

No. 42318-9-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

In re Personal Restraint Petition of
MARVIN SIDES FAIRCLOTH,
Petitioner

FILED
COURT OF APPEALS
DIVISION II
2012 OCT 16 PM 1:26
STATE OF WASHINGTON
BY  DEPUTY

STATE'S RESPONSE (SUPPLEMENTAL) TO PERSONAL
RESTRAINT PETITION AND TO SUPPLEMENTAL BRIEF OF
PETITIONER

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A. INTRODUCTION

In 1996, a Mason County jury convicted the Petitioner, Marvin Faircloth, of the crime of premeditated murder for killing his adoptive father, Frank Faircloth. To maintain clarity in this brief, the State will refer to the petitioner as Faircloth and will refer to the victim by his first name, Frank.

After his premeditated murder conviction, Faircloth filed a direct appeal (No. 20549-1-II) of his sentence and also claimed on appeal that there was insufficient evidence to prove that he had premeditated the murder. This court denied the appeal and affirmed the judgment and sentence.

On August 2, 2005, Faircloth filed in this court a personal restraint petition, which was assigned case number 33901-3-II. In the petition Faircloth claimed that he received ineffective assistance of counsel at trial, that he was denied the right to present battered child syndrome and self-defense as defenses at trial, and that his defense of diminished capacity was not adequately developed at trial. This court dismissed the petition, ruling that it was untimely under RCW 10.73.090.

In 2011 Faircloth filed a motion for a new trial in Mason County Superior Court, alleging that he had located an expert witness who was of

the opinion that in the year 2000 (which was approximately four years after the trial and was eleven years before the motion for a new trial) Faircloth had recovered a memory, which the expert opined would probably change the result of the trial because the memory recovered in the year 2000 would support an assertion that Faircloth was experiencing battered child syndrome when he committed the murder for which he was convicted in 1996. Faircloth asserts that the discovery of this memory is newly discovered evidence that would, under RCW 10.73.100, except his petition from the statute of limitations mandated by RCW 10.73.090.

The superior court transferred Faircloth's motion to this court as a personal restraint petition. After considering Faircloth's petition, together with his *pro se* reply brief and the State's response brief, this court appointed an attorney to represent Faircloth and directed the parties to file supplemental briefs. By order of this court dated April 5, 2012, this court incorporated with this petition the records from Faircloth's direct appeal, No. 20549-1-II, and his prior personal restraint petition, No. 33901-3-II. Accordingly, citations to the verbatim report of proceedings (RP), in the State's response, below, are to the verbatim reports incorporated from No. 20549-1-II.

To avoid duplication, the State in its supplemental response, below, will mostly avoid repeating arguments and recitations of facts and authority that are included in its initial response, but the State respectfully requests that the court consider its original response together with this supplemental brief.

B. STATE'S RESTATEMENT OF PETITIONER'S ISSUES PRESENTED FOR REVIEW

- 1) Faircloth asserts that he is entitled to a new trial because he claims to have newly discovered evidence that would have changed the result of the trial. Faircloth asserts that the new evidence is the recovery of a previously suppressed memory of a rape perpetrated against him by his victim.
- 2) Faircloth asserts that he received ineffective assistance at trial because his trial attorney failed to preserve the defense of self-defense and because of a *Brady* violation. The defense of self-defense is derived from battered child syndrome. The claim of a *Brady* violation is derived from Faircloth's assertion that his trial attorney failed to investigate DSHS records that pertain to the murder victim.

C. STATEMENT OF CASE

On February 26, 1995, Marvin Faircloth and Keith Murphy murdered Marvin Faircloth's adoptive father, Frank Faircloth. RP 907.

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A couple of weeks before the murder, Faircloth was in his backyard standing around a fire with some friends when Frank came out of the house and told them to put the fire out. RP 321. A little while after Frank had gone back into the house, Faircloth told Keith Murphy something to the effect of, "one of these days we ought to kill him, you know." RP 321; 322.

The Friday before the murder, Krystal Stacy was at Frank's house and was upstairs watching TV with Faircloth, Murphy, and a girl named Tracy Brady when Frank came home from work and told the girls they had to leave. RP 409-411. As the girls were leaving, Krystal heard either Faircloth or Murphy (she doesn't remember which one) say that they were going to kill Frank by stabbing him. RP 412-414.

Joseph Henson was a foster child who lived in Frank's home for about a month and a half but had moved out before the murder. RP 395-397. About a month before the murder, while Henson listened, Faircloth told Murphy that Faircloth was going to sniff paint and then kill Frank. RP 398-399. Faircloth said he was going to stab Frank. RP 399.

Ryan Giddings testified at trial that prior to the murder Murphy and Faircloth talked frequently, between once a day or once a week, about killing Frank. RP 518-519

Bryce West lived in the house with Frank, Murphy, and Faircloth when the murder occurred. RP 335-336. West had only lived in the house for about a month and a half. RP 381-382. Within the week before the murder occurred, Murphy and Faircloth told West that they were going to do something to Frank. RP 382. West asked them if they were going to kill Frank. RP 382. They answered that they weren't sure, "just maybe scare him." RP 382.

On the night of the murder, West was in bed with a radio on; he had just returned from Murphy and Faircloth's room, where Murphy and Faircloth had been huffing paint to get high. RP 347-348. Frank came to West's room and told him to turn the radio down. RP 348. Soon afterward, West heard yelling, screaming, and banging downstairs. RP 348.

About 10 to 15 minutes after he first heard the screaming and banging, West heard Frank screaming West's name and telling West to call the police. RP 350. Within a minute of this, Faircloth ran into West's room, sat down in a chair, and asked West if he was aware of what was happening. RP 351. Faircloth had a bloody knife in his hand. RP 352, 354.

Faircloth sat in the chair and smoked a cigarette. RP 352.

Faircloth told West to stay in his room and that if he didn't, Faircloth would kill him. RP 352-353. Frank was still alive at that time, which is apparent because West could still hear him screaming while Faircloth sat in West's room smoking a cigarette. RP 353.

Faircloth left West's room, and West could hear that Faircloth went back downstairs. RP 355. Then West heard Faircloth and Murphy beating Frank. RP 355. West heard Faircloth screaming at Frank, "tell me you love me." RP 355. Frank was still alive, which was apparent because West could hear Frank telling Faircloth that he loved Faircloth. RP 355. Then West heard more screaming from Frank. RP 356.

Finally, West heard Frank mumbling, then heard more crashing and banging, and then heard Frank give out one last, loud scream. RP 356. Then it was over. RP 356. The murder took about 25 minutes to complete. RP 356. Faircloth returned to West's room and told West to go downstairs and help clean up. RP 357. Faircloth threatened to kill West if he did not obey. RP 357.

When West got downstairs, he saw Frank's body on the floor in front of the couch. RP 358. West asked Faircloth whether Frank was dead. RP 358. Faircloth said, "well, I don't know, let's find out." RP

359. Faircloth then went over and began kicking Frank and telling him to get up and “to clean up his mess.” RP 359. Murphy and Faircloth told West that they had killed Frank by beating him in the head with a hammer, a table leg, and a Jack Daniels bottle, and that Faircloth had stabbed Frank with a knife. RP 364-369, 494.

West testified that Murphy and Faircloth “were happy about it that... it was done finally.” RP 369. After moving Frank’s body to the garage, Murphy and Faircloth sat in the living room, drank coffee, and talked about how glad they were that they had killed Frank. RP 372.

Murphy testified at trial that on the night of the murder, Frank had gone into the room that Murphy shared with Faircloth and that as soon as Frank left the room they decided to kill him. RP 606. Frank smelled the paint that Murphy and Faircloth were huffing, and he told them he was going to kick them out of the house. RP 611, 616. Murphy doesn’t remember whether it was him or Faircloth, but one of them said, “let’s kill Frank.” RP 607. Murphy admitted that in the weeks prior to the murder he and Faircloth made statements about killing Frank. RP 609.

At trial, Murphy admitted that in his statement to the police after the murder, he told the police that he and Faircloth “just sat around and we decided that we were gonna kill him.” RP 612. After the decision was

made, they got completely dressed, grabbed the weapons they had available, left the upstairs room, and went downstairs to find Frank in his bed and murder him. RP 612-613, 617.

At the sentencing hearing following his conviction for premeditated murder, Faircloth told the court that the decision to kill Frank was made as soon as Frank left the room. RP 954. After the decision was made, Faircloth armed himself with a spear and went downstairs to murder Frank. RP 950. Murphy and Faircloth were not immediately successful in killing Frank; so, a fight broke out, and Frank did not immediately die. RP 951. During a frenzy of beating Frank by punching and kicking him, Faircloth took an intermission and went upstairs to tell West to stay in his room or he would kill him, too. RP 951. Faircloth testified that he “didn’t want [West] to see anything” because he “didn’t want to have to kill him or nothin’.” RP 951-952.

Faircloth testified that after he threatened West to stay in his room, he then went back downstairs and found Murphy and Frank “wrestling at the door.” RP 952. Faircloth grabbed Frank by the hair and pulled him back into the house, shut the blinds and locked the door. RP 952.

Faircloth testified at sentencing that he pulled a knife out of Frank’s back and used the knife to cut Frank’s throat, but was unable to successfully cut

his throat and kill him that way. RP 952. So, Faircloth found a hammer and used it to beat Frank in the head until he finally died. RP 952.

When the case went to trial, Faircloth (through his trial counsel) asserted as a defense a general denial and said that “there will be an effort to present an abused, what’s commonly known as an abused child defense.” RP 1-2. Faircloth began exploring the “abused child syndrome” early in the case, as far back as February 27, 1995. RP 6. This exploration began the day before charges were filed. RP 44.

It appears from the record that trial counsel made a tactical or strategic decision to opt to pursue a defense that relied upon diminished capacity to premeditate the murder rather than self-defense. RP 18, 27-29. In addition to a tactical or strategic decision to forego a self-defense defense and to focus instead on attempting to reduce the degree of the crime by negating the element of premeditation, the record reflects that the facts, some of which may have been known to trial counsel through confidential communications, did not support the defense of self-defense, as counsel informed the court that when Faircloth murdered Frank “there was no present threat to the defendants.” RP 28.

On October 6, 1995, trial counsel informed the court: “We have reports of obscenities in the house and pornography. I have information

about where [Frank] was performing inappropriate acts in front of them.”

RP 21. Trial counsel informed the court that Faircloth had been abused from the age of two (by his biological parents) and that he was “abused sexually and physically.” RP 20-21.

In pursuit of the defense of diminished capacity to premeditate the murder, Faircloth informed the court that: “basically what we’re looking at is a course of conduct, a lifestyle here, that’s put this young man in a position not to be able to respond to the things that you and I respond to because he’s got – he’s been diminished by his life experiences.” RP 23. Trial counsel informed the court that “[t]he defense in terms of Faircloth is basically along the lines of a diminished capacity which is the product of a long, unfortunate lifestyle in terms of his childhood and the many foster homes he was in and things that have occurred to him.” RP 38.

In January of 1996, Faircloth filed a memorandum with the court and told the court that it was “dealing with the area of diminished capacity focusing on the events that influenced [Faircloth’s] perception of the world on the day of the incident. In that particular memorandum, I made reference to other cases and most of the other cases dealt specifically with the area of self-defense.” RP 91-92. (Appendix A). Faircloth clarified that he was not asserting the defense of self-defense and that he was

instead pursuing the defense of diminished capacity to premeditate, but that “these cases... place before the court and the trier of fact certain psychological conditioning that may impact on the actor.” RP 92.

Trial counsel explained with detail how Faircloth’s history of abuse and his other life circumstances could have led to “psychological effects” that could diminish his ability to premeditate, and counsel explained that those effects apply to a defense of self-defense. RP 91-94. But counsel explained that Faircloth was not asserting self-defense, and that instead those psychological factors diminished Faircloth’s capacity to premeditate the murder. RP 94. Counsel summarized the defense by explaining that Faircloth could not premeditate the murder because “[h]is abuse, emotional and psychological abuse he’s received throughout his lifetime precluded him from the intent to commit this – the specific intent of first degree murder.” RP 97.

At trial, Faircloth argued that he lacked the ability to premeditate the murder. RP 532-534. During a mid-trial offer of proof, Dr. Killoran testified about Faircloth’s various psychological disorders and about Frank’s [alleged] “sexual overtures” toward Faircloth. RP 129. Dr. Killoran testified about how these sexual overtures would have contributed to Faircloth’s inability to premeditate the murder. RP 128-

134. Dr. Killoran attributed Faircloth's act of murdering Frank to an "internalized rage" that "was outer-directed in a violent paroxysm of destruction and... ended in the victim's death." RP 134, 137. Dr. Killoran testified that "homosexual panic" was "a symptom that might have further impaired [Faircloth's] ability to withhold his impulses." RP 138. Dr. Killoran testified that even though Faircloth's ability to refrain from committing the murder was impaired, he nevertheless knew what he was doing when he committed the murder and that he knew that it was wrong. RP 140.

Dr. O'Shaunessy testified during a mid-trial offer of proof that Faircloth committed the murder because Faircloth had a history of abuse, was impaired by intoxicants, that he did not like Frank, and that Frank interrupted him at a bad time. RP 195. Dr. O'Shaunessy explained that the abuse history included "sexual abuse by his father." RP 196. She opined that Faircloth had "repressed some of the earlier episodes of sexual abuse and the history simply to be able to survive."¹ RP 196. She went on to explain that "on an occasion like this his view... was that Frank

¹ More discussion of repressed memory appears at RP 679-80 during an offer of proof and at RP 709 during testimony to the jury. At RP 937, Faircloth testified at sentencing in regard to abuse perpetrated by his biological parents that "it's hard to remember a lot because, I don't know, blocked a lot out..." To explain his decision to murder Frank, Faircloth explained that Frank's treatment of him "brought a lot of old emotions and feelings back throughout my whole life that I've been compacting, through my whole life. And the fact of being high that night – just that little thing that he had said triggered it all.... [That] he said I was out of the home, you know." RP 947.

Faircloth was gay and his view was that Frank Faircloth was at least being sexually provocative with him on a number of occasions.” RP 196. She summarized that she thought that “with the diminished capacity [from huffing paint and using alcohol (RP 202)] what you have is that his own repressed rage, not at Frank Faircloth, but at his father and at his earlier abuse history, came to the fore with the diminished capacity. And it was very volatile at that moment.” RP 197.

Dr. O’Shaunessy testified (during the offer of proof) that when Faircloth murdered Frank, Faircloth knew what he was doing, and he knew that it was wrong. RP 204.

At another mid-trial offer of proof, Dr. O’Shaunessy testified that she opined that Faircloth perceived Frank as a threat, but she also testified that the murder was impulsive and due to Faircloth’s diminished impulse control, which was contributed to by intoxication. RP 670-677.

The prospect that the defense of self-defense was implicated was not lost on the parties at trial. Self-defense was raised as a potential issue by the prosecutor after Dr. O’Shaunessy’s offer of proof. RP 682, 683. In response, Faircloth, through trial counsel, explained that:

[I]f the isolated reason for the act would have been perceived threat, then it would have been self-defense. I think if the, if the sole facet was the consumption of alcohol and paint, then we’d have the intoxication defense. But what we have here is a multi-

facet symptoms that are put under this post-traumatic stress. And I think that the explanation of this disorder comes from experiences and we have a perceived threat. I believe in her report she said it may not necessarily have been a threat generated by Frank, but it might have been generated because of earlier experiences.

RP 684-685. The trial court judge pointed out that this line of testimony “under certain circumstances give rise to the existence of a defense of self-defense,” but that self-defense was “not being presented to this particular jury, and that is a decision made by defense counsel in forming the theory of this case.” RP 685. Acknowledging Faircloth’s right to choose his own defenses and defense strategies and tactics, the trial court judge then allowed testimony regarding a diminished capacity to premeditate the murder and said, in summary, that “if the trier of fact were to accept that theory, they might well determine that he is guilty of a second degree murder as opposed to a first degree murder.” RP 686.

Rather than pursue the potential defense of self-defense, Faircloth chose instead to focus upon the premeditation element of first degree murder, and he elicited testimony to the jury from Dr. O’Shaunessy, as follows: “I don’t believe he was capable of premeditating.” RP 712. She elaborated upon this theory by explaining Faircloth’s history of abuse, the resulting mental disorders, and his use of drugs and other intoxicants. RP 715-721, 729. She also testified to the jury that despite this history of

abuse, his mental disorders, and his intoxication, when Faircloth murdered Frank he knew what he was doing and he knew it was wrong. RP 729, 731-732.

After Dr. O'Shaunessy's testimony to the jury, the trial court addressed Faircloth's trial counsel as follows: "[H]ave you promoted or preserved or put forward in any way the defense of self-defense on behalf of your client?" RP 820. Trial counsel responded, "No, I have not, your honor, but this is not a self-defense." RP 820. The trial court asked for an offer of proof on Faircloth's theory of impaired ability to premeditate. RP 821.

In response, trial counsel summarized the long list of [alleged] abuse perpetrated by Frank against Faircloth, which included unwanted touching and psychological and emotional pressure. RP 821-822. Trial counsel further elaborated, as follows:

I would also add that on those occasions when he did have the physical contact, Marvin did physically assault Frank. And I think that is mentioned in some of the evidence, that Frank was always being beat up by Marvin and Marvin was pushing Frank. And I think that – and that's the reason those assaults occurred in the past was because of the physical approaching of Marvin by Frank. And that's present in some of the statements, and I think may have been testified to. But that is the background to those particular assaults.

Now there is no suggestion or indication that on the night in question when Frank came up to the room that there was any overtures of sexual motivation in his behavior....

RP 822.

D. STANDARD OF REVIEW FOR PERSONAL RESTRAINT PETITION

To overcome the finality of the jury's verdict of guilty and the finding on direct appeal sustaining the jury's verdict, Faircloth "must first overcome statutory and rule based procedural bars." *In re Personal Restraint of Grasso*, 151 Wn.2d 1, 10-11, 84 P.3d 859, 864 (2004), citing RCW 10.73.090, .140; RAP 16.4(d).

To prevail on an assertion of newly discovered evidence, it is not enough to show that the evidence might or could change the result of the trial; instead, Faircloth must show that the new evidence, if it is new evidence, will probably change the result. *State v. Peele*, 67 Wn.2d 724, 409 P.2d 663 (1966).

"Significantly, the standard is 'probably change,' not just possibly change the outcome." *State v. Gassman*, 160 Wn. App. 600, 609, 248 P.3d 155 (2011)(citing *State v. Williams*, 96 Wn.2d 215, 223, 634 P.2d 868 (1981)). "Defendants seeking postconviction relief face a heavy burden and are in a significantly different situation than a person facing

trial.”” *Gassman* at 609 (quoting *State v. Riofta*, 166 Wn.2d 358, 369, 209 P.3d 467 (2009)).

E. ARGUMENT

1. THIS PETITION SHOULD BE DISMISSED BECAUSE IT IS A MIXED PETITION THAT INCLUDES CLAIMS THAT ARE BARRED BY RCW 10.73.090.

Faircloth’s supplemental brief has a new claim of ineffective assistance of counsel, but RCW 10.73.090 prohibits the filing of an ineffective assistance of counsel claim that is beyond the one-year statute of limitations for collateral attack. *See, e.g., In re Pers. Restraint of Weber*, ___ Wn.2d ___, ___ P.3d ___ (No. 85992-2, Sep. 6, 2012) (dismissing collateral attack that asserted ineffective assistance of counsel claim as time barred); *Shumway v. Payne*, 136 Wn.2d 383, 400, 964 P.2d 349 (1998) (prohibiting the filing of an ineffective assistance of counsel claim beyond the one-year period authorized by RCW 10.73.090); *In re Runyan*, 121 Wn.2d 432, 436, 853 P.2d 424 (1993) (dismissing as time-barred collateral attack that asserted a claim of ineffective assistance of counsel).

Because Faircloth’s petition includes a claim that is time-barred, his petition is a “mixed petition,” and the entire petition must be dismissed

as untimely. *In re Personal Restraint of Hankerson*, 149 Wn.2d 695, 699-700, 72 P.3d 703 (2003). Faircloth can cure this defect by filing a new petition, after this one is dismissed, that asserts only those claims that fall into one of the exceptions contained in RCW 10.73.100. *Id.*

2. FAIRCLOTH'S ASSERTION THAT HE HAS RECOVERED A MEMORY OF BEING RAPED BY HIS VICTIM IS NOT NEWLY DISCOVERED EVIDENCE THAT ENTITLES HIM TO A NEW TRIAL.

Faircloth bears the burden of establishing that he has "newly discovered evidence." *In re Personal Restraint of Brown*, 143 Wn.2d 431, 21 P.3d 687 (2001). To meet this burden, Faircloth must satisfy each -- and every one -- of the following factors:

"[T]hat the new evidence (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and, (5) is not merely cumulative or impeaching. The absence of any one of the five factors is grounds for the denial of a new" proceeding.

Id. at 453 (quoting *State v. Williams*, 96 Wn.2d 215, 222-23, 634 P.2d 868 (1981)). This five-factor test has been consistently applied in Washington, in both criminal and civil cases, since the 1930's. *See, e.g., State v. Adams*, 181 Wash. 222, 229-30, 43 P.2d 1 (1935).

a) *Whether the “new” evidence would “probably” change the result of the trial.*

In *State v. Peele*, 67 Wn.2d 724, 409 P.2d 663 (1966), the Washington Supreme Court explained the test for reviewing a claim of newly discovered evidence. The court must “first examine the record to ascertain upon what proof the jury found [the defendant] guilty.” *Id.* at 727. Second, the court must juxtapose the strength of the state’s evidence of guilt with the defendant’s allegedly new evidence. *Id.* at 730-31. If the evidence “will probably” result in an acquittal (or conviction of a lesser offense), then the defendant is entitled to a new trial; evidence that “may” or “will possibly” lead to a different result, however, is insufficient. *Id.*

The State disputes the credibility and reliability of Faircloth’s recovered memory and disputes the scientific validity of recovered memories in general, but even if Faircloth’s recovered memory were, or is, real and accurate, it does not on the facts of this case lead to a finding that the result of the trial would “probably” have been different had the evidence been available at the time of trial.

First, the State asserts that, even if Faircloth was affected by battered child syndrome, that assessment does not mean that he is incapable of committing premeditated murder or that any murder he might

commit would probably be justified based upon the defense of self-defense. *See, e.g., State v. Janes*, 121 Wn.2d 220, 240-41, 850 P.2d 495 (1993). There is no credible evidence that Frank ever sexually or physically abused Faircloth. But regardless whether or not Faircloth was ever abused by Frank, it is fair to consider from evidence presented in this case that Faircloth could have been affected by battered child syndrome due to his treatment by other adults and that he might be suspicious of Frank as a result.

But there is no evidence that Faircloth feared Frank, and in particular there is no evidence that Faircloth was in fear of imminent grievous bodily harm or rape perpetrated by Frank. Even when Faircloth testified, he did not say that he feared Frank. RP 937-54.

Faircloth said that at some point in the past Frank told him that if he masturbated, he should do it privately. RP 941. Faircloth said that Frank once pinched his thigh and that he once grabbed his crotch. RP 944. Faircloth said that Frank tried to be too close, that he wanted hugs, and that Frank said he loved Faircloth and wanted him to say that he loved Frank. RP 944. Faircloth said that he thought Frank was homosexual. RP 945.

But all of these things together, even when combined with Faircloth's recovered memory of an anal rape that occurred five months before the murder, do not suggest, show, or otherwise prove to any standard of proof that Faircloth feared Frank or that he felt any kind of threat, imminently or otherwise, or that he believed that he had no other option but to kill Frank.

In appropriate cases, expert testimony regarding battered child syndrome is generally admissible to assist in proving the defense of self-defense. *State v. Janes*, 121 Wn.2d at 236. But the mere fact, or assertion, “[t]hat the defendant is a victim of a battering relationship is not alone sufficient evidence to submit the issue of self-defense to a jury.” *Id.* at 240-41, quoting *State v. Walker*, 40 Wn. App. 658, 665, 700 P.2d 1168, review denied, 104 Wn.2d 1012 (1985) (further citations omitted).

In the context of the instant case, a self-defense instruction to the jury would be appropriate if there were at least some evidence that Faircloth had “reasonable ground to apprehend a design on the part of [Frank] to commit a felony or to do some great personal injury to [Faircloth], and there [was] imminent danger of such design being accomplished.” RCW 9A.16.050. Even assuming, arguendo, that Faircloth currently believes that he has recovered a memory of being

anally raped by Frank, and even assuming, arguendo, that the memory is accurate, Faircloth has not shown how an anal rape that occurred five months before he murdered Frank would probably result in a self-defense instruction at trial. Still more, Faircloth has not shown that the jury would probably acquit him based upon the defense of self-defense if it were presented with evidence that Frank anally raped Faircloth five months before the murder. “No matter how sound the justification, revenge can never serve as an excuse for murder.” *State v. Janes*, 121 Wn.2d at 240.

The murder occurred not because Faircloth feared Frank; instead, the murder occurred because Frank came to Faircloth’s room and told him that he was kicking him out of the house. RP 611, 616. Frank left the room, returned to his own room, and went back to bed. RP 607. Faircloth then decided to carry out his plan of killing Frank. RP 612, 954. Faircloth clearly resented Frank, but neither revenge nor a feeling of repugnance, even if driven by the life experiences of a battered child, justifies a homicide. *Janes* at 240.

The evidence shows that Faircloth killed Frank not because he feared him or felt he had no choice, but instead because he consciously decided to kill him, and that he then went and did it in a fit of rage, because he resented what he perceived to be Frank’s emotional or sexual

advances toward him. RP 347-372; 606-617; 950-954. “[T]he right of self-defense does not... permit action done in retaliation or revenge.” *Janes* at 240, quoting *People v. Dillon*, 24 Ill.2d 122, 125, 180 N.E.2d 503 (1962). (Appendix B).

b) *Whether the new evidence was discovered since the trial.*

A defendant seeking post-conviction relief must tender competent evidence to support his petition. *In re Personal Restraint of Lord*, 123 Wn.2d 296, 303, 868 P.2d 835 (1991) (allegations supporting a personal restraint petition must be proven by "competent, admissible evidence").

Dr. Brown’s opinion is based upon information that was all known at the time of trial: documents listed in paragraph 2(b) of her declaration, and Faircloth’s report of a molestation incident that he remembered while in jail pending trial but was too ashamed to disclose. Dr. Brown’s declaration, at page 4, para 3. The only new assertion of fact is Faircloth’s assertion that in the year 2000 he recovered a memory of Frank anally raping him.

Retest or reexamination of existing evidence does not constitute “new” evidence. *See, e.g., State v. Harris*, 106 Wn.2d 784, 796, 725 P.2d

975 (1986), *cert. denied*, 480 U.S. 940 (1987) (new expert opinion based upon a review of evidence that was available prior to trial will not support a motion for new trial); *State v. Harper*, 64 Wn. App. 283, 823 P.2d 283 (1992) (same); *State v. Evans*, 45 Wn. App. 611, 614-15, 726 P.2d 1009 (1986), *review denied*, 107 Wn.2d 1029 (1987) (same).

Washington Courts understand that a defendant trying to collaterally attack her or his conviction has an enormous incentive to fabricate claims; defendants, therefore, are required to substantiate their allegations with corroborative evidence. *See, e.g., State v. Robinson*, 138 Wn.2d 753, 760, 982 P.2d 590 (1999) (a bare assertion by petitioner that the right to testify was violated is not sufficient to warrant an evidentiary hearing).

Faircloth has no corroborative evidence that the victim molested him, or that he did not previously recall the abuse, or that the victim sexually abused other children. In other words, Faircloth has no new “evidence.”

Dr. Brown bases her opinion on assumptions for which there is no proof. On page six of her declaration, Dr. Brown states that she believes Faircloth’s memory is “accurate” because “[m]aterials reviewed indicate that after his death, Frank Faircloth’s persistent sexual interest in

adolescent boys, which was apparently known to many other persons, became better known to [sic].” With nothing more than her bias when interpreting what must be the DSHS report attached to the State’s original Response Brief as Appendix E, Dr. Brown alleges that “Marvin was likely not the only adolescent boy who was a target of Frank Faircloth’s sexually abusive behaviors, although the extent to which other boys were abused is not known to me.” Dr. Brown’s declaration, p.6. Based on no corroborated or otherwise credible evidence, Dr. Brown concludes that “Frank Faircloth’s interest in sexual contact with adolescent boys does *seem* [emphasis added] to have been *adequately* [emphasis added] corroborated. Id.

“It is improper for an expert to base an opinion about an ultimate issue of fact solely on the expert’s determination of a witness’s veracity.” *State v. Fitzgerald*, 39 Wn. App. 652, 657, 694 P.2d 1117 (1985).

There is considerable controversy regarding whether “recovered memories” should be admissible in court. *See generally, Clark v. Edison*, ___ F.Supp.2d ___, 2012 WL 3063094 (D.Mass), 88 Fed. R. Evid. Serv. 1390 (summarizing the current debate). (Appendix C).

The scientific validity of repressed memory theory has been called into question by modern cases in other jurisdictions, as well, as the excerpt

from the following case illustrates:

Overall, at least seventy-two individuals were convicted in nearly a dozen major child sex abuse and satanic ritual prosecutions between 1984 and 1995, although almost all the convictions have since been reversed. [Citation omitted]. Some defendants, fearing trial, pled guilty or “no contest” to impossible acts of ritualistic abuse, and in some cases they provided detailed confessions in exchange for immunity or generous plea bargains. See Debbie Nathan & Michael Snedeker, *Satan's Silence: Ritual Abuse and the Making of a Modern American Witch Hunt* 160-77 (1995). Many have described these widespread prosecutions as a modern-day “witch hunt.” See generally, e.g., Richard Guilliat, *Talk of the Devil: Repressed Memories and the Ritual Abuse Witch-Hunt* (1996); Nathan & Snedeker, *supra*; Elizabeth Loftus & Katherine Ketcham, *The Myth of Repressed Memory: False Memories and Allegations of Sexual Abuse* (1994); Richard A. Gardner, *Sex Abuse Hysteria: Salem Witch Trials Revisited* (1992).

