Taint Hearings and Strategies in Child Sex Cases

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Child sex cases present some of the most difficult challenges a defense lawyer can face. Most jurors truly believe that children tell the truth most of the time and few judges understand and appreciate the undue and pervasive influence of interviewers and family members who question and interrogate the child. In addition, neither courts nor jurors fully appreciate the frailty of the child’s memory and the subtle (and sometimes not so subtle) overly suggestive techniques implored by those who interact with the child.

When established protocols are not followed or when real questions arise as to the context of the allegations and the techniques implored in the questioning process, then we as defense lawyers need to consider filing a “taint” motion and seek a hearing to explore whether the complainant’s memory has been so compromised that it is no longer reliable as required by Rule 602 of the Federal Rules of Evidence.[[1]](#footnote-1) If not, and especially if uncorroborated by forensic and physical evidence, the child is incompetent to testify under Rule 602 and case law to be discussed below. To obtain a hearing and ultimately achieve the desired result, the lawyer needs to obtain qualified experts to testify at the hearing. And we need to become intimately familiar with not only the case prevailing case law, but with the powerful scientific literature that supports the meaning underlying Rule 602.

A “taint” hearing is nothing more than a motion to suppress evidence, no different than a fingerprint, eyewitness, Miranda or search and seizure motion. Evidentiary Rule 104 and case law such as *Jackson v. Denno* and *Neil v. Biggers* etc. require a pre-trial hearing out of the presence of the jury to make such critical determinations.[[2]](#footnote-2) [[3]](#footnote-3) Because the results of these challenges affect the theory of defense and the entire trial strategies, obviously it is best for the court to hold them well enough in advance of trial for both sides to adjust their strategies insofar as other evidentiary rulings may hinge upon the decisions.

Since taint hearings require courts to delve into the prior questionings and interrogations (by anyone) of the child and to make credibility assessments, they afford the defense an opportunity to cross examine those who may have unfairly affected the credibility and indeed the memory of the child. Often the defense can test the prosecutions experts as well as offer their own if appropriate.

A crucial element of any child sexual abuse case is whether the child has been so unduly influenced that the child’s ability to testify reliably and truthfully has been impaired. Rule 602 of the Federal Rules of Evidence requires that a witness must have personal knowledge in order to testify in the proceeding. Therefore, it is imperative that not only should taint hearings become a common occurrence in the realm of child sexual abuse cases, we, as defense lawyers, must strive to understand the suggestive influences employed on the child.

In this article, we summarize some of the leading research concerning the suggestibility of a child as well as other factors that can potentially affect the reliability and truthfulness of the child witness. Further, we will discuss the past history of the taint hearing and the specific procedures and strategies a defense attorney must know in order to succeed in undertaking one.

In Part I, we will describe experiments and studies that have taken place over the years that explain the suggestibility of a child and how certain techniques can influence him or her in making false allegations. While there has been a disagreement among researchers over the degree of child suggestibility, there is still an overwhelming consensus that children are extremely suggestible and that interviewers can manipulate these children in saying something that is completely inaccurate. We will show that the use of highly suggestible techniques is prevalent in the interviewing of a child witness and how there is a real possibility that a child has been or will be influenced in a case that will come before you.

In Part II, we will describe the protocols that national organizations and child centers have created in order for their counselors to use better techniques in interviewing a child witness. When the concepts underlying these protocols are not followed, there exists a high probability that improper and suggestive questioning has created significant risks in tainting the memory of a child.

In Part III, we will discuss the history of the taint hearing and how it is used today. The cases of McMartin Pre-School and Kelly Michaels are prime examples of how a child can be influenced, and although you may never face a case that is as extreme, it is important to understand how the process of the taint hearing evolved and the procedures you must go through to obtain one.

**PART I**

Cases charging child sexual abuse pose the most difficult challenges for the defense in large part because they invoke such personalized deep emotions. Jurors want, and tend, to believe the child, even if no physical evidence corroborates his or her testimony. Jurors do not relish rejecting the child’s testimony and will often unwittingly shift the burden of proof to the defense in such cases. In many instances, an interview will be conducted to assess whether the child has been abused.

However, during this process, problems arise when the investigator uses poor interviewing skills and suggestive techniques which lead to the child falsely incriminating a person. A primary concern is the use of repeated, leading, and suggestive questions that occur throughout an interview. The use of these types of questions increases the chance that a child’s memory will be altered. Indeed over the last twenty years, there have been numerous studies that have established a consensus that children are quite suggestible to these types of techniques and that these interviewers are leading children into making false accusations of abuse.[[4]](#footnote-4) Just as importantly are the subtle signals the interviewer transmits to the child suggesting a pre-conceived notion that the child has been abused. Studies show that children often want to please the interviewers and confirm their biases. This tendency becomes even more enhanced when the interviewer employs techniques of bribery or fear and intimidation that the child learns to respond to during the process.

As far back as the 17th century the Salem Witch trials revealed many of the same issues prevalent today in child sex cases. A court convicted over twenty defendants of witchcraft after a group of girls (aged 5-16) testified that they flew on broom sticks, were able to summon spirits into animals, and were able to deposit bent nails and pins into the stomachs of the girls.[[5]](#footnote-5) In these interviews, the girls were encouraged to embellish their statements after being asked leading questions and given positive attention for answers that were consistent with witchcraft. In some occasions, the children were even locked in jail cells during their interviews and were only freed after admitting that these people were witches. By the time that many of these children recanted their statements, nineteen of the defendants were already convicted and put to death. While it would be preposterous that someone was convicted of witchcraft today, the investigation techniques used in the Salem trials are synonymous with the techniques used in the interviewing of a child in a sexual abuse allegation.

