not arise from the spontaneous recollections that are generally considered to be most reliable. See *Wright*, *supra*, 497 U.S. at 826-27, 110 S.Ct. at 3152, 111 L.Ed.2d at 659 (implying that spontaneous recall is under normal conditions an accurate indicator of trustworthiness); *D.R.*, *supra*, 109 N.J. at 359, 537 A.2d 667 ("Moreover, a child victim's spontaneous out-of-court account of an act of sexual abuse may be highly credible because of its content and the surrounding circumstances."). Few, if any, of the children volunteered information that directly implicated defendant. Further, none of the child victims related incidents of actual sexual abuse to their interviewers using "free recall." 264 N.J.Super. at 629, 625 A.2d 489. Additionally, few of the children provided any tell-tale details of the alleged abuse although they were repeatedly prompted to do so by the investigators. We note further that the investigators were not trained in interviewing young children. The earliest interviews with children were not recorded and in some instances the original notes were destroyed. [FN1] Many of the interviewers demonstrated ineptness in dealing with the challenges presented by pre-schoolers, and displayed their frustration with the children.

FNI. As a matter of sound interviewing methodology, nearly all experts agree that initial interviews should be videotaped. See Goodman and Helgeson, supra, 40 U.Miami L.Rev., at 195, 198-99, David C. Raskin & John C. Yuille, Problems in Evaluating Interviews of Children in Sexual Abuse Cases in Perspectives on Children's Testimony 184, 195-96 (Stephen J. Ceci et al. eds., 1989) [hereinafter Raskin & Yuille]; Margaret A. Berger, The Deconstitutionalization of the Confrontation Clause: A proposal for a Prosecutorial Restraint Model, 76 Minn.L.Rev. 557, 608 (1992) (suggesting that the prosecutor should always provide a tape or transcript of an interview to aid in assessing suggestion or coercion). We have recognized generally that the existence of a video or sound recording of a statement elicited through pretrial interrogation is a factor bearing on its reliability. State v. Gross, 121 N.J. 1, 10, 577 A.2d 806 (1990).

In this case, fully one-half of the earliest interviews at issue here were not audio or video-taped. The record indicates that the DYFS investigator did not begin taping interviews until June 19, 1985. The Court is aware of 39 transcripts of interviews with thirty-four children, or about one-half of those interviewed by DYFS. The rest were apparently unrecorded.

Almost all of the interrogations conducted in the course of the investigation revealed an obvious lack of impartiality on the part of the interviewer. One investigator, who conducted the majority of the interviews with the children, stated that his interview techniques had been based on the premise that the "interview process is in essence the beginning of the healing process." He considered it his "professional and ethical responsibility to alleviate whatever anxiety has arisen as a result of what happened to them." A lack of objectivity also was indicated by the interviewer's failure to pursue any alternative hypothesis that might contradict an assumption of defendant's guilt, and a failure to challenge or probe seemingly outlandish statements made by the children.

The record is replete with instances in which children were asked blatantly leading questions that furnished information the children themselves had not mentioned. All but five of the thirty-four children interviewed were asked questions that indicated or strongly suggested that perverse sexual acts had in fact occurred. Seventeen of the children, fully one-half of the thirty-four, were asked questions that involved references to urination, defecation, consumption of human wastes, and oral sexual contacts. Twenty-three of the thirty-four children were asked questions that suggested the occurrence of nudity. In addition, many of the children, some over the course of nearly two years leading up to trial, were subjected to repeated, almost incessant, interrogation. Some children were re-interviewed at the urgings of their parents.

The record of the investigative interviews discloses the use of mild threats, cajoling, and bribing. Positive reinforcement was given when children made inculpatory statements, whereas negative reinforcement was expressed when children denied being abused or made exculpatory statements.

Throughout the record, the element of "vilification" appears. Fifteen of the thirty-four children were told, at one time or another, that Kelly was in jail because she had done bad things to children; the children were encouraged to keep "Kelly" in jail. For example, they were told that the investigators "needed their help" and that they could be "little detectives." Children were also introduced to the police officer who had arrested defendant and were shown the handcuffs used during her arrest; mock police badges were given to children who cooperated.

In addition, no effort was made to avoid outside information that could influence and affect the recollection of the children. As noted by the Appellate Division, the children were in contact with each other and, more likely than not, exchanged information about the alleged abuses. 264 N.J.Super. at 629, 625 A.2d 489. Seventeen of the thirty-four children were actually told that other children had told investigators that Kelly had done bad things to children. In sum, the record contains numerous instances of egregious violations of proper interview protocols.

We thus agree with the Appellate Division that the interviews of the children were highly improper and employed coercive and unduly suggestive methods. As a result, a substantial likelihood exists that the children's recollection of past events was both stimulated and materially influenced by that course of questioning. Accordingly, we conclude that a hearing must be held to determine whether those clearly improper interrogations so infected the ability of the children to recall the alleged abusive events that their pretrial statements and in-court testimony based on that recollection are unreliable and should not be admitted into evidence.

IV

This Court has a responsibility to ensure that evidence admitted at trial is sufficiently reliable so that it may be of use to the finder of fact who will draw the ultimate conclusions of guilt or innocence. That concern implicates principles of constitutional due process. "[R]eliability [is] the linchpin in determining admissibility" of evidence under a standard of fairness that is required by the Due Process Clause of the Fourteenth Amendment. *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S.Ct. 2243, 2253, 53 L.Ed.2d 140, 154 (1977). Competent and reliable evidence remains at the foundation of a fair trial, which seeks ultimately to determine the truth about criminal culpability. If crucial inculpatory evidence is alleged to have been derived from unreliable sources due process interests are at risk. *Hurd*, supra, 86 N.J. at 547, 432 A.2d 86.

A.