These prosecutions were largely based on memories that alleged victims “recovered” through suggestive memory recovery tactics, including those petitioner claims were used in this case. Indeed, the dramatic increase in conspiratorial charges of child sexual abuse has been traced to a relatively small group of clinical psychologists who supported the psychoanalytic notion of “repressed memories” and encouraged patients to employ extensive “memory recovery procedures” to “break through the barrier of repression and bring memories into conscious awareness.” Loftus & Davis, *supra*, at 470-71, 483-86 [Elizabeth F. Loftus & Deborah Davis, *Recovered Memories*, 2 *Annu. Rev. Clin. Psychol.* 469, 477 (2006)].

Friedman v. Rehal, 618 F.3d 142, 156 (C.A.2 (N.Y.), 2010).

Additionally, “there is a subgroup of persons with major dissociative symptoms ‘whose memory is very uncertain.’ Some in this subgroup start to speculate when they do not have the memory available to

them, and then engage in ‘expressed uncertainty,’ where they fill in the blanks of what they cannot remember, either by inferring the memory from other information or making it up, which is known as ‘confabulation.’” *Commonwealth v. Polk*, 462 Mass. 23, 28, 965 N.E.2d 815, 821 (2012) (quoting testimony of trial expert). (Appendix D). This unreliability is further complicated because:

[T]he direct study of memory is in many ways impossible, in the sense that the inner workings of the human mind cannot be directly examined. The study of memory relies heavily, if not entirely, on self-reporting by individual patients and subjects. When a person claims to have a lack of memory, or to have lost a memory and then recovered it, there may be no accurate way to test that proposition. At the very least, the type of rigorous testing and analysis required in other sciences is simply not possible.

Clark v. Edison, ___ F.Supp.2d ___, 2012 WL 3063094, 1 (D.Mass), 88 Fed. R. Evid. Serv. 1390. (Appendix C). Thus the *Clark* court wrote that:

It certainly gives the Court pause to admit, as scientific testimony, evidence of a thesis that is supported solely by self-reported accounts of individuals' memories as they existed over the course of many years. Proponents of repressed-memory theory have argued that this concern is overstated, and that studies on the topic have evolved and developed more sophisticated methodologies to mitigate the risks inherent to self-report data. [Footnote omitted]. Those experts have also argued that self-report data derived from reasonably well-designed studies can be scientifically valid, even if such data are imperfect. [Footnote omitted]. Whether that is true or not, there is nevertheless legitimate cause for concern that the entire theory rests on a foundation of inherently unreliable data. Indeed, the problem of reliance on self-reported information is endemic to the fields of psychiatry and psychology generally.

Nonetheless, it appears that such information is routinely relied on by experts in the field, and that on balance the appropriate course is to permit the testimony and subject it to vigorous cross-examination.

Id. at 16-17.

A North Carolina appeals court recently upheld a trial court which found that recovered memories in that case were inadmissible under ER 403 “because recovered memories are of ‘uncertain authenticity’ and susceptible to alternative explanations.” *State v. King*, ___ S.E.2d ___, 2012 WL 2213682, 6 (N.C., June 14, 2012). (Appendix E).

The Minnesota Supreme Court recently upheld a trial court’s ruling excluding testimony regarding suppressed and recovered memory theory, holding that the theory lacked foundational reliability. *John Doe 76C v. Archdiocese of Saint Paul and Minneapolis*, 817 N.W.2d 150, 2012 WL 3023204 (Minn., July 25, 2012). (Appendix F). The court noted that the trial court found that “because of serious methodological flaws, the scientific literature relied upon by Doe's experts simply did not support an argument that ‘someone could have a terrible trauma and then be literally unable to remember it for a period of time’” and that the trial “court found that ‘the accuracy of the recovered memories has not been scientifically established,’ and [that] Doe's experts conceded that there was no way to

tell whether a person was actually suffering from repressed memories in any given case.” *Id.* at 169.

c) *Whether the “new evidence” could have been discovered before trial by the exercise of due diligence.*

A finding of diligence requires a party to show what steps they took to discover the evidence. *See, e.g., Peoples v. Puyallup*, 142 Wash. 247, 252 P. 685 (1927); *Vance v. Thurston County Comm'rs*, 117 Wn. App. 660, 685, 71 P.3d 680 (2003), *review denied*, 151 Wn.2d 1013 (2004). Pure non-action does not constitute “due diligence.” *See, e.g., Davenport v. Taylor*, 50 Wn.2d 370, 374, 311 P.2d 990 (1957).

A party also cannot demonstrate due diligence when he or she had knowledge of a witnesses’ existence prior to trial and failed to discuss the matter that the party now claims to be “newly discovered.” *See, e.g., State v. Gibson*, 75 Wn.2d 174, 178-79, 449 P.2d 692 (1969) (due diligence not shown where defense counsel could have discovered the fact by questioning his own client); *State v. Pope*, 73 Wn.2d 919, 442 P.2d 994 (1968) (due diligence not shown where defense counsel was aware of witnesses prior to trial and had discussed the substance of their information with defense counsel, and defense counsel simply did not

recognize the importance of the witnesses' testimony); *Wick v. Irwin*, 66 Wn.2d 9, 400 P.2d 786 (1965) (due diligence not shown where appellant's attorney failed to discover, prior to trial, that his client saw a telephone company truck parked at the scene); *State v. Douglas*, 193 Wash. 425, 429, 75 P.2d 1005 (1938)(due diligence not used where defendant knew about the witnesses' existence prior to trial and did not ascertain the nature and extent of his information); *Peoples v. Puyallup*, 142 Wash. 247, 252 P. 685 (1927) (due diligence not shown where the "newly discovered" eye witness's existence was known to at least one witness who actually testified at trial).

Here, Faircloth's own submission indicates that he had knowledge of the abuse prior to trial. Dr. Brown states in her declaration that Faircloth withheld portions of his knowledge from his attorneys and the mental health experts that he met with prior to trial "because he felt intensely ashamed and afraid of being labeled gay." Pg. 4, lines 19-20.

d) *Whether the "new" evidence is material.*

Evidence is "material" when there is a reasonable probability that, had the evidence been introduced to the jury, the result of the proceeding would have been different. *Cf. United States v. Bagley*, 473 U.S. 667,

682, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985) (for *Brady* purposes, evidence is material when “there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different”). As a matter of law, evidence that is merely cumulative impeachment is not “material.” See, e.g., *Felder v. Johnson*, 180 F.3d 206, 213 (5th Cir.), cert. denied, 528 U.S. 1067 (1999) (suppressed evidence is not material when it merely furnishes an additional basis on which to impeach evidence whose credibility has already been shown to be questionable); *State v. Swan*, 114 Wn.2d 613, 643-44, 790 P.2d 610 (1990) (new evidence that “was at most cumulative impeaching evidence” was not material as it would not have changed the outcome of the trial).

In the instant case, at the time of trial Faircloth asserted that he had been subjected to abuse by Frank, and as examples of this abuse Faircloth described a variety of allegations, which included that Frank urged him to masturbate, that he touched his thigh and crotch, that he frequently tried to hug him, that he acted gay. RP 941-945. Still more, there was a great deal of evidence offered directly and in offers of proof that show that Faircloth was subjected to a lifetime of heinous sexual, psychological, and physical abuse that could cause him to experience battered child syndrome. The

addition of a purported recovered memory of a single incident of anal rape, while substantial, does not alter the circumstances or background information that support opinions of Faircloth's mental state.

e) *Whether the "new" evidence is merely cumulative or impeaching.*

"Cumulative evidence is additional evidence of the same kind to the same point." *Roe v. Snyder*, 100 Wash. 311, 314, 170 P. 1027 (1918). *See also* Black's Law Dictionary, 343 (5th ed. 1979) ("Cumulative evidence" is "[a]dditional or corroborative evidence to the same point. That which goes to prove what has already been established by other evidence.").

In her declaration at page 2, paragraph 2(b), Dr. Brown names several reports, each of which was available at the time of trial, that she relied upon to form her opinion. Among these is a psychological report authored by Dr. Trowbridge on January 19, 1996. (Appendix G). Dr. Trowbridge reported that:

When I asked Marvin directly why he had killed his father, he told me, "He touched me quite a few times, but I didn't like it." He said he thought Frank was "gay," and thought Frank sometimes stood too close to him and brushed his body up against him. He told me, "I didn't feel comfortable around him." He described an incident in which, "One time he was rubbing my leg and I woke

up.” Although he stated there were no actual incidents in which Frank propositioned him or actually initiated sexual behavior, Marvin “thought he wanted to have sex with me the way he made passes at me.” According to Marvin, “sometimes I beat him up for it!”

Trowbridge Report, p. 5. Dr. Brown also relied upon Dr. O’Shaunessey’s report from January 8, 1996. (Appendix H). In her 1996 report, Dr.

O’Shaunessey wrote that:

Marvin reports that he found Mr. Faircloth (Frank) “kind of weird.” When asked to elaborate, he said that when he first met Frank, Frank asked him if he masturbated and told him if he did that he should do it in private. Marvin found this a strange comment which seemed “out of the blue” at the time. He further indicated that he felt uncomfortable around Frank because he believed that Frank was gay and that he found excuses to touch Marvin. Marvin described a game in which every time Frank saw a monkey tree first, he (Frank) would pinch Marvin’s inner thigh when they were riding in the car. He reported other times when Frank rubbed against him and grabbed his genitals in a kind of mock play. Once when Marvin was ill and asleep, he awoke to find Frank sitting up on his bed, rubbing his legs. Marvin found this upsetting and pulled away. He said he found pornographic magazine photos under Frank’s bed of adult males masturbating and that he felt uncomfortable because Frank would buy him “weird” shirts (shirts that were purple or pink ripped [sic] which Marvin would not wear. Marvin denied explicit sexual contact with Frank, although Dr. Maxwell reported that Marvin said Frank “... was touching me sexually.” It is clear that Marvin felt physically uneasy and that [he] did not like to be touched or hugged by Frank.

Dr. O’Shaunessey’s Jan. 8, 1996, Psychological Evaluation, at pg. 4. Yet another record relied upon by Dr. Brown was a transcript of interviews of Faircloth by Bob Zornes conducted on July 27, 1995 (Appendix I), and

September 1, 1995. (Appendix J). On pages 27-32 of Zornes's first interview of Faircloth, the same allegations as above are again reported.

As summarized in the "Statement of Facts" section of this brief, above, both the jury and the trial court were made aware of a history of inappropriate conduct alleged against Frank and learned that Faircloth had suffered extensive, heinous sexual, psychological and physical abuse perpetrated against him by his biological parents. RP 20-23, 38, 91-94, 97, 128-140, 195-196, 679-680, 715-21, 729, 731-32, 821-22.

The jury also learned that Faircloth had been sexually abused in the past, and that this past abuse contributed to a diagnosis of Post Traumatic Stress Disorder (PTSD). RP 699. Consequences of Faircloth's PTSD included "major depression recurrent," alcohol and poly drug dependence, and borderline personality disorder. RP 699-700. Symptoms of Faircloth's PTSD included high anxiety, depression, intrusive recurring thoughts, psychological numbing, emotional numbing, reactivity or hyper-vigilance, and dissociation among other symptoms. RP 700-701, 704, 708-709. The jury learned that those who experience PTSD "often have no memory for some of these events, the event itself or the circumstances surrounding the event." RP 701. The jury learned that Faircloth's PTSD was the result of a "prolonged history of emotional abuse, sexual and

physical abuse and neglect.” RP 701-702. Dr. O’Shaunessy opined that due to Marvin’s PTSD and drug consumption, he was unable to premeditate the murder. RP 712.

Marvin’s “recovered memories” merely serve to reinforce the opinions of his experts. Those opinions were rejected by the jury based upon overwhelming evidence. Evidence that included: (1) Faircloth’s statement to another resident of the house and to other witnesses that he was planning on murdering the victim (RP 321-22, 382, 398-99, 409-14, 609; (2) the use of a variety of weapons to complete the murder (RP 364-369; (3) the length of the fatal assault, which took about 25 minutes to complete and included torture (RP 347-56); (4) that Faircloth took a break during the murder episode to go upstairs and threaten to kill West as a means of covering up the crime, and to smoke a cigarette (RP 350-53, 951-52); (5) that when Frank tried to escape, Faircloth dragged him back into the house by his hair, pulled a knife from his back and tried to cut his throat, but failing that, bashed him to death with a hammer (RP 952); and, (6) that Frank posed no threat to Faircloth when the murder episode began but was instead, in bed, where he was ambushed (RP 612-17).

3. THERE IS NO EVIDENCE THAT FAIRCLOTH WAS REASONABLY
DILIGENT IN FILING COLLATERAL ATTACK.

RCW 10.73.100(1) requires a petition to establish that the defendant acted with “reasonable diligence”² in “filing the petition or motion” based upon the newly discovered evidence. Dr. Brown reports that Faircloth first recovered his lost memory in the year 2000. Dr. Brown’s declaration, p. 4, lines 25-26. The lost memory, now recovered, was of being anally raped by Frank about five months before the murder. Dr. Brown’s declaration, p. 4, lines 25-26; p. 5, lines 17-21. Thus, the purported memory was recovered about four years after trial, but a motion for a new trial and this personal restraint petition was not brought for another 11 years after the so-called new evidence was discovered. This omission, alone, precludes a finding that Marvin acted with “reasonable diligence” in filing the instant collateral attack.

While no Washington case explains what constitutes “reasonable diligence in filing the petition,” a number of other jurisdictions have explored this concept, and generally use a 30 to 60 day period to be

² The phrases “due diligence” and “reasonable diligence” have the same meaning. *See, e.g., People v. Cogswell*, 48 Cal. 4th 467, 227 P.3d 409, 414, 106 Cal. Rptr. 3d 850 (2010) (“Reasonable diligence, often called “due diligence” in case law, “connotes persevering application, untiring efforts in good earnest, efforts of a substantial character.”). (Appendix K).

“reasonable.” See, e.g., *Evans v. Chavis*, 546 U.S. 189, 210, 126 S. Ct. 846, 163 L. Ed. 2d 684 (2006) (using 30 to 60 days as general measurement for reasonableness based on other states' rules governing time to appeal to the state supreme court); *Carey v. Saffold*, 536 U.S. 214, 219, 122 S. Ct. 2134, 153 L. Ed. 2d 260 (2002) (same); *Chaffer v. Prosper*, 592 F.3d 1046 (9th Cir. 2010) (same). Federal courts³ have found that diligence was not displayed when petitioners waited more than 60 days from the triggering event to the filing of the collateral attack. See, e.g., *Chaffer v. Prosper, supra* (diligence not displayed where there was a 115-day gap between the denial of his first habeas petition in the Lassen County Superior Court and the filing of his second habeas petition in the California Court of Appeal, and a 101-day gap between the denial of his second habeas petition and the filing of his third habeas petition); *Beards v. Dailey*, 38 Ore. App. 309, 589 P.2d 1207 (1979) (motion to set aside

³ The federal court opinions referenced here either deal with the equitable tolling of the one-year statute of limitations or the requirements that must be met to present evidence on a claim for the first time in federal court. Both of these federal concepts require the petitioner to establish diligence. See, e.g., *Williams v. Taylor*, 529 U.S. 420, 120 S. Ct. 1479, 146 L. Ed. 2d 435 (2000) (28 U.S.C.S. § 2254(e)(2) prohibits a prisoner, who failed to develop the factual basis for his claim in state court, from obtaining an evidentiary hearing in federal court; a lack of diligence and a failure to use the available state procedures to seek the evidence constitutes a “failure”); *Waldron-Ramsey v. Pacholke*, 556 F.3d 1008, 1011 (9th Cir.), cert. denied, 130 S. Ct. 244 (2009) (with regard to a petition for a writ of habeas corpus, to receive equitable tolling, a petitioner bears the burden of showing (1) that he has been pursuing his rights diligently; and (2) that some extraordinary circumstance stood in his way).

default not filed with reasonable diligence where 82 days elapsed between the day notice of the judgment was sent to the defendant and the filing of the motion to set aside the judgment). (Appendix L).

The 30 to 60-day time period is consistent with a multitude of judicially established deadlines. *See, e.g.*, RAP 10.2(a) (briefs of appellants due 45 days after the record is filed with the appellate court); RAP 10.2(b) (respondent's brief in civil cases due 30 days after service of the appellant's brief); RAP 10.2(c) (respondent's brief in criminal cases due 60 days after service of the appellant's brief); RAP 13.5(a) (motion for discretionary review must be filed within 30 days after the Court of Appeals' decision is filed); RAP 13.4(a) (petition of review must be filed within 30 days of the filing of the Court of Appeal's decision).

A 30 to 60-day rule is also consistent with the Washington Supreme Court's decree that a "reasonable time within which to apply for a statutory writ is the analogous statutory or rule time period." *Clark County Pub. Util. Dist. No. 1 v. Wilkinson*, 139 Wn.2d 840, 847, 991 P.2d 1161 (2000). In the instant context, the "analogous statutory or rule time period" is either CrR 7.5(b)'s 10-days for filing a motion for new trial based upon newly discovered evidence, or RAP 5.2(a) and (b)'s 30-day time period for filing a notice of appeal or notice of discretionary review.

Faircloth exceeded the 30 to 60 day time period by more than 140 days.⁴ Accordingly, this collateral attack must be dismissed as time-barred. Equally or more significantly, Faircloth waited 11 years after recovering the memory that he now asserts as “new” evidence before bringing this personal restraint petition.

4. FAIRCLOTH’S TRIAL COUNSEL WAS NOT INEFFECTIVE.

In counsel’s supplemental brief, Faircloth argues that his counsel was ineffective because he failed to preserve the issue of self-defense. This claim fails as the trial record establishes that counsel fully explored an abused child defense, both retaining necessary experts and presenting the applicable legal authority. See “Defendant’s Memorandum Re:

⁴ Faircloth is not excused from filing the instant collateral attack sooner due to his “pro se” status. A convicted person, who wishes to pursue a collateral attack upon his or her conviction, has no constitutional right to counsel. *Pennsylvania v. Finley*, 481 U.S. 551, 555, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987); *In re Personal Restraint of Gentry*, 137 Wn.2d 378, 390, 972 P.2d 1250 (1999) (“There is no constitutional right to counsel in postconviction proceedings”). This principle extends to cases in which the convicted person has been condemned to die. *Murray v. Giarratano*, 492 U.S. 1, 106 L. Ed. 2d 1, 109 S. Ct. 2765 (1989). Pro se litigants are held to the same standard as an attorney in Washington. Accord *Johnson v. United States*, 544 U.S. 295, 311, 125 S. Ct. 1571, 161 L. Ed. 2d 542 (2005) (“[W]e have never accepted *pro se* representation alone or procedural ignorance as an excuse for prolonged inattention when a statute’s clear policy calls for promptness.”); *State v. Miller*, 19 Wn. App. 432, 436, 576 P.2d 1300, *review denied*, 90 Wn.2d 1018 (1978) (“An orderly judicial system cannot have one set of rules for cases handled by attorneys, and another set for those who wish to take the risk of representing themselves.”).

Diminished Capacity,” filed with trial court clerk on Jan. 29, 1996.

(Appendix A).

Counsel’s efforts were undermined, however, by Faircloth’s lack of candor. Counsel’s performance must be judged solely based upon the information he possessed at the time of trial. *See, e.g., Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (“A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.”); *Mickey v. Ayers*, 606 F.3d 1223, 1239 (9th Cir. 2010) (a later social history could not establish ineffective assistance where it was based on defendant’s later, change of story); *Harris v. Vasquez*, 949 F.2d 1497, 1525 (9th Cir. 1990) (counsel cannot be faulted for following the defendant's claim and not conducting further investigation).

Counsel clearly made a tactical decision to pursue the stronger diminished capacity defense, predicated upon Faircloth’s contemporaneous “huffing,” instead of a self-defense claim. “That this strategy ultimately proved unsuccessful is immaterial to an assessment of defense counsel's initial calculus; hindsight has no place in an ineffective

assistance analysis.” *State v. Grier*, 171 Wn.2d 17, 43, 246 P.3d 1260 (2011). Pursuing an intoxication defense rather than self-defense under the facts of this case was eminently reasonable. *Cf. Matylinsky v. Budge*, 577 F.3d 1083, 1091-92 and n.3 (9th Cir. 2009) (no ineffectiveness to pursue intoxication defense rather than provocation in beating death of wife where victim struck 40 times in head, hair pulled out, blood throughout house, petitioner’s toenails broken from kicking despite wearing shoes and counsel told jury that it was contrary to human nature to believe that there was adequate provocation for what was seen).

5. FAIRCLOTH’S ATTORNEY-FILED BRIEF CONTAINS A NEW BRADY CLAIM.

Faircloth’s trial attorney received the 1996 DSHS report prior to trial. (Attached to the State’s original “State’s Response to Personal Restraint Petition,” as Appendix E).

Brady does not require the police to expand the scope of a criminal investigation. *See, In re Personal Restraint of Gentry*, 137 Wn.2d 378, 399, 972 P.2d 1250 (1999) (“While the prosecution cannot avoid *Brady* by keeping itself ignorant of matters known to other state agents, *United States v. Hamilton*, 107 F.3d 499, 509 (7th Cir. 1997), the State has no

duty to search for exculpatory evidence.”); *State v. Judge*, 100 Wn.2d 706, 717-18, 675 P.2d 219 (1984) (“Neither *Brady* nor *Wright*, or their progeny, imposes a duty on the State to expand the scope of a criminal investigation.”); *State v. Entzel*, 116 Wn.2d 435, 442, 808 P.2d 228 (1991) (“while the State may in some instances have a duty to preserve potentially material and exculpatory evidence, it is not required to search for exculpatory evidence”; no obligation to offer a driver, who has been arrested for DUI, a breath or blood test); *State v. Jones*, 26 Wn. App. 551, 554, 614 P.2d 190 (1980) (“The State ‘is required to preserve all potentially material and favorable evidence.’ This rule, however, has not been interpreted to require police or other investigators to search for exculpatory evidence, conduct tests, or exhaustively pursue every angle on a case. The police are required only to preserve that which comes into their possession either as a tangible object or a sense impression, if it is reasonably apparent the object or sense impression potentially constitute material evidence.”).

DSHS is not part of the “prosecution team” for purposes of *Brady*. See, e.g., *LaVallee v. Coplin*, 374 F.3d 41, 44 (1st Cir. 2004) (For purposes of *Brady*, New Hampshire Department of Health and Human Services, Division of Children, Youth, and Families (DCYF) “is neither

the police nor the equivalent of the police in assisting the prosecution. DCYF was not the prosecuting agency and is independent of both the police department and the prosecutor's office”).

In Faircloth’s attorney-filed brief in support of his personal restraint petition, Faircloth argues a *Brady* violation based upon a “DSHS document.” Supplemental Brief of Petitioner, p. 24. Faircloth does not explain how this document is exculpatory or how it was withheld from him even though it was provided to him. Faircloth concedes that his trial attorney had access the “DSHS document.” *Id.* at 24. Faircloth makes a number of factual assertions based upon an interpretation of the report. *Id.* at 7. But these factual assertions are not supported by the report.

Still more, Faircloth has not shown how the DSHS report, which was delivered to his attorney prior to trial, was favorable to the accused or how any prejudice ensued, or how the existence of this report in any way undermines confidence in the jury’s verdict. *See*, Supplemental Brief of Petitioner, p. 25.

As conceded by Faircloth, to prove a *Brady* violation there must be evidence that was suppressed by the state. *Stricker v. Greene*, 527 U.S. 263, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). In the instant case, nothing was suppressed from Faircloth. Additionally, to prove a *Brady* violation,

Faircloth must show that the suppressed evidence was favorable to him because it was exculpatory, or because it was impeaching, and that suppression of it resulted in prejudice to him. *Id.* Faircloth has not made an adequate showing in regard in any one these three requirements.

F. CONCLUSION

Faircloth's personal restraint petition is a mixed petition because he has alleged both that he has discovered new evidence and that he was denied effective assistance of counsel, but his effective assistance of counsel claim is time-barred by RCW 10.73.090; therefore, this petition should be dismissed.

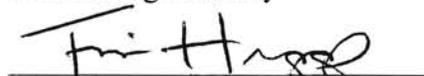
Faircloth was not diligent in bringing his claim of new evidence. His trial was in 1996. Faircloth claims to have recovered a memory in the year 2000. He claims that the purported memory that he recovered in the year 2000 is new evidence that entitles him to a new trial. But he was not diligent in bringing this petition. He waited 11 years after recovering the memory before seeking a new trial.

Finally, Faircloth has not met his burden of showing that, assuming arguendo that his recovered memory is accurate, that the result of the trial would be different had this evidence been available to him at the time of

trial. The recovered memory might explain his motive to murder or to explain the extent of his rage and desire to kill his victim, but the recovered memory does not add anything substantial to the story that resulted in the murder of Frank Faircloth, and it is unlikely that the jury would have rendered any verdict different than the verdict it returned eleven years before Faircloth recovered this memory.

DATED: October 15, 2012.

MICHAEL DORCY
Mason County
Prosecuting Attorney



Tim Higgs
Deputy Prosecuting Attorney
WSBA #25919

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

IN RE PERSONAL RESTRAINT)
PETITION OF:)
)
)
)
)
MARVIN SIDES FAIRCLOTH,)
)
Petitioner,)
_____)

NO. 42318-9-II

DECLARATION
FILING/MAILING
PROOF OF SERVICE

BY  DEPUTY
STATE OF WASHINGTON

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COURT OF APPEALS
DIVISION II

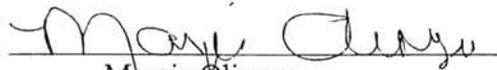
I, MARGIE OLINGER, declare and state as follows:

On October 15, 2012, I deposited in the U.S. Mail, postage properly prepaid, the documents related to the above cause number and to which this declaration is attached (STATE'S RESPONSE (SUPPLEMENTAL) TO PERSONAL RESTRAINT PETITION AND TO SUPPLEMENTAL BRIEF OF PETITIONER), to:

Lise Ellner
PO Box 2711
Vashon, WA 98070

I, Margie Olinger, declare under penalty of perjury of the laws of the State of Washington that the foregoing information is true and correct.

Dated this 15th day of October, 2012, at Shelton, Washington.


Margie Olinger

Appendix A

“Defendant’s Memorandum Re: Diminished Capacity”

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR MASON COUNTY

STATE OF WASHINGTON,)	
)	
Plaintiff,)	NO. 95-1-00051-7
)	
vs.)	DEFENDANT'S MEMORANDUM
)	RE: DIMINISHED CAPACITY
MARVIN SIDES FAIRCLOTH,)	
)	
Defendant.)	
)	
)	

I. FACTS

The defendant, MARVIN SIDES FAIRCLOTH, born on September 8, 1976, was charged with First Degree Murder for the murder of his adoptive father, FRANK FAIRCLOTH, on the 28th day of February, 1995. Prior to this event, Marvin had a lengthy history of involvement with the courts and social services. The relationship between Marvin and his biological parents was terminated in 1986. This occurred after subsequent years of extensive, severe physical, sexual and emotional abuse and neglect as documented in his Child Protective Services file. Marvin does not recall any memory of the abuse perpetrated on him by his biological parents.

The reports by Kathleen O'Shaunessy, Ph.D., who had the opportunity to assess Marvin's problems at age 8 and again after he was charged herein; Sean M. Killoran, M.D.; and James K. Maxwell, Ph.D., in summary, reflect that Marvin was a highly impaired young man, suffering from chronic depression, ADHD or SI and chemical dependency and Post Traumatic Stress Syndrome from his years of abuse and neglect.

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2 They further set out that Marvin continued in a downward spiral in his ability cope with
3 school and other social settings. Marvin began abusing drugs and alcohol by the sixth
4 grade. By the time of his arrest in February, 1995, Marvin had only completed a 10th
5 grade education. He had completed drug and alcohol treatment.

6 Marvin's placement in Frank Faircloth's foster home was originally requested by
7 Marvin to gain access to the extra-curricular social activities in Shelton. His previous
8 foster placement had been physically and socially isolating. Soon after placement with
9 Frank Faircloth, Marvin began to feel uncomfortable in Frank's presence because he
10 believed Frank Faircloth to be gay.

11 Approximately one year prior to the death of Frank Faircloth, the deceased was
12 placed in St. Peter's Hospital for observation. A note was found by the defendant and
13 turned into the police. St. Peter's Hospital used that note as a basis for Frank's
14 involuntary commitment for a period of time. From the contents of this note, it would
15 appear that Frank was admitting his homosexual tendencies and, given Marvin's complete
16 history, one could see why Marvin would withdraw for "self-protection." (See attached
17 copy of note.) It would appear that Marvin then began to focus on this facet of the
18 relationship and to drown in a flood of confusion emanating from his years of abuse.
19 Marvin's ability to recognize his inhibitors was severely diminished. It would appear that
20 Frank Faircloth was grooming Marvin for a sexual relationship.

21 From Marvin's point of reference, this relationship dramatically changed upon the
22 finalization of the adoption of Marvin by Frank Faircloth, becoming more sexual in
23 nature than prior to the adoption. While Marvin denied sexually explicit contact, he
24 admitted to feeling threatened by any touches by the decedent. Marvin, according to the
25 mental health evaluations, was subjected to various forms of "play" by Frank, i.e. Frank's
26 continual "brushing up against Marvin" or pinching his inner thigh when riding in a car
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2 with Marvin, Frank's grabbing Marvin by the genitals in the spirit of "a game." These
3 types of gestures on Frank's part represented a inescapable danger to Marvin.

4 The perceived sexual undercurrent of the relationship led Marvin into further
5 alcohol and drug addiction to escape the repulsion he felt towards Frank Faircloth.
6 Marvin avoided discussions of his adoption by Frank until he simply gave into the
7 pressure from Frank. However, in an fit for emotional control over Marvin just one week
8 after the adoption was finalized, Frank Faircloth ripped the new birth certificate in half
9 and told Marvin that he was not his son because he, Marvin, would not declare his love
10 for Frank. Marvin stated that he felt that every "touch" by Frank Faircloth became tainted
11 with the fear that it was of a homosexual nature. Thus, adding to the weight of Marvin's
12 confusion and significant loss of self-esteem. Marvin's drug and alcohol abuse continued
13 significantly. Marvin was huffing spray paint as a cheap alternative to other drugs during
14 the weeks prior to and, more specifically, on the night of Frank Faircloth's murder.