Since this time, young children have been looked upon as vulnerable to suggestion.[[6]](#footnote-6) These vulnerabilities have far-reaching implications in the context of an allegation of sexual abuse. Therefore, numerous researchers have created studies that question a child’s competence and how certain suggestible techniques can lead to a child making a false allegation.

At the turn of the 20th century, Alfred Binet, a world renowned psychologist, concluded in his research that “young children are more highly suggestible” than adults and that the way an examiner questions a child can affect the response given.[[7]](#footnote-7) Binet, most importantly, noted that once a child gave an inaccurate response to an improper line of questioning, “the answer became incorporated into her memory.”[[8]](#footnote-8) William Stern, a German psychologist who agreed with Binet, followed up on this concept when he declared that being asked repeated questions can have a disastrous effect on a child’s memory and that “a child is more likely to remember her answers to earlier questions than the underlying events themselves.” [[9]](#footnote-9) Therefore, the earliest studies of Binet and Stern proved fruitful in revealing that children are highly suggestible and it helped pave the way for later researchers to further expand the topic of the susceptibility of a child when asked numerous repeated and leading questions.

In the last twenty years, there has been “a wide consensus among experts, scholars, and practitioners” regarding the undue suggestiveness that an interviewer can create when speaking to a child.[[10]](#footnote-10) In these four studies mentioned below, children were placed into different situations involving a stranger and were then asked suggestive questions about what happened during their time with him.[[11]](#footnote-11) For the most part, the use of these types of questioning techniques caused the children in these studies to irremediably alter his or her memory of what actually happened.

**“Chester Study”**

This study that was created in 1989 concerned the use of repeated and leading questions on five and six year old children when interacting with a janitor named Chester.[[12]](#footnote-12) In this study, Chester would begin to clean the room the child was in and would follow one of two scripts: either clean and handle the doll with care or handle the doll roughly and suggestively.[[13]](#footnote-13) Later, the child would be questioned by different counselors “who were either (a) accusatory in tone (suggesting that Chester had been inappropriately playing with the toys instead of cleaning); (b) exculpatory in tone (suggesting that Chester was just cleaning the toys and not playing); or (c) neutral in tone” (allowing for open ended answers to non-suggestive questioning).[[14]](#footnote-14) Each child was then interviewed a second time by a different interviewer who either reinforced or contradicted the first interviewer.[[15]](#footnote-15)

During the initial interview, a child’s account of what happened was accurate when being questioned by the neutral interviewer or by the interviewer whose interrogation technique was consistent with what the child witnessed.[[16]](#footnote-16) However, once the child was interviewed by someone who contradicted what he or she saw, 75% of the children would alter their own perception of the events and would adapt to the interviewer’s suggestions.[[17]](#footnote-17) The suggestibility of the child proved even more glaring after the second contradictory interview when 90% agreed with what the interviewer suggested.[[18]](#footnote-18) It is also important to note that when the children were questioned by their parents after the interview, the child’s answers mirrored the suggestions of the interviewer.[[19]](#footnote-19)

Ultimately these techniques, coupled with the interviewer’s tone and other pre-conceived notions, significantly encourage the false reporting of alleged sexual abuse.

**Mousetrap**

In another study by Stephen Ceci conducted in 1994, researchers examined how interviewing a child for ten consecutive weeks could alter the ability of a child to understand reality from fiction.[[20]](#footnote-20) In this study, researchers presented children cards that displayed either real or fictitious events. One of the fictitious events concerned the child getting his or her finger caught in a mousetrap and having to go to the hospital. Over the next few weeks, the child was told to think really hard about the events on the cards and for them to decide whether the event actually happened. At the end of the experiment, each child was then interviewed by a new person who asked them one question, “Did you ever get your finger caught in a mousetrap and have to go to the hospital to get the trap off?”[[21]](#footnote-21) Surprisingly, 58% of the children stated that they had and most of them were able to provide a compelling summary as to how the event occurred. For example, one kid stated that

“…my daddy, mommy, and my brother [took me to the hospital] in our van. The hospital gave me a little bandage, and it was right here [pointing to index finger] . . . . I was looking and then I didn't see what I was doing and it [finger] got in there somehow. . . . The mousetrap was in our house because there's a mouse in our house . . . . The mousetrap is down in the basement, next to the firewood . . . . I was playing a game called `operation' and then I went downstairs and said to Dad, `I want to eat lunch,' and then it got stuck in the mousetrap . . . . My daddy was down in the basement collecting firewood . . . . [My brother] pushed me [into the mousetrap]; he grabbed *Blow Torch* [an action figure]. It happened yesterday. The mouse was in my house yesterday. I caught my finger in it yesterday. I went to the hospital yesterday.”[[22]](#footnote-22)

In addition to this narrative, 20/20, the long running ABC news program, reported the results of the study and even met with one of the families involved.[[23]](#footnote-23) When the correspondent, John Stossel, interviewed one of the children in the experiment about what had happened, the child remained adamant that a mousetrap really was caught on his finger even after being told numerous times by the researchers and his family that it was not true. When Stossel asked Ceci about the boy, Ceci contemplated that “the child has come to believe it” and that “it is a part of their believe system now.”[[24]](#footnote-24) Ceci then explained to Stossel that the leading questions and manipulative techniques that were used in their experiments were mild compared to the techniques investigators used in real sexual abuse cases!