We acknowledge that although reliability assessments with respect to the admissibility **1381 of out-of-court statements are commonplace, e.g., *Hill*, supra, 121 N.J. at 150, 578 A.2d 370; *Bethune*, supra, 121 N.J. at 137, 578 A.2d 364; *State v. Spruell*, 121 N.J. 32, 577 A.2d 821 (1990); *State v. A. Gross*, 121 N.J. 1, 577 A.2d 806 (1990); *D.R.*, supra, 109 N.J. at 348, 537 A.2d 667, assessing reliability as a predicate to the admission of in-court testimony is a somewhat extraordinary step. Nevertheless, it is not unprecedented. See *Manson*, supra, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (authorizing hearing to determine admissibility of in-court identification testimony because of pretrial suggestiveness); *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964) (same); *State v. Gookins*, 135 N.J. 42, 637 A.2d 1255 (1994) (requiring pretrial taint hearing to determine admissibility of evidence because of prior falsified police breathalyzer reports); *Hurd*, supra, 86 N.J. 525, 432 A.2d 86 (ruling taint hearing necessary to determine admissibility of hypnotically-recalled in-court testimony); *State v. Sugar*, 84 N.J. 1, 417 A.2d 474 (1980) (requiring taint hearing following police investigatory conduct that led to inadmissible evidence). When faced with extraordinary situations in which police or prosecutorial conduct has thrown the integrity of the judicial process into question, we have not hesitated to use the procedural protection of a pretrial hearing to cleanse a potential prosecution from the corrupting effects of tainted evidence. *Gookins*, supra, 135 N.J. at 42, 637 A.2d 1255; *Sugar*, supra, 84 N.J. at 1, 417 A.2d 474; *State v. Peterkin*, 226 N.J.Super. 25, 543 A.2d 466 (App.Div.), certif. denied, 114 N.J. 295, 554 A.2d 850 (1988).

The determination of the reliability of pretrial statements must take into account all relevant circumstances. In *Gross*, supra, we detailed the range of factors that might bear on the reliability of a pretrial statement. Among those are the person or persons to whom the statement was made; the manner and form of interrogation; physical and mental condition of the declarant, the use of inducements, threats or bribes; and the inherent believability of the statement. 121 N.J. at 10, 577 A.2d 806.

The inquiry into the reliability of pretrial statements of children in a child-sex-abuse case is similarly comprehensive. The Appellate Division recognized that the assessment of the trustworthiness of a child's statements made in the course of an investigatory interview must touch all relevant circumstances. 264 N.J.Super. at 633, 625 A.2d 489. In *D.R.*, supra, 109 N.J. at 348, 537 A.2d 667, dealing with the admissibility of statements by child-victims of sexual-abuse under the age of twelve, the Court required a hearing to determine whether a child's statement possesses sufficient indicia of reliability. Among the factors that bear on that determination are: (1) the person to whom the child made the statement; (2) whether the statement was made under conditions likely to elicit truthfulness; (3) whether the child's recitation exhibits unusual or above-age-level familiarity with sex or sexual functions; (4) post-event and post-recitation distress; (5) any physical evidence of abuse; and (6) any congruity between a defendant's confession or statement. *Id.* at 358, 537 A.2d 667; Evid.R. 803(c)(27)(b) (providing "that on the basis of the time, content, and the circumstances of the statement there is a probability that the statement is trustworthy"). In *Hill*, the Court noted several factors that should be considered in assessing the reliability of a complaint regarding sexual offenses. They are: (1) the age of the victim, (2) circumstances of the questioning; (3) the victim's relationship with the interrogator; and (4) the type of questions asked, 121 N.J. at 168, 578 A.2d 370; see also *Idaho v. Wright*, supra, 497 U.S. at 820, 110 S.Ct. at 3149, 111 L.Ed.2d at 655-56 ("We think the 'particular guarantees of trustworthiness' ... must likewise be drawn from the totality of the circumstances that surround the making of the statement.").

In this case we are equally concerned about the reliability of anticipated in- court testimony that may be derived from

the out-of-court statements and antecedent interrogations. The considerations that are germane to the assessment of the reliability of in-court testimony parallel those that inform the determination of the reliability of out-of-court statements.

The law governing the admissibility of eye-witness identification testimony provides a helpful perspective in addressing the concerns at issue here. The United States Supreme Court has insisted that a pretrial hearing be held to determine the reliability and admissibility of proffered in-court testimony based on unduly suggestive identification procedures. *Manson*, supra, 432 U.S. at 114, 97 S.Ct. at 2253, 53 L.Ed.2d at 154. Like the investigatory interview in a child sexual-abuse case, a pretrial identification procedure can be a critical moment in the course of a criminal prosecution. *United States v. Wade*, 388 U.S. 218, 230, 87 S.Ct. 1926, 1932, 18 L.Ed.2d 1149, 1158 (1967). The pretrial identification, like the investigatory interview with a child victim, is "peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial." *Ibid.* Similarly, the effects of an initially suggestive identification, like those of a coercive or suggestive interrogation, are likely to remain corrosive over time; that is, "once the witness has picked out the accused ... he is not likely to go back on his word later." *Id.* 388 U.S. at 229, 87 S.Ct. at 1933, 18 L.Ed.2d at 1159. Further, the effects of suggestive pre-trial identification procedures, as with suggestive or coercive interview practices, are exceedingly difficult to overcome at trial. *Ibid.* Witnesses in both situations are quite likely to be absolutely convinced of the accuracy of their recollection. Thus their credibility, understood as their obvious truth-telling demeanor, is unlikely to betray any inaccuracies or falsehoods in their statements. *Younts*, supra, 41 Duke L.J. at 727.

We have also recognized that when an identification is crucial to the prosecution of a criminal case, its reliability, and ultimate admissibility, must be strictly tested through a searching pretrial hearing. E.g., *State v. Clausell*, 121 N.J. 298, 326, 580 A.2d 221 (1990); *State v. Madison*, 109 N.J. 223, 233, 536 A.2d 254 (1988); *State v. Ford*, 79 N.J. 136, 137, 398 A.2d 95 (1979).

Similarly, we have used the protection of a pretrial hearing to assay the reliability of testimony based on the recollection of a witness that may have been altered by suggestive influences. In *Hurd*, supra, 86 N.J. at 525, 432 A.2d 86, this Court required a pretrial hearing to determine the reliability of testimony based on hypnotically-induced recollection. The identification at issue in *Hurd* was not the product of a conventional pretrial identification proceeding, such as a line-up or photo array, which concerned the Supreme Court in *Wade* and *Manson*. Ms. *Hurd*, a victim of an attack, recalled the assault but could not recall her assailant. She underwent hypnosis and was able to remember that her husband, Paul, had been her attacker. The Court determined that before a witness could be permitted to testify about matters that he or she was able to recall only through hypnosis, a pretrial hearing must be held to ensure that the hypnotic technique used on the witness was "reasonably reliable." 86 N.J. at 543, 432 A.2d 86. See *Elizabeth Loftus and Graham Davies, Distortions in the Memory of Children* 40 *J.Soc.Issues*, 51, 52-53 (1984) (drawing analogy between amalgamation of fact and fantasy in children's memories and process that occurs in hypnosis).