15 II. ARGUMENT

16 Defense raises the issue of "Diminished Capacity" on behalf of Marvin Sides
17 Faircloth supported by the facts that he suffered years of abuse, emotional, physical and
18 sexual. In addition to the battering he suffered as a child, the defendant looked to escape
19 the total devastation he felt, Marvin sought release through drugs and alcohol to the point
20 that he was severely incapable of forming the required intent.
21

22 The court held in State v. Hutchinson, 111 Wn.2d 872, 766 P.2d 447 ((1989) that

23 The defenses of insanity and diminished capacity both bring the
24 defendant's mental capacity into question. The elements of the
25 defense of insanity require that the defendant establish by a
26 preponderance of the evidence that at the commission of the
27 offense the defendant was unable to perceive the nature or quality
28 of his acts and unable to tell right from wrong. State v. Jamison,

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2 94 Wn.2d 663, 664, 619 P.2d 352 (1980). The defense of
3 diminished capacity requires proof that the defendant lacks the
4 mental capacity to form the specific intent to commit the crime.
5 State v. Ferrick, 81 Wn.2d 942, 506 P.2d 860 (1973);

6 and in State v. Gough, 53 Wn.App. 619, 768 P.2d 1028 (1989), at 622 that

7 Diminished capacity arises out of a mental disorder, usually not
8 amounting to insanity, that is demonstrated to have a specific effect
9 on one's capacity to achieve the level of culpability required for a
10 given crime. State v. Ferrick, 81 Wn.2d 942, 944, 506 P.2d 860,
11 cert. denied, 414 U.S. 1094, 94 S.Ct. 726, 38 L.Ed.2d 552 (1973),
12 as modified by State v. Griffin, 100 Wn.2d [768 P.2d 1030] 417,
13 418, 670 P.2d 265 (1983). Evidence of such a condition is
14 admissible only if it tends logically and by reasonable inference to
15 prove that a defendant was incapable of having the required level
16 of culpability. See Ferrick, 81 Wn.2d at 944, 506 P.2d 860.
17 Existence of a mental disorder is not enough, standing alone, to
18 raise an inference that diminished capacity exists, nor is conclusory
19 testimony that the disorder caused a diminution of capacity. The
20 testimony must explain the connection between the disorder and
21 the diminution of capacity. State v. Edmon, 28 Wn.App. 98, 103,
22 621 P.2d 1310, review denied, 95 Wn.2d 1019 (1981).

23 Diminished capacity is distinguished from insanity because as a
24 legal defense the latter has to do only indirectly, if at all, with a
25 specific mental state. the legal defense of insanity encompasses a
26 host of mental disorders, some of which may presumably diminish
27 capacity and some of which may not, but all of which operate to
28 excuse the crime because of a particular quality of the impairment.
State v. Box, 109 Wn.2d 320, 329, 745 P.2d 23 (1987).
Diminished capacity, on the other hand, allows a defendant to
undermine a specific element of the offense, a culpable mental
state, by showing that a given mental disorder had a specific effect
by which his ability to entertain that mental state was diminished.
It is apparent that a mental disorder may amount to insanity and
also have a specific effect on the afflicted's capacity to achieve a
culpable mental state. However, diminished capacity does not ipso
facto follow from insanity. For example, one can be insane under
the M'Naughton rule and still be capable of intending to
accomplish a result defined by law as a crime.

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2 The defendant herein did not have the capacity to achieve a culpable mental state.
3 Given all of the years of repressed memory concerning the abuses the defendant suffered,
4 the defendant exhibited all of the signs of a "battered child." Any physical touches by
5 the deceased were magnified by the defendant. These touches, some of which were not
6 appropriate in nature, set off warning bells for the defendant, and in a subjective standard,
7 Frank became an "imminent threat" to Marvin's safety. Although defense is not raising
8 the issue of "self-defense", the response by the mental capacity of the defendant is
9 relatively the same.

10 The court stated in State v. Janes, 64 Wn.App. 134, 822 P.2d 1238 (1992)
11 that :

12 ...viewing the evidence from the perspective of the defendant at the time of
13 the act....the victim (the defendant herein) honestly and reasonably
14 believed that the aggressor intended to inflict serious bodily injury in the
15 near future....there need be no evidence of an actual physical assault to
demonstrate the immediacy of the danger.

16 ...Some evidence of aggressive or threatening behavior, gestures, or
17 communication by the victim is typically required to show that the
18 defendant's belief that he or she was in imminent danger of great bodily
harm was reasonable.

19 As noted above, Washington uses a subjective standard to evaluate the
20 imminence of the danger a defendant faced at the time of the act. This
21 requires the court and the jury to evaluate the reasonableness of the
22 defendant's perception of the imminence of that danger in light of all the
23 facts and circumstances as he perceived them before the crime. State v.
24 Wanrow, 88 Wn.2d 221, 235-236, 559 P.2d 548 91977). Because
25 battering itself can alter the defendant's perceptions, Washington courts
26 have held that expert testimony with respect to the battered woman
27 syndrome is admissible to explain a woman's perception that she had no
28 alternative but to act in the manner that she did.

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And at 143:

Children do not reach the age of majority until they are 18 years of age. RCW 26.28.010, .015. Until then, they have virtually no independent ability to support themselves, they preventing them from escaping the abusive atmosphere. Further, unlike an adult who may come into a bettering relationship with at least some basis on which to make comparisons between current and past experiences, a child has no such equivalent life experience on which to draw to put the battering into perspective. There is therefore every reason to believe that a child's entire world view and sense of self may be conditioned by reaction to that abuse.

"Hypervigilance is a heightened ability to discern preaggressive behavior in others, a condition which occurs with long-term abuse.a child may notice a change in the usual pattern of abuse which would be almost imperceptible to one who has not been abused. This, in turn, may suggest to the victim of abuse a level of imminent and acute danger very different from that perceived by one not continuously exposed to an abusive environment. Other psychological effects that may contribute to a child's sense that he or she has no alternatives include **learned helplessness, depression, isolation, low self-esteem, fear of reprisal, a belief in the omnipotence of the batterer, and a belief in the futility of either resistance or flight.** (emphasis added.)

Battered children live in an environment wholly different from the safe and nurturing home depicted by traditional values and social expectations. The impact of long-term abuse on a child's emotional and psychological responses is a matter that is thus beyond the average juror's understanding. Without expert testimony to put the child's perceptions into context, a jury cannot fairly evaluate the reasonableness of the child's perception of the imminence of the danger to which he or she reacted. The jury in this case should....be permitted to hear the testimony and evaluate the reasonableness of Andy's perceptions [822 P.2d 1244] and actions in light of the battered child syndrome evidence.

and continuing at 144:

Character evidence does not prove or disprove an element of a charged crime or a particular defense; rather "[i]ts relevance is to permit, but not require, the jury to infer from the particular character trait that it is unlikely or improbable that the defendant committed the charged act."

1 ...Here, there is no dispute as to whether the defendant committed the act;
2 the only issue is his mental state.

3 A diminished capacity instruction is to be given "whenever there is
4 substantial evidence of such a condition and such evidence logically and
5 reasonably connects the defendant's alleged mental condition with the
6 inability to possess the required level of culpability to commit the crime
charged.

7 In this case, the court held that Janes's "Battered Child Syndrome" was a viable
8 condition to support a Diminished Capacity defense

9 that Andy suffered from post-traumatic stress disorder and that Andy's
10 ability to premeditate was "impaired" as a result. State v. Janes, supra.

11 The court defined the requirements for a diminished capacity defense and expert
12 testimonial support in State v. Harper, 64 Wn.App. 283, 823 P.2d 1137 (1992) as:

- 13 1) The defendant lacked the ability to form a specific intent due to a
14 mental disorder not amounting to insanity.
- 15 2) The expert is qualified to testify on the subject.
- 16 3) The expert personally examines and diagnoses the defendant and is
able to testify to an opinion with reasonable medical certainty.
- 17 4) The expert's testimony is based on substantial supporting evidence in
the record relating to the defendant and the case, or there must
18 be an offer to prove such evidence. The supporting evidence
must accurately reflect the record and cannot consist solely of
19 uncertain estimates or speculation.
- 20 5) The cause of the inability to form a specific intent must be a mental
disorder, not emotions like: jealousy, fear, anger and hatred.
- 21 6) The mental disorder must be causally connected to a lack of specific
intent, not just reduced perception, overreaction or other
22 irrelevant mental states.
- 23 7) The inability to form a specific intent must occur at a time relevant to
the offense.
- 24 8) The mental disorder must substantially reduce the probability that the
defendant formed the alleged intent.
- 25 9) The lack of specific intent may not be inferred from evidence of the
26 mental disorder, and it is insufficient to only give conclusory
testimony that a mental disorder caused an inability to form

1 specific intent. The opinion must contain an explanation of how the
2 mental disorder had this effect.

3 The court also held in State v. Stumpf, 64 Wn.App. 522, 827 P.2d 294 (1992)

4 that:

5
6 [3] Lay witness testimony is admissible to establish a criminal defendant's
7 "mental state", subject to the following requirements:

8 (1) The lay witness must have had a sufficient acquaintance with
9 the defendant or must have had sufficient time to observe the
10 defendant. State v. Miller, 177 Wash. 442, 450, 32 P.2d 535
(1934); State v. Stroudamire, 30 Wn.App. 41, 47, 631 P.2d 1028,
11 review denied, 96 Wn.2d 1011 (19810).

12 (2) The witness must testify, at least in a general way, as to the
13 peculiar facts and circumstances on which his or her conclusion is
14 based. E.g., State v. Wilkins, 156 Wash. 456, 287 P. 23 (1930).

15 (3) The testimony must refer to the defendant's mental condition at
16 or close to the time the witness made the observation and at or
17 close to the time the offense at issue occurred. E.g. State v. Smith,
18 16 [827 P.2d 297] Wn.App. 300, 302, 555 P.2d 431 (1976), review
19 denied, 88 Wn.2d 1014 (1977).

20 Testimony by lay witnesses is also governed by ER 701 which provides:

21 If the witness is not testifying as an expert, his testimony in the
22 form of opinions or inferences is limited to those opinions or
23 inferences which are (a) rationally based on the perception of
24 the witness and (b) helpful to a clear understanding of his
25 testimony or the determination of a fact in issue.

26 III. CONCLUSIONS

27 It is well documented that the defendant suffered years of mental, emotional and
28 sexual abuse at the hands of parental figures in his life, both from his natural parents and
in several other foster care situations.

It is further documented that the defendant had an uncontrollable drug and alcohol
addiction. The defendant admits to ingesting large quantities of "spray paint" on the

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night of the murder, to the point that he did not recognize the extent of his actions for several days later.

The defendant herein was suffering from diminished capacity at the time of the murder. He was unable to exercise any inhibitor that might have prevented this tragedy because of the reduction of his ability to form an a specific intent. It is because of these conditions that the defendant, MARVIN SIDES FAIRCLOTH, was severely impaired and lacked the mental capacity to form intent in the murder of Frank Faircloth.

DATED THIS 29 day of January, 1996.

Respectfully submitted,



S.A. DAVIDSON

WSBA#: 6413

Attorney for Defendant

Appendix B

People v. Dillon, 24 Ill.2d 122, 180 N.E.2d 503 (1962)

Westlaw

180 N.E.2d 503
 24 Ill.2d 122, 180 N.E.2d 503
 (Cite as: 24 Ill.2d 122, 180 N.E.2d 503)

Page 1

C

Supreme Court of Illinois.
 The PEOPLE of the State of Illinois, Defendant in
 Error,
 v.
 Daisy DILLON, Plaintiff in Error.

No. 36583.
 Jan. 23, 1962.
 Rehearing Denied March 22, 1962.

Convicted of murder in the Criminal Court, Cook County, Garry G. Hershenson, J., the defendant brought error. The Supreme Court, Hershey, C. J., held that the evidence warranted court's finding defendant guilty of murdering her husband and rejecting defense of self-defense and contention that, if she were guilty of any crime, it was manslaughter.

Affirmed.

West Headnotes

[1] Homicide 203 ↪795

203 Homicide
 203VI Excusable or Justifiable Homicide
 203VI(B) Self-Defense
 203k792 Apprehension of Danger
 203k795 k. Reasonableness of Belief
 or Apprehension. Most Cited Cases
 (Formerly 203k116(4))

One deliberately assaulted in manner to make him reasonably apprehensive of death or great bodily harm has right to kill assailant, if it reasonably appears to him that such action is necessary to save himself from death or great bodily harm.

[2] Homicide 203 ↪774

203 Homicide
 203VI Excusable or Justifiable Homicide
 203VI(B) Self-Defense

203k773 Aggression or Provocation by
 Accused
 203k774 k. In General. Most Cited
 Cases

(Formerly 203k112(1))

Right of self-defense does not imply right to attack in first instance or permit action done in retaliation or revenge.

[3] Homicide 203 ↪1134

203 Homicide
 203IX Evidence
 203IX(G) Weight and Sufficiency
 203k1133 Homicide in General
 203k1134 k. In General. Most Cited
 Cases
 (Formerly 203k250)

Homicide 203 ↪1193

203 Homicide
 203IX Evidence
 203IX(G) Weight and Sufficiency
 203k1192 Self-Defense
 203k1193 k. In General. Most Cited
 Cases

(Formerly 203k250, 203k244(1))
 Evidence warranted court's finding defendant guilty of murdering her husband and rejecting defense of self-defense and contention that, if she were guilty of any crime, it was manslaughter.

[4] Criminal Law 110 ↪1130(2)

110 Criminal Law
 110XXIV Review
 110XXIV(I) Briefs
 110k1130 In General
 110k1130(2) k. Specification of Errors. Most Cited Cases

Question of admissibility of evidence was not before reviewing court where brief did not urge erroneous rulings on admission of evidence as ground for reversal.

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Page 2

*123 **503 Euclid Louis Taylor and Howard T. Savage, Chicago, for plaintiff in error.

William G. Clark, Atty. Gen., and Daniel P. Ward, State's Atty., Chicago (Fred G. Leach, Asst. Atty. Gen., and John T. Gallagher and Rudolph L. Janega, Asst. State's Attys., Chicago, of counsel), for defendant in error.

HERSHEY, Chief Justice.

Defendant was indicted for the murder of her husband. She was tried by the court without a jury, found guilty of murder, and sentenced to the penitentiary for a term of 14 years. She prosecutes this writ of error, contending that the evidence does not support the conviction.

It is undisputed that defendant's husband, Earl Dillon, died as the result of a knife wound inflicted by defendant. Defendant contends, however, that she killed her husband in self-defense and is, therefore, guilty of no crime. As an alternative contention, she argues that, if the evidence proves her guilty of any crime, it is manslaughter rather than murder.

Defendant fatally stabbed her husband on the night of October 9, 1959, in front of the residence of the deceased's brother-in-law, A. C. Patterson, located at 508 South Oakley Boulevard in the city of Chicago. The two had driven to the Patterson residence in company with Charles Reed. *124 They entered the building while Reed remained outside in the car. Defendant and her husband started to quarrel in the hallway of the Patterson apartment, apparently over an address she had found in his pocket, and they either commenced or resumed 'tussling' when Patterson opened the door to let them into the living room. The testimony of both Mr. and Mrs. Patterson would indicate that the defendant was the aggressor in this fighting. However, the defendant's testimony was that her husband had struck her in the hallway before Patterson opened the door. At any rate, blows were exchanged in the apartment, and one **504 of the

husband's blows caused defendant's lip to bleed. After this, defendant went into the back part of the apartment, where the kitchen and bathroom were situated. While defendant was gone Patterson handed Earl Dillon four brake shoes which he had purchased for Dillon's automobile. Defendant returned to the living room and shortly thereafter she and her husband left the building. Both the Pattersons testified that, just before leaving, defendant told Mrs. Patterson that, even though Dillon was Mrs. Patterson's brother, defendant was going to kill him. Defendant denies having said this. After the Dillons left, Patterson heard Earl Dillon cry out. He looked out, and saw him stagger and fall backwards.

Defendant and other witnesses testified to brutal treatment inflicted upon her by her husband going back over six years before the killing. Her testimony with regard to what happened in the Patterson home differed from that of the Pattersons in that she denied having struck her husband and stated that he struck her repeatedly. She further testified that her husband threatened to beat her when they got home. Defendant testified that she got the knife with which she killed her husband from the Patterson's kitchen when she went there to wash after he had struck her and caused her lip to bleed, and that she got the knife in order to protect herself if he started to beat her again. She denied that she *125 told Mrs. Patterson that she intended to kill her husband. According to defendant's testimony, as she and her husband walked down the steps after leaving the Patterson home, her husband cursed her and threatened to beat her. She stood still and refused to follow him, and he told her to come on. She testified that he then turned around and struck her on the side of the face with the brake shoes and that she then pulled the knife and stabbed him.

Charles Reed, who had ridden with the Dillons to the Patterson residence and had remained in the car while they went inside, was, with the exception of the defendant, the only eyewitness to the killing. He appeared as a witness for the People and testi-

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fied that defendant and her husband were walking from the apartment building toward the car with defendant about two steps behind, when the husband turned and defendant's hand moved out. The husband cried out, staggered and fell. Reed did not actually see whether or not defendant had a weapon in her hand, but said a knife was on the pavement immediately after the husband fell. The officer who investigated the stabbing did not find any brake shoes in the deceased's hand. Neither did he notice any marks or bruises on the defendant other than the bleeding lip.

[1][2] Defendant contends that the evidence shows that she killed her husband justifiably in self-defense and, therefore, was not guilty of a crime. It is true that, under the law of self-defense, one who is deliberately assaulted in a manner to make him reasonably apprehensive of death or great bodily harm has the right to kill his assailant, if it reasonably appears to him that such action is necessary to save himself from death or great bodily harm. (*People v. Motuzas*, 352 Ill. 340, 185 N.E. 614; see *People v. Strader*, 23 Ill.2d 13, 177 N.E.2d 126.) However, the right of self-defense does not imply the right of attack in the first instance or permit action done in retaliation or revenge. (*People v. Gibbs*, 349 Ill. 83, 181 N.E. 628; *People v. Andrews*, 327 Ill. 162, 158 N.E. 462.) While there is much testimony *126 indicating that defendant had frequently been physically mistreated by her husband, that is not the question here. The question is, rather, whether the evidence shows that, at this particular instant, her husband had made an unprovoked assault upon her which put her in reasonable fear of imminent death or great bodily harm which could be avoided only by stabbing him. The only evidence in the record that suggests that this may have been the case is defendant's own testimony that her husband struck her with a brake shoe just before she stabbed him. This testimony, however, is contradicted by **505 that of Reed, who witnessed the occurrence but saw no such move on the part of the husband. Moreover, no brake shoe was found in the deceased's hand, nor did defendant appear to

have any marks or bruises indicating that she had been struck with a brake shoe. The record does not support defendant's claim that the killing was necessary in self-defense.

[3] Neither do we find the record in this case to be such as to compel the court to find defendant guilty of manslaughter and to preclude a finding of guilty of murder. Defendant voluntarily armed herself with a knife before leaving the apartment with her husband. Although she claims to have secured the knife with the intention of using it only when necessary in self-defense she actually used it when she had no such justification. Moreover, both Mr. and Mrs. Patterson testified that defendant said she was going to kill her husband. This evidence is certainly sufficient to show the malice necessary to sustain a charge of murder. Defendant sought to impeach Patterson's testimony in this regard by showing that Patterson had testified at the coroner's inquest and at that time did not testify about any statement made by defendant that she intended to kill her husband. However, there is no indication that Patterson was asked about this at the coroner's inquest, nor is there any showing that he had made any previous statements inconsistent with his *127 testimony at the trial. Even if there were, this would be a matter bearing upon the credibility of the witnesses rather than the sufficiency of the evidence. We have repeatedly held that where a cause is tried without a jury the law commits to the trial judge the determination of the credibility of the witnesses and the weight to be given to their testimony, and where the evidence is merely conflicting this court will not substitute its judgment for that of the trial court. (*People v. Sally*, 17 Ill.2d 578, 162 N.E.2d 396; *People v. Golson*, 392 Ill. 252, 64 N.E.2d 462.) The evidence is sufficient to sustain the finding that defendant was guilty of murder.

[4] In arguing the insufficiency of the evidence to prove her guilty of murder, defendant also argues that certain evidence was inadmissible and should not have been considered by the trial court. Both Mr. and Mrs. Patterson testified that when defend-

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ant and her husband entered the apartment, the husband had a broken knife in his hand and told them that his wife had tried to cut him. No objection was made by defendant to this testimony at the trial. She did, however, object to the admission of this knife in evidence, and it was admitted over her objection. She does not, however, in her brief urge erroneous rulings on the admission of evidence as a ground for reversal. We do not, therefore, regard the question of the admissibility of this evidence as properly before us. We have, however, considered the record on the basis of the unquestionably competent evidence therein, and find such evidence sufficient to sustain the verdict.

The judgment of the criminal court of Cook County is affirmed.

Judgment affirmed.

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Appendix C

Clark v. Edison, ___ F.Supp.2d ___, 2012 WL 3063094 (D.Mass),
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(Cite as: 2012 WL 3063094 (D.Mass.))

H

United States District Court,
D. Massachusetts.
Timothy CLARK, Plaintiff,
v.
Richard B. EDISON, Defendant.

Civil Action No. 09-40040-FDS.
July 25, 2012.

Background: Plaintiff brought action against defendant alleging assault and battery under Massachusetts law arising from childhood sexual abuse that was alleged to have occurred between 35 and 38 years before filing of complaint. Both parties moved in limine to exclude the other's expert testimony.

Holdings: The District Court, Saylor, J., held that:
(1) plaintiff's expert was qualified to render expert opinion regarding repressed memory theory;
(2) testimony of plaintiff's expert regarding repressed memory theory was admissible expert evidence;
(3) testimony of defendant's expert regarding critique of repressed memory theory was admissible expert evidence; and
(4) probative value of expert testimony regarding memory suppression would not be substantially outweighed by any unfair risks.

Motions denied.

West Headnotes

[1] Limitation of Actions 241 95(4.1)

241 Limitation of Actions
241II Computation of Period of Limitation
241II(F) Ignorance, Mistake, Trust, Fraud,
and Concealment or Discovery of Cause of Action
241k95 Ignorance of Cause of Action
241k95(4) Injuries to the Person
241k95(4.1) k. In general. Most

Cited Cases

Massachusetts' three-year statutory limitations period for assault and battery does not begin to run until the potential plaintiff has first, an awareness of his injuries and, second, an awareness that the defendant caused his injuries. M.G.L.A. c. 260, § 4C.

[2] Limitation of Actions 241 95(1)

241 Limitation of Actions
241II Computation of Period of Limitation
241II(F) Ignorance, Mistake, Trust, Fraud,
and Concealment or Discovery of Cause of Action
241k95 Ignorance of Cause of Action
241k95(1) k. In general; what constitutes discovery. Most Cited Cases

Under Massachusetts common-law, a claim does not accrue as long as the underlying facts that give rise to it remain inherently unknowable, a standard that is no different from, and is used interchangeably with, the knew or should have known standard.

[3] Limitation of Actions 241 95(4.1)

241 Limitation of Actions
241II Computation of Period of Limitation
241II(F) Ignorance, Mistake, Trust, Fraud,
and Concealment or Discovery of Cause of Action
241k95 Ignorance of Cause of Action
241k95(4) Injuries to the Person
241k95(4.1) k. In general. Most

Cited Cases

Pursuant to the Massachusetts three-year statutory limitations period for assault and battery, a plaintiff who files suit more than three years after reaching maturity must demonstrate both that he actually lacked awareness and that his lack of awareness was objectively reasonable. M.G.L.A. c. 260, § 4C.

[4] Limitation of Actions 241 95(4.1)

241 Limitation of Actions

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241II Computation of Period of Limitation
241II(F) Ignorance, Mistake, Trust, Fraud,
and Concealment or Discovery of Cause of Action
241k95 Ignorance of Cause of Action
241k95(4) Injuries to the Person
241k95(4.1) k. In general. Most

Cited Cases

Under Massachusetts law, in determining when the three-year statute of limitations for an assault and battery action begins to accrue, the objective reasonableness of a plaintiff's lack of knowledge of abuse is determined from the perspective of a reasonable person who has been subjected to the conduct which forms the basis for the plaintiff's complaint; that analysis focuses on the nature of the abusive conduct, the injuries that the abuse inflicted, and the effect that both would have had on the causal understanding of an ordinary, reasonable person. M.G.L.A. c. 260, § 4C.

[5] Limitation of Actions 241 ↪95(4.1)

241 Limitation of Actions
241II Computation of Period of Limitation
241II(F) Ignorance, Mistake, Trust, Fraud,
and Concealment or Discovery of Cause of Action
241k95 Ignorance of Cause of Action
241k95(4) Injuries to the Person
241k95(4.1) k. In general. Most

Cited Cases

Under Massachusetts law, the discovery rule may delay accrual of an assault and battery claim where a victim who remembers being sexually abused nonetheless lacks knowledge of his injury because he was not aware that he had suffered any appreciable or legally recognizable harm; similarly, for purposes of the rule, even a plaintiff who is aware that misconduct is wrong may remain unaware of the causal connection between that misconduct and subsequent emotional or psychological injuries. M.G.L.A. c. 260, § 4C.

[6] Evidence 157 ↪508

157 Evidence
157XII Opinion Evidence

157XII(B) Subjects of Expert Testimony
157k508 k. Matters involving scientific or other special knowledge in general. Most Cited

Evidence 157 ↪555.2

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k555 Basis of Opinion
157k555.2 k. Necessity and sufficiency. Most Cited Cases

Under the Federal Rule of Evidence regarding expert testimony, district courts considering the admissibility of scientific testimony must act as gatekeepers, ensuring that an expert's proffered testimony both rests on a reliable foundation and is relevant to the task at hand. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[7] Evidence 157 ↪508

157 Evidence
157XII Opinion Evidence
157XII(B) Subjects of Expert Testimony
157k508 k. Matters involving scientific or other special knowledge in general. Most Cited

Evidence 157 ↪535

157 Evidence
157XII Opinion Evidence
157XII(C) Competency of Experts
157k535 k. Necessity of qualification. Most Cited Cases

Evidence 157 ↪555.2

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k555 Basis of Opinion
157k555.2 k. Necessity and sufficiency. Most Cited Cases
The gatekeeping function of determining the

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admissibility of expert testimony requires that a court consider three issues: (1) whether the proposed expert is qualified by knowledge, skill, experience, training or education; (2) whether the subject matter of the proposed testimony properly concerns scientific, technical, or other specialized knowledge; and (3) whether the testimony will be helpful to the trier of fact, i.e., whether it rests on a reliable foundation and is relevant to the facts of the case. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[8] Evidence 157 ⚡555.2

157 Evidence

157XII Opinion Evidence

157XII(D) Examination of Experts

157k555 Basis of Opinion

157k555.2 k. Necessity and sufficiency. Most Cited Cases

The requirement that an expert's testimony must be based on a reliable scientific foundation is often the central focus of a *Daubert* inquiry. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[9] Evidence 157 ⚡508

157 Evidence

157XII Opinion Evidence

157XII(B) Subjects of Expert Testimony

157k508 k. Matters involving scientific or other special knowledge in general. Most Cited

In evaluating whether expert testimony will be helpful to the trier of fact, a court must determine whether it is relevant, not only in the sense that all evidence must be relevant, but also in the incremental sense that the expert's proposed opinion, if admitted, likely would assist the trier of fact to understand or determine a fact in issue. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[10] Evidence 157 ⚡555.2

157 Evidence

157XII Opinion Evidence

157XII(D) Examination of Experts

157k555 Basis of Opinion

157k555.2 k. Necessity and sufficiency. Most Cited Cases

The Federal Rule of Evidence regarding expert testimony requires a court to ensure that there is an adequate fit between the expert's methods and his conclusions. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[11] Evidence 157 ⚡555.2

157 Evidence

157XII Opinion Evidence

157XII(D) Examination of Experts

157k555 Basis of Opinion

157k555.2 k. Necessity and sufficiency. Most Cited Cases

The focus of the inquiry regarding the admissibility of expert testimony is on the principles and methodology employed by the expert, not the ultimate conclusions; the court may not subvert the role of the fact-finder in assessing credibility or in weighing conflicting expert opinions; rather, vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[12] Evidence 157 ⚡146

157 Evidence

157IV Admissibility in General

157IV(D) Materiality

157k146 k. Tendency to mislead or confuse. Most Cited Cases

Expert testimony that is relevant and that passes muster from a scientific standpoint may nonetheless be excluded if it is likely to be misinterpreted or misused by the jury. Fed.Rules Evid.Rule 403, 28 U.S.C.A.; Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[13] Evidence 157 ⚡555.2

157 Evidence

157XII Opinion Evidence

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157XII(D) Examination of Experts

157k555 Basis of Opinion

157k555.2 k. Necessity and sufficiency. Most Cited Cases

The standard for admission of expert testimony under Massachusetts evidentiary rules is substantially the same as under the Federal Rules of Evidence and *Daubert*. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[14] Evidence 157 ↪537

157 Evidence

157XII Opinion Evidence

157XII(C) Competency of Experts

157k537 k. Bodily and mental condition. Most Cited Cases

Licensed psychiatrist was qualified to render expert opinion for defendant regarding repressed memory theory in plaintiff's action for assault and battery arising from childhood sexual abuse that was alleged to have occurred between 35 and 38 years before action, despite plaintiff's contention that psychiatrist did not specialize in trauma-induced memory disorders and otherwise had insufficient training and experience; psychiatrist had written several leading articles that contributed to debate among specialists on whether repressed memory occurred in trauma victims. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[15] Limitation of Actions 241 ↪95(4.1)

241 Limitation of Actions

241II Computation of Period of Limitation

241II(F) Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action

241k95 Ignorance of Cause of Action

241k95(4) Injuries to the Person

241k95(4.1) k. In general. Most Cited Cases

The Massachusetts statute regarding the tolling of an assault and battery claim requires that a plaintiff who claims a delayed date of accrual on the theory that he repressed all memory of the abuse must show (1) that during the relevant period he

was actually unaware of the abuse or its causal relationship to any emotional or psychological conditions he may have had, and (2) that the lack of awareness was objectively reasonable. M.G.L.A. c. 260, § 4C.