**Sam Stone**

In 1995, Michelle Leichtman and Stephen Ceci undertook an experiment to further research the suggestibility of a child.[[25]](#footnote-25) The two scholars believed that “younger preschoolers would be more susceptible to being influenced by certain stereotypes and that suggestive questioning may influence their opinions toward a stranger.” [[26]](#footnote-26) The Sam Stone experiment consisted of 175 preschoolers who were split into two groups by age (3-4 year olds and 5-6 year olds). In this experiment, Sam Stone would pay a visit to the children and he would always behave the same way every time. He would enter the classroom and say “Hi” to the kindergarten teacher as the teacher would start to read the children a book and he would then wander around the room and wave goodbye to the kids as he was leaving. However, the children were assigned one of four conditions: (a) control (neutral), (b) stereotype (told before the experiment that Sam Stone was clumsy and prone to break things), (c) suggestion (leading and repeated questions), and (d) stereotype plus suggestion, and the researchers would then use these various conditions in an attempt to influence the children to lie.

In the control group, none of the children made false allegations regarding Sam Stone when asked about his visits. However, in the remaining three groups, the study proved that preschool aged children can be easily influenced by the use of stereotypes and suggestive questions. In the stereotype condition, 37% of the entire group of children gave accusatory statements to the interviewers and this number was exponentially higher in the 3-4 year old age group. In many cases, the children would accuse Sam of being the one who was responsible for a “book being ripped or a teddy bear being soiled” even though these events never happened.[[27]](#footnote-27) In the suggestion group, the incorrect and accusatory answers rose significantly and by the end of the interviews, 72% of the children who were in the stereotype plus suggestion group stated that Sam Stone did something he did not do.[[28]](#footnote-28)

**Mt. Sinai Study**

In 1998, another experiment on the suggestibility of a child was conducted by Gail Goodman.[[29]](#footnote-29) Goodman is known as one of the first in her field to study children’s roles in the legal system and is the scholar most favored by child advocates. In the study, 108 children between the ages of three and fifteen who were actually involved in abuse investigations in the past were interviewed.[[30]](#footnote-30)[[31]](#footnote-31) Normally, experiments are tested on any type of child, but these children were specifically examined in this experiment due to the researcher’s belief that abused children could be “hyper-vigilant regarding abusive actions or abuse suggestion and, as a result, would be more resistant to such questioning than non-abused children.”[[32]](#footnote-32)

In the first two days of the experiment, the children received a medical checkup and an anogenital examination.[[33]](#footnote-33) On the last day, the children were interviewed and were asked leading and suggestive questions concerning the checkup and the examination. The results of the experiment were quite startling due to the evidence that showed kids were overwhelmingly suggestible. Nevertheless, Goodman attempted to remain optimistic about the data, but the statistics showed a “substantial level of incorrect answers” to misleading and repeated questions.[[34]](#footnote-34)

Goodman touted the experiment as a success when she stated that 79% of the questions answered by 3-5 year olds were answered without error.[[35]](#footnote-35) However, Goodman failed to acknowledge the resulting 21% of answers that were inaccurate She acknowledged that “if these children were interviewed in an abuse investigation, a false accusation may well potentially result.”[[36]](#footnote-36) Furthermore, while other age groups performed better (16% inaccurate for six to ten years and 9% for eleven to fifteen year olds), the study pointed out that children are more prone to give inaccurate statements when being asked leading and repeated questions.[[37]](#footnote-37)

Additionally, transcripts of actual child sexual abuse interviews reveal that interviewers ask an even larger percentage of leading and suggestive questions than in the studies mentioned above. Since over 20,000 children testify yearly regarding sexual abuse allegations, many innocent people are wrongfully charged and even convicted. For these reasons, a taint hearing may be a necessity in a child sexual abuse case and it must be aggressively litigated in order to discover if the child witness is competent to testify under Rule 602.

**PART II**

Research and scientific studies clearly establish that improper questioning generates a significant risk that the memory of a child will become tainted. This conclusion no doubt led to the adopted protocols by the National Center for the Prosecution of Child Abuse, the National Institute of Child Health and Human Development, and the American Professional Society on the Abuse of Children that detail certain standards of how their counselors should question suspected child abuse victims.[[38]](#footnote-38) These guidelines are supposed to set the standard for how an investigator should interview a child. Interviewers need to “remain open, neutral and objective” throughout the interview, avoid asking leading, suggestive and repeated questions, and to never threaten or entice a child or try to force the child to speak about something that he or she appears to have no knowledge of.[[39]](#footnote-39)

When a child is suspected of being abused the protocols outline a procedure to follow that includes the forensic interview and a forensic evaluation (if the child initially denies the abuse). The procedures provide for one or two interviews followed by a number of fact-finding sessions conducted by a counselor at a child welfare agency.[[40]](#footnote-40) During these interviews, the complex issue of memory acquisition, storage and retrieval are extremely important so open-ended and non-leading questions are the desired method of interviewing a child. The counselors are also told to avoid any coaching and should alert the child to these four important rules,

“1. If you do not know the answer, don’t guess, just say you don’t know.

2. If you don’t want to answer, it’s ok to say so.

3. If you don’t understand something, let me know, and I will say it a different way.

4. If a question is asked more than once, you don’t have to change your answer, just tell me what you remember, the best you can.”[[41]](#footnote-41)

These protocols are meant to provide an environment for the child to feel at ease during the investigation process and to enhance the reliability of the statements. Unfortunately, there is no mechanism to enforce their use and many counselors have simply ignored them, interviewers continue to use faulty techniques such as close-ended and multi-part questions.