We are confronted in this case with pretrial events relating not to the identification of an offender but, perhaps more crucially, to the occurrence of the offense itself. Those events--investigatory interviews--are fraught with the elements of untoward suggestiveness and the danger of unreliable evidentiary results. We thus concur in the determination of the Appellate Division, 264 N.J.Super. at 631-32, 625 A.2d 489, that to ensure defendant's right to a fair trial a pretrial taint hearing is essential to demonstrate the reliability of the resultant evidence.

B.

The pretrial hearing should be conducted pursuant to Evid.R. 104. The basic issue to be addressed at such a pretrial hearing is whether the pretrial events, the investigatory interviews and interrogations, were so suggestive that they give rise to a substantial likelihood of irreparably mistaken or false recollection of material facts bearing on defendant's guilt. See *Simmons v. United States*, 390 U.S. 377, 384, 88 S.Ct. 967, 971, 19 L.Ed.2d 1247, 1253 (1968) (ruling that evidence would be excluded if pretrial identification procedures "give rise to a very substantial likelihood of irreparable misidentification"); *State v. Clausell*, supra, 121 N.J. at 325, 580 A.2d 221.

Consonant with the presumption that child victims are to be presumed no more or less reliable than any other class of

witnesses, the initial burden to trigger a pretrial taint hearing is on the defendant. *Watkins v. Sowders*, 449 U.S. 341, 101 S.Ct. 654, 66 L.Ed.2d 549 (1981) (holding that no constitutional mandate exists for pretrial Wade hearing be held merely because counsel demands it). The defendant must make a showing of "some evidence" that the victim's statements were the product of suggestive or coercive interview techniques. *Id.*, 449 U.S. at 350, 101 S.Ct. at 659, 66 L.Ed.2d at 577 (Brennan, J., dissenting); *State v. Rodriguez*, 264 N.J.Super. 261, 269, 624 A.2d 605 (App.Div.1993); *State v. Ortiz*, 203 N.J.Super. 518, 522, 497 A.2d 552 (App.Div.), certif. denied, 102 N.J. 335, 508 A.2d 212 (1985).

That threshold standard has been met with respect to the investigatory interviews and interrogations that occurred in this case. Without limiting the grounds that could serve to trigger a taint hearing, we note that the kind of practices used here--the absence of spontaneous recall, interviewer bias, repeated leading questions, multiple interviews, incessant questioning, vilification of defendant, ongoing contact with peers and references to their statements, and the use of threats, bribes and cajoling, as well as the failure to videotape or otherwise document the initial interview sessions--constitute more than sufficient evidence to support a finding that the interrogations created a substantial risk that the statements and anticipated testimony are unreliable, and therefore justify a taint hearing.

Once defendant establishes that sufficient evidence of unreliability exists, the burden shall shift to the State to prove the reliability of the proffered statements and testimony by clear and convincing evidence. *Hurd*, supra, 86 N.J. at 546, 432 A.2d 86. Hence, the ultimate determination to be made is whether, despite the presence of some suggestive or coercive interview techniques, when considering the totality of the circumstances surrounding the interviews, the statements or testimony retain a degree of reliability sufficient to outweigh the effects of the improper interview techniques. The State may attempt to demonstrate that the investigatory procedures employed in a case did not have the effect of tainting an individual child's recollection of an event. To make that showing, the State is entitled to call experts to offer testimony with regard to the suggestive capacity of the suspect investigative procedures. The defendant, in countering the State's evidence, may also offer experts on the issue of the suggestiveness of the interrogations. However, the relevance of expert opinion focusing essentially on the propriety of the interrogation should not extend to or encompass the ultimate issue of the credibility of an individual child as a witness. Cf. *State v. R.W.*, supra, 104 N.J. at 26, 514 A.2d 1287 (holding that absent strong showing of abnormality and substantial need child may not be subjected to psychiatric examination by expert for purpose of determining credibility). The State is also entitled to demonstrate the reliability of the child's statements or testimony by proffering independent indicia of reliability. See *Ford*, supra, 79 N.J. at 137, 398 A.2d 95 (inquiring, "whether there are sufficient indicia of reliability to outweigh the 'corrupting effect of the suggestive identification itself.'") (quoting *Manson*, supra, 432 U.S. at 114, 97 S.Ct. at 2253, 53 L.Ed.2d at 154). It bears repeating that the focus of the pretrial hearing is on the coercive and suggesting propensity of the investigative questioning of each child and whether that questioning, examined in light of all relevant circumstances, gives rise to the substantial likelihood that the child's recollection of actual events has been irretrievably distorted and the statements and the testimony concerning those events are unreliable.

In choosing the burden of proof to be imposed on the State, we are satisfied that the clear-and-convincing-evidence standard serves to safeguard the fairness of a defendant's trial without making legitimate prosecution of child sexual abuse impossible. We have applied the clear and convincing evidence standard to other areas in which the issue of illegal or unreliable evidence was in question. See, e.g., *State v. Sugar*, 100 N.J. 214, 239, 495 A.2d 90 (1985) (applying "clear and convincing evidence" standard as burden of proof with respect to "inevitable discovery" discovery claim), *Hurd*, supra, 86 N.J. at 546, 432 A.2d 86 (imposing "clear and convincing" standard on party who proffers hypnotically refreshed testimony).

We have not hesitated to employ the sternest standard of proof in cases involving egregious prosecutorial or police misconduct that implicates judicial integrity and the administration of justice. *Gookins*, supra, 135 N.J. at 51, 637 A.2d 1255 (relying on the procedure out-lined in *Sugar*, supra, 84 N.J. at 25, 417 A.2d 474 and imposing beyond a reasonable doubt standard of proof to counteract egregious constitutional violations); *State v. Gerald*, 113 N.J. 40, 118, 549 A.2d 792 (1988) (requiring proof beyond a reasonable doubt that confession was voluntary). Here, however, although we find the prosecutorial investigations to have been professionally inept, we cannot conclude that the improper investigatory techniques were the result of conscious bad faith rather than a lack of training coupled with over-zealousness.