[16] Limitation of Actions 241 ↪95(4.1)

241 Limitation of Actions

241II Computation of Period of Limitation

241II(F) Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action

241k95 Ignorance of Cause of Action

241k95(4) Injuries to the Person

241k95(4.1) k. In general. Most Cited Cases

The rule contained in the provision of the Massachusetts statute of limitations for assault and battery, which states that the limitations period does not begin to run until the potential plaintiff has an awareness of his injuries and an awareness that the defendant caused his injuries, applies only in actions based on alleged childhood sexual abuse. M.G.L.A. c. 260, § 4C.

[17] Evidence 157 ↪555.10

157 Evidence

157XII Opinion Evidence

157XII(D) Examination of Experts

157k555 Basis of Opinion

157k555.10 k. Medical testimony. Most Cited Cases

Under Massachusetts law, the admissibility of testimony on repressed-memory theory in a case where a plaintiff alleges total amnesia as to the alleged abuse prior to that memory's recovery depends on the scientific reliability of two postulates; those are (1) that a victim of childhood sexual abuse may repress memory of the abuse-such that he has no conscious awareness of it-for a prolonged but finite period, and (2) that such repression is the result of psychological phenomena specific to such abuse and not other types of forgetfulness. M.G.L.A. c. 260, § 4C.

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[18] Evidence 157 555.2

157 Evidence

157XII Opinion Evidence

157XII(D) Examination of Experts

157k555 Basis of Opinion

157k555.2 k. Necessity and sufficiency. Most Cited Cases

Daubert principles support admission of a scientific theory if it is within the range where experts might reasonably differ. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[19] Evidence 157 574

157 Evidence

157XII Opinion Evidence

157XII(F) Effect of Opinion Evidence

157k574 k. Conflict with other evidence.

Most Cited Cases

Where legitimate disagreement exists within the scientific community, it is for the jury, not the judge, to determine which of several competing scientific theories has the best provenance.

[20] Evidence 157 555.2

157 Evidence

157XII Opinion Evidence

157XII(D) Examination of Experts

157k555 Basis of Opinion

157k555.2 k. Necessity and sufficiency. Most Cited Cases

The Federal Rule of Evidence regarding expert testimony does not require exclusion of all but the most scientifically supported view, and it clearly contemplates the admission of testimony by experts who have fundamental disagreements about the scientific principles at issue. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[21] Evidence 157 555.10

157 Evidence

157XII Opinion Evidence

157XII(D) Examination of Experts

157k555 Basis of Opinion

157k555.10 k. Medical testimony.
Most Cited Cases

Evidence 157 556

157 Evidence

157XII Opinion Evidence

157XII(D) Examination of Experts

157k556 k. References to authorities on subject. Most Cited Cases

Acceptance of theory of memory repression in scientific community weighed in favor of admitting psychiatrist's expert testimony regarding dissociative amnesia in plaintiff's action for assault and battery under Massachusetts law arising from childhood sexual abuse that was alleged to have occurred between 35 and 38 years before action; diagnostic manual for mental disorders reflected high degree of acceptance of at least some theories of memory repression among psychiatrists. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[22] Evidence 157 555.10

157 Evidence

157XII Opinion Evidence

157XII(D) Examination of Experts

157k555 Basis of Opinion

157k555.10 k. Medical testimony.
Most Cited Cases

Evidence 157 556

157 Evidence

157XII Opinion Evidence

157XII(D) Examination of Experts

157k556 k. References to authorities on subject. Most Cited Cases

Acceptance in scientific community of theory that dissociative amnesia did not exist weighed in favor of admission of psychiatrist's expert testimony regarding such theory in plaintiff's action for assault and battery under Massachusetts law arising from childhood sexual abuse that was alleged to have occurred between 35 and 38 years before action; number of scientific articles on theory of

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repressed-memory theory had dwindled after decade in which it was popular in scientific community and some recent articles criticized validity of theory. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[23] Evidence 157 ↪555.10

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k555 Basis of Opinion
157k555.10 k. Medical testimony.
Most Cited Cases

Evidence 157 ↪556

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k556 k. References to authorities on subject. Most Cited Cases
Memory repression was sufficiently testable and tested hypothesis, weighing in favor of admission of psychiatrist's expert testimony regarding such theory in plaintiff's action for assault and battery under Massachusetts law arising from childhood sexual abuse that was alleged to have occurred between 35 and 38 years before action, despite contention by defendant's expert that studies that plaintiff cited relied on research subjects' own unverified accounts; scientific literature on repressed-memory theory included substantial number of studies that purported to provide empirical evidence of repression, and information from unverified accounts was routinely relied on by experts in the field. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[24] Evidence 157 ↪510

157 Evidence
157XII Opinion Evidence
157XII(B) Subjects of Expert Testimony
157k510 k. Mental condition or capacity.
Most Cited Cases
Expert testimony on topic of memory repression was relevant to plaintiff's claim for assault and

battery under Massachusetts law arising from childhood sexual abuse that was alleged to have occurred between 35 and 38 years before action weighing in favor of admission of such testimony, plaintiff's claim was untimely unless he proved to jury that he lacked any conscious memory of alleged abuse until time that was within statute of limitations period, determination of whether plaintiff repressed his memory required understanding of scientific views as to whether it was possible for victim to repress such memories and what characteristics persons who suffer repression might have, and such knowledge was not within common experience of ordinary jurors. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[25] Federal Courts 170B ↪416

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(C) Application to Particular Matters
170Bk416 k. Evidence law. Most Cited Cases
Generally, whether expert testimony is necessary to sustain a state-law claim is determined by reference to substantive state law.

[26] Evidence 157 ↪146

157 Evidence
157IV Admissibility in General
157IV(D) Materiality
157k146 k. Tendency to mislead or confuse. Most Cited Cases
Probative value of expert testimony regarding memory suppression would not be substantially outweighed by danger of misleading jury that such testimony was opinion that plaintiff was credible in action for assault and battery under Massachusetts law arising from childhood sexual abuse that was alleged to have occurred between 35 and 38 years before action was filed; Massachusetts legislature appeared to have expressly recognized legitimacy of memory repression by enacting discovery rule which stated that limitations period for assault and battery arising from childhood abuse did not begin

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to run until potential plaintiff had awareness of his injuries and awareness that defendant caused his injuries, plaintiff's case did not involve memory recovered in therapy, or otherwise under more dubious circumstances, and district court had authority to give appropriate limiting and cautionary instructions, both as testimony was admitted and at end of trial, to help ensure that jury was properly focused on issues and that they would not misinterpret expert evidence or their duty to consider evidence as whole. Fed.Rules Evid.Rule 403, 28 U.S.C.A.; M.G.L.A. c. 260, § 4C.

Stephen J. Gordon, Dana L. Lauer, Stephen Gordon & Associates, Worcester, MA, for Plaintiff.

David K. McCay, Westborough, MA, Stephen L. Cohen, Law Office of Stephen L. Cohen, Chatham, NY, John O. Mirick, Mirick, O'Connell, Demallie & Lougee, Worcester, MA, for Defendant.

**MEMORANDUM AND ORDER ON
CROSS-MOTIONS TO LIMIT OR EXCLUDE
EXPERT TESTIMONY**

SAYLOR, District Judge.

*1 This is a civil lawsuit for assault and battery arising from childhood sexual abuse. The abuse is alleged to have occurred between 35 and 38 years ago. Jurisdiction is based on diversity of citizen- ship.

Plaintiff Timothy Clark alleges that between 1974 and 1977, when he was between the ages of 10 and 14, he was repeatedly sexually abused by defendant Richard Edison. Clark contends that he did not recall the abuse until May 2008, when he suddenly recovered memories of it while visiting his mother's grave. This lawsuit was brought in November 2008, more than three decades after the alleged abuse ended.

Ordinarily, such a claim would be barred by the three-year limitations period set forth in Mass. Gen. Laws ch. 260, § 2A. However, in 1993, Massachusetts enacted a statute, ch. 260, § 4C, that provides

that a claim for sexual abuse of a minor does not accrue until the victim "discovered or reasonably should have discovered that an emotional or psychological injury or condition was caused by" the abuse. Plaintiff contends that his claim did not accrue until May 2008, and thus the lawsuit was timely filed.

The parties have retained expert witnesses to testify at trial as to the theory of memory repression and recovery as it relates to plaintiff's allegations. Each party has moved *in limine* to exclude the other's expert testimony under Fed.R.Evid. 702 and 403 and the principles of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). The Court held an extended evidentiary hearing on those motions, at which it heard testimony from two psychiatrists and a psychologist. On June 21, 2012, the Court denied both motions, subject to certain limitations. This memorandum sets forth the Court's reasoning for its decisions.

I. Introduction

At the outset, the Court notes that it has deep reservations about the admission of the disputed testimony. This case does not involve a typical subject of expert testimony, such as whether a broken leg was set properly or whether a company was insolvent. The proposed testimony addresses the issue of human memory: how memories are encoded, how they are stored, and how they are recovered. Almost inevitably, it touches directly on the issue of whether those memories are accurate or not, or indeed whether the underlying events occurred at all.

It is no exaggeration to say that our justice system, civil and criminal, is based to a very large extent on the reliability of human memory. Virtually all witness testimony derives from human memory, and normally the core function of the jury is to assess the accuracy and credibility of those memories. The critical issue, therefore, is whether any expert testimony on the subject of memory will unfairly affect the jury's assessment of the facts by bolster-

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ing the testimony of a key witness in a way that would otherwise be impermissible.

To complicate matters, the direct study of memory is in many ways impossible, in the sense that the inner workings of the human mind cannot be directly examined. The study of memory relies heavily, if not entirely, on self-reporting by individual patients and subjects. When a person claims to have a lack of memory, or to have lost a memory and then recovered it, there may be no accurate way to test that proposition. At the very least, the type of rigorous testing and analysis required in other sciences is simply not possible.

*2 To make matters worse, the subject arises in the context of an emotionally and politically charged case. It is difficult for anyone to be entirely dispassionate on the subject of child sexual abuse; the conduct is of course repugnant, and our natural instincts are to be strongly protective of the victim. Those same instincts may, however, lead us to forget that those accused of such conduct must also have a fair opportunity to refute the charge. Jurors who are predisposed to favor alleged victims may give undue weight to tenuous evidence if that evidence confirms their pro-plaintiff biases. That risk is particularly acute here, where the confirmatory evidence is in the form of expert testimony that, despite its limitations, may be perceived as representing an endorsement by the scientific community.

Finally, the sparsity of evidence in this case may lend undue weight to the expert testimony. Because of the passage of time, the critical evidence in this case consists almost entirely of uncorroborated memory—that is, complainant testimony, with no confirming medical or scientific evidence—and some of the key witnesses have long since passed away. It is, of course, of great importance that the law give victims of abuse an opportunity to vindicate their rights in court. But that consideration does not obviate the policies that lie behind all limitations on plaintiffs' right to sue. As the Supreme Court has explained, “[m]emories fade, and witnesses can die or disappear. Such problems can

plague child abuse cases, where recollection after so many years may be uncertain, and ‘recovered’ memories faulty” *Stogner v. California*, 539 U.S. 607, 631, 123 S.Ct. 2446, 156 L.Ed.2d 544 (2003). The challenges of discerning fact from allegation years after the events at issue have occurred are so great that statutes of limitations bar actions in almost all other contexts. Those challenges require equal consideration here, even though the alleged misconduct is highly reprehensible.

In short, and at a minimum, the proposed testimony should be subject to close and exacting scrutiny. After careful consideration, and despite substantial misgivings, both motions to exclude expert testimony on this topic will be denied. The experts will be permitted to testify regarding memory repression theory, its limitations, its level of acceptance in the scientific community, and the characteristics likely to be present in individuals who have experienced repressed memory. However, neither expert may testify as to their personal beliefs regarding the ultimate issues in this case—that is, whether plaintiff suffered from the alleged abuse and whether he repressed his memories of the experience before 2008.

II. Background

A. Factual Background

Timothy Clark was born in 1963. After his parents divorced, he lived with his mother and his two brothers, Michael and David Clark. In 1974, when he was ten years old, the Clarks lived in Shrewsbury, Massachusetts, in an apartment complex known as Shrewsbury Gardens.

*3 Richard Edison also resided at Shrewsbury Gardens in 1974. At the time, he was a medical student at the University of Massachusetts in Worcester. The Clark brothers knew Edison and would visit his apartment and listen to music with him. Clark alleges that Edison provided the children with marijuana and on multiple occasions took

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Timothy into his bedroom, alone, and sexually abused him.

In 1975, the Clark family moved to an apartment in a complex known as Brandywine Village. Edison also moved to Brandywine Village during that year, and the Clark children continued to visit him there despite their mother's objections. Clark alleges that Edison continued to abuse him sexually during that period.

At some point, the Clark family moved to a new apartment at Lincoln Village in Worcester. According to Clark, Edison continued to associate with the boys. In 1977, their mother filed a "disturbing the peace" complaint against him in Massachusetts District Court. Timothy went to court with his mother for a hearing on that matter, but he was taken outside of the courtroom for much of the proceeding. The action was dismissed, and no criminal prosecution occurred. However, the court ordered Edison to cease his interactions with the children, and they had no further contact with him.

Clark turned 18 in 1981. He contends that for many years he retained no memory of the sexual abuse. However, he asserts that in May 2008, he experienced a sudden flood of memories while visiting his mother's grave with his brother Michael. These memories included episodic visions of his interactions with Edison and explicit memories of sexual contact. In the months following that experience, Clark suffered emotional reactions to the memories. He received psychological therapy from Erik D. Nelson, who identified symptoms of post-traumatic stress disorder that he believed were derived from childhood sexual abuse.

B. Legal Background

Clark filed a complaint on November 24, 2008. The complaint asserts a single cause of action, that of assault and battery under Massachusetts common law.

[1][2] Mass. Gen. Laws ch. 260, § 4C provides

that "the time limit for commencement of an action [for assault and battery alleging the defendant sexually abused a minor] is tolled for a child until the child reaches eighteen years of age." *Id.* The same statute delays the accrual of such a cause of action until "the victim discover[s] or reasonably should [discover] that an emotional or psychological injury or condition was caused by" the abuse. *Id.*^{FN1} Thus, the statute's three-year limitations period for assault and battery does not begin to run until the potential plaintiff has "first, an awareness of [his] injuries and, second, an awareness that the defendant caused [his] injuries." *Doe v. Creighton*, 439 Mass. 281, 283, 786 N.E.2d 1211 (2003).^{FN2}

[3][4] With respect to both elements, a plaintiff who files suit more than three years after reaching maturity must demonstrate both that he actually lacked awareness and that his lack of awareness was objectively reasonable. *Id.* The objective reasonableness of a plaintiff's lack of knowledge is determined from the perspective of "a reasonable person who has been subjected to the conduct which forms the basis for the plaintiff's complaint." *Riley v. Presnell*, 409 Mass. 239, 245, 565 N.E.2d 780 (1991). That analysis focuses "on the nature of the abusive conduct, the injuries that the abuse inflicted, and the effect that both would have had on the causal understanding of an ordinary, reasonable person." *Creighton*, 439 Mass. at 284, 786 N.E.2d 1211.

*4 [5] Courts have recognized the potential applicability of the statutory discovery rule where a plaintiff alleges that some psychological process prevented him from becoming aware of an alleged abuse until the memory was suddenly recovered years later. *See, e.g., Hoult v. Hoult*, 792 F.Supp. 143, 145 (D.Mass.1992) (denying summary judgment where plaintiff asserted that she had no memory of sexual abuse until after the otherwise-applicable limitations period).^{FN3}

III. Analysis

A. Rules 702 and 403 Generally

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Both parties have, in substance, cross-moved to exclude the other side's expert testimony on the subject of repressed memory. Whether that testimony may be admitted is governed principally by two rules of evidence: Rules 702 and 403.

Rule 702 provides as follows:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed.R.Evid. 702. The adoption of Rule 702 in its present form codified the standard of admissibility for expert testimony that was set forth in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). *United States v. Diaz*, 300 F.3d 66, 73 (1st Cir.2002).

[6][7] Under Rule 702, district courts considering the admissibility of scientific testimony must "act as gatekeepers, ensuring that an expert's proffered testimony 'both rests on a reliable foundation and is relevant to the task at hand.'" *Samaan v. St. Joseph Hosp.*, 670 F.3d 21, 31 (1st Cir.2012) (quoting *Daubert*, 509 U.S. at 597). This gatekeeping function requires that the Court consider three issues: (1) whether the proposed expert is qualified by "knowledge, skill, experience, training or education;" (2) whether the subject matter of the proposed testimony properly concerns "scientific, tech-

nical, or other specialized knowledge;" and (3) "whether the testimony [will be] helpful to the trier of fact, i.e., whether it rests on a reliable foundation and is relevant to the facts of the case." *Bogosian v. Mercedes-Benz of N. Am., Inc.*, 104 F.3d 472, 476 (1st Cir.1997).

[8] The requirement that an expert's testimony must be based on a reliable scientific foundation is often the "central focus of a *Daubert* inquiry." *Ruiz-Troche*, 161 F.3d at 81. In *Daubert*, the Supreme Court enumerated a non-exhaustive list of factors that a court may consider in undertaking its reliability analysis: (1) whether the scientific theory or technique can be (and has been) tested; (2) whether it has been subjected to peer review and publication; (3) whether it has a known rate of error; (4) whether there are standards controlling its application or operation; and (5) whether it is generally accepted in the relevant scientific community. *Daubert*, 509 U.S. at 593-94; see also *Samaan*, 670 F.3d at 31-32.

*5 [9][10] In evaluating whether expert testimony will be helpful to the trier of fact, the Court must determine whether it is relevant, "not only in the sense that all evidence must be relevant, but also in the incremental sense that the expert's proposed opinion, if admitted, likely would assist the trier of fact to understand or determine a fact in issue." *Ruiz-Troche*, 161 F.3d at 81 (citing *Daubert*, 509 U.S. at 591-92). In other words, Rule 702 requires the court to "ensure that there is an adequate fit between the expert's methods and his conclusions." *Samaan*, 670 F.3d at 32 (citing *Daubert*, 509 U.S. at 591). See also *Cipollone v. Yale Indus. Prods., Inc.*, 202 F.3d 376, 380 (1st Cir.2000) (describing the "ultimate purpose of the *Daubert* inquiry" as determining the testimony's helpfulness to the jury).

[11] The focus of the Rule 702 inquiry is on the principles and methodology employed by the expert, not the ultimate conclusions. *Daubert*, 509 U.S. at 595. The court may not subvert the role of the fact-finder in assessing credibility or in weigh-

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ing conflicting expert opinions. Rather, “vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.” *Id.* at 596. See also *Ruiz-Troche*, 161 F.3d at 85 (admitting testimony notwithstanding a lack of peer-reviewed publications because the opinion rested upon good grounds generally and should be tested by the “adversarial process”).

[12] Expert scientific testimony that is admissible under Rule 702 may nonetheless be excluded under Rule 403 “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.” Fed.R.Evid. 403. See also *Daubert*, 509 U.S. at 595. Thus, expert testimony that is relevant and that passes muster from a scientific standpoint may nonetheless be excluded if it is likely to be misinterpreted or misused by the jury.

B. Testimony at Evidentiary Hearing

This dispute concerns the admissibility of testimony by two proposed expert witnesses: plaintiff’s expert, Dr. James W. Hopper, and defendant’s expert, Dr. Harrison G. Pope, Jr. The Court held an evidentiary hearing at which it heard testimony from Dr. Pope and Dr. Hopper concerning the scientific reliability of repressed-memory theory. The Court also heard testimony from Dr. James A. Chu, a psychiatrist called by plaintiff.

1. Dr. James W. Hopper

Dr. Hopper is a clinical psychologist licensed to practice in Massachusetts. He received a B.A. in history from the University of Rochester in 1988 and a Ph.D. in clinical psychology from the University of Massachusetts—Boston in 1997. He has experience treating trauma victims and estimates that he has treated more than 200 patients who were sexually abused as children. He has also conducted research related to post-traumatic stress disorder (“PTSD”) and memory-related effects of childhood sexual abuse. One focus of his research has been on brain-imaging studies concerned with biological

mechanisms associated with psychological trauma and memory impairments. He is an advisory board member of an organization that provides support to men who were victims of childhood sexual abuse.

*6 Dr. Hopper testified that the theory of repressed-memory was first conceived by Sigmund Freud in the late 19th century. (6/4/2012 Tr. at 42). He explained that modern concepts in the fields of cognitive neuroscience and cognitive psychology have modified psychologists’ understanding of what repression is and how it works. (*Id.*). However, he asserted that the fundamental hypothesis—that the mind may suppress memories of a traumatic event so that a person cannot freely recall those memories—is accepted by many psychologists today. (*Id.* at 42–43). He defined the phenomenon of “recovered memory” as a “memory of an episode that [individuals] have experienced in their life that they believe they have not retrieved for a very long time.” (*Id.* at 27).^{FN4} Dr. Hopper estimated that, of the roughly 200–300 patients he has treated who were sexually abused as children, more than fifty of them had experienced such a recovery of previously repressed memories at some point. (*Id.* at 24).

Dr. Hopper also testified that the Fourth Edition of the Diagnostic and Statistical Manual of Mental Disorders (“DSM–IV–TR”), recognizes a diagnosis called “dissociative amnesia.” (*Id.* at 30–36).^{FN5} He summarized the diagnosis as consisting of (1) a reversible memory impairment that prevents a person from consciously recalling certain personally significant memories (usually of traumatic experiences) and (2) clinically significant distress that results from that impairment. (*Id.* at 34–36). Dr. Hopper testified that the manual’s recognition of dissociative amnesia reflected a general consensus within the psychiatric community that a person may experience a reversible memory loss that is too extensive to be explained by ordinary mechanisms. (*Id.* at 35). He added that although some persons disagree, the diagnosis is widely accepted by experts in the field. (*Id.*).

When asked what distinguishes diagnosable

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dissociative amnesia from ordinary human forgetfulness, Dr. Hopper rejected what he called a “false dichotomy” between the two. (*Id.* at 50–53). He suggested that “[t]here’s no simple thing called ordinary human forgetfulness. There are a whole bunch of mechanisms and processes by which people can forget things and retrieve them It’s a matter of degrees; it’s a matter of context.” (*Id.* at 53). Different individuals, he explained, have different “capacities to block” memories. (*Id.*) Finally, he rejected the assumption that a person must meet the diagnostic criteria for dissociative amnesia as defined in the DSM–IV–TR to be experiencing substantial memory impairments as a result of childhood trauma. (*Id.*)

Dr. Hopper indicated that some of the theories to which he was testifying are reviewed in a book by Daniel Schacter, a neuroscientist at Harvard. (*Id.* at 69–70).^{FN6} He testified that Schacter describes a concept known as “directed forgetting,” by which a person may intentionally suppress a memory that he does not want to remember until it becomes inaccessible to his conscious mind without an external cue. (*Id.* at 71). Dr. Hopper also identified a 2009 scientific article as one of several recent studies that have suggested potential brain mechanisms that could operate to keep an unwanted memory out of a person’s conscious awareness. (*Id.* at 81–82).^{FN7} He acknowledged that repressed-memory theory has been criticized for its reliance on the self-reported accounts of research subjects concerning internal mental processes that cannot be objectively verified. (*Id.* at 98–99). However, he asserted that self-reporting is an accepted methodology in the field of psychological research. (*Id.* at 108). Moreover, he argued that some studies have correlated directly observed brain activities that may operate to suppress unwanted thoughts with individuals’ self-reported periods of memory lapse. (*Id.* at 99–100).

*7 Dr. Hopper endorsed the conclusions of a 2006 article by Constance Dalenberg and a 1999 article by Daniel Brown, both of which address the

role of repressed-memory theory in the courts. (*Id.* at 102–107).^{FN8} He testified that the articles demonstrate that the criteria for admissibility under Fed.R.Evid. 702 favor admitting testimony on memory repression in cases such as this one. (*Id.*) When asked to describe a properly designed study that would test the existence and accuracy of repressed memories, he identified a 1995 prospective study by Linda Williams in which women with documented histories of childhood sexual abuse appeared not to remember the abuse when questioned several years later. (*Id.* at 107).^{FN9}

2. Dr. Harrison G. Pope, Jr.

Dr. Pope is a licensed psychiatrist and professor of psychiatry at Harvard Medical School. Although Dr. Pope has treated patients who report memory problems, the focus of his work is on research. He has co-authored several articles that review published studies on repressed memory for purposes of clarifying the state of scientific knowledge on the topic.^{FN10} He has testified on the subject in courts across the country.

At the outset of his testimony, Dr. Pope acknowledged that he agreed with “80 or 90 percent” of what Dr. Hopper said, but that he disagreed as to a “critical” portion that remained. (6/6/2012 Tr. at 12). In his words,

I would certainly agree ... that we lose our memory for things and then at some later date we get reminded of it, and the memory comes back to us. I would certainly agree that we often try to block out or not think about unpleasant or miserable or traumatic memories. I would certainly agree that there has been a lot of scientific research on—on memory and people ... making an effort to try to not think about things.... [The] 10 percent sort of comes down actually to ... whether there was some process over and above ordinary human experience that would—that would postulate that someone ... would become literally unable to remember a traumatic event for many years or decades, over and above these ordinary processes that we all experience of forgetfulness

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and blocking out of unpleasant memories.

(*Id.* at 12–13).

Dr. Pope proceeded to elaborate on the types of memory impairment that he believed to be generally accepted among all scientists. He classified those impairments as (1) ordinary forgetfulness, (2) biological amnesia (including loss of memories of early-childhood memories due to brain development and amnesia due to head injuries and alcohol intoxication), (3) incomplete encoding due to focus on particular details (for example, a victim of an armed robbery might remember the type of gun used but not the assailant's appearance), (4) global amnesia (by which an individual loses all memories from a portion of their life), and (5) behavior that is erroneously diagnosed as “amnesia” (for example, deliberate non-disclosure). (*Id.* at 23–27). In contrast to these forms of memory loss, Dr. Pope defined “repressed memory” as the hypothesis “that you would become literally unable to remember an entire traumatic event ... but nevertheless, at some later date, you might somehow regain [the] ability to recover [that] previously inaccessible memory.” (*Id.* at 28).^{FN11} He asserted that “there is no sound scientific evidence” of a psychological process that would fit that definition. Phenomena that others attribute to memory repression, he suggested, may be accounted for by the five well-recognized forms of amnesia that he described, without hypothesizing some mechanism “over and above ordinary human experiences.” (*Id.* at 17).

*8 Dr. Pope next testified that repressed-memory theory is not generally accepted in the scientific community. With respect to the apparent recognition of the theory in the DSM–IV–TR, he asserted that “dissociative amnesia” is an ambiguous term that may be used to describe many forms of memory impairment, including, for example, incomplete encoding, global amnesia, and pseudoneurological amnesia. (*Id.* at 35). He cautioned that repressed-memory theory should not be equated with the concept of dissociative amnesia, and that recognition of the latter in the

DSM–IV–TR does not imply scientific acceptance of the former. (*Id.* at 31). Treating the DSM–IV–TR diagnosis for dissociative amnesia as evidence that the scientific community accepts repressed-memory theory, he warned, would be analogous to assuming that because scientists recognize the existence of equine animals, they therefore believe in unicorns. (*Id.*).

Dr. Pope provided a list of 33 scientific publications in which authors have questioned the validity of the theory of repressed memory. (*Id.* at 37–40).^{FN12} To demonstrate that scientific interest in memory repression has declined, he testified that he has counted the number of scientific articles in a computerized medical index that mentioned “repressed memory” for each year between 1984 and 2003.^{FN13} The count revealed a spike in references to the phenomenon in the mid–1990s, after which the number fell by roughly four-fifths by the early 2000s. (*Id.* at 40–41). Finally, Dr. Pope testified that brain-imaging studies, biochemical studies, and laboratory studies in which subjects are asked to memorize word lists and subsequently suppress them are irrelevant to whether repressed-memory theory is generally accepted. (*Id.* at 41–43). Because those studies merely reveal biological mechanisms related to memory that might, hypothetically, cause a person to experience memory repression with respect to traumatic experiences, they do not provide evidence that any individuals actually do forget such events. (*Id.*). Dr. Pope clarified that he was “not claiming that every single scientist in the world rejects recovered memory” but only that “a large number of prestigious scientists do” (*Id.* at 40).

Dr. Pope also testified that he has reviewed 77 studies involving more than 11,000 individuals with various traumatic experiences, such as survivors of the holocaust or natural disasters. (*Id.* at 55). Of those, he asserted, not a single individual was reported to have experienced a period of repression during which he or she did not remember the experience. (*Id.*).

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As to the testability of the repressed-memory hypothesis, Dr. Pope next explained what, in his view, a scientifically valid study supporting the theory of repressed memory would require. Such a study, he contended, would involve (1) a large group of subjects, each of whom is documented to have experienced a type of traumatic experience; (2) an interview of each subject within a year of that event, in which the victims are asked whether they remember the event and at least some say that they do not; and (3) follow-up interviews of those who claimed that they did not remember the experience, in which the interviewer describes the traumatic events to ensure that the interviewee is actually *unable* to recall the memory. (*Id.* at 56–57). He asserted that no published study that has purported to provide evidence of repressed memory—whether retrospective or prospective in experimental design—meets those criteria. (*Id.*)^{FN14} Of the studies that have claimed to document memory repression, Dr. Pope dismissed the retrospective studies because they relied on interviews in which the subjects self-reported their belief that there had been periods earlier in their lives when they had been unable to access the memory. (*Id.* at 58–59).^{FN15} As for prospective studies, Dr. Pope criticized their failure to document the original traumatic event adequately and to exclude alternative possible causes of the apparent amnesia. (*Id.* at 62–64). Without evidence that satisfies these standards of scientific rigor, he argued, proponents of the theory have not met their burden as scientists to provide affirmative evidence in support of their hypothesis. (*Id.* at 54).