Researchers investigating these protocols “have used transcripts of actual child sexual abuse interviews to show both the extent of suggestive and close-ended questions used with an inherent lack of free recall questions” even after being warned of the dangers of such questions.[[42]](#footnote-42)

In addition to failing to follow established protocols, interviewers often fail to adequately document the results of their efforts. In many cases, the interviewer does not record the interview, but only takes notes as the main form of documentation. However, studies have shown that interviewers fail to report specific details of the alleged sexual acts and at times misrepresent in court what the child actually said in the interview.[[43]](#footnote-43) This is very alarming, given the fact that “such errors appear very likely to distort judgments about the extent of the interviewer contamination (i.e. leading and suggestive questions), the accuracy of the children’s testimony, the severity of the alleged abuse, and perhaps even the children’s credibility.” [[44]](#footnote-44)

In one study conducted by the National Institute of Child Health and Human Development, the same organization that created protocols to ensure proper interviewing, “more than 50% of the interviewer’s utterances and 25% of the incident-related details provided by the children were not recorded” in the interviewer’s notes.[[45]](#footnote-45) Furthermore, an interviewer’s notes cannot account for the child’s body language or demeanor throughout the interview.[[46]](#footnote-46) Accordingly one should persist in obtaining every note, statement, drawing or recording of any interview of or encounter with a child.

Another problem in sexual abuse cases is the manner in which counselors have crossed the line of being unbiased and objective in their duties and instead have become advocates for the alleged sexual abuse victim. In some cases, these counselors testify as prosecution experts and state their opinions that the abuse occurred and that the child is telling the truth. Motions in Limine and other pre-trial motions should be filed along with supporting law to exclude these counselors or social workers from offering such testimony; they are not qualified experts under rule 702 and their opinions would violate rule 704 in regard to the ultimate issue.

Recently, in *Naylor v. Alabama,* the Alabama Court of Criminal Appeals held that the counselor could not give her opinion as to the ultimate issue of the case regardless if she was viewed as an expert and that she had crossed the line into becoming an advocate for the alleged victim instead of an objective informant of the court.[[47]](#footnote-47)

The National Child Protection Training Center recently published an article discussing this very issue when it pertains to SANE nurses.[[48]](#footnote-48)[[49]](#footnote-49) In the article, the Center states that these counselors should resist the tendency to gravitate towards working with the prosecution and distrusting the defense attorney. Instead, she “must accept that the evidence she gleans might be useful to either party, and that she might be called as a witness by the prosecution, the defense, or both. Simply put, she does not collect evidence and make observations for either side.[[50]](#footnote-50) She makes them for the court, to be utilized in the case by either side or both as a part of the ultimate search for truth.” In concluding the article, the author states that a SANE Nurse “must maintain a sense of objectivity.” [[51]](#footnote-51)

While we have only discussed but a few of the problems that occur in child sexual abuse cases, there is a plethora of information as to why children are being rendered incompetent to testify under Rule 602. Undeniably, interviews of the children are becoming comparable to military interrogations than being an open-ended conversation intended to elicit accurate and unbiased information. Two such cases that present these problems are the *McMartin* Preschool case and the case of *State v. Michaels.* Not only are these cases great examples of how the legal system views the problems presented in Part I and Part II, *State v. Michaels* is the foundation of how a taint hearing began and the process one will use in motions to obtain one today.

**PART III**

In any case involving the sexual abuse of a child, a crucial element is whether the child has been so unduly influenced that it has impaired his ability to testify reliably and truthfully, thereby rendering him incompetent and lacking personal knowledge to testify. In *Idaho v Wright,* the Supreme Court of the United States discussed these two factors thoroughly in coming to the conclusion that once the tainting of memory has occurred, the problem is irremediable.[[52]](#footnote-52) In *Wright,* the Court acknowledged that the use of manipulation, prior interrogation, leading questions, and an interviewer with a “preconceived idea of what the child should be disclosing” are indicators of a tainted process.[[53]](#footnote-53) Further, the United States Supreme Court has held that the admission of testimony is only “admissible if it bears adequate “indicia of reliability.’”[[54]](#footnote-54)As you have seen in Part I and Part II, there is a real probability for a child to invent unreliable and false information when he has been questioned improperly. Sadly, however, this type of questioning is occurring too often in relation to child sexual abuse cases which raise a real concern that false charges occur and are not properly challenged. Therefore, it may be instructive to discuss the history of the taint hearing and the steps one can take to obtain one.

**McMartin Preschool**

In the early 1980’s, the McMartin Preschool Abuse Trial in California became known as “the longest and most expensive criminal trial in the history of the United States.” and is compared to a modern-day witch hunt.[[55]](#footnote-55) In the end, the government spent $15 million over a seven year period in investigating and prosecuting the case which, in the end, led to zero convictions.

The case arose when Judy Johnson, a clinically unstable mother of a child at McMartin Preschool, alleged that her son had been molested by Ray Buckey, a teacher’s aide, even though the boy could not identify Buckey in a photo-lineup and he showed no physical sign of abuse.[[56]](#footnote-56) Nevertheless, Buckey was soon arrested and the police department began their investigation by sending letters to 200 parents of current and former children at the school.

These letters stated that the police “suspected ''possible criminal acts'' at the school, including oral sex, handling of genitals, and sodomy” and that any information would be helpful regarding Buckey being alone with a child. At that point, panic ensued and interviews were taken with each child. While most children denied being abused during the initial interviews, 360 children of the 400 interviewed at one point described some sort of molestation after leading and suggestive techniques began being incorporated in the interview process.

Months later, a grand jury indicted seven workers of the McMartin Preschool on 208 counts of sexual abuse, and by the time of the preliminary hearing, the prosecutor told the media that there were 397 sexual crimes committed by the “McMartin Seven.”[[57]](#footnote-57) [[58]](#footnote-58) Nevertheless, one could see through the interviews of the children and parents that something was just not adding up. Judy Johnson, the original alleger, stated that her child was taken by Peggy Buckey to satanic rituals where her child witnessed babies being beheaded and that other teachers at McMartin “chopped up rabbits” in front of him.