Our decision today should make clear that the investigatory techniques employed by the prosecution in this case are

unacceptable and that prudent prosecutors and investigatory agencies will modify their investigatory practices to avoid those kinds of errors and to conform to those standards that are now accepted by the professional and law enforcement communities. Therefore, we conclude that the need to deter prosecutorial misbehavior will be adequately fulfilled by the clear and convincing-evidence standard.

Finally, if it is determined by the trial court that a child's statements or testimony, or some portion thereof, do retain sufficient reliability for admission at trial, then it is for the jury to determine the probative worth and to assign the weight to be given to such statements or testimony as part of their assessment of credibility. Experts may thus be called to aid the jury by explaining the coercive or suggestive propensities of the interviewing techniques employed, but not of course, to offer opinions as to the issue of a child-witness's credibility, which remains strictly a matter for the jury. *R.W.*, supra, 104 N.J. at 26, 514 A.2d 1287. We add the observation that the jury must make that determination in light of all the surrounding circumstances, and without reference to the trial court's determination and ruling on admissibility. See *Crane v. Kentucky*, 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (stressing defendant's right to adduce evidence of circumstances surrounding confession even after Court determines confession admissible); *State v. Hampton*, 61 N.J. 250, 271, 294 A.2d 23 (1972) ("admissibility of evidence is for the Court ... it is admitted when a proper predicate is laid for it. If the predicate is disputed but the court is satisfied the evidence should be received, it is accepted for jury consideration, with an instruction that if they found it credible, then it is admissible for consideration in making up their verdict.").

C.

In conclusion, we find that the interrogations that occurred in this case were improper and there is a substantial likelihood that the evidence derived from them is unreliable. We therefore hold that in the event the State seeks to re-prosecute this defendant, a pretrial hearing must be held in which the State must prove by clear and convincing evidence that the statements and testimony elicited by the improper interview techniques nonetheless retains a sufficient degree of reliability to warrant admission at trial. Given the egregious prosecutorial abuses evidenced in this record, the challenge that the State faces is formidable. If the statements and proffered testimony of any of the children survive the pretrial hearing, the jury will have to determine the credibility and probative worth of such testimony in light of all the surrounding circumstances.

V

The judgment of the Appellate Division is affirmed.

Note: Proper names of the investigators have been deleted throughout.

APPENDIX

This Appendix presents a detailed summary of several interviews.

1. R.F.

R.F., a three-year-old girl, was interviewed on June 21, 1985, by the Essex County Prosecutor's Office at the Wee Care facility. After several minutes of small talk, R.F. told the investigator that Kelly sometimes sings in school. In response to her inquiry, R.F. indicated that the school owned a piano and that she would show the investigators where it was. At that point, the interview went off the record and R.F. apparently took the interviewers to the piano room. On their return to the interview room, the following colloquy took place between the investigator and R.F.

The investigator asked, "Do you remember what you were saying to me? You said,--you said Kelly did a lot of bad things to the children."

R.F. responded, "No, she's in jail.... Because she did a lot of bad things.

R.F. was unable to identify any of the "bad things" that Kelly did because, according to R.F., "she only did them to D.A." Then, after several minutes of trying to get R.F. to draw pictures, including one of Kelly, the investigators returned to the alleged abuse. An investigator asked if Kelly or Brenda (another teacher at Wee Care) had ever hurt

her. R.F. was clear and unambiguous with her response. R.F. was absolutely certain that they had done nothing to her. The investigators continued to press the questioning. R.F. continually stressed that she had not been hurt or touched. R.F. did say, however, that "they (Kelly and Brenda) did hurt D.A." The interview continued uneventfully, ending with R.F. telling the interviewers that she would like to come back to the school.

A detective from the Prosecutor's office interviewed R.F. again on July 3, 1985. The detective approached his questioning of R.F. somewhat differently than had the previous investigators in that he appeared not to have any warm up period with the child. Prior to engaging in any small talk or even introducing himself to R.F., he asked her "where's Kelly?" In an effort to find out what relationship R.F. had with Kelly the investigator asked the following questions:

Detective: Do you know Kelly?

R.F.: Yes.

Detective: Was Kelly your teacher?

R.F.: Yeah, but she did a lot of bad things to me.

Detective: [W]hat did she do to you that was bad?

R.F.: Yesterday she did something. But I don't know what it is.

Detective: Sure you do, would you like to show me instead of tell me?

R.F. then drew a picture of Kelly, giving her a "mad" face. She indicated to him that she drew a mad face simply because she wanted Kelly to have a mad face. The detective continued the interview asking pointed questions:

Detective: Do you think Kelly can hurt you?

R.F.: No.

Detective: Did Kelly say she can hurt you? Did Kelly ever tell you she can turn into a monster?

R.F.: Yes.

Detective: What did she tell you?

R.F.: She was gonna turn into a monster.

* * * *

Detective: What did Kelly,--was Kelly a good girl or a bad girl?

R.F.: She was a bad girl.

Detective: She was a bad girl, were there any other teachers that were bad?

R.F.: No.

Detective: No, O.K. Kelly was the only bad girl? What did Kelly do that made her a bad girl?

R.F.: She readed [sic].

Detective: She what?

R.F.: She um, she readed [sic] and she came to me and I said no, no, no.

Detective: Did she hurt you?

R.F.: I hurted [sic] her.

Detective: How did you hurt her?

R.F.: Because she, I didn't want to write, and she write and I said no, no, no, no, and I hit her.

* * * * *

The Detective then questioned R.F. using anatomically correct dolls in an apparent attempt to elicit from R.F. the level of understanding she had concerning certain body parts.

Detective: What are these?

R.F.: Dolls.

Detective: O.K. But what am I pointing to? What's that?

R.F.: An eye, mouth, nose arm.

Detective: What do you call this right here?

R.F.: Vagina.

Detective: What's this right here?

R.F.: Tooshie.

Detective: Tooshie. O.K. What do you call these right up here?

R.F.: I don't know.

Detective: O.K. what do you want to name them? Do you want to name them breasts?

R.F.: Yeah.

Detective: Now we are going to pretend that this is a little boy.

R.F.: Let me see the little boy.

Detective: It has no arms or legs or anything, but we are going to pretend that it's a little boy doll, O.K.? What do you call the little thing between the little boy's legs?

R.F.: Um, feet.

Detective: No, up farther between the legs. Right here.

R.F.: Vagina.

Detective: No, it's a vagina on a little girl, what is it on a little boy?

