

pronounced effect among young children. Maryann King and John C. Yuille, *Suggestibility and the Child Witness in Children's Eyewitness Memory*, 82 (Stephen J. Ceci, et. al. Ed., 1987).

II. BACKGROUND

In this case, the complainant, Christian, when she was eight years old, was interviewed by the Dallas County Children's Advocacy Center on September 26, 2005 regarding an alleged sexual assault that took place more than two and one-half years earlier. Nevertheless, prior to this forensic interview, Christian had been repeatedly interviewed by a counselor hired by her mother and maternal grandparents in connection with a child custody matter that was to be held in North Carolina.

On June 8, 2005, Christian's mother filed a Motion to Modify Custody in the General Court of Justice District Court Division in Johnston County, North Carolina. In connection with that proceeding, Christian was repeatedly interviewed by Cynthia Starling, LCSW of Carolina Counseling and Consultation Services in Smithfield North Carolina. She was first seen on July 29, 2005. She was again seen only five days later on August 3, 2005. Then she was seen on August 9, 2005, the day prior to the North Carolina custody hearing. Finally, Ms. Starling testified on behalf of Christian's mother at the custody hearing held on August 10, 2005.

It is submitted that Ms. Starling tainted any testimony that Christian will give in this Court as well as tainted her statements made to the Dallas County Children's Advocacy Center. The taint resulted from improper forensic interview techniques as well as the use of anatomical dolls.

III. DISCUSSION

The due process clauses of the United States Constitution and the due course of law clause of the Texas Constitution protect a defendant from having the state offer tainted testimony before a jury.

A. Analogous Situations

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

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

For example, in *Zani v. State*, 758 S.W.2d 233 (Tex.Crim.App. 1988), the Court of Criminal Appeals dealt directly with the issue of the admissibility of a witness' testimony after hypnosis. The opinion reviewed the opinion of other courts and scientific literature on the subject of hypnosis and noted the dangers associated with the use of the procedure on witnesses

in an attempt to enhance their memory of an event. Generally, the noted dangers can be categorized as follows:

1. Hypersuggestibility. The witness is extremely susceptible while under hypnosis to suggestion of facts which the witness later recalls as having actually occurred. Often this may be the result of the witnesses compelling desire to please the interviewer by “remembering” facts suggested by the interviewer.
2. Loss of critical judgment. The witness loses his critical judgment which causes him to give credence to memories so vague and fragmentary they would not have relied on them before being hypnotized.
3. Confabulation. Neither the subject nor the interviewer can distinguish between real memories and “pseudomemories” arising from various causes including the two described above. Even after the interview ends the subject remains unable to distinguish between true memories and confabulation.
4. Memory “cementing.” The witness becomes much more sure of a vague memory after the session. Often the memory of the witness becomes enhanced by suggestion occurring during the session and the subject then can not distinguish his actual memory from his memory acquired during the session. He becomes more sure of his recollection because of the enhancement supplied by the session.

Id., at 237-238.

The *Zani* Court did not discuss the admissibility of the testimony of a witness who has been previously hypnotized in the context of due process but instead analyzed its admissibility in light of a defense objection that “there is no proper basis for permitting such testimony as a matter of scientific reliability.” *Id.* at 235. In light of the foregoing recognized uncertainties of posthypnotic testimony, the Texas Court of Criminal Appeals fashioned a rule for admissibility to protect the integrity of the fact finding process. The Court held:

We conclude that because of the uncertainties inherent in posthypnotic testimony it is appropriate to require the proponent of such testimony to demonstrate to the satisfaction of the trial court, outside the jury’s presence, by clear and convincing

evidence, that such testimony is trustworthy.

Id., at 243.

B. Instant Case

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. Reliability is the linchpin in determining admissibility of evidence under a standard of fairness that is required by due process.

Therefore, Mr. YYYY requests a pretrial hearing conducted pursuant to Tex. R. Evid. 104. The basic issue to be addressed at such a hearing will be whether Ms. Starling engaged in investigatory interviews and interrogations that were so suggestive that they give rise to a substantial likelihood of irreparable mistaken or false recollection of material facts bearing on Mr. YYYY's guilt. *See United States v. Simmons*, 390 U.S. 377, 384 (1968) (Holding that evidence would be excluded in pretrial identification procedures "gives rise to a very substantial likelihood of irreparable misidentification.")

Indeed, this Court is urged to look at the holding of the New Jersey Supreme Court in *State v. Michaels*, 642 A.2d 1372 (N.J. 1994) (attached hereto as Attachment A) requiring the type of taint hearing requested in the instant case. In *Michaels*, the New Jersey court recognized that "the use of 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." *Id.* at 1379. The court stated that the concern with the reliability of statements resulting from suggestive or

coercive interview techniques implicates "principles of due process." *Id.* at 1380. The court placed the initial burden to trigger a pretrial taint hearing on the defendant, who must make a showing of "some evidence" that the victim's statements were the product of suggestive or coercive interview techniques. Once the defendant establishes sufficient evidence of unreliability of statements at the pretrial hearing, the burden shifts to the state to prove reliability of proffered statements and testimony by clear and convincing evidence. *Id.* at 1383. While the procedure in *Michaels* has not been discussed in any reported Texas cases, it has been adopted by courts from around the county. *See, e.g., Commonwealth v. Delbridge*, 855 A.2d 27 (Pa. 2003); *Commonwealth v. Callahan*, 9 Mass. L. Rep. 228 (Ma. Supr. Ct. 1998). *Cf. English v. State*, 982 P.2d 139 (Wyo. 1999) (Taint can be explored during hearing to determine child's competency to testify); *State v. Carrol*, 983 P.2d 1165 (Wash. Ct. App. 1999).¹

IV. CONCLUSION

Based upon the foregoing, Defendant, XXXX YYYY, respectfully requests this Court, pursuant to the due process guarantees of the United States Constitution and the Texas Constitution, to grant a pre-trial hearing to determine whether the statements and testimony of Christian ZZZZ must be excluded because improper suggestion and statements made have compromised the reliability of that testimonial evidence.

¹Tex. R. Evid 601(a)(2) requires Texas courts to find a child is competent to testify before such a child may testify.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, F. Clinton Broden, do hereby certify that, on this 27th day of April, 2007, I caused a copy of the foregoing document to be served on Dallas County District Attorney's Office, 133 N. Industrial Blvd., Dallas, Texas 75207 by first-class mail, postage pre-paid.

F. Clinton Broden