Additionally, the testimony of the children was quite bizarre. Numerous children reported being photographed naked and forced in a game of “Cowboys and Indians” where the cowboys were forced to sexually assault the Indians, some reported sexual abuse occurring in a “secret tunnel” under *McMartin* Preschool, and others told the interviewers of animal sacrifices where they were forced to drink blood from the animal. Nevertheless, none of the information provided by Judy Johnson or the children was supported by physical evidence, including an allegation that the children were forced to dig up coffins at a nearby cemetery and to watch the teachers hack away at the dead bodies in the coffins.

At the preliminary hearing, the main interviewer of the children, Kee MacFarlane, testified that the abuse occurred for years at McMartin and the children did not tell due to the teachers threatening them that it would result in their own deaths or the deaths of their parents. Strikingly, videotapes of the interviews showed that interviewers “relied heavily on leading questions and pressure” with one in particular telling a child that “183 kids had already revealed ‘yucky secrets; and that all the McMartin teachers were "sick in the head" and deserved to be beaten up.”[[59]](#footnote-59) By the end of the hearing, one member of the prosecution who was starting to express doubts about the case was quoted as saying “Kee MacFarlane could make a sixth month old baby say he was molested.”[[60]](#footnote-60)

Shortly before the trial began, the lead prosecutor in an interview with an independent filmmaker admitted that the “children began ‘embellishing their stories” and that “we had no business being in court.” [[61]](#footnote-61) As a result, the charges on all members of the “McMartin Seven” except for Buckey and his mother were dropped.

When the trial finally did commence against Buckey and his mother, it lasted for over thirty months. The state presented sixty-one witnesses. The main witness, McFarlane testified for over five weeks and as her examination was coming to a close, the judge even stated that “her credibility [was] becoming more of an issue” the longer she was on the stand.[[62]](#footnote-62) The jury returned an acquittal on all but thirteen charges and remained deadlocked on the rest. When the foreperson was asked to explain their decision, “Luis Chang explained that ‘the interview tapes were too biased; too leading. That’s the main crux of it.”[[63]](#footnote-63)

The effects of this case have been felt across the United States. Many day care providers “resisted the temptation to hug or touch children out of a fear that their actions might be interpreted as signs of abuse” and many centers closed due to a belief they would be accused of a similar thing.[[64]](#footnote-64)  For this reason, there are many lessons that came out of the McMartin trial that are consistent with the Salem Witch Trials.[[65]](#footnote-65) These include that people tend to rely heavily on the statements made by children even if there are inconsistencies in their statements, the use of leading and suggestive questions are dangerous, and that there is a shifting of the burden to the defendant to prove his innocence rather than forcing the state to prove guilt in child sexual abuse cases.[[66]](#footnote-66)

Fortunately, the jury in the *McMartin* Preschool case was able to see through much of the unwarranted hysteria. However, Ray Buckey spent over five years in jail and the State of California wasted numerous years and millions of dollars trying a case that seemed entirely meritless

**Kelly Michaels**

In the pioneer case of *State v Michaels,* the New Jersey Supreme Court held a taint hearing is a***must*** when assessing a child’s reliability and trustworthiness before testifying in a sexual abuse case.[[67]](#footnote-67) The Court opined that the use of such a hearing was justified in protecting the defendant’s denial of due process and the integrity of the judicial system when looking at the facts of the case. *Id.* at 1381.

Kelly Michaels began to work at Wee Care, a nursery school, in the mid- 1980’s.[[68]](#footnote-68) In less than a year, she was promoted due to her exceptional work and the lack of complaints about her performance from parents, children, and the other staff at Wee Care.[[69]](#footnote-69) However, things soon turned chaotic when a four year old student of hers stated during a doctor examination that “his teacher had done this to him” after his temperature was checked rectally. Days later, an investigation began with all children who had contact with Michaels at Wee Care. In all, “these interviews revealed accounts of sexual abuse ranging from minor instances to bizarre and heinous sexual acts” and soon after, Michaels was indicted on 163 counts of sexual abuse, sexual assault, etc., and was convicted on 115 of these counts.[[70]](#footnote-70)

However, the Appellate Court soon reversed and remanded the trial court’s decision due to the child-witnesses being found incompetent to testify as a result of the suggestive and coercive techniques the counselors incorporated in their investigation. These were more egregious than what is found in any study and the evidence supporting the charges against Michaels was baseless, uncorroborated and beyond the realm of possibility. The interviews that were recorded show an extreme case of improper questioning, including numerous interviewers that only asked leading and repeated questions.[[71]](#footnote-71)

Most disturbingly, after the children denied any alleged abuse in the interviews, the counselor elicited even more bizarre information, including that the teacher made them “eat a cake made of feces,” that she “cut off my penis,” she “stuck a sword in my rectum,” and “made us eat boiled babies.”[[72]](#footnote-72) As well as these outrageous allegations, the Appellate Court noted numerous faults in the way the investigators interviewed the children. Most importantly, there was an “obvious lack of objectivity and impartiality on the part of the interviewers” and that it was grossly inappropriate for the investigator to confide in some of the children that he was abused as a child and that they would feel better after telling someone about their own abuse.[[73]](#footnote-73)

It was also found that the interviewer used suggestive techniques to induce the children to provide sexual information, such as using peer pressure and offering bribes to the children, in exchange for their statements against Michaels.[[74]](#footnote-74) Shockingly, when asked to explain his reasoning behind using these techniques, an investigator stated that “the interview process is in essence the beginning of the healing process” and that the children “needed some reassurance . . . [that] they were not alone.” [[75]](#footnote-75) The court also noted that the same few interviewers with the same biases interviewed the vast majority of the children.