R.F.: Penis.

Detective: Penis, very good. O.K. Now did you ever see a little boy's penis in the school?

R.F.: Yes, M.Z.'s.

Detective: O.K. Who else was there?

R.F.: That's it, only one.

Detective: Just M.Z. and you? Was Kelly there?

R.F.: She was at jail.

The questioning of R.F. continued; the detective sought to uncover any "bad things" Kelly might have done to R.F. or to anyone else. The following sequence of questions and answers was the first time the use of utensils entered the discussion:

Detective: Now, did Kelly ever do any bad things to you?

R.F.: No.

Detective: Not at all?

R.F.: No.

Detective: Did Kelly ever hurt you?

R.F.: No.

Detective: Do these look familiar?

R.F.: What are them [sic]?

Detective: You tell me what they are?

R.F.: Knife.

Detective: Knife.

R.F.: Do you have anything to eat in here?

Detective: We're going to pretend that this is a spoon, O.K.?

R.F.: O.K., and this is a knife.

Detective: Did Kelly ever do anything to you with a knife that hurt you? Or bad things to you with a knife?

R.F.: No.

Detective: No. O.K. Do [sic] she ever do bad things or hurt you with a spoon?--No. Did she ever do bad things or hurt you with a knife--I mean fork? OK. What about a wooden spoon? Did you ever see her do bad things or hurt anybody?

R.F.: Um, no.

After concluding the discussion of utensils, and whether Kelly had used utensils on R.F. or any other child, the discussion once again focused on Kelly's alleged mistreatment of R.F. The questioning of this child continued for several more transcript pages. In an attempt to obtain additional information from R.F., the detective told her that he had spoken to several of her friends already and that the information she could provide would help her friends.

2. P.I.

On June 27, 1985, investigators from DYFS and from the Prosecutor's Office interviewed P.I., a four-and-a-half year old. The interview appeared to be adversarial from the outset. P.I. no longer wanted to participate in any interviews. In an attempt to convince P.I. to cooperate, Investigator (I) told P.I. that he and his colleague had spoken with "lots of other [helpful] kids" since they had last spoken, and that the sooner P.I. cooperated, the sooner they could get out of

there. P.I. became annoyed with his persistence telling him that he did not want to talk to him, and stating emphatically, "I hate you." Investigator (I) attempted to calm P.I. and reassured him that he really did not hate the investigator, in fact he knew that P.I. secretly liked him. Over the course of what appears to be several minutes of conversation, P.I. responded to his questions, on at least ten occasions, with "I hate you."

P.I. began to participate in the conversation but continued his refusal to discuss anything concerning Kelly. In an attempt to gain his cooperation, the investigators tried a different approach:

Investigator (I): Come on do you want to help us out? Do you want to help us keep her (Kelly) in jail.

P.I.: No.

* * * * *

Investigator (I): Tell me what happened.... I'll make you fall on your butt again.

P.I.: No!

* * * * *

Investigator (I): I'll let you hear your voice and let you play with the tape recorder. I need your help again, buddy. Come on.

P.I.: No.

* * * * *

Investigator (I): Just tell me--show me what happened with the wooden spoon. Let's go.

P.I.: I forgot.

Investigator (I): No you didn't. I'll tell you what, let's just go to the P.I. doll, we won't waste any time.

Investigator (II): Now listen you have to behave.

Investigator (I): Do you want me to tell him to behave?

Investigator (II): Are you going to be a good boy? Huh? You have to be good. Yes or no?

P.I.: Yes.

* * * * *

Investigator (I): If you don't remember words, maybe you can show me.

P.I.: I forgot....

Investigator (I): You remember. You told your mommy about everything, about the music room. And the nap room. And all the stuff. You want to help her stay in jail don't you. So she doesn't bother you anymore and so she doesn't tell you any more scary stories. Did she tell you a story like about this little bird and he built a nest. But did she do that though?

P.I.: Yes.

After P.I. began to cooperate the interviewers' questions turned to more specific acts allegedly committed by Kelly. P.I. told Investigator (I) that he and another Wee Care child put their penises into Kelly at the same time. They were able to accomplish that by chopping off their penises. Further, some of the children had to urinate in Kelly's mouth, and she would do the same to them. P.I. also discussed the utensils used by Kelly on the children.

Investigator (I): Did she put the fork in your butt? Yes or no?

P.I.: I don't know, I forgot.

Investigator (I): You forgot? O.K. Did she do anything else to your bottom?

P.I.: That's all that she did.

Investigator (I): What was it that she did to you?

P.I.: I hate you. I hate you.

Investigator (I): Oh, come on, if you just answer that you can go.

P.I.: I hate you.

Investigator (I): No you don't.

P.I.: Yes I do.

Investigator (I): You love me I can tell. Is that all that she did to you, what did she do to your hiney?

Investigator (II): What did she do to your hiney? Then you can go.

P.I.: I forgot.

Investigator (II): Tell me what Kelly did to your hiney and then you can go. If you tell me what she did to your hiney we'll let you go.

P.I.: No.

Investigator (I): Please.

P.I.: O.K. O.K. O.K.

Investigator (I): Tell me now.

P.I.: O.K.

Investigator (I): What did Kelly do to your hiney?

P.I.: I'll try to remember.

Investigator (I): What did she put in your hiney?

P.I.: The fork.

Investigator (I): Did that hurt a lot? Did you bleed?

P.I.: Nope.

3. B.M.

On June 26, 1988, Investigator (I) interviewed B.M., a six year-old boy. The interview began in typical fashion with Investigator (I) asking B.M. to draw pictures of himself, his mother, his father and Kelly. After B.M. drew several pictures, Investigator (I) began asking B.M. about Kelly.

Investigator (I): I talked to all of [the kids in your class] and they were telling me how they didn't like the stuff Kelly was doing. Anyway I like talking to you older guys better because you're better to talk **1389 to, more like grownups than the little kids in the nursery school. So I'm asking you a favor--

B.M.: Why because they talked about Kelly because she did something bad to them?

Investigator (I): Uh, huh.

B.M.: What?

Investigator (I): She did bad stuff to them.

B.M.: Not me.

* * * * *

Investigator (I): She was hurting some kids in not some nice ways. So I'm wondering if you saw anything. You can help me to find out who some of the hurt kids are so that I can make it all better again. Because they must be pretty upset and pretty mad.

B.M.: What did she do?