*9 Finally, Dr. Pope warned against applying the diagnostic standards contained in the DSM–IV–TR in court (especially the diagnosis for dissociative amnesia) because the manual was designed for therapeutic, not forensic, purposes. (*Id.* at 71). He indicated that the introduction to the DSM–IV–TR itself contains cautionary language stating that its use in legal settings may result in errors if the significance of the manual's diagnostic definitions is not properly understood by the de-

cision-maker. (*Id.*). He added that Dr. Robert Spitzer, a psychiatrist who served on the editorial board for the DSM–IV–TR, was, like Dr. Pope, a signatory on an amicus brief filed with the Massachusetts Supreme Judicial Court that urged it to exclude concepts such as “repressed-recovered memories” or “dissociative amnesia” from legal proceedings. (*Id.* at 70).

3. Dr. James A. Chu, M.D.

Dr. Chu is a licensed psychiatrist and associate professor of psychiatry at Harvard Medical School. He is a practicing clinician at McLean Hospital and has more than 30 years of experience in the diagnosis and treatment of adults who have been seriously traumatized as children. He has received numerous professional awards and distinctions for his work in the field of post-traumatic and dissociative disorders. He was a member of the task force that was responsible for dissociative disorders during the preparation of the DSM–IV.

Dr. Chu testified regarding the inclusion of dissociative amnesia as a diagnosis in the DSM–IV–TR. He explained that the diagnosis was first recognized in the Third Edition of the DSM, which was published in 1980. (6/8/2012 Tr. at 3). Although the earlier edition referred to the disorder as “psychogenic amnesia,” the diagnosis had essentially the same criteria. (*Id.*). He testified that the continued inclusion of a diagnosis for the disorder in the DSM–IV–TR was not controversial, and that what debate did occur among members of the task force focused on the decision to change its name. (*Id.* at 7).

As to the significance of a diagnosis for dissociative amnesia in the DSM–IV–TR, Dr. Chu testified that although the DSM–IV–TR is a diagnostic tool, it is used for other purposes, as well. (*Id.* at 7–8). For example, recognition of a psychological or behavioral pattern in the manual legitimizes that disorder for purposes of defining health-insurance coverage and health-policy studies. (*Id.* at 8). In general, he explained, diagnoses in the manual do not address the mechanisms by which diagnosable

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symptoms arise. (*Id.* at 10). Instead, they provide a common language by which practitioners may categorize types of symptoms and behaviors. (*Id.* at 9).

Dr. Chu testified that dissociative amnesia is not itself a controversial concept among psychiatrists. (*Id.* at 14). He testified that the controversy related to the diagnosis among practitioners does not concern its validity, but the possibility that it may be erroneously diagnosed in cases where therapists' suggestive techniques have caused a patient to "recover" a memory during therapy of an experience that never actually occurred. (*Id.*)^{FN16}

*10 Dr. Chu contended that the list of 33 scientific articles cited by Dr. Pope as critical of repressed-memory theory "looks a lot better than it really is." (*Id.* at 32). According to Dr. Chu, the majority of articles in the list deal with issues related to suggestive therapy, not repression or spontaneous memory recovery; nearly 40 percent of them either are not validated by peer review or lack other indicia of scientific standards; and eight others are authored by a small minority of psychologists, including Dr. Pope himself, who hold "extreme" views on the topic. (*Id.*). Dr. Chu also testified that Dr. Pope's list of 77 studies of trauma victims that failed to report any case of memory repression was less persuasive than Dr. Pope suggested. (*Id.* at 33). He indicated that many of those studies did not focus specifically on childhood sexual trauma, and that because the researchers were not testing for amnesiac disorders, they would have had no reason to ask about, or to report, memory repression. (*Id.* at 33). Thus, he concluded, it was unsurprising and insignificant that those studies did not contain scientific evidence to support that theory. (*Id.*).

In sum, Dr. Chu concluded that trauma-related memory disorders are substantially more accepted in the scientific community than Dr. Pope asserted. (*Id.* at 33-37).

C. Prior Case Law

Plaintiff contends that the issue of whether expert testimony on the subject of memory repression is admissible has been settled as a matter of law, and that no further analysis is required. That position is clearly incorrect; admissibility of expert testimony under Rule 702 must be assessed on a case-by-case basis. Indeed, prior legal rulings may no longer reflect valid science:

Science evolves, and scientific methods that were once considered unassailable truths have been discarded over time. Unreliable testimony based upon those outdated theories and methods must be discarded as well, lest scientific *stare decisis* ensure that such theories survive only in court.

Shirt v. Hazeltine, 461 F.3d 1011, 1026 (8th Cir.2006). Nonetheless, prior decisions applying the *Daubert* standard to the issue of memory repression merit review.

One of the first federal courts to apply *Daubert* principles to memory repression was *Isely v. Capuchin Province*, 877 F.Supp. 1055 (E.D.Mich.1995). In *Isely*, the court considered two motions *in limine* by the defendant that sought to exclude expert testimony by a clinical psychologist on PTSD and repressed-memory theory. The plaintiff offered the testimony both to prove the underlying allegations and to prove that the applicable statute of limitations was tolled as a result of plaintiff's memory repression. Of the two motions, the first sought exclusion of testimony on the theories generally, while the second only sought to preclude testimony that the plaintiffs' memories of abuse were credible or that the alleged abuse actually occurred. The court distinguished the two classes of testimony recognized by the two motions. Although it found that repressed-memory theory was sufficiently recognized within the field of psychology to warrant testimony about *possible* psychological explanations of plaintiff's behavior, it found that the clinical methodologies at issue offered "no absolute empirical way to prove that (1) an event happened and/or (2) that the memory of it was repressed." 877 F.Supp. at 1066. The court therefore granted

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the second motion *in limine* and held that the expert “should not be permitted to testify that she either believes [the plaintiff] or believes that the incidents he alleges occurred” *Id.* at 1067.^{FN17} However, it denied the first motion and allowed the expert to testify as to (1) general tenets of “theories and opinions concerning PTSD and repressed memory” and (2) his opinion as to whether the plaintiff’s behavior “is consistent with someone who is suffering repressed memory or post-traumatic stress disorder.” *Id.*

*11 The same year, the First Circuit tangentially addressed the admissibility of repressed-memory testimony to prove allegations of childhood sexual abuse in *Hoult v. Hoult*, 57 F.3d 1 (1st Cir.1995). In *Hoult*, the court reviewed an appeal of the denial of a motion by the defendant for relief from judgment based on alleged trial errors. The court saw no error in the trial court’s admission of general testimony on memory repression in cases of sexual trauma, but it did note that the testimony may have, at points, “crossed the line” because the expert “came perilously close to testifying that this particular victim/witness could be believed.” 57 F.3d at 7.^{FN18} However, the defendant had not objected at trial or appealed the admission of the evidence directly, and the First Circuit found that any possible error did not rise to the level necessary for relief from judgment under Fed.R.Civ.P. 60(b). *Id.*

In *Shahzade v. Gregory*, 923 F.Supp. 286 (D.Mass.1996), a court in this district reached essentially the same conclusion as the court in *Isely*. In *Shahzade*, the plaintiff alleged that she was sexually abused as a child over the course of a five-year period that ended nearly 47 years before she filed the complaint. The defendant moved to exclude the testimony of the plaintiff’s expert, a psychiatrist who specialized in memory and trauma. As in *Isely*, the expert testimony was offered both to support the underlying allegations of abuse and to prove memory repression for purposes of avoiding the statute of limitations.^{FN19} However, unlike in *Isely*, in *Shahzade* the proposed testimony did not

include the expert’s opinion as to the “elicitation and accuracy of the recovered memory,” but merely whether the expert could testify to “the theory itself.” 923 F.Supp. at 289. For purposes of that narrow testimony, the court found “the subject matter, repressed memory syndrome, to be reliable and therefore admissible.” *Id.* at 287.

[13] In 2010, the Massachusetts Supreme Judicial Court considered a criminal defendant’s claim that the trial judge erred in admitting expert testimony related to memory repression in *Commonwealth v. Shanley*, 455 Mass. 752, 919 N.E.2d 1254 (2010).^{FN20} At trial, the Commonwealth had offered testimony from one expert “to explain the theory, conditions, and symptoms of dissociative amnesia and recovered memory” and from another regarding “the ‘fit’ of the proposed opinion testimony regarding dissociative amnesia and recovered memory, to the facts of [the] case.” ^{FN21} *Shanley*, 455 Mass. at 763, 919 N.E.2d 1254. After conducting a hearing on admissibility, the trial judge admitted testimony by both experts as well as by the defendant’s rebuttal expert. On appeal, the defendant challenged the admission of the first expert’s testimony on two grounds. First, he argued that the theory of memory repression was not generally accepted because there is not a sufficient amount of peer-reviewed literature regarding it. *Id.* at 766, 919 N.E.2d 1254. Second, he asserted that “the theory is invalid because there does not yet exist a scientific method using experimental design to test for its existence in certain individuals nor are there known error rates or standardization.” *Id.* The SJC rejected both arguments, finding that “a wide collection of clinical observations and a survey of academic literature” suggested that repressed-memory theory and dissociative amnesia were based on sufficiently reliable science for testimony on them to be admitted at trial. *Id.* See also *Commonwealth v. Polk*, 462 Mass. 23, 965 N.E.2d 815 (2012) (reversing criminal conviction and ordering new trial due to exclusion of expert testimony on dissociative memory disorders).

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*12 Although there is a split of authority, other state courts have admitted expert testimony on dissociative amnesia, memory repression, and PTSD for purposes of proving that a victim of sexual trauma repressed and then later recovered memory of the abuse. *See, e.g., Keller v. Maccubbin*, 2012 Del.Super. LEXIS 229, 2012 WL 1980417 (May 16, 2012) (listing decisions of Delaware courts that found expert testimony on repressed-memory theory to be admissible to prove the applicability of a discovery rule); *Logerquist v. McVey*, 196 Ariz. 470, 482, 1 P.3d 113 (2000) (reversing an order to exclude testimony on repressed memories for statute-of-limitations purposes); *Wilson v. Phillips*, 73 Cal.App.4th 250, 252, 86 Cal.Rptr.2d 204 (Cal.App.4th Dist.1999) (affirming the admission of expert testimony on repressed-memory theory for statute-of-limitations purposes); *Doe v. Archdiocese of New Orleans*, 823 So.2d 360, 363 (La.App. 4th Cir. May 8, 2002) (same); *State v. Ali*, 233 Conn. 403, 434, 660 A.2d 337 (1995) (affirming the admission of expert testimony on rape syndrome, including testimony regarding rape victims' tendency to delay reporting).^{FN22}

On the other hand, a substantial number of courts have determined that testimony on repression is not sufficiently reliable under the relevant evidentiary standard. *See, e.g., State v. Quattrocchi*, 1999 WL 284882 (R.I.Super.Apr.26, 1999) (“The State has not met its burden of establishing that repressed recollection is reliable and admissible as scientific evidence.”); *State v. Walters*, 142 N.H. 239, 246, 698 A.2d 1244 (1997) (“On the basis of the record before us, we conclude ... that the indicia of reliability present in the particular memories in [this] case[] do not rise to such a level that they overcome the divisive state of the scientific debate on the issue.”).^{FN23}

D. Application of Rule 702

1. Qualifications of the Experts

[14] Plaintiff objects to Dr. Pope's qualifications to render an expert opinion, contending that

he does not specialize in trauma-induced memory disorders and otherwise has insufficient training and experience. However, Dr. Pope's background is amply sufficient to testify knowledgeably on the topic. He has written several leading articles that contribute to the debate among specialists on whether repressed memory occurs in trauma victims. If his qualifications are less than complete, that issue is properly addressed on cross-examination, not by excluding the testimony altogether. *See Mitchell v. United States*, 141 F.3d 8, 15 (1st Cir.1998) (holding that an expert's lack of specialty practice in the area about which he testified went to the weight of his testimony, not its admissibility). The Court accordingly concludes that Dr. Hopper and Dr. Pope have sufficient academic and professional credentials to provide expert testimony on the issues in this case.

2. Scientific Reliability of the Testimony

Consideration of the second requirement for admissibility—that the proffered testimony is scientifically reliable—is more complex. The parties each contest the other's proffered testimony as to whether such a theory meets the standard of scientific reliability required by Rule 702.^{FN24} Of the criteria for reliability enumerated in *Daubert*, the primary focus of the parties' motions is on (1) whether the theory of repressed memory is generally accepted in the relevant scientific community, and (2) whether the theory can be, and has been, adequately tested.^{FN25}

*13 As a threshold matter, it is necessary to clarify what the experts' testimony is offered to prove and disprove. Both Dr. Hopper and Dr. Pope began their testimony at the evidentiary hearing by defining “repressed” and “recovered” memory, but their definitions were not the same. Defendant urges that the statutory discovery rule requires that plaintiff prove that he experienced “repressed memory” within the meaning of Dr. Pope's definition—that is, that plaintiff was absolutely unable to remember the alleged abuse until his recovered-memory experience in 2008. (6/6/2012 Tr. at 28).

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In contrast, plaintiff contends that he must prove only that his experience in 2008 matches Dr. Hopper's definition of a "recovered memory," that is, "a memory of an episode that [an individual has] experienced in [his] life that [he believes he has] not retrieved for a very long time." (6/4/2012 Tr. at 31).

[15] Neither expert's definition precisely captures what a plaintiff must prove to claim the benefit of the statutory discovery rule. Mass. Gen. Laws ch. 260, § 4C provides that a victim's cause of action for childhood sexual abuse accrues at "the time the victim discovered or reasonably should have discovered that an emotional or psychological injury or condition was caused by" the defendant's alleged misconduct. The statute thus requires that a plaintiff who claims a delayed date of accrual on the theory that he repressed all memory of the abuse must show (1) that during the relevant period he was actually (that is, subjectively) unaware of the abuse or its causal relationship to any emotional or psychological conditions he may have had, and (2) that the lack of awareness was objectively reasonable. See *Hoult v. Hoult*, 792 F.Supp. 143, 145 (D.Mass.1992).

As to the first element, this standard does not require proof that plaintiff was completely *unable* to remember, regardless of what cues or reminders he experienced. Rather, the discovery rule clearly contemplates the possibility that a victim of abuse who represses memory of it will eventually recover that memory when appropriate cues trigger the memory. However, the statute also requires more than Dr. Hopper's definition suggests, because it is necessary that the plaintiff actually did not consciously remember the experience during the period preceding the memory's recovery.

[16] As to the second element, the objective reasonableness of a plaintiff's failure to discover his cause of action must be understood in relation to the context of the statute. The rule contained in ch. 260, § 4C applies only in actions based on alleged childhood sexual abuse. The inclusion of a discovery rule in that statute alone implies a legislative in-

tent to carve out an exception based on considerations that are specific to, or especially salient in cases of, victims of childhood sexual abuse. Psychological processes that are caused by childhood abuse and that hinder a victim's ability to recognize the causal connection between the abuse and subsequent psychological injuries fit with that type of consideration.

*14 [17] In sum, the admissibility of testimony on repressed-memory theory in a case where a plaintiff alleges total amnesia as to the alleged abuse prior to that memory's recovery depends on the scientific reliability of two postulates. Those are: (1) that a victim of childhood sexual abuse may repress memory of the abuse—such that he has no conscious awareness of it—for a prolonged but finite period, and (2) that such repression is the result of psychological phenomena specific to such abuse and not other types of forgetfulness.

[18][19][20] A second threshold consideration is raised by the relationship between the parties' two motions. Because plaintiff has cross-moved to exclude the testimony of defendant's rebuttal expert, Dr. Pope, the issues before the Court includes not only the scientific reliability of repressed-memory theory but also the reliability of Dr. Pope's opinion that the theory is invalid. Although those issues are ostensibly distinct, they are two sides of one coin. As discussed below, the effect of trauma on memory is the focus of heated controversy within the scientific community, and both Dr. Hopper and Dr. Pope espouse views that appear to have some support among scientists engaged in that debate. *Daubert* principles support admission of a scientific theory if it is within "the range where experts might reasonably differ." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 153, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999) (citing *Daubert*, 509 U.S. at 596). In other words, where legitimate disagreement exists within the scientific community, it is for the jury, not the judge, "to determine which of several competing scientific theories has the best provenance." *Ruiz-Troche v. Pepsi Cola of P.R.*

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Bottling Co., 161 F.3d 77, 85 (1st Cir.1998); see also *Daubert*, 509 U.S. at 596 (“Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.”). Rule 702 does not require exclusion of all but the most scientifically supported view, and it clearly contemplates the admission of testimony by experts who have fundamental disagreements about the scientific principles at issue.

Consistently with that principle, the Court could evaluate each expert's testimony separately to decide whether that testimony falls within the range of views in the repressed memory debate that are scientifically supported. However, doing so would undermine the principle purposes of Rule 702—to assist the jury in applying scientific concepts—because admission of either expert's testimony without the other would present a distorted view of the scientific debate. Put another way, it would be meaningless to admit Dr. Pope's testimony, which is in the form of a rebuttal, without that of Dr. Hopper. Conversely, admitting Dr. Hopper's testimony without that of Dr. Pope would disguise the fact that reasonable experts appear to disagree on the topic.^{FN26} The parties' motions therefore rise or fall together.

*15 For the following reasons, the Court finds both that repressed-memory theory is a highly controversial theory and that it nonetheless has sufficient scientific support to be admissible under Rule 702. Accordingly, both experts will be permitted to testify.

a. Acceptance in the Scientific Community

Dr. Hopper testified that numerous studies and scientific reviews demonstrate that memory repression is generally accepted among both clinicians and research scientists.^{FN27} In addition, both Dr. Hopper and Dr. Chu asserted that the recognition of dissociative amnesia in the DSM-IV-TR reflects a high degree of acceptance of at least some theories of memory repression among psychiatrists.^{FN28}

These considerations weigh in favor of admitting Dr. Hopper's testimony on repressed-memory theory on the basis of its acceptance in the field. Defendant nonetheless argues that memory repression is not accepted in the relevant scientific community for three reasons.

[21] First, defendant argues that the inclusion of “dissociative amnesia” in the DSM-IV-TR provides no evidence that the American Psychiatric Association recognizes the theory of memory repression as to which Dr. Hopper will testify. Dissociative amnesia, defendant contends, is a broad concept that includes undisputed causes of amnesia, such as head injuries or alcohol abuse, so that acceptance of dissociative amnesia does not imply acceptance of repressed-memory theory. (*Id.*). However, both Dr. Chu and Dr. Hopper testified that the DSM-IV-TR diagnosis reflected psychiatrists' explicit recognition of a form of trauma-induced temporary memory loss that is distinct—even if only by degree—from other recognized forms of forgetfulness. Moreover, the manual defines the basic criterion for dissociative amnesia as “an inability to recall important personal information, usually of a traumatic or stressful nature, that is too extensive to be explained by ordinary forgetfulness.” DSM-IV-TR at 519. It excludes from the diagnosis memory disturbances that may be attributed to substance abuse, other amnesia-type disorders, or head injury. *Id.* at 523. It therefore appears that recognition of dissociative amnesia in the DSM-IV-TR weighs in favor of admitting Dr. Hopper's testimony.

Second, defendant argues that testimony concerning the diagnostic criteria for dissociative amnesia should not be admitted because the manual is not generally accepted as a forensic, as opposed to a therapeutic, tool. As Dr. Pope testified during his testimony, the introduction to the DSM-IV-TR warns against the risks of using its diagnostic criteria in a legal setting:

When the DSM-IV [is] employed for forensic purposes, there are significant risks that diagnost-

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ic information will be misused or misunderstood. These dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis In determining whether an individual meets a specified legal standard ..., additional information is usually required about the individual's functional impairments and how these impairments affect the particular abilities in question.

*16 *Id.* at xxxii-xxxiii. However, the reservations expressed in that paragraph do not preclude use of information in the manual to assist the jury in assessing plaintiff's allegations of memory repression. The manual goes on to state that "[t]he use of the DSM-IV in forensic settings should be informed by an awareness of the risks and limitations discussed above. When used appropriately, diagnoses and diagnostic information can assist decision makers in their determinations." *Id.* at xxxiii. The authors of the manual thus do not state that it should not be used for forensic purposes, only that it should be used in such settings with considerable caution and care.

[22] Third, defendant contends that a review of scientific literature shows that repressed-memory theory was a "scientific fad" during the 1990s that has since been discredited. Dr. Pope's testimony that the number of scientific articles on the theory has dwindled after that decade and that many recent articles criticize the validity of the theory supports that view to some extent.^{FN29} (See 6/6/2012 Tr. at 37-43). In response, however, plaintiff has submitted articles from recent years that purport to support theories of repression.^{FN30} (See 6/4/2012 Tr. at 85, 89, 94, 96, 106, 110). Given conflicting evidence regarding trends in scientific work on this issue, the Court will not exclude testimony based merely on an apparent decline in the amount of research in the field.

In sum, both Dr. Hopper and Dr. Pope advocate scientific perspectives that have some support within the field of psychiatric and psychological sci-

ences. For this reason, the general-acceptance factor weighs in favor of admitting their testimony on repressed-memory theory.

b. Verifiability

[23] Plaintiff has submitted evidence that the scientific literature on repressed-memory theory includes a substantial number of studies that purport to provide empirical evidence of repression. However, defendant contends that those studies are unreliable because they do not employ objective methodologies.

First, defendant contends that the studies that plaintiff cites rely on research subjects' own unverified (and unverifiable) accounts of whether they were abused and later forgot about that abuse for some period of their lives. As Dr. Pope explained, retrospective studies in this field employ a "do-you-remember-that-you-forgot" experimental design that yields results that cannot be objectively verified because they concern purely mental processes. (6/6/2012 Tr. at 134). Even in prospective studies, where the fact of the abuse has been corroborated, there is no way to verify that a victim's failure to report that abuse can be attributed only to repression and not to other psychological processes. (*Id.* at 62-64).

It certainly gives the Court pause to admit, as scientific testimony, evidence of a thesis that is supported solely by self-reported accounts of individuals' memories as they existed over the course of many years. Proponents of repressed-memory theory have argued that this concern is overstated, and that studies on the topic have evolved and developed more sophisticated methodologies to mitigate the risks inherent to self-report data.^{FN31} Those experts have also argued that self-report data derived from reasonably well-designed studies can be scientifically valid, even if such data are imperfect.^{FN32} Whether that is true or not, there is nevertheless legitimate cause for concern that the entire theory rests on a foundation of inherently unreliable data. Indeed, the problem of reliance on self-reported information is endemic to the fields of

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psychiatry and psychology generally. Nonetheless, it appears that such information is routinely relied on by experts in the field, and that on balance the appropriate course is to permit the testimony and subject it to vigorous cross-examination.

*17 Second, defendant argues that experiments that would verify the theory can be designed, but that such experiments have not been conducted by its proponents. Dr. Pope testified that verification of memory repression would require (1) documentation of the actual abuse, (2) an interview within about a year of the abuse in which the victim fails to remember that abuse, and (3) a follow-up interview in which the interviewer confronts the person with corroborating evidence or describes the abuse to ensure that the interviewee is unable to recall the memory even when reminded of it. (*Id.* at 56–57). However, Rule 702 does not require scientific evidence to be based on perfect, or even the best available, methodologies. *Daubert*, 509 U.S. at 596. Dr. Hopper and Dr. Chu testified that the studies Dr. Pope criticized use methodologies that are scientifically acceptable, and proponents of repressed-memory theory have criticized Dr. Pope's proposed study as unfeasible. ^{FN33} Thus, the failure to prove repressed-memory theory using the particular experimental design that Dr. Pope proposes is likewise insufficient to require exclusion under Rule 702.

In sum, notwithstanding the methodological criticisms raised by Dr. Pope, the court finds that memory repression is a sufficiently testable and tested hypothesis to permit it to be submitted to the jury.

3. Relevance of the Testimony

[24][25] Expert testimony on the topic of memory repression is clearly relevant to plaintiff's claim. Generally, whether expert testimony is necessary to sustain a state-law claim is determined by reference to substantive state law. *Beaudette v. Louisville Ladder, Inc.*, 462 F.3d 22, 27 (1st Cir.2006). Here, plaintiff's claim is untimely unless he proves to the jury that until 2008 he lacked any

conscious memory of the alleged abuse. *Creighton*, 439 Mass. at 283, 786 N.E.2d 1211. Determination of whether plaintiff repressed his memory requires an understanding of scientific views as to whether it is possible for a victim to repress such memories and what characteristics persons who suffer repression might have. Such knowledge is not within the common experience of ordinary jurors. Testimony from the parties' experts will therefore provide substantial assistance to the jury in evaluating plaintiff's claims.

Dr. Hopper's testimony is therefore relevant and likely to assist the jury in assessing the factual issues in this case. Dr. Pope's testimony, in turn, is necessary to give the jury a full picture of the relevant psychiatric or psychological principles.

E. Application of Rule 403

The fact that the evidence survives scrutiny under Rule 702 is not the end of the inquiry. As noted, Fed.R.Evid. 403 provides that otherwise-admissible evidence may be excluded if "its probative value is substantially outweighed by a danger of ... unfair prejudice, confusing the issues, [or] misleading the jury" In *Daubert*, the Supreme Court noted that Rule 403 may act as a backstop where expert testimony that is admissible under Rule 702 carries a risk of unduly influencing the jury: "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses." *Daubert*, 509 U.S. at 595 (quoting Jack B. Weinstein, *Rule 702 of the Federal Rules of Evidence is Sound; It Should Not Be Amended*, 138 F.R.D. 631, 632 (1991)).

*18 Whether Rule 403 bars expert testimony on repressed-memory theory is, in some ways, a more difficult question than whether such evidence is allowed under Rule 702. In this case, important considerations weigh on both sides of the Rule 403 balance.

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[26] The principal danger in admitting the testimony is the possibility that the jury will interpret the expert's testimony, explicitly or implicitly, as an opinion that the plaintiff is credible. This consequence flows directly from nature of the testimony; the very purpose of offering it is to establish that plaintiff's version of events ("this happened, and I forgot about it for more than thirty years") is more credible than it otherwise might appear to be. Put another way, if the expert testimony does not bolster plaintiff's credibility, it has no real purpose.

A further danger is that the concept of memory repression may invite fallacious reasoning. Of course, a jury may logically credit a witness's testimony that he remembers being abused. But testimony that the witness does not remember being abused may be interpreted equally as evidence of repressed memory or as evidence of a non-existent memory. Testimony on repression might lead a juror to err by treating a person's lack of memory as affirmative evidence that the alleged abuse occurred. To state the point simply, a jury might conclude that if he remembered the abuse, that fact is proof that it occurred—and if he didn't remember it, that too is proof that it occurred, and indeed that it was so traumatic that he suppressed his memory of it.

There are other dangers, as well; for example, the jury might interpret testimony that a person's behavior is "consistent with" that of someone who has repressed memory of a traumatic experience as being testimony that the person actually experienced the phenomenon. All these risks, taken together, demand that a court exercise caution in admitting expert testimony of the kind at issue here.

However, other factors that are specific to this case weigh in favor of admission. First, the Massachusetts legislature appears to have expressly recognized the legitimacy of memory repression by enacting the discovery rule set forth in Mass. Gen. Laws ch. 260, § 4C. Indeed, the statutory text is tailored for plaintiffs whose failure to file a timely complaint was caused by the psychological ef-

fects—including memory impairment—of childhood abuse. While that legislative judgment does not affect the validity (or lack of validity) of the underlying science, it is nonetheless a factor to be weighed in the overall "fairness" assessment under Rule 403.

Second, this matter does not involve a memory "recovered" in therapy, or otherwise under more dubious circumstances. Testimony during the *Daubert* hearing made clear that therapeutic techniques may introduce false memories and that memories recovered under such circumstances are less reliable than spontaneously recovered memories. *Compare State v. King*, 2012 N.C. LEXIS 418 (June 14, 2012) (in criminal action where timeliness was not raised as an issue, affirming the exclusion of expert testimony on repressed memories that were recovered in therapy because "its probative value was outweighed by its prejudicial effect."). In such a case, the balance might tip substantially in favor of exclusion of the evidence.

*19 Third, this is a civil, not a criminal case. For a variety of reasons, the balance under Rule 403 might well be drawn differently if the evidence were offered by the government in a criminal prosecution.

Finally, the Court is not limited to mere admission or exclusion of the evidence. The Court has the authority to give appropriate limiting and cautionary instructions, both as the testimony is admitted and at the end of the trial, to help ensure that the jury is properly focused on the issues and that they do not misinterpret the expert evidence or their duty to consider the evidence as a whole.

After careful consideration, the Court has concluded that the balance under Rule 403 tips narrowly in favor of admission. The Court finds that, under the narrow circumstances of this case, the probative value of testimony of repressed-memory theory is not substantially outweighed by its risks. However, that testimony will be subject to strict limitations. The experts may not opine as to the

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credibility of plaintiff's memories or as to whether the alleged abuse actually occurred, and the Court will underscore that point to the jury with appropriate instructions and cautions. Moreover, testimony as to the reliability of memories recovered in therapy will be excluded as irrelevant.

IV. Conclusion

At trial, Dr. Hopper and Dr. Pope will be permitted—assuming, of course, that a proper factual foundation has been laid—to testify concerning memory repression theory, its defining characteristics, and its limitations and degree of acceptance in the scientific community. Dr. Hopper will be permitted to testify that plaintiff's reported experience is consistent with repressed-memory theory. However, neither expert will be permitted to opine as to whether Clark suffered from the alleged abuse, whether he actually repressed any memories of the experience, or whether he is a credible witness or his claimed memory is more credible than it otherwise might appear.

For the foregoing reasons, both motions *in limine* to exclude expert testimony are DENIED.