The state appealed, but the New Jersey Supreme Court upheld the decision on the basis that the interrogations were so coercive and suggestive that they had a capacity to distort the children’s recollection of the events and that a taint hearing would be required given the substantial likelihood that the evidence was unreliable.[[76]](#footnote-76) The Court went even further and stated that the “decision to prosecute often hinges on the information elicited in the initial investigatory interview” and that if a child’s recollection of the actual events has been molded by the suggestive interrogation, those influences will undermine the reliability of the child’s testimony and he or she will not be allowed to testify at trial. *Id.*

The Court further held that “a court should examine, under all the circumstances, whether the procedure used to obtain the identification was so ‘. . . suggestive and conducive to irreparable mistaken identification that (the defendant) was denied due process of law.’”[[77]](#footnote-77) The court laid out a compilation of issues that would require a taint hearing including, but not limited to, an inability to control familial influences, absence of spontaneous recall in the supposed victim, interviewer bias, repeated leading questions, incessant questioning either by examiners or by family members, the transmission of suggestion to children, i.e., tone of voice, and instances of vilification of alleged wrongdoer, and the pursuit by the interviewers with a preconceived notion of what has happened to the child.[[78]](#footnote-78) If one of these issues is raised, a taint hearing should be held, and “if the court finds the pre-trial identification procedure unduly suggestive, the testimony is inadmissible at trial.”[[79]](#footnote-79)

The Court noted that the rationale behind a taint hearing is that “children are extremely susceptible to suggestion by adult authority figures because of their ‘vulnerability, immaturity, and impressionability” and because of this a “child’s response can be shaped by a suggestive interviewer and recollections of actual events can be distorted.”[[80]](#footnote-80) Therefore, to ensure reliability, a taint hearing is an appropriate technique to ensure the reliability of a child’s memory. The court stated that the initial burden is on the defendant to produce “’some evidence’ that the alleged witness’s statements were the product of suggestive or coercive question” due to the presumption that any witness is to be presumed competent to testify.[[81]](#footnote-81)

If the Court finds that the defendant has met this burden, the state must then prove by clear and convincing evidence that the proffered testimony is reliable. If the state is unable to do so, the child’s testimony will be deemed unreliable and not admissible at trial. In some cases the tainted memory is the only evidence of sexual abuse. If so, the charges would have to be dismissed.

As well as *Michaels,* other states have determined that when a child is unduly influenced by his/her family and/or interviewer, an inquiry into the child’s personal knowledge should be required. *Hawaii vs. McKellar,* Criminal No. 85-0553.(1985) (holding that the child lacked a present memory to testify and was incompetent after interviews consisting of numerous repeated and leading questions were given); *People v. Meeboer*, 484 N.W.2d 621 (Mich. 1992) (determining that a child’s statement much be analyzed with more precision due to interviewer and family influences); *State v. Huss*, 506 N.W.2d 290 (Minn. 1993) (concluding that the use of a highly suggestible book and inappropriate interview techniques by the therapist and mother was a sufficient reason to question the reliability of the statements of the child such that her testimony was inadmissible); *Felix v. State*, 849 P.2d 220 (Nev. 1993) (holding that statements by children about alleged sexual abuse were unreliable due to numerous interviews, the use of leading questions, and that allegations were clearly false or incredible); *People v. Michael M*., 618 N.Y.S.2d 171 (Sup. Ct. 1994) (holding that in an appropriate case a hearing should be held to determine whether a witness was subject to unduly suggestive or coercive questioning by governmental or non-governmental personnel, and whether the potential trial testimony was thereby rendered unreliable); *Fischbach v. State*, 676 A.2d 902 (Del. 1996) (holding that the absence of spontaneous recall, interviewer bias, repeated leading questions, multiple interviews, incessant questioning, etc. could trigger a taint hearing).

Recently, my firm filed a taint motion asserting that the then five-year old child’s testimony was inadmissible under Rule 602 since her memory had been irrevocably compromised due to the leading and suggestive discussions of both family members and the child services expert with the child. We asked for a pre-trial taint hearing under Rule 104. While there was almost no Alabama law on the subject, we filed a supplemental motion supported by other state’s laws, scientific literature and case specific facts that demonstrated that this was a valid claim. In our case, the tainting of the child began in the initial interview with a family member and continued during the numerous encounters with other family members and interviews with the Department of Human Resources. The judge granted our motion and afforded us an all-day hearing where we were able to cross each witness of the state establishing why the child was completely unreliable and incompetent to testify under Rule 602. Ultimately the state dismissed the charges in large part due to the evidence elicited at the taint hearing.

**CONCLUSION**

In child sex cases, the defense must be aggressive and show that the child’s memory has become so unreliable that he or she cannot properly testify under Rule 602. The capacity of a child to tell the truth can be damaged, if not destroyed, through the use of suggestive, leading, and repetitive questions because a child’s memory is so fragile and receptive to undue suggestive questioning techniques and other influences such as domestic proceedings and motivations. A taint hearing is the most effective way to test by litigation if a child’s memory has been irrevocably compromised. Hopefully, through the use of the information above, you as a defense lawyer will be able to persuade the court that taint hearings in the appropriate cases are not only important, but essential to ensuring a fair trial.