Investigator (I): Well, I don't want to tell you exactly what she did because you may know something that I don't know yet, and that can really help.... These are funny dolls. A little different from those you have seen before.

B.M.: I want to leave.

Investigator (I): Why.

B.M.: Because I don't like--

Investigator (I): Like what? You don't like being here: Well you'll be out of here in a couple of minutes. And you never have to come back if you don't want to. Anyway these are--what's different about these dolls, this one's a boy.

B.M.: Yeah.

Investigator (I): Because he's got a what? What do you call this?

B.M.: I don't know.

Investigator (I): You know. Is it a peepee [sic] or a penis? What's the word you use?

B.M.: A wee-wee.

* * * * *

Investigator (I) then went to a female doll and asked B.M. questions about its anatomy.

Investigator (I): What are these things. What do we all have here? Breasts or boobies, what do you want to call them?

B.M.: You're teaching me.

Investigator (I): I'm not teaching you, I am asking you. Come on. Don't go throwing stuff around like that. It's not very nice.

B.M.: Stop teaching me this stuff.

Investigator (I): You got [sic] to learn somehow. The little three-year-old kids knew what everything was. And you don't. Anyway, what I did is [sic] show the kids dolls like this and then I pull out this stuff. A wooden spoon, a fork, a knife and a teaspoon, a metal spoon. Your daddy was telling that you would hit mommy. Mommy would hit you on the butt sometimes when you deserved it, right? But aside from that did you ever see Kelly hurt anybody with this?

B.M.: Yeah.

Investigator (I): How do you think she might hurt somebody with this? For example, it would hurt, how do you think she might hurt a little boy with this, this wooden spoon.

B.M.: She did that. [Apparently demonstrating with the doll and the spoon that Kelly would smack the boys on the bottom.]

Investigator (I) introduced the possible use of other utensils into the conversation, identifying each to B.M. B.M. steadfastly refused to say that he was hurt with any of the utensils by Kelly. At one point however, he seemed to implicate his mother as the one responsible for the bruises on his back. Investigator (I) continued to question B.M. about how Kelly used the various utensils on him and his friends. At one point he exhibited frustration at not receiving the cooperation or the answers for which he was looking.

Investigator (I): I want to ask you something.

B.M.: No.

Investigator (I): Don't be a baby. You're acting like a nursery school kid. Come here. Come here a second. B.M., come here. We're not finished yet. Sit down.

B.M.: No.

Investigator (I): Come here. Seriously, we are going to need your help on this.

B.M.: No I'm not.

Investigator (I): How do you think she would hurt boys and girls, with a fork? A fork in the face? Sticking on the legs? The arms or on the neck? Does that hurt?

B.M.: [Inaudible reply.]

At that point in the questioning B.M. told Investigator (I) that he wanted to leave. Investigator (I), in an effort to put B.M. at ease, changed the tenor of the conversation and began to reassure B.M. that he was safe from Kelly.

Investigator (I): I know it must not be very easy to remember this and to talk about it. It's painful and embarrassing. I also know that she scared a lot of kids and telling them things that weren't true. About monsters and about how she can fly. I heard all those stories from your friends. Did you know Kelly is in jail?

B.M.: Yeah.

Investigator (I): If you help me out, when we finish here in a couple of minutes I will introduce you to the man who put her in jail.

B.M.: I thought you put her in jail.

Investigator (I): I helped to get her there. By talking to all the kids and telling me the truth about what happened. The more kids we get to tell us what happened the longer she can stay in jail. You see?

You said you were real upset when she was hurting your friend or damaging your friends, we do not want her damaging anymore kids, right? So when we finish today, I will introduce you to the man who put her in jail. And, if you want, if you help me out I can have Sgt. Noonan of the local police department show you what a jail cell looks like so that you can see it, how tough it is for her, she cannot break out of jail, like she was telling everybody. I think she was telling everybody she had superpowers, that she could see through walls and stuff like that. She doesn't have anything like that. She's a regular woman. A regular person.

B.M.: Is she really like that? Super powers?

Investigator (I): No. I think you know that she doesn't have super powers. You know what it is, Kelly was sick when she was hurting kids. It's o.k. to like her, she was a nice lady until she got sick. And then after she got sick is when she started hurting kids....

Investigator (I): Did she try to bother you and you didn't let her?

B.M.: No.

Investigator (I): It would be o.k. to tell me the truth if she did try to bother you just so that you can show me how she might just try to hurt these other kids. 'Cause the more we know the longer she will stay in jail. You understand? And I think you would like to know that she doesn't have any secret powers, she can't fly, she can't see through walls, she can't hurt anybody with her vision.... What are some of the other stories that she used to scare the kids? That they wouldn't tell anybody. Did she tell them she would hurt their parents or something Do you know if she said that?

B.M.: Yeah.

Investigator (I): You know that's not true.... The police put her in jail. Because she was hurting you, you know. That's why I really need your help, especially you older kids, you six-year-olds and kindergartners, because you can talk better than the little kids, and you can show **1391 things a little clearer on the dolls. And if you help us out we can take you on a little tour of the jail. And you will be helping to keep her in jail longer so that she doesn't hurt anybody else. Not to mention that you'll feel a lot better once you start--

B.M.: It's scaring me.

* * * * *

Investigator (I): That's o.k.... Believe me she is not going to be coming out of jail. She's not going to be hurting you guys anymore. That's why I'm really proud of you, and E.N. and L.J. Which one got hurt the worst?

B.M.: None of them.

Investigator (I): That's not what they told me.

B.M.: I never saw anybody get hurt.

Investigator (I): You never saw anybody get hurt? Did they ever tell you that they got hurt? See, the reason I think that you might have gotten hurt or seen them ... is that you started to show me on the dolls just exactly what happened. And unless you saw it happen you wouldn't really know, would you?

B.M.: I didn't get hurt.

Investigator (I): No maybe you didn't, maybe you fought her off. Maybe you really didn't hurt then. Maybe you saw your other friends getting hurt and you didn't like it very much. You know.

* * * * *

B.M.: What did Kelly do?

Investigator (I): Oh I think you know. N.J. told me, and G.G. told me that she hurt them in the gym downstairs. And E.N. told me what he saw.

B.M.: What did he see?

Investigator (I): I don't want to tell you what they told me because I want to know if everybody is telling me the truth. If what you tell me goes along with what they said, then I know they were all telling the truth. You know what I mean, jellybean.