So Ordered.

FN1. In enacting the statute, the Massachusetts legislature extended a common-law discovery rule that Massachusetts courts apply with respect to other causes of action in tort. *Doe v. Creighton*, 439 Mass. 281, 283, 786 N.E.2d 1211 (2003). Under the common-law rule, a claim does not accrue as long as the underlying facts that give rise to it remain “inherently unknowable,” a standard that is “no different from, and is used interchangeably with, the ‘knew or should have known’ standard.” *Williams v. Ely*, 423 Mass. 467, 474 n. 7, 668 N.E.2d 799 (1996); *see also Saenger Org., Inc. v. Nationwide Ins. Licensing Assoc., Inc.*, 119 F.3d 55, 64 (1st Cir.1997).

FN2. Edison previously moved for sum-

mary judgment on the grounds that Clark's claim was time-barred under Mass. Gen. Laws ch. 260, § 4C. On January 24, 2012, the Court denied that motion on the grounds that there were material factual disputes as to when the cause of action accrued.

FN3. The discovery rule may also delay accrual where a victim who remembers being sexually abused nonetheless lacks knowledge of his injury because he “was not aware that he had suffered any appreciable or legally recognizable harm.” *Ross v. Garabedian*, 433 Mass. 360, 366, 742 N.E.2d 1046 (2001) (internal quotation omitted). Similarly, for purposes of the rule, even a plaintiff who is aware that misconduct is wrong may remain unaware of the causal connection between that misconduct and subsequent emotional or psychological injuries. *See Riley*, 409 Mass. at 246, 565 N.E.2d 780 (noting that psychological damage from sexual abuse is an “injury to the mind” that “by its very nature prevents the discovery of its cause”); *Creighton*, 439 Mass. at 285, 786 N.E.2d 1211; *Armstrong v. Lamy*, 938 F.Supp. 1018, 1038 (D.Mass.1996). Here, plaintiff asserts that he lacked any memory of the alleged abuse, not that he failed to recognize a causal connection.

FN4. During the hearing, all three experts agreed that the scientific literature on the issues raised in this case uses inconsistent terminology. They distinguished the use of certain terms (for example, “repressed memory,” “recovered memory,” and “dissociative amnesia”) to *describe* a phenomenon from their use to identify a psychological or biological mechanism to *explain* that phenomenon. Here, the court will use the term “repression” to refer to the phenomenon that the plaintiff must

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prove to benefit from the statutory discovery rule in this case.

FN5. The DSM is published by the American Psychiatric Association. It is a classification manual widely used by mental health professionals in making diagnoses of mental health problems. The DSM lists criteria for a clinician to consider when making a particular diagnosis. The most recent edition, DSM-IV, was published in 1994. In 2000, a text revision of the DSM-IV, the DSM-IV-TR, was released. See American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, at xxxiii (4th ed. text rev.2000). The Fifth Edition of the manual is currently under development. See *DSM-5 Development Home*, American Psychiatric Association DSM-5 Development, <http://www.dsm5.org/Pages/Default.aspx> (last visited June 29, 2012).

FN6. DANIEL L. SCHACTER, THE SEVEN SINS OF MEMORY: HOW THE MIND FORGETS AND REMEMBERS (2001).

FN7. Michael C. Anderson & Benjamin J. Levy, *Suppressing Unwanted Memories*, 18 CURRENT DIRECTIONS IN PSYCHOL. SCI.. 189 (2009). See also Karl-Heinz Bauml et al., *Binding and Inhibition in Episodic Memory—Cognitive, Emotional, and Neural Processes*, 34 NEUROSCIENCE & BIOBEHAVIORAL REV. 1047 (2010); Tony W. Buchanan, *Retrieval of Emotional Memories*, 133 PSYCHOL. BULL. . 761 (2007); E. Ger-aerts et al., *Recovered Memories of Childhood Abuse: Current Findings and Their Legal Implications*, 13 LEGAL & CRIM. PSYCHOL. 165 (2008).

FN8. Constance Dalenberg, *Recovered*

Memory and the Daubert Criteria: Recovered Memory as Professionally Tested, Peer Reviewed, and Accepted in the Relevant Scientific Community, 7 TRAUMA, VIOLENCE, & ABUSE 274 (2006); Daniel Brown et al., *Recovered Memories: The Current Weight of the Evidence in Science and the Courts*, J. OF PSYCHIATRY & L., vol. 27, Spring 1999, at 5.

FN9. Linda M. Williams, *Recovered Memories of Abuse in Women with Documented Child Sexual Victimization Histories*, 8 J. OF TRAUMATIC STRESS 649 (1995).

FN10. See, e.g., Harrison G. Pope, Jr. & James I. Hudson, *Can Memories of Childhood Sexual Abuse Be Repressed?*, 25 PSYCHOL. MED.. 121 (1995); Harrison G. Pope, Jr. et al., *Attitudes Toward DSM-IV Dissociative Disorders Diagnoses Among Board-Certified American Psychiatrists*, 156 AM. J. PSYCHIATRY 321 (1999); Pope & Hudson, *Repressed Memories: Scientific Status, Modern Scientific Evidence*, in 2 MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY 20 (West 2011–2012 ed.).

FN11. Dr. Pope clarified that he used the term “repressed memory” not in the “narrow Freudian sense of some hypothetical process where something is driven down into the unconscious mind.” (*Id.* at 21–22). Rather, his definition reflected his understanding of how the word is generally use by the public and by the courts. (*Id.*)

FN12. See, e.g., G.S. Goodman et al., *A Prospective Study of Memory for Child Sexual Abuse: New Findings Relevant to the Repressed-Memory Controversy*, 14 PSYCHOL. SCI.. 113 (2003) (noting that its findings “do not support the existence

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of special memory mechanisms unique to traumatic events, but instead imply that normal cognitive operations underlie long-term memory for [childhood sexual abuse]"); John F. Kihlstrom, *An Unbalanced Balancing Act: Blocked, Recovered, and False Memories in the Laboratory and Clinic*, 11 CLINICAL PSYCHOL. SCI. & PRAC. 34 (2004) ("[R]esearch on actual victims has produced hardly a shred of evidence for psychogenic amnesia covering the traumatic event itself."); August Piper et al., *What's Wrong with Believing in Repression?: A Review for Legal Professionals*, 14 PSYCHOL. PUB. POL'Y & L. 223 (2008) ("Repressed- and recovered-memory theory is not supported by science."); Richard J. McNally & Elke Geraerts, *A New Solution to the Recovered Memory Debate*, 4 PERSP. IN PSYCHO. SCI. 126 (2009) ("The repression interpretation does not withstand empirical scrutiny").

FN13. See Harrison G. Pope, Jr. et al., *Tracking Scientific Interest in the Dissociative Disorders: A Study of Scientific Publication Output 1984–2003*, 75 PSYCHOTHERAPY & PSYCHOSOMATICS 19 (2006).

FN14. Retrospective studies that are cited in support of repressed-memory theory have involved subjects who claimed that at the time of the study they remembered being abused during childhood and, further, that there was a period between that abuse and the time of the study when they lost the ability to remember the experience. (*Id.* at 58–60). In prospective studies, a group of individuals who have been victims of a documented traumatic events years before the study took place have been asked whether they remember experiencing any traumatic event of the same nature. (*Id.* at

61).

FN15. Dr. Pope referred to those studies as employing a "do-you-remember-that-you-forgot" methodology. (*Id.* at 134).

FN16. In this case, plaintiff does not allege that he recovered memories of abuse during therapy, and therefore the issue of therapeutic suggestibility is not directly relevant.

FN17. The court also added that testimony that the plaintiff in fact suffered from PTSD and repressed memory was "subject to Rules 401 and 403 concerning relevance and whether the probative value of the testimony is substantially outweighed by a danger of unfair prejudice to the defendants or whether the testimony could lead to confusion in the minds of the jurors." *Id.* at 1066.

FN18. In *Hellums v. Williams*, 16 Fed. Appx. 905 (10th Cir.2001), the Tenth Circuit granted in part a state prisoner's petition for habeas corpus with respect to convictions that were based in part on expert testimony that similarly crossed the line between admissible "consistent with" testimony and inadmissible testimony concerning another witness's credibility. During the trial, one expert "consistently made statements in which she assumed the truth of the victim's allegations or affirmatively indicated that the abuse had occurred based on the victim's statements to her." 16 Fed. Appx. at 911. Another expert exceeded the bounds of admissible expert testimony on the topic when he stated "that he found no reason to question the victim's allegations of sexual abuse." *Id.*

The Court found that the testimony of those experts "invaded the jury's

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province.” *Id.* It explained: “In abuse cases, experts may testify that an alleged victim suffers from symptoms consistent with sexual abuse Experts, however, may not comment on the alleged victim's credibility Expert testimony, based on the statements of an alleged victim, that sexual abuse in fact occurred is inadmissible Statements that assume the fact of abuse are also inadmissible.” *Id.* at 910 (internal citations omitted).

FN19. In *Isely*, the plaintiff asserted that the “episodes [of abuse] had been completely blocked out and that she had no memory of them until she recovered so-called ‘repressed memories’ of these touchings during psychotherapy in November of 1990.” *Shahzade*, 930 F.Supp. at 674. Because the Massachusetts legislature had enacted Mass. Gen. L. ch. 260, § 4C in 1993, the court was applying Fed.R.Evid. 702 in the context of the same legal issues that apply in this case.

FN20. The standard for admission of expert testimony under Massachusetts evidentiary rules is substantially the same as under Fed.R.Evid. 702 and *Daubert*. See *Commonwealth v. Lanigan*, 419 Mass. 15, 26, 641 N.E.2d 1342 (1994) (“We accept the basic reasoning of the *Daubert* opinion because it is consistent with our test of demonstrated reliability.”).

FN21. The second of the Commonwealth's experts was Dr. James A. Chu.

FN22. *Discepolo v. Gorgone*, 399 F.Supp.2d 123, 128 (D.Conn.2005), was an action for sexual assault and intentional infliction of emotional distress in which the plaintiff alleged that the defendant sexually assaulted her multiple times when he babysat for her during the years from 1988 to 1990. *Discepolo v. Gorgone*, 2006 U.S.

Dist. LEXIS 68191, at * 1–2 (D.Conn. Sept. 12, 2006). Before trial, the defendant moved to exclude the testimony of the plaintiff's treating psychologist that the plaintiff suffered from PTSD and that her behavior (including a delay in reporting the alleged sexual assault) was consistent with that of someone who suffered from PTSD as a result of sexual abuse. *Discepolo*, 399 F.Supp.2d at 124. Unlike in *Isely* and *Shahzade*, the statute of limitations was not at issue, and the expert's testimony was offered not to prove that the plaintiff in fact repressed the memory but instead to buttress the credibility of her allegations that the abuse actually occurred.

The court admitted the testimony for that purpose, permitting the expert to testify “that the plaintiff suffer[ed] from PTSD, that sexual abuse can be a stressor sufficiently severe to result in PTSD, and that plaintiff's symptoms and behaviors [were] consistent with those of people who have suffered childhood sexual abuse.” *Id.* at 130. The court also held, however, that the expert could not “opine on the credibility of plaintiff or offer any opinion that plaintiff in fact suffered the sexual abuse she claims.” *Id.*

FN23. Another set of state court decisions have, after finding that the scientific basis for repressed-memory theory is inadequate, held that allegations of memory repression are insufficient to toll or delay the running of the applicable statute of limitations. *Doe v. Maskell*, 342 Md. 684, 698, 679 A.2d 1087 (1996); *Dalrymple v. Brown*, 549 Pa. 217, 232, 701 A.2d 164 (1997); *Travis v. Ziter*, 681 So.2d 1348, 1355 (Ala.1996); *Hunter v. Brown*, 1996 WL 57944 (Tenn.Ct.App. Feb.13, 1996); *S.V. v. R. V.*, 933 S.W.2d 1, 25 (Tex.1996).

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FN24. As previously noted, the Daubert criteria are (1) whether a scientific theory or technique can be (and has been) tested; (2) whether it has been subjected to peer review and publication; (3) whether it has a known potential rate of error; (4) whether there exists or are maintained standards controlling its application; and (5) whether it is generally accepted in the relevant scientific community. *Daubert*, 509 U.S. at 593–94; *see also Samaan*, 670 F.3d at 31–32.

FN25. The Court agrees that those criteria are dispositive in this case and will not address the remaining *Daubert* factors.

FN26. The admission of Dr. Hopper's testimony without that of Dr. Pope would raise similar concerns under Rule 403 because the probative value of hearing one side of the scientific debate in this field might be substantially outweighed by the potential for un-rebutted expert testimony to mislead the jury or confuse the issues.

FN27. *Williams*, *supra* note 8; *Dalenberg*, *supra* note 7; *Brown*, *supra* note 7.

FN28. *See DSM–IV–TR* at xxxiii (“DSM–IV reflects a consensus about the classification and diagnosis of mental disorders derived at the time of its initial publication.”). Courts that have considered the issue have found that the DSM–IV's diagnosis for dissociative amnesia is persuasive evidence that memory repression is generally accepted within the psychiatric community. *See, e.g., Isely*, 877 F.Supp. at 1065–66 (admitting testimony on PTSD and repressed-memory theory based in part on diagnosis for PTSD in the DSM–IV); *Shahzade*, 923 F.Supp. at 289 (admitting testimony on repressed-memory theory based on inclusion of dissociative amnesia in the DSM–IV); *Discepolo*, 399

F.Supp.2d at 127 (finding that “the inclusion of a PTSD diagnosis with the rigor of diagnostic criteria and process for inclusion in the DSM–IV–TR” belied defendant's argument that PTSD was not generally accepted in the relevant community).

FN29. *See, e.g., McNally & Geraerts*, *supra* note 11.

FN30. *See, e.g., Hirokazu Kikuchi et al., Memory Repression: Brain Mechanisms Underlying Dissociative Amnesia*, 22 J. OF COGNITIVE NEUROSCIENCE 602 (2010).

FN31. *Brown*, *supra* note 7, at 34–36; *Dalenberg*, *supra* note 7.

FN32. *Brown*, *supra* note 7, at 47–48.

FN33. *Dalenberg*, *supra* note 7, at 283–84.

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Appendix D

Commonwealth v. Polk, 462 Mass. 23, 965 N.E.2d 815 (2012)

Westlaw.

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H

Supreme Judicial Court of Massachusetts,
 Norfolk.
 COMMONWEALTH
 v.
 William POLK.

SJC-10867.
 Argued Dec. 8, 2011.
 Decided April 13, 2012.

Background: Defendant was convicted in the Superior Court, Norfolk County, Janet L. Sanders, J., of two counts of statutory rape. Defendant filed application for direct appeal.

Holdings: The Supreme Judicial Court, Gants, J., held that:

(1) expert testimony of psychologist that those with dissociative memory sometimes had a distorted memory of past events was admissible to demonstrate the unreliability of victim's testimony;
 (2) testimony of alleged victim as to what she saw, heard, and experienced regarding her prior sexual abuse, as well as her testimony about her inconsistent memory regarding her sexual abuse by an uncle when she was a young child was admissible; and
 (3) trial court's error in excluding expert psychological evidence regarding dissociative memory and evidence from alleged victim's past that suggested that victim had the disorder was not harmless.

Reversed and remanded.

West Headnotes

[1] Criminal Law 110  **469**

110 Criminal Law
 110XVII Evidence
 110XVII(R) Opinion Evidence
 110k468 Subjects of Expert Testimony
 110k469 k. In general. Most Cited

Where a party in a criminal trial seeks to offer an expert opinion, the judge, as gatekeeper, must first determine whether the proponent of the evidence has met the five foundational requirements for admissibility: (1) that the expert testimony will assist the trier of fact because the information is beyond the common knowledge of jurors, (2) that the witness is qualified as an expert in the relevant area of inquiry, (3) that the expert's opinion is based on facts or data of a type reasonably relied on by experts to form opinions in the relevant field, (4) that the theory underlying the opinion is reliable, and (5) that the theory is applied to the particular facts of the case in a reliable manner.

[2] Criminal Law 110  **493**

110 Criminal Law
 110XVII Evidence
 110XVII(R) Opinion Evidence
 110k492 Effect of Opinion Evidence
 110k493 k. In general. Most Cited

Criminal Law 110  **741(4)**

110 Criminal Law
 110XX Trial
 110XX(F) Province of Court and Jury in General
 110k733 Questions of Law or of Fact
 110k741 Weight and Sufficiency of Evidence in General
 110k741(4) k. Opinion evidence.
 Most Cited Cases

Once expert testimony is admitted, its validity and credibility is subject to challenge like any other testimony, including through the admission of opposing expert testimony, and it is for the jury to determine what aid it might provide to their deliberations.

[3] Criminal Law 110  **474**

110 Criminal Law

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110XVII Evidence
 110XVII(R) Opinion Evidence
 110k468 Subjects of Expert Testimony
 110k474 k. Mental condition or capacity. Most Cited Cases

When a judge, in her role as gatekeeper regarding the admissibility of expert testimony, determines the admissibility of an expert opinion regarding a psychological disorder, the judge must first decide whether the expert's opinions regarding the disorder are reliable, i.e., whether the existence of the disorder and recognition of its symptoms are generally accepted in the relevant psychological community or are otherwise demonstrated to be reliably established.

[4] Criminal Law 110 ↪474

110 Criminal Law
 110XVII Evidence
 110XVII(R) Opinion Evidence
 110k468 Subjects of Expert Testimony
 110k474 k. Mental condition or capacity. Most Cited Cases

Where an expert opinion regarding a psychological disorder and its symptoms is reliable, the judge, as gatekeeper regarding the admissibility of expert testimony, must determine whether the opinion evidence is relevant to an issue in the case and, if relevant, weigh its relevance against the risk the evidence will be unfairly prejudicial, or will confuse, divert, or mislead the jury, or will be unnecessarily time consuming.

[5] Criminal Law 110 ↪1153.1

110 Criminal Law
 110XXIV Review
 110XXIV(N) Discretion of Lower Court
 110k1153 Reception and Admissibility of Evidence
 110k1153.1 k. In general. Most Cited Cases

Trial court's evidentiary decision is reviewed under the abuse of discretion standard.

[6] Criminal Law 110 ↪474.3(1)

110 Criminal Law
 110XVII Evidence
 110XVII(R) Opinion Evidence
 110k468 Subjects of Expert Testimony
 110k474.3 Credibility, Veracity, or Competency
 110k474.3(1) k. In general. Most Cited Cases

Criminal Law 110 ↪662.7

110 Criminal Law
 110XX Trial
 110XX(C) Reception of Evidence
 110k662 Right of Accused to Confront Witnesses
 110k662.7 k. Cross-examination and impeachment. Most Cited Cases

Where a defendant seeks to admit expert testimony regarding the credibility of an alleged victim's testimony, especially where the Commonwealth's case rests almost entirely on the credibility of the alleged victim, a judge's evidentiary decision assumes a constitutional dimension because the Federal and State Constitutions requires that a defendant be permitted to introduce evidence which may materially affect the credibility of the alleged victim's testimony. U.S.C.A. Const.Amend. 6, 14; M.G.L.A. Const.Amend. Art. 12.

[7] Criminal Law 110 ↪474.3(1)

110 Criminal Law
 110XVII Evidence
 110XVII(R) Opinion Evidence
 110k468 Subjects of Expert Testimony
 110k474.3 Credibility, Veracity, or Competency
 110k474.3(1) k. In general. Most Cited Cases

Expert testimony of psychologist that those with dissociative memory sometimes had a distorted memory of past events, offered by defendant in prosecution for statutory rape, was relevant in ab-

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sence of diagnosis of dissociative memory in victim to demonstrate the unreliability of victim's testimony, as there was evidence that victim's personal history was consistent with a diagnosis of dissociative memory that was sufficient to permit an inference that she might suffer from it.

[8] Rape 321 ⚡40(5)

321 Rape
 321II Prosecution
 321II(B) Evidence
 321k37 Admissibility
 321k40 Character and Habits of Female
 321k40(5) k. Female under age of consent. Most Cited Cases

Testimony of alleged victim as to what she saw, heard, and experienced regarding her prior sexual abuse, as well as her testimony about her inconsistent memory regarding her sexual abuse by an uncle when she was a young child was relevant to evaluate the risk that she had dissociative disorder and that her memory of what happened at the defendant's home was unreliable because of confabulation, and, thus, this testimony was admissible, in prosecution for statutory rape.

[9] Witnesses 410 ⚡77

410 Witnesses
 410II Competency
 410II(A) Capacity and Qualifications in General
 410k77 k. Examination of witness as to competency. Most Cited Cases

A judge has no authority in a criminal prosecution to order a psychological examination of a witness to assess the witness's credibility.

[10] Criminal Law 110 ⚡449.1

110 Criminal Law
 110XVII Evidence
 110XVII(R) Opinion Evidence
 110k449 Witnesses in General

110k449.1 k. In general; subjects of opinion evidence. Most Cited Cases

Criminal Law 110 ⚡474.3(1)

110 Criminal Law
 110XVII Evidence
 110XVII(R) Opinion Evidence
 110k468 Subjects of Expert Testimony
 110k474.3 Credibility, Veracity, or Competency
 110k474.3(1) k. In general. Most Cited Cases

No witness, expert or not, may offer an opinion as to the credibility of another witness.

[11] Criminal Law 110 ⚡419(2.20)

110 Criminal Law
 110XVII Evidence
 110XVII(N) Hearsay
 110k419 Hearsay in General
 110k419(2.20) k. Then-existing state of mind or body. Most Cited Cases

Testimony of alleged victim's biological mother as to what victim had said to her about an uncle sexually abusing her in a bathtub when she was a young child was admissible, in prosecution for statutory rape, as it was relevant to victim's apparent belief at the time that her uncle had abused her and her consequent fear of her uncle.

[12] Rape 321 ⚡40(5)

321 Rape
 321II Prosecution
 321II(B) Evidence
 321k37 Admissibility
 321k40 Character and Habits of Female
 321k40(5) k. Female under age of consent. Most Cited Cases

Defendant was entitled to present evidence of alleged victim's sexual abuse by her uncles when she was a child to demonstrate the significant possibility that she suffered from dissociative memory

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and confabulated her memory of defendant's alleged sexual assaults on her when she was a child, notwithstanding the rape shield statute, as defendant had a constitutional right to present a defense, and such evidence, if credited, would materially affect the jury's evaluation of victim's credibility and reliability, and it was not cumulative of other admitted evidence. M.G.L.A. c. 233, § 21B.

[13] Criminal Law 110 ↪1170(1)

110 Criminal Law

110XXIV Review

110XXIV(Q) Harmless and Reversible Error

110k1170 Exclusion of Evidence

110k1170(1) k. In general. Most Cited

Cases

Trial court's error in excluding expert psychological evidence regarding dissociative memory and evidence from alleged victim's past that suggested that victim had the disorder prejudiced defendant, and, thus, was not harmless, in prosecution for statutory rape, as the Commonwealth's case rested wholly on victim's credibility, and the exclusion of the evidence might have significantly affected the jury's evaluation of her credibility regarding the defendant's alleged rapes.

[14] Criminal Law 110 ↪2174

110 Criminal Law

110XXXI Counsel

110XXXI(F) Arguments and Statements by Counsel

110k2164 Rebuttal Argument; Responsive Statements and Remarks

110k2174 k. Comments on evidence or witnesses. Most Cited Cases

Prosecutor's question to jury during closing argument asking jury what motive alleged victim had to lie was not improper, in prosecution for statutory rape, where defense counsel, in his closing argument, challenged the credibility of the victim.

****818** Max D. Stern (Alexandra H. Deal with him), Boston, for the defendant.

Tracey A. Cusick, Assistant District Attorney, for the Commonwealth.

Present: SPINA, CORDY, GANTS, DUFFLY, & LENK, JJ.

GANTS, J.

***23** The defendant was convicted by a jury in the Superior Court on two indictments charging statutory rape, in violation of G.L. c. 265, § 23.^{FN1} The alleged victim was his then ***24** fifteen year old niece, Molly.^{FN2} The defendant appealed from his convictions, and we granted his application for direct appellate review. On appeal, the defendant argues that the judge erred by excluding expert psychological testimony regarding “dissociation” and the evidence from Molly's past that suggested that Molly had that disorder. The defendant contends that the exclusion of that evidence was prejudicial because it denied him the opportunity adequately to explain to the jury the significant possibility that Molly's allegations were either fabricated or arose from a distortion of memory. We conclude that the exclusion of this evidence was prejudicial error and therefore reverse the convictions and remand the case for a new trial.

FN1. The defendant was sentenced to from four to five years in State prison on the first indictment, and to five years' probation, to commence on the conclusion of his incarceration, on the second indictment. In addition to the statutory conditions of probation, G.L. c. 265, § 47, the judge ordered the defendant to comply with five special conditions of probation: that he enter and complete a sex offender treatment program, submit to an evaluation for alcohol abuse and receive any treatment deemed necessary, have no unsupervised contact with children under sixteen years of age (except his own children), engage in no employment or volunteer work with children under sixteen years of age, and stay

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away from the alleged victim and her family. A single justice of this court allowed the defendant's motion for a stay of execution, and we affirmed his decision. *Polk v. Commonwealth*, 461 Mass. 251, 960 N.E.2d 242 (2012).

FN2. We use pseudonyms for the children.

Background. We summarize the evidence admitted at trial that is relevant to this appeal. Molly's adoptive mother is the defendant's sister. In August, 2007, Molly, her adoptive parents, and three of her four siblings traveled from their home in Minnesota and stayed with the defendant's family at their home in Massachusetts for one week.^{FN3}

FN3. Molly and her brother were adopted by her adoptive parents in Minnesota when she was nine years old. Her adoptive parents also had separately adopted another girl, and had given birth to two children. Molly's adopted sister, Jane, had serious behavioral issues and had not lived in Molly's home since May, 2006. Jane did not accompany the family when they visited the defendant in August, 2007.

Six months after the visit, on February 14, 2008, Molly attended a meeting at school led by her godmother that discussed the topic of sexual abuse. During the meeting, according to Molly, "all of a sudden, it just popped up in my head of what happened in Boston." After the meeting, Molly told her godmother that "someone had touched her in ways that he shouldn't have." Her godmother asked her who had touched her, and she said it was her "Uncle Bill," referring to the defendant, and then started to cry. When asked how he had touched her, Molly *25 said that "he had sex with me." After the revelation, the godmother took Molly home, where Molly told her parents, who took her to the Midwest Children's Resource Center (center). At the center, she was interviewed by a nurse, and the interview was recorded on videotape. She was **819 also examined by a physician. The results of this

physical examination were normal, revealing no signs of trauma or sexually transmitted disease.

At trial, Molly testified that, on the next to last night at the defendant's home (first night), she, the defendant, and Martha, the defendant's then ten year old daughter, went upstairs to the first floor to watch a movie on the television, while Molly's three siblings and two of the defendant's five children stayed downstairs in the basement to watch another movie. The defendant and Molly sat on one couch; Martha sat alone on another. The defendant placed a blanket over both him and Molly, and then put his hand under her shirt and touched her breasts. Nothing else happened, and she later went to bed.^{FN4}

FN4. The defendant was not charged with any crime related to this alleged incident.

The next night (second night), Molly and the defendant watched television alone on the first floor, while three of her siblings and two of the defendant's children were in the basement television room. The defendant again touched Molly's breasts and told her to go downstairs and take off her underwear, which she did.^{FN5} When she returned to the first-floor room, they kissed and the defendant, now on his knees on the floor, put his finger in, and later licked, her vagina. He then told Molly to sit on top of him, which she did. He took out his penis, which went into her vagina when she sat on him, but she said it hurt and they stopped. She then went to the downstairs bedroom, where her sister lay awake on the upper bunk. The defendant later entered the room to say good night, kissing Molly on her lips while she lay on the lower bunk.

FN5. While at the defendant's home, Molly shared a bedroom in the basement with one of her sisters.

On cross-examination, Molly was shown portions of her videotaped interview. With respect to the first night, Molly admitted that she had told the nurse at the center that Martha did not see the de-

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fendant touching her breasts because Martha from her vantage point on the other couch could not see Molly *26 and the defendant. But Molly agreed at trial that she and the defendant, while on the couch, would have been within Martha's field of vision. Molly also admitted that she had made no mention of a blanket during her videotaped interview at the center. When the assistant district attorney and a detective sergeant interviewed Molly in Minnesota in October, 2009, she told them, "I don't remember the first night."

At trial, Molly initially said that she did not remember whether the defendant touched her at any other time during the week. But when the detective sergeant had interviewed Molly in March, 2008, she told him that the defendant had swiped his arm against her breasts approximately ten times while sitting with her and Martha at the piano. When asked at trial whether she recalled that actually happening, she replied, "Yes, because of the video I watched," but then admitted that she had not mentioned this touching during the videotaped interview. At trial, she said that the touching at the piano happened only when Martha had left the room, but she had earlier told the detective sergeant that it happened while Martha was in the room.

Molly had also told the detective sergeant in March, 2008, of another incident with the defendant during her week-long vacation at his home where, three or four times, the defendant brushed her thigh with his foot while they leaned against a table watching television. At trial, she did **820 not remember whether that touching happened, or whether she had spoken of it during her interview with the detective sergeant.

Defense counsel informed the judge that he wished to advance two separate theories as to why Molly's allegations of sexual abuse were not credible. First, he contended that at the time she made her first complaint to her godmother, Molly was seeking "attention" and "sympathy" because her adoptive family was in turmoil as a result of the conduct of her adopted sister Jane. ^{FN6} She sought at-

tention during a group discussion of sexual abuse by accusing her uncle of sexual abuse, because, as a result of *27 Molly's prior exposure to abuse before her adoption at the age of nine, it had been "drilled into her in the most traumatic time in her life that this is what uncles do." She did not expect her allegation to cause a "blow up" because sexual abuse by an uncle was a "pretty ordinary" event in her preadoption childhood and none of her uncles had ever been prosecuted for such abuse.