1. For purposes of this discussion, we will rely on the Federal Rules of Evidence, since many State evidence rules are substantially the same as the Federal Rules or otherwise model theirs upon them. [↑](#footnote-ref-1)
2. Rule 104 of the Federal Rules of Evidences states that the court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible and that it must conduct any hearing on a preliminary question so that the jury cannot hear it if justice so requires. [↑](#footnote-ref-2)
3. 378 U.S. 368 (1964); 409 U.S. 188 (1972). [↑](#footnote-ref-3)
4. Ashish S. Joshi, *Taint Hearing: Scientific and Legal Underpinnings*, 34 NOV Champion 36-40 (2010). [↑](#footnote-ref-4)
5. Stephen J. Ceci & Maggie Bruck, *Jeopardy in the Courtroom: A Scientific Analysis of Children’s Testimony,* 7-8 (1995). [↑](#footnote-ref-5)
6. Stephen J. Ceci & Richard D. Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 Cornell L. Rev. 33, 34 (2000). [↑](#footnote-ref-6)
7. See Alfred Binet, La Suggestibilité (1900). [↑](#footnote-ref-7)
8. *Id.* [↑](#footnote-ref-8)
9. William Stern, Abstracts of Lectures on the Psychology of Testimony and on the Study of Individuality, 21 Am. J. Psychol. 270 (1910). [↑](#footnote-ref-9)
10. *Taint Hearing: Scientific and Legal Underpinnings*, 34 NOV Champion at 36. [↑](#footnote-ref-10)
11. It is important to note that there are a multitude of other studies and experiments that indicate the same levels of influence on children when being asked suggestive questions. [↑](#footnote-ref-11)
12. G.S. Goodman & A. Clarke-Stewart, *Suggestibility in Children's Testimony: Implications for Sexual Abuse Investigations*, The Suggestibility of Children’s Recollections: Implications for Eyewitness Testimony (J. Doris Ed. 1991). [↑](#footnote-ref-12)
13. M.E. Hertzig & E.A. Farmer, *Annual Progress in Child Psychiatry and Child Development,* (1998). [↑](#footnote-ref-13)
14. *Id.* [↑](#footnote-ref-14)
15. *Id.* [↑](#footnote-ref-15)
16. *Id.* [↑](#footnote-ref-16)
17. *Id.* [↑](#footnote-ref-17)
18. *Id.* [↑](#footnote-ref-18)
19. *Id.* [↑](#footnote-ref-19)
20. Ceci, Crotteau-Huffman, Smith & Lotus, *Repeatedly Thinking About Non-Events,* 3 Consciousness & Cognition 388-407 (1994). [↑](#footnote-ref-20)
21. *Id.* [↑](#footnote-ref-21)
22. *Id.* [↑](#footnote-ref-22)
23. John Stossel, Book Excerpt: 'Myths, Lies and Downright Stupidity. 2008. ABC 20/20, http://abcnews.go.com/2020/Stossel/story?id=4395788&page=2 (available Sept. 5 2012). [↑](#footnote-ref-23)
24. *Id.* [↑](#footnote-ref-24)
25. M.D. Leichtman & S.J. Ceci, *The Effects of Stereotypes and Suggestions on Preschoolers’ Reports,* Developmental Psychology, 31(4), 568-578 (1995). [↑](#footnote-ref-25)
26. *Id.* [↑](#footnote-ref-26)
27. *Taint Hearing: Scientific and Legal Underpinnings*, 34 NOV Champion at 37. [↑](#footnote-ref-27)
28. *Id.* [↑](#footnote-ref-28)
29. Ceci, *The Suggestibility of Children*, 86 Cornell L. Rev. at 49. [↑](#footnote-ref-29)
30. Mitchell L. Eisen et al., *Memory and Suggestibility in Maltreated Children: New Research Relevant to Evaluating Allegations of Abuse, in Truth in Memory* 163, 175-77 (1998). [↑](#footnote-ref-30)
31. The reasoning behind the experiment was for researchers to “gain ecological validity by studying children who were actually involved in abuse investigations.” *Id.* [↑](#footnote-ref-31)
32. M. Rutter & E. A. Taylor. *Child and Adolescent Psychiatry* 121-22 (4th ed. 2002). [↑](#footnote-ref-32)
33. *Id.* [↑](#footnote-ref-33)
34. *Id.* [↑](#footnote-ref-34)
35. *Id.* [↑](#footnote-ref-35)
36. *Id.* [↑](#footnote-ref-36)
37. *Id.* [↑](#footnote-ref-37)
38. Orly Bertel, *Lets Go to the Videotape: Why the Forensic Interviews of Children in Child Protective Cases Should Be Video Recorded*, 50 Fam. Ct. Rev. 344, 345 (2012). [↑](#footnote-ref-38)
39. American Prosecutors Research Institute, National Center for Prosecution of Child Abuse, Investigation and Prosecution of Child Abuse at 7 (1987). [↑](#footnote-ref-39)
40. This number can be anywhere from 4 to 12 sessions. [↑](#footnote-ref-40)
41. Saywitz, Geiselman, & Bornstein, *Effects of Cognitive Interviewing and Practice on Children’s Recall Performance,* Journal of Applied Psychology 7, 744-56 (1992). [↑](#footnote-ref-41)
42. Clayton Gillette, *Appointing Special Masters to Evaluate the Suggestiveness of A Child-Witness Interview: A Simple Solution to A Complex Problem*, 49 St. Louis U. L.J. 499, 537 (2005). [↑](#footnote-ref-42)
43. *Let's Go to the Videotape,* 50 Fam. Ct. Rev. at 347-49. [↑](#footnote-ref-43)