B.M.: I want to leave.--Now!

Investigator (I): Did you ever go in the music room? The room with the big black piano?

B.M.: No.

Investigator (I): Did you ever see Kelly play Jingle Bells on the piano?

B.M.: No.

Investigator (I): How did she look when she was sitting at the piano?

B.M.: I never saw her play the piano.

Investigator (I): Did she look like this when she was sitting at the piano?

B.M.: No.

Investigator (I): Did you ever see Kelly locking any of the kids in the bathroom or closet?

B.M.: No.

Investigator (I): If you did see her hurt any kids would you tell me?

B.M.: No.

B.M. steadfastly refused to implicate Kelly in any way. The interview continued for a few more minutes, ending with Investigator (I)'s final attempts to gain "cooperation" from B.M.

B.M.: I want to leave now.

Investigator (I): I'd hate having to tell your friends that you didn't want to help them.

B.M.: I do.

Investigator (I): I'll have to tell them that you didn't want to though.

The interview ended without any further comment from B.M.

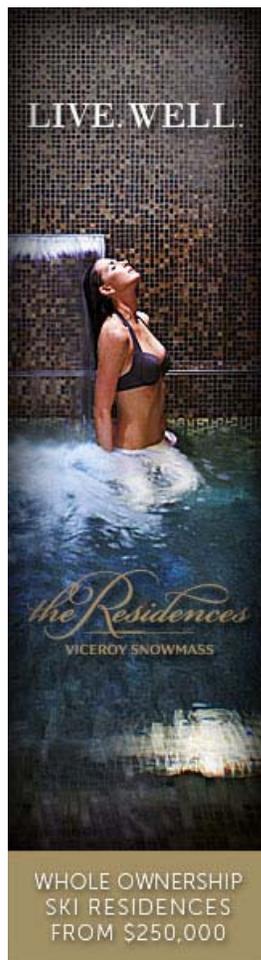
For affirmance--Chief Justice WILENTZ, and Justices CLIFFORD, HANDLER, POLLOCK, O'HERN, GARIBALDI and STEIN--7.

For reversal--none.

[McMartin Trial Homepage](#)

[COLLECTIONS > PROSECUTION](#)

ADS BY GOOGLE



Prosecutors Rebuked in Molestation Case

By SETH MYDANS
Published: June 03, 1994

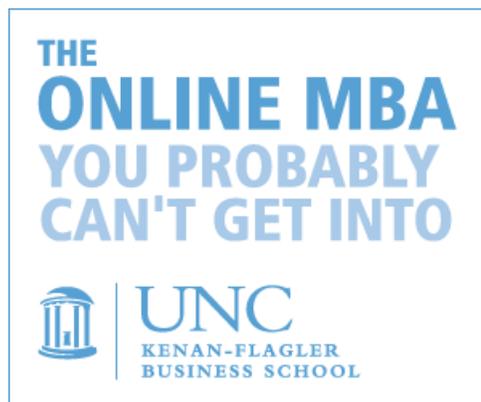
Therapists and parents improperly prodded children to accuse a child-care worker of bizarre sexual abuse, a San Diego grand jury said in a report issued on Wednesday that sharply criticized the prosecution" of the case.

In November, after seven months of trial, a jury took seven hours to acquit Dale Akiki, 35, a mentally retarded and physically deformed church volunteer, who had been charged with sexually abusing, torturing and kidnapping nine children at a suburban San Diego church in 1988 and 1989.

The grand jury, which investigated the case at the request of San Diego County supervisors, said the children had been pressured to come up with stories about satanic ritual abuse, with therapists improperly serving as investigators. The report also accused the county District Attorney, Ed Miller, of failing to adequately supervise his deputies in the case.

"Overzealous prosecution can lead to injustice," said Joe Dolphin, the foreman of the grand jury. "Lawyers should try cases, not causes. When perspective gets lost, everything becomes muddled and tainted."

ADS BY GOOGLE



More Like This

[METRO NEWS BRIEFS: NEW JERSEY; Judge Denies Damages To Day...](#)

[Metro Briefing | Connecticut: Hartford: Criminal Inquiry On...](#)

[Charge Against Webber Is Dropped](#)

[Find More Stories](#)
[Prosecution](#)

Mr. Miller responded that many criticisms in the report were being addressed by his office, which he said had engaged in a "candid self-assessment."

Mr. Akiki, who was held for two and a half years without bail, is bringing a civil suit for \$110 million against San Diego County.

Kate Coyne, the public defender who represented Mr. Akiki, said the report did not go far enough. "I think there is a recognition in these conclusions that Dale Akiki is innocent and should never have been prosecuted," she said.

As the Akiki case proceeded last year, the testimony of the children, who were 3 and 4 years old at the time he was a volunteer and were now at least 7, became increasingly colorful, including descriptions of satanic rites. They accused Mr. Akiki of hanging them upside down from a chandelier, dunking them in toilets, drinking blood, bringing an elephant and a giraffe to class and mutilating and killing animals and a human baby.

The grand jury criticized the prosecution for asking therapists to attend a seminar on ritual abuse and for urging them to seek damaging testimony from the children.

SIGN IN TO E-MAIL

PRINT

"We were disturbed that there might have been some kind of predisposition of the therapists toward that kind of bent," Mr. Dolphin said. He added that members of the grand jury had concluded that satanic ritual abuse during child molestation "just does not occur in San Diego County."

Mr. Dolphin said the grand jury also studied other child-abuse cases that resulted in acquittals or the overturning of guilty verdicts. New Jersey and Nevada Cases

In March 1993, a New Jersey appeals court overturned the conviction of Margaret Kelly Michaels, who began serving a 47-year sentence in 1988 after being convicted of abusing 19 children at the Wee Care Nursery School in Maplewood, N.J. Ten days earlier, the Nevada Supreme Court overturned the 1988 child molestation conviction of Martha Felix and her nephew Francisco Ontiveros.

Those investigations followed the highly publicized McMartin Preschool case in Los Angeles. That trial, the longest criminal trial in American history, ended in 1990 without convictions after six and a half years.

Reviewing those cases as well as the Akiki case, the grand jury concluded, "There is no justification for further pursuit of the theory of satanic ritual child molestation in the investigation and prosecution of child abuse cases."