FN6. Jane is two months younger than Molly and once had shared a bedroom with Molly. Jane had been running away from home, was jailed for stealing from the family, and later was placed with another family. In January, 2008, Molly's adoptive father wanted to see Jane, but Molly's adoptive mother did not want him to, and Molly's performance in school had slipped because of the trouble at home.

This theory required the admission of evidence as to what Molly had seen, said, heard, or experienced regarding the sexual abuse committed against her and others by Molly's biological father's brothers. Defense counsel made a proffer to the judge of the evidence of abuse in support of this theory. He proffered that Molly's biological mother had testified in a deposition that Molly, when she was approximately five years old, said that an uncle had touched her "in between her legs" when she was taking a bath. In a voir dire, Molly did not recall being sexually molested in her bath, but she testified that she did remember that an uncle had anally penetrated her with his penis while she lay on a bed when she was younger than six years old.^{FN7} Defense counsel further proffered that the biological mother had told Molly of an incident of abuse of Molly's cousin by another one of her biological father's brothers, where Molly's aunt "woke up to the bed shaking back and forth to find [the uncle] on top of his niece." And defense counsel proffered that, after the biological mother recognized she could no longer care for her children, she told

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Molly that she wanted her placed outside the family “because all of your uncles are child molesters.”

FN7. Molly told the assistant district attorney and the detective sergeant that the sexual assault may have been committed by a cousin rather than an uncle but testified at trial that the abuse was committed by an uncle.

While the first theory suggested that Molly had initially fabricated what she instinctively understood to be a familiar allegation of sexual abuse against an uncle without appreciating the consequences of such an allegation, the defendant's second theory suggested that Molly's memory might be impaired because of a “dissociative memory” disorder. Defense counsel intended to present this theory to the jury through the expert testimony of a licensed psychologist, Dr. Daniel Brown.

At voir dire and in his report, Dr. Brown declared that children *28 with “disorganized attachment” at the age of twenty months have “significantly more frequent and a greater range of dissociative behaviors” during childhood and adolescence. Dr. Brown stated that persons with a dissociative memory can sometimes manifest episodes **821 of restricted awareness, where they can have large gaps in memory, or “rigid compartmentalization,” where “they have significant memory gaps for important life events and memory sort of comes and goes.” He testified that many children grow out of these dissociative behaviors but children who were physically or sexually abused in later childhood do not, because they use dissociation to deal with their abuse, which changes the dissociation from restricted awareness to rigid compartmentalization.

Dr. Brown further opined that, while recovered memories of abuse by those with dissociated memory are not generally inaccurate, there is a subgroup of persons with major dissociative symptoms “whose memory is very uncertain.” Some in this

subgroup start to speculate when they do not have the memory available to them, and then engage in “expressed uncertainty,” where they fill in the blanks of what they cannot remember, either by inferring the memory from other information or making it up, which is known as “confabulation.” Dr. Brown noted that “source misattribution error” is a common error of memory, where someone hears or reads a story, incorporates it into their memory, and then believes it is a memory about their own life. Dr. Brown reported that others in this subgroup have a factitious disorder, which is manifested by “the simulation of symptoms and/or life stories, not necessarily conscious, for the purpose of adopting a sick role or gaining attention.”

According to Dr. Brown, a child is most likely to develop the disorganized attachment that can lead to dissociative memory when the child's mother has had children at age fourteen or earlier, is frightening to her children, and is “sort of present but out of it.” Dr. Brown noted that Molly's biological mother had all three risk factors.^{FN8} He opined that Molly “meets the criteria for dissociative amnesia” because “she has significant gaps in *29 her memory specifically for alleged abuse, assuming that it happened,” based on her lack of memory of the sexual abuse in the bathtub and her recovered memory of the sexual abuse in the bed when she was a young child.^{FN9} Dr. Brown also opined that “there are some red flags” as to factitiousness, but his evidence of this focused primarily on social service records that reported lies by her biological mother regarding her life story. Dr. Brown made clear that it was not possible for him to interview Molly and have her perform standardized testing, and that he would not make a diagnosis that Molly has a dissociative disorder without having interviewed her.^{FN10} But he opined that the record was “quite consistent” with Molly's having dissociative **822 symptoms and that “there are dissociative behaviors with respect to memory, and she clearly has that.”

FN8. Molly's biological mother testified at

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a deposition that she gave birth to Molly when she was twelve years old. The social service records show that the biological mother was prone to violent outbursts. A social worker's observation of the biological mother with Molly's younger sister showed that the biological mother was "sort of there but out of it" even when she knew she was being observed.

FN9. Molly testified at voir dire that she had forgotten about the bed rape after it occurred but then remembered the bed rape in "seventh or eighth grade," but then had forgotten the memory again and did not mention it in her videotaped interview at the center, where she had instead stated that she had never been sexually abused by any other person in her life. Molly recalled the incident again three months before trial in October, 2009, when she was interviewed by the assistant district attorney and the detective sergeant. In that interview, Molly described her recollection of the bed rape as "something happens, and you don't think about it, and then one day, you just remember it."

FN10. Dr. Brown asserted that it would not be ethical to make such a diagnosis without having interviewed her.

The judge excluded the testimony of Dr. Brown and the biological mother, and also excluded evidence regarding what Molly had seen, said, heard, or experienced as a young child regarding her uncles' alleged sexual abuses, with one exception: the judge permitted Molly to testify on cross-examination about inconsistencies in her recollection of the rape committed in a bed by an uncle when she under six years old. As a result of the evidentiary ruling allowing this testimony, the jury learned from Molly that she had told the nurse during the videotaped interview that she had never been abused by anyone other than the defendant, but at trial she recalled having been raped by an

uncle when she was six years old or younger. Molly explained at trial that "I didn't remember at the time" of the videotaped interview but "start[ed] remembering" the incident "[w]hen I went and *30 talked to [the detective sergeant and assistant] district attorney." Molly told the jury, "There are just times where an image just popped into my head."^{FN11}

FN11. The judge did not allow the defendant to elicit from Molly that she had remembered the incident in "seventh or eighth grade" and then forgot it before she remembered it again. When asked at trial, "[H]ow long have you remembered [the bed rape]?" Molly answered, "I don't know."

The judge ruled that this evidence was admissible solely as an inconsistent prior statement and instructed the jury, over the defendant's objection, that it was admitted for the limited purpose of assisting the jury in their evaluation of Molly's credibility as to what happened at the defendant's home.^{FN12}

FN12. The jury appeared to struggle with the meaning of this limiting instruction during their deliberations. After the jury had informed the judge that they were at an impasse and the judge had instructed the jury in accordance with *Commonwealth v. Rodriguez*, 364 Mass. 87, 101, 300 N.E.2d 192 (1973) (Appendix), the jury informed the judge: "There is disagreement among the jury as to the extent we can use the testimony regarding [Molly's] prior sexual abuse by an uncle. Are we limited to determining whether the interview with [the nurse] alone is credible or can we use it to question [Molly's] overall state of mind?"

The judge instructed the jury, again over the defendant's objection, that the significance of the inconsistency "depends largely on why you think [Molly] made

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that prior statement.” The judge explained:

“Was her statement to the interviewer that she had not been abused an intentional misstatement? In that case, you may ask yourselves whether, with regards to the events of August, 2007, she is not telling the truth there as well. Alternatively, was it simply that [Molly] did not remember the prior abuse at the moment she was asked that question in the interview? In that case, her testimony at trial may be seen simply as a correction of a past misstatement ... that was due to an unintentional lapse of memory.”

The judge then added: “You are not to use this evidence of prior sexual abuse for any other purpose. More specifically, there is no evidence in this case that ties the events of ten or twelve years ago to the events of August, 2007. Moreover, [Molly’s] state of mind, apart from her credibility, is not relevant in this case.”

The judge explained her reasons for denying the defendant’s motion to admit the expert testimony of Dr. Brown, the testimony of Molly’s biological mother, and evidence of prior instances of abuse. First, the judge found that there was no evidence that Molly was currently suffering from a psychiatric disorder and the records “indicate the opposite.”^{FN13} The judge declared that “**31** Dr. Brown’s opinion was “wholly ****823** speculative,” noting that he based his opinion on the premise that Molly suffers from disorganized attachment but “has no idea whether or not [Molly] has any current difficulty in forming attachments.”^{FN14} She also noted that he had never seen Molly and was basing his opinion on records from at least nine years earlier.^{FN15} Second, she declared that Dr. Brown’s opinion “falls clearly on that side of the line of forbidden testimony” by intruding on the jury’s function of determining the credibility of witnesses.

Third, she declared that the defendant “has been given plenty of latitude and has fully exploited every opportunity to probe memory lapses as to this incident.” While she recognized that the defendant would not be able to “probe prior sexual abuse and memory lapses as to those events, ... we’re not on trial here for those events.” For these reasons, she concluded that the risk of prejudice arising from this testimony outweighed its probative value.

FN13. The records the judge appeared to be referring to were the records prepared by a social worker who was providing psychological counselling to Molly in 2008 after her disclosure of the defendant’s rapes.

FN14. The previous day, the judge articulated her concern with Dr. Brown’s opinion:

“You say, ‘Here are the characteristics of the disorder. I can’t make the diagnosis, but you the jury, you be the expert. You make the diagnosis and put it together.’ That is essentially ... what you are asking the jury to do.”

FN15. Molly was eighteen years old at the time of trial, and nine years of age at the time of her adoption, so the judge appears to be referring to Dr. Brown’s reliance on records that preceded her adoption.

[1][2] *Discussion.* Where a party in a criminal trial seeks to offer an expert opinion, the judge, as gatekeeper, must first determine whether the proponent of the evidence has met the five foundational requirements for admissibility: (1) that the expert testimony will assist the trier of fact because the information is beyond the common knowledge of jurors; (2) that the witness is qualified as an expert in the relevant area of inquiry; (3) that the expert’s opinion is based on facts or data of a type reasonably relied on by experts to form opinions in the relevant field; (4) that the theory underlying the

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opinion is reliable; and (5) that the theory is applied to the particular facts of the case in a reliable manner. *Commonwealth v. Barbosa*, 457 Mass. 773, 783, 933 N.E.2d 93 (2010), cert. denied, — U.S. —, 131 S.Ct. 2441, 179 L.Ed.2d 1214 (2011). “Once admitted, the *32 validity and credibility of the expert testimony is subject to challenge like any other testimony, including through the admission of opposing expert testimony, and it is for the jury to determine what aid it might provide to their deliberations.” *Commonwealth v. Shanley*, 455 Mass. 752, 762, 919 N.E.2d 1254 (2010) (*Shanley*).

At trial, the Commonwealth conceded the reliability of the “general science” described by Dr. Brown.^{FN16} But it contended that Dr. Brown’s opinion regarding dissociative memory and confabulation was not relevant in this case, because there was not sufficient evidence that Molly had a dissociative disorder.

FN16. Dr. Brown had earlier testified on behalf of the Commonwealth at a hearing pursuant to *Commonwealth v. Lanigan*, 419 Mass. 15, 25–26, 641 N.E.2d 1342 (1994), in the case of *Commonwealth v. Shanley*, 455 Mass. 752, 763, 919 N.E.2d 1254 (2010), regarding the theory, conditions, and symptoms of dissociative amnesia and the reliability of recovered memory. The Commonwealth defended the admissibility of expert testimony on these subjects in the appeal in the *Shanley* case at the time of the defendant’s trial. We concluded that the trial judge in *Shanley* did not abuse his discretion in admitting the expert testimony. *Id.* at 766, 919 N.E.2d 1254.

[3][4][5] When a judge, in her role as gatekeeper under *Commonwealth v. Lanigan*, 419 Mass. 15, 25–26, 641 N.E.2d 1342 (1994), determines the admissibility of an **824 expert opinion regarding a psychological disorder, the judge must first decide whether the expert’s opinions regarding the disorder are reliable, i.e., whether the existence of

the disorder and recognition of its symptoms are generally accepted in the relevant psychological community or are otherwise demonstrated to be reliably established. See *Shanley*, *supra* at 761–762, 919 N.E.2d 1254. Where an opinion regarding a psychological disorder and its symptoms is reliable, the judge must then determine whether the opinion evidence is relevant to an issue in the case and, if relevant, weigh its relevance against the risk the evidence will be unfairly prejudicial; will confuse, divert, or mislead the jury; or will be unnecessarily time consuming. See generally *Commonwealth v. Bonds*, 445 Mass. 821, 831, 840 N.E.2d 939 (2006); Mass. G. Evid. § 403 (2012). In this case, the judge determined that Dr. Brown’s expert testimony regarding dissociation disorder was not relevant (or that any relevance was outweighed by the risk of juror confusion) because there was insufficient evidence to permit the jury to conclude that Molly had the disorder. We review her evidentiary decision under the abuse of discretion standard. See *Shanley*, *supra* at 762, 919 N.E.2d 1254, citing *Canavan’s Case*, 432 Mass. 304, 312, 733 N.E.2d 1042 (2000).

[6] *33 Where a defendant seeks to admit expert testimony regarding the credibility of an alleged victim’s testimony, especially where, as here, the Commonwealth’s case rests almost entirely on the credibility of the alleged victim, a judge’s evidentiary decision assumes a constitutional dimension because our “Constitution requires that a defendant be permitted to introduce evidence which may materially affect the credibility of the [alleged] victim’s testimony.” *Commonwealth v. Ruffen*, 399 Mass. 811, 816, 507 N.E.2d 684 (1987). See *Commonwealth v. Joyce*, 382 Mass. 222, 229, 415 N.E.2d 181 (1981), and cases cited. This right is grounded in both the Sixth and Fourteenth Amendments to the United States Constitution, as well as art. 12 of the Massachusetts Declaration of Rights, which provides that “every subject shall have a right to produce all proofs, that may be favorable to him.” See *Commonwealth v. Louraine*, 390 Mass. 28, 33, 453 N.E.2d 437 (1983), quoting *Washington*

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v. *Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967) (“few rights are more fundamental in our jurisprudence than that of an accused ‘to present ... [his] version of the facts’”).

[7][8][9] In the context of this case, the defendant was not required to offer in evidence an expert diagnosis that Molly had dissociative memory in order to establish the relevance of Dr. Brown's expert opinion that those with dissociative memory sometimes have a distorted memory of past events. We found no abuse of discretion in the admission of comparable testimony by the Commonwealth regarding a dissociative disorder in *Shanley* without a diagnosis that the victim suffered from dissociative amnesia. See *Shanley*, *supra* at 757, 766, 919 N.E.2d 1254. And we have rejected a defendant's argument that expert testimony regarding the general behavioral characteristics of sexually abused children should only have been admitted by the Commonwealth in response to a hypothetical question related to the facts of the case, whether assumed or in evidence. *Commonwealth v. Dockham*, 405 Mass. 618, 627–628, 542 N.E.2d 591 (1989). See *Commonwealth v. Goetzendanner*, 42 Mass.App.Ct. 637, 641–646, 679 N.E.2d 240 (1997) (expert testimony regarding behavioral and emotional characteristics common to victims of battering **825 without diagnosis that victim suffered from battered women syndrome properly admitted). If such a diagnosis were required, expert evidence regarding dissociative disorder would rarely be available to either a defendant *34 or the Commonwealth, because a judge has no authority to order a psychological examination of a witness to assess the witness's credibility. *Commonwealth v. Widrick*, 392 Mass. 884, 884–885, 467 N.E.2d 1353 (1984). Without such an examination, a psychologist, as in this case, may not be able to provide a diagnosis, and may not even consider it ethical to attempt one. Nor will there commonly be evidence of such a diagnosis. A witness with a dissociative memory disorder may not have received psychological counselling and, where she did, those confidential records may not be discoverable. *Commonwealth v.*

Bishop, 416 Mass. 169, 179–183, 617 N.E.2d 990 (1993). Even where, as here, the defendant has access to the witness's psychological records, the absence of a diagnosis of dissociative memory in the records is of little consequence where, as Dr. Brown testified, the counselling was provided by social workers and therapists who did not appear to consider such a diagnosis.

In determining whether Dr. Brown's expert testimony was relevant in this case in the absence of such a diagnosis, it must be remembered that the defendant need not prove that Molly had a dissociative disorder to prevail at trial; the defendant need only raise a reasonable doubt in a rational jury's mind as to the reliability of her testimony, which he may accomplish with evidence permitting a reasonable inference that her memory may be distorted by a dissociative disorder. Therefore, a defendant may establish the relevance of reliable expert testimony regarding a dissociative disorder by presenting evidence regarding the alleged victim and her personal history that is consistent with the diagnosis, and that is sufficient to permit a reasonable inference that the alleged victim may have the disorder. See *Commonwealth v. Sheehan*, 435 Mass. 183, 189, 755 N.E.2d 1208 (2001) (mental health records admissible where they “provide a basis for cross-examination about the possibility that these earlier events in [the alleged victim's] life caused him to fantasize and have problems separating reality from fiction”). Cf. *Commonwealth v. Wilson*, 441 Mass. 390, 401, 805 N.E.2d 968 (2004) (expert witness may testify that certain quantity of drugs is consistent with possession with intent to distribute).

In *Shanley*, *supra* at 756–759, 919 N.E.2d 1254, the Commonwealth sought to admit expert testimony to explain how the victim of sexual abuse in that case could have recovered memories of the sexual *35 abuse he suffered between the ages of six and thirteen that had been lost for twenty years. The expert was allowed to testify that, among adults who had been seriously traumatized, approximately twenty per cent suffer from dissociative

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amnesia. *Id.* at 758–759, 919 N.E.2d 1254. We concluded that the judge did not abuse his discretion in admitting this expert testimony to assist the jury in determining the credibility of the victim's testimony of recovered memory, and the reliability of those memories. *Id.* at 757, 766, 919 N.E.2d 1254.

Just as the Commonwealth in *Shanley* was permitted to offer expert testimony about dissociative memory disorder to educate the jury about this psychological condition in seeking to demonstrate the reliability of the victim's testimony, *id.*, so, too, here the defendant should have been able to offer comparable expert evidence to demonstrate the unreliability of Molly's testimony. In *Shanley*, the victim's testimony of recovered memory of childhood **826 sexual abuse by a priest was consistent with such a diagnosis. *Id.* Here, Molly's testimony about the defendant's alleged rapes suddenly “popping into” her head, her loss of memory as to what happened on the first day of the defendant's touching, her recovered memory of being sexually abused in a bed when she was a young child, and her lack of memory of having told her biological mother that she was sexually assaulted as a young child in a bathtub ^{FN17} were consistent with a diagnosis of dissociative memory disorder.^{FN18} Because the evidence in the record was consistent with the diagnosis of a dissociative disorder, and was sufficient to permit a reasonable inference that Molly may suffer from the disorder, we conclude the judge abused her discretion in barring Dr. Brown from testifying about the risk of confabulation arising from dissociative memory.^{FN19} See *State v. Lujan*, 192 Ariz. 448, 452, 967 P.2d 123 (1998) *36 (“Just as the prosecution ... could use expert testimony about the behavioral characteristics of sexually abused children to explain the inconsistencies in a child's statements, when appropriate under the facts of a particular case, the defense may use such testimony to show a child's possible misperceptions”).

FN17. While no evidence was presented at trial that this abuse actually occurred, there is evidence in the record that Molly told

her biological mother about the abuse in the bath, because at her deposition, the biological mother testified that she reported the incident to police immediately after the incident. Other records show she later reported the incident again to the State child services protective agency.

FN18. In addition, to the extent that disorganized attachment leads to dissociative memory, there was evidentiary support in the record that Molly had suffered disorganized attachment by the age of twenty months based on evidence from the biological mother and about the biological mother.

FN19. Because the evidence in the record was not consistent with a “factitious disorder” and was not sufficient to permit a reasonable inference that Molly may suffer from that disorder, we conclude that the judge did not abuse her discretion in barring testimony regarding factitious disorder. Our conclusion that the judge did not abuse her discretion as to this testimony does not bind the judge on retrial again to bar such testimony, especially if the defendant makes a stronger preliminary showing that Molly may suffer from this disorder.

[10] Properly limited, such expert testimony does not intrude on the jury's function of determining the credibility of witnesses. No witness, expert or not, may offer an opinion as to the credibility of another witness. *Commonwealth v. Montanino*, 409 Mass. 500, 504, 567 N.E.2d 1212 (1991), and cases cited. While the line “between permissible and impermissible opinion testimony in child sexual abuse cases is not easily drawn,” *Commonwealth v. Richardson*, 423 Mass. 180, 186, 667 N.E.2d 257 (1996), an expert witness does not cross that line where he educates the jury about the causes of dissociative disorder, the prevalence of the disorder, the symptoms of the disorder, and the risk of con-

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fabulation arising from “expressed uncertainty” and “source misattribution error.” See *Shanley, supra* at 758–759, 766, 919 N.E.2d 1254 (expert testimony admissible regarding dissociative amnesia, how it works, its causes, and its prevalence among those with serious trauma); *Commonwealth v. Frangipane*, 433 Mass. 527, 535 n. 12, 744 N.E.2d 25 (2001) (“no error in permitting the witness to testify to the symptoms, including dissociative memory loss and recovered memory, of sexually abused children”).

[11] The line would be crossed if Dr. Brown, in testifying before the jury, were explicitly to opine that Molly's memory of **827 events at the defendant's home was unreliable as a result of her dissociative disorder. See *Commonwealth v. Richardson, supra* (“impermissible vouching” where “witness explicitly links the opinion to the experience of the witness”); *Commonwealth v. Ianello*, 401 Mass. 197, 202, 515 N.E.2d 1181 (1987) (“expert may not render an opinion on the credibility of a witness”). Because of this limitation, an expert's opinion that touches on the credibility of a fact witness must be accompanied by other evidence that permits the *37 jury to apply the information learned from the expert in deciding for themselves whether they find the fact witness credible. Here, the jury needed to learn what Molly said, saw, heard, and experienced regarding her prior sexual abuse to evaluate the risk that Molly had dissociative disorder and that her memory of what happened at the defendant's home was unreliable because of confabulation. The judge erred in excluding this evidence.^{FN20} For the same reason, the judge also erred in limiting Molly's testimony about her inconsistent memory regarding her sexual abuse by an uncle when she was a young child. This evidence was relevant to the defendant's theory of confabulation arising from dissociative memory, so the jury should not have been instructed, in essence, that her lapse of memory is inconsequential unless the jury found it to be intentional.

FN20. The Commonwealth contends that the biological mother's testimony as to

what Molly said to her about an uncle sexually abusing her in a bathtub is inadmissible hearsay, but the evidence is admissible regardless of its truth, because it is relevant to Molly's apparent belief at the time that her uncle had abused her and her consequent fear of her uncle. See *Commonwealth v. Montanez*, 439 Mass. 441, 447–448, 788 N.E.2d 954 (2003) (evidence of victim's statement to friend admissible to establish her fear of defendant). See generally Mass. G. Evid. § 801(c) (2012). The Commonwealth also contends that Molly's biological mother is incompetent to testify, but no competency hearing was conducted and no finding made as to competency. If there is evidence at retrial that the biological mother is incompetent to testify, the judge may conduct a hearing and make appropriate findings.

The Commonwealth contends that evidence of the prior sexual assaults against Molly is inadmissible under the rape shield statute, G.L. c. 233, § 21B. Under that statute, “[e]vidence of specific instances of a victim's sexual conduct ... shall not be admissible except evidence of the victim's sexual conduct with the defendant or evidence of recent conduct of the victim alleged to be the cause of any physical feature, characteristic, or condition of the victim....”^{FN21}

FN21. General Laws c. 233, § 21B, provides:

“Evidence of the reputation of a victim's sexual conduct shall not be admissible in any investigation or proceeding before a grand jury or any court of the commonwealth for a violation of [G.L. c. 265, §§ 13B, 13B 1/2, 13B 3/4, 13F, 13H, 22, 22A, 22B, 22C, 23, 23A, 23B, 24, and 24B,] or [G.L. c. 272, § 5]. Evidence of specific instances of a victim's sexual conduct in such an investigation or proceeding shall not be admissible except

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evidence of the victim's sexual conduct with the defendant or evidence of recent conduct of the victim alleged to be the cause of any physical feature, characteristic, or condition of the victim; provided, however, that such evidence shall be admissible only after an in camera hearing on a written motion for admission of same and an offer of proof. If, after said hearing, the court finds that the weight and relevancy of said evidence is sufficient to outweigh its prejudicial effect to the victim, the evidence shall be admitted; otherwise not. If the proceeding is a trial with jury, said hearing shall be held in the absence of the jury. The finding of the court shall be in writing and filed but shall not be made available to the jury."

We have recognized, however, that where the rape shield *38 statute is in conflict**828 with a defendant's constitutional right to present evidence that might lead the jury to find that a Commonwealth witness is lying or otherwise unreliable, the statutory prohibition must give way to the constitutional right. See *Commonwealth v. Harris*, 443 Mass. 714, 721, 825 N.E.2d 58 (2005) (defendant may introduce evidence of complainant's past sexual conduct notwithstanding rape shield statute "where that conduct is relevant to the complainant's bias or motive to fabricate"); *Commonwealth v. Ruffen*, 399 Mass. 811, 816, 507 N.E.2d 684 (1987) ("despite the general statutory policy prohibiting inquiry into a victim's prior sexual experiences, the Constitution requires that a defendant be permitted to introduce evidence which may materially affect the credibility of the victim's testimony"); *Commonwealth v. Joyce*, 382 Mass. 222, 229, 415 N.E.2d 181 (1981), quoting *Commonwealth v. Hayward*, 377 Mass. 755, 760, 388 N.E.2d 648 (1979) ("The right to cross-examine a complainant in a rape case to show a false accusation may be the last refuge of an innocent defendant. 'A defendant has the right to bring to the jury's attention any

"circumstance which may materially affect" the testimony of an adverse witness which might lead the jury to find that the witness is under an "influence to prevaricate"') [emphasis in original]).

[12] Here, the defendant sought to admit evidence of Molly's sexual abuse by her uncles to demonstrate the significant possibility that Molly suffered from dissociative memory and confabulated her memory of the defendant's alleged sexual assaults by recovering a dim memory of sexual abuse by her biological father's brother, confusing the source of the abuse with her adoptive mother's brother (the defendant), and inferring facts to fill in the blanks of her memory. Because such evidence, if credited, would materially affect the jury's evaluation *39 of Molly's credibility and reliability, and because it was not cumulative of other admitted evidence, cf. *Commonwealth v. Frey*, 390 Mass. 245, 251–252, 454 N.E.2d 478 (1983) (no constitutional violation in excluding evidence under rape shield statute where other "ample evidence of the complainant's bias and motive to lie was presented to the jury"), we conclude that the defendant was constitutionally entitled to present the evidence regardless of the prohibition in the rape shield statute. See *Commonwealth v. Baxter*, 36 Mass.App.Ct. 45, 51–52, 627 N.E.2d 487 (1994) (evidence of prior rape improperly excluded under rape shield statute where defendant "was seeking to show that the complainant had been victimized, that she was suffering from psychiatric problems as a result of that assault, and that because of those problems and the many remarkable similarities of that trauma to the present incident, she was unable to distinguish between the two situations").

[13] The error was prejudicial and requires a new trial. The Commonwealth's case rested wholly on the credibility of Molly, and the exclusion of evidence that may have significantly affected the jury's evaluation of her credibility regarding the defendant's alleged rapes was not harmless. See *Commonwealth v. Sheehan*, 435 Mass. 183, 190, 755

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N.E.2d 1208 (2001) (exclusion from evidence of complainant's psychiatric records required new trial where Commonwealth's case rested "almost entirely" on his testimony and evidence, if believed, might have had significant effect on outcome of trial).

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[14] Because the issue may arise at a new trial, we briefly address the defendant's claim that the prosecutor's closing argument was improper in asking the jury, "What motive does [Molly] have to lie?" The defendant relies on our statement in ***829** *Commonwealth v. Beaudry*, 445 Mass. 577, 587, 839 N.E.2d 298 (2005), quoting *Commonwealth v. Riberio*, 49 Mass.App.Ct. 7, 10, 725 N.E.2d 568 (2000), that "[t]elling the jury that the victims have no reason to lie is over the line of permissible advocacy...." But in the *Beaudry* case we declared that a prosecutor may not argue that a victim is credible simply because she appeared to testify in court. *Id.* See *Shanley, supra* at 777, 919 N.E.2d 1254. We recognized that a prosecutor may marshal the evidence in closing argument to "urge the jury to believe the government witnesses and disbelieve those testifying for the defendant." *Commonwealth v. Beaudry, supra*. Where, ***40** as here, defense counsel in his closing argument challenged the credibility of the alleged victim, a prosecutor acts properly in inviting the jury to consider whether the victim has a motive to lie, and identifying evidence that demonstrates that the victim's testimony is accurate and reliable. See *Shanley, supra*.

Conclusion. Because the judge erred in excluding the expert testimony of Dr. Brown and the evidence of childhood sexual abuse necessary to apply the expert opinion to the facts of this case, and because the error was prejudicial, we reverse the defendant's convictions and remand the case to the Superior Court for a new trial.

So ordered.

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Appendix E

State v. King, ___ S.E.2d ___, 2012 WL 2213682 (N.C., June 14, 2012)

--- S.E.2d ----, 2012 WL 2213682 (N.C.)
 (Cite as: 2012 WL 2213682 (N.C.))



Only the Westlaw citation is currently available.

Supreme Court of North Carolina.
 STATE of North Carolina
 v.
 Melvin Charles KING.

No. 385A11.
 June 14, 2012.

Background: Defendant was indicted for felony child abuse based on a sexual act upon a child, incest, and indecent liberties with a child. The Superior Court, Moore County, John O. Craig, III, J., granted defendant's motion to suppress evidence of repressed memory. State appealed. A divided panel of the Court of Appeals, 713 S.E.2d 772, Bryant, J., affirmed. State appealed as of right.

Holdings: The Supreme Court, Edmunds, J., held that:

(1) order suppressing expert testimony on repressed memory was not abuse of discretion; and
 (2) expert testimony is not an automatic prerequisite to admission of lay witness testimony involving allegedly recovered memories, so long as the lay evidence does not otherwise violate statutes or evidence rules, abrogating *Barrett v. Hyldburg*, 127 N.C.App. 95, 487 S.E.2d 803.