44. Michael L. Lamb et al., Accuracy of Investigators' Verbatim Notes of Their Forensic Interviews with Alleged Child Abuse Victims, 24 Law & Hum. Behav. 699 (2000). [↑](#footnote-ref-44)
45. *Let's Go to the Videotape,* 50 Fam. Ct. Rev. at 349. [↑](#footnote-ref-45)
46. *Id.*  [↑](#footnote-ref-46)
47. *Naylor v. State*, 2012 WL 1890826 (Ala. Crim. App. May 25, 2012) [↑](#footnote-ref-47)
48. Roger A. Canaff, *SANE Testimony in Child Sex Abuse Cases: Shedding Light, Dispelling Myths for Justice,* Center Piece: The Official Newsletter of the National Child Protection Training Center2:3, 2010, http://www.ncptc.org/vertical/Sites/%7B8634A6E1-FAD2-4381-9C0D-5DC7E93C9410%7D/uploads/%7BA8EF2D4D-1FC0-4000-A1E8-2271B8570FDD%7D.PDF (available Sept. 5 2012). [↑](#footnote-ref-48)
49. A Sexual Assault Nurse Examiner (SANE) is a registered nurse who has been trained to provide comprehensive care to sexual assault victims, including conducting the forensic collection of evidence. The goal of a SANE nurse is to minimize the physical and psychological trauma to the victim and to maximize the probability of collecting and preserving the physical evidence of an assault for potential use in the legal system. [↑](#footnote-ref-49)
50. *Id.* [↑](#footnote-ref-50)
51. *Id.* [↑](#footnote-ref-51)
52. 497 U.S. 805 (1990). [↑](#footnote-ref-52)
53. *Wright*, 497 U.S. at 813. [↑](#footnote-ref-53)
54. *Ohio v Roberts*, 448 U.S. 56 (1980); *see also* Neil v. Biggers, 409 U.S. 188, 199–200 (1972); *Manson v. Brathwaite*, 432 U.S. 98 (1977); *Jackson v. Denno*, 378 U.S. 368 (1964) (assessing reliability as a predicate to the admission of in-court testimony is a somewhat extraordinary step). [↑](#footnote-ref-54)
55. Doug Linder, *The McMartin Preschool Abuse Trial: A Commentary, (2003),* http://law2.umkc.edu/faculty/projects/ftrials/mcmartin/mcmartinaccount.html (available Sept. 5 2012). [↑](#footnote-ref-55)
56. Robert Reinhold, *The Longest Trial – A Post Mortem; Collapse of Child-Abuse Case: So much Agony for So Little,* N.Y. Times, January 24, 1990, http://www.nytimes.com/1990/01/24/us/longest-trial-post-mortem-collapse-child-abuse-case-so-much-agony-for-so-little.html?src=pm (available Sept. 5 2012). [↑](#footnote-ref-56)
57. Ray Buckey, Peggy Buckey (Ray's mother), Peggy Ann Buckey (Ray's sister), Virginia McMartin, and three other McMartin teachers, Mary Ann Jackson, Bette Raidor, and Babette Spitler [↑](#footnote-ref-57)
58. By the start of the trial, the charges had dwindled down to 65. [↑](#footnote-ref-58)
59. *McMartin Preschool Abuse Trial: A Commentary* [↑](#footnote-ref-59)
60. *Id.*  [↑](#footnote-ref-60)
61. *Id.* [↑](#footnote-ref-61)
62. *Id.* [↑](#footnote-ref-62)
63. *Id.* [↑](#footnote-ref-63)
64. *Id.* [↑](#footnote-ref-64)
65. Doug Linder, *The Daycare Abuse Trials of the 1980s and the Salem Witchcraft Trials: Some Parallels,* http://law2.umkc.edu/faculty/projects/ftrials/mcmartin/salemparallels.htm (available Sept. 5 2012). [↑](#footnote-ref-65)
66. *Id.*  [↑](#footnote-ref-66)
67. 642 A.2d 1372, 1382-83 (N.J. 1994). [↑](#footnote-ref-67)
68. Julie A. Jablonski, Where Has Michaels Taken Us?: Assessing the Future of Taint Hearings, 3 Suffolk J. Trial & App. Advoc. 49 (1998). [↑](#footnote-ref-68)
69. It must be noted that Kelly worked in a room that was separated into two different classes by a curtain. [↑](#footnote-ref-69)
70. Where Has Michaels Taken Us?, 3 Suffolk J. Trial & App*.* Advoc*.* at 49-51. [↑](#footnote-ref-70)
71. Almost all of the initial interviews with the children were not recorded. [↑](#footnote-ref-71)
72. K.E. Blackstone, ***The Fallibility of Forensic Interviewing: Understanding the Michaels Decision and the Taint Hearing.*** The Forensic Examiner, 18(4), 48-54 (2009). [↑](#footnote-ref-72)
73. *Id.* [↑](#footnote-ref-73)
74. Robert Rosenthal, *State of New Jersey v. Margaret Kelly Michaels: An Overview*, 1 Psychol. Pub. Pol'y & L. 246, 249 (1995). [↑](#footnote-ref-74)
75. *Id.* [↑](#footnote-ref-75)
76. *Michaels,* 642 A.2d at 1372. [↑](#footnote-ref-76)
77. Where Has Michaels Taken Us?, 3 Suffolk J. Trial & App*.* Advoc*.* at 49-51. [↑](#footnote-ref-77)
78. *Michaels,* 642 A.2d at 1378-79. [↑](#footnote-ref-78)
79. *See Simmons v. U.S.,* 390 U.S. 377, 384 (1968); *see also Stovall v. Denno*, 388 U.S. 293, 301-302 (1967). [↑](#footnote-ref-79)
80. *Michaels*, 642 A.2d at 1376; *see Idaho v. Wright*, 497 U.S. 805, 812-13 (1990) (recognizing susceptibility of child-witnesses to suggestion). [↑](#footnote-ref-80)
81. *Taint Hearing: Scientific and Legal Underpinnings*, 34 NOV Champion at 40. [↑](#footnote-ref-81)