In the Akiki case, it said, "Although the parents were cautioned not to talk about these events with the children, the fact is that at least some of the parents did." 'Pressures' on Children

In addition, it said, the prosecutors asked the therapists to provide more disclosures of abuse. "The parents were urging children to provide more and more allegations that could be used for trial," the report said. "The pressures on the children were enormous."

The grand jury also criticized the use, in this case and others, of such models as the child sexual abuse syndrome, a catalogue of behavior that is purported to be evidence of abuse. These include symptoms like nightmares, separation anxiety, fear of dying, fear of water and fear of doctor's offices.

ADS BY GOOGLE

[Are You Writing a Book?](#)

Get a free guide to professional editing & publishing options.

www.iUniverse.com

[Home](#) | [Times topics](#) |

[Member Center](#)

Copyright 2013 The New York Times Company | [Privacy Policy](#) | [Help](#) | [Contact Us](#) | [Work for Us](#) | [Site Map](#) |

[Index by Keyword](#)

Prosecutors Drop Charges In Abuse Case From Mid-80's

By EVELYN NIEVES
Published: December 03, 1994

Ending one of the most sensational child sex-abuse scandals in the nation, prosecutors today formally dropped their case against Margaret Kelly Michaels, the former day care teacher who spent five years in prison before her 1987 conviction was overturned on appeal last year.

In a hearing this afternoon before Judge Joseph A. Falcone of State Superior Court here, an assistant Essex County prosecutor, John S. Redden, said his office decided to seek dismissal because too many obstacles had been placed in the way of a successful retrial.

Ms. Michaels, 32, has been free on \$75,000 bail since March 1993, when a three-judge appellate division panel ruled that her trial was full of egregious prosecutorial abuses, including questioning of the children that planted suggestions, tainting their testimony.

The dismissal closes a 10-year odyssey that began when Ms. Michaels, a Pittsburgh native, was a 22-year-old aspiring actress working at the Wee Care Day Nursery in Maplewood, N.J., to make ends meet. It also adds her case to the growing number of lengthy, expensive, multiple-child sexual-abuse trials across the country in which defendants were acquitted or had their convictions overturned because the interrogations of the children in the cases were found to have planted suggestions in their minds.

Bubbly and radiant, Ms. Michaels told reporters at the West Orange office of her lawyer, Alan L. Zegas, that she harbored no bitterness, planned to marry her fiance, Jay Romano, a freelance journalist, have children and become a writer, starting with a book about her ordeal.

"I am greatly relieved to have this terrible nightmare finally over," she said. "And above all, I praise God for the returning of my rightful freedom and good name and the right to live a quiet and decent life."

Ms. Michaels also emphatically maintained her innocence and criticized the prosecutors who tried the case.

"The way they questioned those children was outrageous," she said.

Mr. Zegas, who took on the case after the conviction was overturned, said he had waited eight months for the state to make "the right decision."

"I've been trying to talk to the prosecutors all this time and urge them to make an objective decision," he said. "I think the prosecutors did just that after casting aside the influence of the prosecutors who tried the case."

Charged at the height of the multiple-child sex-abuse scandals of the 1980's, Ms. Michaels was convicted after a \$3 million, 11-month trial on 115 counts of sexually abusing 19 children. She was charged with performing sexual acts on the children in 1984 and 1985, including playing naked games, probing their bodies with knives and forks and forcing them to eat feces and defecate on her. Sentenced to 47 years in prison, she was denied bail pending her appeal.

Mr. Redden said he was "not authorized" to answer questions from reporters. But at this afternoon's hearing, he told Judge Falcone that the state had lost some witnesses when parents decided that putting their children back on the witness stand was not worth the psychological damage. Others were unavailable, he said. And he added that the New Jersey Supreme Court's ruling that a pretrial hearing would have to be held to determine whether the children's testimony was reliable placed an undue burden on prosecutors given the age of the case and the very young age of the children at the time of the trial.

In fact, the prosecutor would have faced a major legal hurdle. The New Jersey Supreme Court, in a unanimous decision in June upholding the appellate panel's decision to overturn the conviction, ruled that if the state decided to re prosecute Ms. Michaels, it must produce "clear and convincing evidence" that the statements and testimony elicited by the improper interview techniques are reliable enough to warrant admission.

While the Supreme Court stopped short of instructing the prosecutor to drop the case, the court made it clear that it believed the children's testimony would not hold up.

In July, the Essex County Prosecutor, Clifford J. Minor, announced that he would seek a retrial. He called the decision not to prosecute "the most difficult" of his term.

In a statement issued today, he said the withdrawal of the charges "should not be construed as any adverse reflection upon the veracity of the victim children or their parents."

None of the parents of the children involved in the case were present at the hearing. Ray Weiss, a spokesman for Mr. Minor, said the

prosecutor had told the parents Thursday night that he had decided not to retry the case.

Today, Mr. Zegas expressed concern that the stigma of being accused as a child sex abuser would remain with Ms. Michaels for the rest of her life. But as her long recitation of "thank you" this afternoon illustrated, she has also had several champions.

After her conviction, journalists researching the case began to read transcripts of the children's interviews that suggested to them that the children had been coaxed or prodded into saying that Ms. Michaels had abused them. Debbie Nathan, a reporter for The Village Voice, and Dorothy Rabinowitz, who researched the case for Harper's magazine, each concluded that Ms. Michaels had been denied a fair trial.

Ms. Rabinowitz persuaded Morton Stavis, a civil rights lawyer, to take on the case. He did so, without charge, and with a passion. Using a stable of young lawyers, Mr. Stavis devoted two years and a room of his house to the case. He died shortly before the appellate panel overturned Ms. Michaels's conviction. William Kunstler, a close friend of Mr. Stavis, then picked up the case.

When Ms. Michaels' conviction was overturned, the conditions of her bail forbade her to set foot in New Jersey or be near children younger than 13, conditions that Judge Falcone later dropped.

Through Mr. Zegas, Ms. Michaels thanked Judge Falcone today for recognizing her presumption of innocence in the case.

Later, she said that she and her fiance, whom she met during an interview for an article and who has done freelance work for The New York Times, do not want to settle in New Jersey. She said they might move to Pennsylvania, where her family lives.

[Home](#) | [Times topics](#) |

[Member Center](#)

[Copyright 2013](#) [The New York Times Company](#) | [Privacy Policy](#) | [Help](#) | [Contact Us](#) | [Work for Us](#) | [Site Map](#) |

[Index by Keyword](#)