Judgment of Court of Appeals modified and affirmed; case remanded.

West Headnotes

[1] **Criminal Law 110** **469**

110 Criminal Law
 110XVII Evidence
 110XVII(R) Opinion Evidence
 110k468 Subjects of Expert Testimony
 110k469 k. In General. Most Cited
 Cases

Criminal Law 110 **478(1)**

110 Criminal Law
 110XVII Evidence
 110XVII(R) Opinion Evidence
 110k477 Competency of Experts
 110k478 Knowledge, Experience, and
 Skill
 110k478(1) k. In General. Most
 Cited Cases

The three prongs of the *Howerton* inquiry to determine admissibility of expert testimony are: (1) whether the expert's proffered method of proof is sufficiently reliable; (2) whether the witness presenting the evidence qualifies as an expert in the applicable area; and (3) whether the testimony is relevant. Rules of Evid., Rule 702, West's N.C.G.S.A. § 8C-1 (2009).

[2] **Criminal Law 110** **469.2**

110 Criminal Law
 110XVII Evidence
 110XVII(R) Opinion Evidence
 110k468 Subjects of Expert Testimony
 110k469.2 k. Discretion. Most Cited
 Cases

Criminal Law 110 **1153.12(3)**

110 Criminal Law
 110XXIV Review
 110XXIV(N) Discretion of Lower Court
 110k1153 Reception and Admissibility of
 Evidence
 110k1153.12 Opinion Evidence
 110k1153.12(3) k. Admissibility.
 Most Cited Cases

The trial court is afforded wide discretion in determining the admissibility of expert testimony and will be reversed only for an abuse of that discretion. Rules of Evid., Rule 702, West's N.C.G.S.A. § 8C-1 (2009).

[3] **Criminal Law 110** **469**

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110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k468 Subjects of Expert Testimony
110k469 k. In General. Most Cited

Cases

Even if the trial judge determines that expert testimony is relevant and admissible and otherwise meets the requirements of *Howerton* and evidence rule relating to expert testimony, the trial court still must determine, under another rule of evidence, whether the expert testimony's probative value outweighs the danger of unfair prejudice to the defendant. Rules of Evid., Rules 403, 702, West's N.C.G.S.A. § 8C-1.

[4] Criminal Law 110 ↪476.6

110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k468 Subjects of Expert Testimony
110k476.6 k. Miscellaneous Matters.

Most Cited Cases

Order suppressing expert testimony on repressed memory was not abuse of discretion in prosecution for sexual offenses arising from allegedly recovered memories reported by defendant's daughter to therapist of alleged sexual abuse by defendant, where trial court concluded that probative value of the proposed testimony was outweighed by danger of unfair prejudice because recovered memories were, in trial court's opinion, of uncertain authenticity and susceptible to possible alternative explanations. Rules of Evid., Rules 403, 702, West's N.C.G.S.A. § 8C-1.

[5] Criminal Law 110 ↪476.6

110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k468 Subjects of Expert Testimony
110k476.6 k. Miscellaneous Matters.

Most Cited Cases

Alleged childhood victim of sexual abuse may

not express the opinion that she herself has experienced repressed memory.

[6] Criminal Law 110 ↪476.6

110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k468 Subjects of Expert Testimony
110k476.6 k. Miscellaneous Matters.
Most Cited Cases

Witnesses 410 ↪37(3)

410 Witnesses
410II Competency
410II(A) Capacity and Qualifications in General
410k37 Knowledge or Means of Knowledge of Facts
410k37(3) k. Recollection of Witness.
Most Cited Cases

Expert testimony is not an automatic prerequisite to admission of lay witness testimony involving allegedly recovered memories, so long as the lay evidence does not otherwise violate the statutes or evidence rules of the state; however, unless qualified as an expert or supported by admissible expert testimony, the witness may testify only to the effect that, for some time period, he or she did not recall, had no memory of, or had forgotten the incident, and may not testify that the memories were repressed or recovered; abrogating *Barrett v. Hyldburg*, 127 N.C.App. 95, 487 S.E.2d 803. Rules of Evid., Rules 601(a), 702, West's N.C.G.S.A. § 8C-1.

*1 Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, — N.C.App. —, 713 S.E.2d 772 (2011), affirming an order entered on 23 April 2010 by Judge John O. Craig, III in Superior Court, Moore County. Heard in the Supreme Court on 13 March 2012.

Roy Cooper, Attorney General, by Anne M.

--- S.E.2d ----, 2012 WL 2213682 (N.C.)
 (Cite as: 2012 WL 2213682 (N.C.))

Middleton, Assistant Attorney General, for the State-appellant.

Van Camp, Meacham & Newman, PLLC, by Patrick M. Mincey, for defendant-appellee.

EDMUNDS, Justice.

In this case we consider whether the trial court abused its discretion when it granted defendant's motion to suppress expert testimony regarding repressed memory. Although we affirm the holding of the Court of Appeals majority that the trial court properly granted defendant's motion, we disavow the portion of the opinion that, relying on an earlier opinion of that court, requires expert testimony always to accompany the testimony of a lay witness in cases involving allegedly recovered memories.

On 12 September 2005, defendant was indicted for first degree rape in violation of N.C.G.S. § 14-27.2(a)(1). Four years later, on 21 September 2009, he was indicted for additional charges of felony child abuse by committing a sexual act on a child, in violation of N.C.G.S. § 14-318.4(a2); incest, in violation of N.C.G.S. § 14-178; and indecent liberties with a child, in violation of N.C.G.S. § 14-202.1. Averments in pretrial motions filed in the case indicate that the victim, who is defendant's daughter and was born in 1988, began suffering panic attacks and pseudoseizures in March 2005. As these episodes continued, the victim began acting as if she were a young child, speaking of a "mean man" she worried would hurt her. During one episode, she identified a photograph of her father as the "mean man." After several visits to a variety of doctors and other medical providers, the victim was diagnosed with conversion disorder and referred to therapy.

Although the victim initially denied having experienced any sexual abuse, she recounted during a therapy session an event that occurred when she was seven years old and visiting defendant for the weekend in accordance with the custody arrangement between defendant and the victim's mother.

The victim told the therapist that she recalled getting out of the bathtub and hurting herself in her "private area." She did not remember the exact facts of the incident or how the injury occurred, though she did remember her father telling her she had fallen. She also remembered bleeding and being taken to the emergency room by her mother, where she was treated for a superficial one-centimeter laceration to her vagina. When the therapist asked the victim what she would think about the incident if a friend had told her about it, the victim responded that she would "wonder about abuse," but added that she did not believe her father would do such a thing to her. The therapist then discussed with the victim how the mind can protect itself by "going somewhere else when something very difficult or painful might be happening."

*2 About three weeks after this therapy session, the victim experienced her first "flashback" to the alleged events underlying the charges in this case. She said that when her boyfriend's arm brushed against her neck, the memory "hit" her that as she had been getting out of the bathtub, defendant entered the bathroom, lifted her up against the wall, threw her on the floor, put his arm across her chest to hold her down, and raped her. The victim also recalled that her father had threatened to hurt her if she told anyone. After reporting this memory to her therapist, the victim was referred to the Moore County Department of Social Services, which initiated an investigation that resulted in the 2005 and 2009 indictments.

Defendant was scheduled to be tried on 1 February 2010. On 28 January 2010, he filed a motion to exclude testimony about " 'repressed memory,' 'recovered memory,' 'traumatic amnesia,' 'dissociative amnesia,' 'psychogenic amnesia' or any other synonymous terms the witnesses may adopt." ^{FN1} In his motion and in two memoranda submitted to support the motion, defendant argued that the phenomenon of repressed memory has generated significant controversy in the scientific community and thus is not sufficiently reliable to meet this Court's

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requirements for admission of expert testimony, as set out in *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 597 S.E.2d 674 (2004). Defendant contended that the theory of repressed memory is based upon “untested and flawed methods and unproved hypotheses” and is analogous to hypnotically refreshed testimony or polygraph test results, both of which this Court has found lack sufficient reliability to be admissible. See *State v. Peoples*, 311 N.C. 515, 532, 319 S.E.2d 177, 187 (1984) (rejecting hypnotically refreshed testimony); *State v. Grier*, 307 N.C. 628, 645, 300 S.E.2d 351, 361 (1983) (same for lie detector tests).

In response, the State submitted a memorandum in which it argued that dissociative amnesia is a legitimate scientific diagnosis that has been recognized by several other jurisdictions and by numerous highly respected scientific organizations, including the American Psychiatric Association, World Health Organization, and American Psychological Association. The State indicated that it intended to call as expert witnesses James A. Chu, M.D., an associate clinical professor of psychiatry at Harvard Medical School, and Desmond Runyan, M.D., a professor of Social Medicine and of Pediatrics at the University of North Carolina at Chapel Hill. Dr. Chu testified at the suppression hearing, as detailed below, and Dr. Runyan was expected to testify at trial that neither falling in the bathtub nor straddling its rim would be likely to cause the type of injury the victim suffered, and that sexual abuse was a more plausible explanation.

The trial court conducted an evidentiary hearing on defendant's motion to suppress on 12 and 13 April 2010. Defendant presented Harrison G. Pope, Jr., M.D., a professor of psychiatry at Harvard Medical School, who was qualified as an expert in psychiatry, specifically on the issue of repressed memory. The State presented Dr. Chu, who also qualified as an expert in repressed memory. Each expert described his extensive experience and background in psychiatry and the field of repressed memory. Each also presented lengthy and detailed

testimony about the nature of memory and the acceptance and status of the theory of repressed memory within the medical community. They disagreed about almost everything.

*3 Although Dr. Pope has treated patients who report memory problems, the majority of his work has consisted of research. His testimony regarding repressed memory focused on his review of and opinion about studies that have been conducted on the topic, articles that he has authored assessing the methodologies of these studies, and a description of the frequency of reports of repressed memories. His study, which reviewed articles published between 1984 and 2003, found “practically no articles about repressed memory or dissociative amnesia up until 1992.” A surge of reports followed, peaking in 1997, then falling off to “a fraction of their previous level.” Although Dr. Pope acknowledged that some reputable scientists disagree with him, he was deeply skeptical of the existence of repressed memory as the term was used in this proceeding and testified that the theory of repressed memory is not generally accepted in the scientific community.

In contrast, Dr. Chu is primarily a clinician. He testified that in his clinical practice he frequently observed cases of repressed memory. Citing instances in which repressed memories of sexual abuse have been corroborated by family members who either committed or knew of the abuse, he stated that the condition, which he described generally as a conversion disorder, can be genuine and unfeigned. He testified that the “vast majority” of those in the scientific community, including academics and clinicians, accept the theory of repressed memory.

[1] After hearing arguments from the State and from defendant, the trial court granted defendant's motion to suppress in an extensive oral order issued from the bench on 13 April 2010. On 23 April 2010, the trial court entered a written order making findings of fact and conclusions of law. In its written order, the court began by citing North Carolina Rule of Evidence 702, which controls admission of

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expert testimony. N.C.G.S. § 8C-1, Rule 702 (2009).^{FN2} The court then reviewed the three-step inquiry set out in *Howerton* to determine whether expert testimony is admissible under Rule 702. See *Howerton*, 358 N.C. at 458, 597 S.E.2d at 686 (citing *State v. Goode*, 341 N.C. 513, 527-29, 461 S.E.2d 631, 639-41 (1995)). The three prongs of the inquiry are: (1) whether the expert's proffered method of proof is sufficiently reliable; (2) whether the witness presenting the evidence qualifies as an expert in the applicable area; and (3) whether the testimony is relevant. *Id.* At the outset, the trial court readily concluded that the State's witness was an expert in the area of repressed memory, meeting the requirements of the second prong.

Turning then to the first prong, the judge reviewed case law from other jurisdictions pertaining to admission of expert testimony on repressed memory theory and summarized the expert testimony presented at the hearing on defendant's motion to suppress. The court found as fact that other jurisdictions have been inconsistent in whether, and on what bases, they have admitted expert testimony on repressed memory. The court further found that, while a significant dispute in the scientific community over the validity of the concept of repressed memory foreclosed a conclusion that the theory of repressed memory is generally accepted in the relevant scientific community, *Howerton* does not "dictate[] the degree to which a scientific theory must be accepted so as to make it established." Accordingly, the court concluded that "the theory of repressed memory may still be generally accepted enough to satisfy *Howerton's* reliability element."

*4 In its consideration of the third prong, whether the evidence was relevant, the court noted that *Howerton* "defers to the traditional definition" set out in N.C.G.S. § 8C-1, Rule 401, and found that the evidence was relevant. However, the court then quoted N.C.G.S. § 8C-1, Rule 403 and observed that even relevant evidence may be inadmissible if the probative value of the testimony "is substantially outweighed by the danger of unfair

prejudice, confusion of the issues, or misleading the jury." "The trial court voiced three particular concerns. First, the court observed that purportedly repressed memories recovered during therapy are not validated by the treating clinician because the goal of clinical therapy is to treat the patient, not to determine if the patient's memories are accurate. Second, the reliability of the memories recovered is contingent upon the training and skill of the clinician treating the patient, subjective traits that are not dependable safeguards for assuring the veracity of the memories recovered. Finally, the court noted that the experts had discussed numerous alternative explanations for sudden memory recovery other than repressed memory, adding that "[t]hese alternate possibilities ... create an additional layer of confusion that cannot be corroborated in a retrospective fashion that can assist the jury." Therefore, the trial court concluded as a matter of law that, even though evidence of repressed memory was relevant and "technically met" the *Howerton* test, the evidence must be excluded under Rule 403 because its probative value was outweighed by its prejudicial effect.

The State immediately appealed the trial court's suppression order to the Court of Appeals, believing it could not proceed to trial because of the holding of that court in *Barrett v. Hyldborg*, 127 N.C.App. 95, 100, 487 S.E.2d 803, 806 (1997). *State v. King*, — N.C.App. —, 713 S.E.2d 772 (2011). In *Barrett*, a civil action for assault and battery, intentional infliction of emotional distress, and negligent infliction of emotional distress, all based upon the plaintiff's memories that allegedly had been repressed for over forty years, the Court of Appeals held that "testimony regarding recovered memories of abuse may not be received at trial absent accompanying expert testimony on the phenomenon of memory repression," 127 N.C.App. at 100, 487 S.E.2d at 806, because such expert testimony would be needed "to afford the jury a basis upon which to understand the phenomenon and evaluate the reliability of testimony derived from such memories," *id.* at 101, 487 S.E.2d at 806. The

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State indicated in its argument to the Court of Appeals that it believes that, once the trial court refused to admit expert testimony of repressed memory, *Barrett* would prevent the victim from testifying in the case. *King*, — N.C.App. at —, 713 S.E.2d at 777.

Although the Court of Appeals majority below “agree[d] with the [S]tate that *Barrett* held that repressed memory testimony must be accompanied by expert testimony,” the majority noted that *Barrett* did not diminish the gatekeeping function of the trial court in determining the fundamental question of whether testimony is admissible. *Id.* at —, 487 S.E.2d 803, 713 S.E.2d at 777 (quoting *Barrett*, 127 N.C.App. at 101, 487 S.E.2d at 806). Relying on our opinions in *Howerton*, 358 N.C. 440, 597 S.E.2d 674, and *Crocker v. Roethling*, 363 N.C. 140, 675 S.E.2d 625 (2009), the Court of Appeals majority stated that a trial court is required to “decide preliminary questions regarding the qualifications of experts to testify or regarding the admissibility of expert opinion.” *King*, — N.C.App. at —, 713 S.E.2d at 777 (citing *Crocker*, 363 N.C. at 144, 675 S.E.2d at 629). The majority then considered whether the trial court abused its discretion when it excluded evidence of repressed memory because of the prejudicial effect of the evidence. *Id.* at —, 675 S.E.2d 625, 713 S.E.2d at 777. The Court of Appeals majority held that the trial court’s “detailed and specific findings of fact,” its recognition of the duty *Howerton* imposes upon trial courts, its examination of authority from other jurisdictions, its careful consideration of the extensive yet conflicting expert testimony, and its expressed concerns about problematic aspects of repressed memory evidence, all led to the conclusion that the trial court’s decision to grant defendant’s motion “was not arbitrary” and was “fully support[ed]” by the record. *Id.* at —, 597 S.E.2d 674, 713 S.E.2d at 777–78. Accordingly, the majority affirmed the trial court’s order granting defendant’s motion to suppress. *Id.* at —, 713 S.E.2d at 778.

*5 The dissenting judge disagreed, arguing that once the trial court determined the evidence was admissible under Rule 702 and *Howerton*, the court abused its discretion when it nevertheless excluded the evidence under Rule 403. *Id.* at —, 597 S.E.2d 674, 713 S.E.2d at 778 (Hunter, Robert C., J., dissenting). The dissenting judge acknowledged that not all Rule 403 safeguards are removed once a preliminary decision is made regarding admissibility, but contended that a trial court “should not be permitted to arbitrarily invoke Rule 403 because the trial court judge is troubled’ by the existence of controversy surrounding the science involved.” *Id.* at —, 713 S.E.2d at 779. The dissent pointed out that “ ‘questions or controversy concerning the quality of the expert’s conclusions go to the weight of the testimony rather than its admissibility.’ ” *Id.* at —, 713 S.E.2d at 779 (quoting *Howerton*, 358 N.C. at 461, 597 S.E.2d at 688). Accordingly, the dissent argued, the trial court’s order should be reversed. *Id.* at —, 597 S.E.2d 674, 713 S.E.2d at 779. The State appealed to this Court as of right based on the dissent.

[2] A leading treatise on evidence in North Carolina acknowledges that “there can be expert testimony upon practically any facet of human knowledge and experience.” 1 Henry Brandis, Jr., *Stansbury’s North Carolina Evidence* § 134, at 438 (rev. ed.1973) [hereinafter Brandis, *Stansbury’s North Carolina Evidence*]. When making preliminary determinations on the admissibility of expert testimony, “trial courts are not bound by the rules of evidence.” *Howerton*, 358 N.C. at 458, 597 S.E.2d at 686 (citing N.C.G.S. § 8C–1, Rule 104(a) (2004)). In reviewing trial court decisions relating to the admissibility of expert testimony evidence, this Court has long applied the deferential standard of abuse of discretion. Trial courts enjoy “wide latitude and discretion when making a determination about the admissibility of [expert] testimony.” *State v. Wise*, 326 N.C. 421, 432, 390 S.E.2d 142, 149 (citation omitted), *cert. denied*, 498 U.S. 853, 111 S.Ct. 146, 112 L.Ed.2d 113 (1990); *see also State v. King*, 287 N.C. 645, 658, 215 S.E.2d 540, 548

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(1975) (noting that “ ‘the determination of [whether to admit expert testimony] is ordinarily within the exclusive province of the trial judge’ “ (quoting Brandis, *Stansbury's North Carolina Evidence* § 133, at 429)), *judgment vacated in part*, 428 U.S. 903, 96 S.Ct. 3208, 49 L.Ed.2d 1209 (1976). A trial court's admission of expert testimony “ ‘will not be reversed on appeal unless there is no evidence to support it.’ “ *King*, 287 N.C. at 658, 215 S.E.2d at 548–49 (quoting Brandis, *Stansbury's North Carolina Evidence* § 133, at 430). Thus, “ ‘the trial court is afforded wide discretion’ in determining the admissibility of expert testimony and will be reversed only for an abuse of that discretion.’ “ *State v. Mackey*, 352 N.C. 650, 659, 535 S.E.2d 555, 560 (2000) (quoting *State v. Anderson*, 322 N.C. 22, 28, 366 S.E.2d 459, 463, *cert. denied*, 488 U.S. 975, 109 S.Ct. 513, 102 L.Ed.2d 548 (1988)).

*6 The test to determine whether proposed expert testimony is admissible was set out in *Howerton*, in which this Court rejected the federal standard for admission of expert testimony established by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). *Howerton*, 358 N.C. at 469, 597 S.E.2d at 693. *Howerton* approved the three-part test for determining admissibility of expert testimony described in *State v. Goode*. *Id.* at 458, 469, 597 S.E.2d 674, 597 S.E.2d at 686, 692 (citing *Goode*, 341 N.C. at 527–29, 461 S.E.2d at 639–41).

[3] Applying this three-part test does not end the trial judge's inquiry, however, for even if the trial judge determines that expert testimony is relevant and admissible and otherwise meets the requirements of *Howerton* and Rule 702, “the trial court still must determine whether [the expert testimony's] probative value outweighs the danger of unfair prejudice to defendant” under Rule 403. *State v. Coffey*, 345 N.C. 389, 404, 480 S.E.2d 664, 673 (1997); *see also Anderson*, 322 N.C. at 28, 366 S.E.2d at 463 (noting that evidence may be excluded “if its probative value is outweighed by the

danger that it would confuse the issues before the court or mislead the jury”). “Whether to exclude evidence under Rule 403 is a matter within the sound discretion of the trial court.” *State v. Penley*, 318 N.C. 30, 41, 347 S.E.2d 783, 789 (1986) (citing *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986)).

[4] As detailed above, the trial court first acknowledged and then followed the requirements listed in *Howerton*. Upon reaching the question of general acceptance of the theory of repressed memory, the trial court observed that, although vigorous and even rancorous debate was ongoing within the relevant scientific community, *Howerton* did not require establishing either conclusive reliability or indisputable validity. As a result, the debate within the scientific community did not by itself prevent admission of evidence regarding repressed memory. Accordingly, the trial court turned to the final prong of *Howerton* and determined that the testimony was relevant. However, the court went on to conclude that, even though the *Howerton* test had been “technically met” and the evidence was relevant, the expert testimony was inadmissible under Rule 403 because recovered memories are of “uncertain authenticity” and susceptible to alternative possible explanations. The court further found that “the prejudicial effect [of the evidence] increases tremendously because of its likely potential to confuse or mislead the jury.” The trial court therefore exercised its discretion to exclude the evidence about repressed memory on the grounds that the probative value of the evidence was outweighed by its prejudicial effect.

We conclude that the trial court did not abuse its discretion by granting defendant's motion to suppress after applying Rule 702, *Howerton*, and Rule 403. The test of relevance for expert testimony is no different from the test applied to all other evidence. Relevant evidence has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evid-

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ence.” N.C.G.S. § 8C-1, Rule 401 (2011). We agree with the trial court that the expert evidence presented was relevant. Nevertheless, like all other relevant evidence, expert testimony must satisfy the requirements of Rule 403 to be admissible. Although the dissenting judge in the Court of Appeals accurately pointed out that *Howerton* envisions admission of expert testimony on controversial theories, he also correctly noted that “not ... all 403 safeguards are removed” when the *Howerton* factors apply. *King*, —N.C.App. at —, 713 S.E.2d at 779. If all other tests are satisfied, the ultimate admissibility of expert testimony in each case will still depend upon the relative weights of the prejudicial effect and the probative value of the evidence in that case. Battles of the experts will still be possible in such cases. However, when a judge concludes that the possibility of prejudice from expert testimony has reached the point where the risk of the prejudice exceeds the probative value of the testimony, Rule 403 prevents admission of that evidence. The trial judge here assiduously sifted through expert testimony that lasted two days, thoughtfully applied the requirements set out in *Howerton* to that testimony, then applied the Rule 403 balancing test, explaining his reasoning at each step. We see no abuse of discretion and affirm the holding of the Court of Appeals that found no error in the trial court's decision to suppress expert testimony evidence of repressed memory.

*7 In so holding, we stress that we are reviewing the evidence presented and the order entered in this case only. We promulgate here no general rule regarding the admissibility or reliability of repressed memory evidence under either Rule 403 or Rule 702. As the trial judge himself noted, scientific progress is “rapid and fluid.” Advances in the area of repressed memory are possible, if not likely, and even Dr. Pope, defendant's expert, acknowledged that the theory of repressed memory could become established and that he would consider changing his position if confronted with a study conducted using reliable methodology that yielded evidence supporting the theory. Trial courts

are fully capable of handling cases involving claims of repressed memory should new or different scientific evidence be presented.

Finally, we consider the holding of the Court of Appeals in *Barrett*, the case on which the State relied when it chose immediately to appeal the trial court's order of suppression rather than to continue to trial. *King*, —N.C.App. at —, 713 S.E.2d at 776 (majority) (citing *Barrett*, 127 N.C.App. at 95, 487 S.E.2d at 803). As noted above, *Barrett* was a civil case in which the plaintiff claimed that memories of improper sexual contact with her father, which had been repressed for approximately forty years, spontaneously emerged while she was watching a television program dealing with child sexual abuse. *Barrett*, 127 N.C.App. at 97, 487 S.E.2d at 804. The defendant father moved to exclude all evidence of the plaintiff's repressed memories, arguing that the evidence was inadmissible without accompanying expert testimony. *Id.* The trial court entered an order finding both that (1) the plaintiff's evidence of repressed memories would be precluded unless expert testimony was presented to explain the phenomenon, and (2) such expert testimony would be excluded because of the lack of scientific assurance that repressed memories were reliable indicators of what actually had occurred in the past. 127 N.C.App. at 98–99, 487 S.E.2d at 805–06. The Court of Appeals affirmed the first part of the trial court's order, holding that the plaintiff could not testify as to recovered memories of abuse unless an expert also testified about the scientific basis of memory repression. *Id.* at 100, 487 S.E.2d at 806.

[5][6] We agree with the holding in *Barrett* that the “plaintiff may not express the opinion [that] she herself has experienced repressed memory.” *Id.* at 101, 487 S.E.2d at 806. As the trial court here noted, psychiatric theories of memory, and specifically of repressed and recovered memories, are arcane even to specialists and may not be presented without accompanying expert testimony to prevent juror confusion and to assist juror comprehension.

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That said, we believe the Court of Appeals went too far in *Barrett* when it added that “even assuming plaintiff were not to use the term repressed memory’ and simply testified she suddenly in 1993 remembered traumatic incidents from her childhood, such testimony must be accompanied by expert testimony.” *Id.* Although we know of no statute that guarantees a witness (other than a criminal defendant) the right to testify, if a witness is tendered to present lay evidence of sexual abuse, expert testimony is not an automatic prerequisite to admission of such evidence, so long as the lay evidence does not otherwise violate the statutes of North Carolina or the Rules of Evidence. *See* N.C.G.S. § 8C-1, Rule 601(a) (2011) (presuming a witness is competent to testify). However, unless qualified as an expert or supported by admissible expert testimony, the witness may testify only to the effect that, for some time period, he or she did not recall, had no memory of, or had forgotten the incident, and may not testify that the memories were repressed or recovered. Therefore, to the extent that the Court of Appeals majority here relied on the statement in *Barrett* that excluded *all* testimony based on recovered memory unless it was accompanied by expert testimony, we disavow that portion of the opinion.

*8 Accordingly, should the State elect to retry the case on remand, the victim may testify as to her recollections. If so, the trial court may choose to reconsider its Rule 403 analysis in light of our holding. We are mindful that, in cases such as this, a defendant facing a witness who claims recently to have remembered long-ago events could seek to present an expert to address or refute the implications of the witness’s purported sudden recall, thereby requiring the trial court to consider the admissibility of such evidence and possibly igniting a duel of experts. Because we believe such instances will be infrequent and because the trial bench is fully capable of addressing such disputes as they arise, we do not attempt to catalog every possibility that could occur at trial.

For the reasons stated above, we modify and affirm the decision of the Court of Appeals that affirmed the trial court’s grant of defendant’s motion to suppress. We remand this case to the Court of Appeals for further remand to the trial court for additional proceedings not inconsistent with this opinion.

MODIFIED AND AFFIRMED; REMANDED.

Justice TIMMONS–GOODSON, J., concurring.

I concur with both the disposition and reasoning of the majority opinion with one exception. We need not address the holding of the Court of Appeals in *Barrett v. Hyldborg*, 127 N.C.App. 95, 487 S.E.2d 803 (1997), to resolve the issue before us.

FN1. Although the parties and witnesses skirmished over the meaning of some of these terms, the trial court stated in its suppression order that “[b]oth parties agree that repressed memory’ and synonymous terms are at issue when a witness intends to testify about a memory that he or she alleges to have about a traumatic event, is literally unable to remember the event for a long period of time afterwards, and then is later able to recover’ the memory.” Neither side has challenged the trial court’s characterization and we will follow the trial court’s convention.

FN2. We note that the General Assembly has amended Rule 702, adopting language similar to the corresponding Federal Rule of Evidence. *See* N.C.G.S. § 8C-1, Rule 702 (2011); *see also* Act of June 17, 2011, ch. 283, sec. 1.3, 2011 N.C. Sess. Laws 1048, 1049. Because the case at bar was decided under the earlier version of Rule 702, we need not now consider the impact of those amendments.

N.C., 2012.
State v. King

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Appendix F

John Doe 76C v. Archdiocese of Saint Paul and Minneapolis,
817 N.W.2d 150, 2012 WL 3023204 (Minn., July 25, 2012)

Westlaw.

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 (Cite as: 817 N.W.2d 150)

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H

Supreme Court of Minnesota.
 John DOE 76C, Respondent,
 v.
 ARCHDIOCESE OF SAINT PAUL AND MIN-
 NEAPOLIS, Appellant,
 Diocese of Winona, Appellant.

No. A10-1951.
 July 25, 2012.

Background: Plaintiff filed suit against Catholic archdiocese and diocese for negligence and fraud arising out of alleged sexual abuse committed by priest while plaintiff was minor. The District Court, Ramsey County, Gregg E. Johnson, J., 2009 WL 5576242, entered summary judgment in defendants' favor on limitations grounds after excluding plaintiff's proffered expert testimony on repressed memory and recollection, which plaintiff claimed was disability that tolled running of six-year limitations period. Plaintiff appealed, and the Court of Appeals, 801 N.W.2d 203, reversed and remanded. Defendants appealed.

Holdings: The Supreme Court, G. Barry Anderson, J., held that:

- (1) nominal *Frye - Mack* analysis conducted in determining admissibility of expert testimony on repressed memory and recollection was de facto analysis under evidentiary rule that was subject to review for abuse of discretion;
- (2) proffered evidence on repressed memory and recollection lacked foundational reliability, and thus, could not serve as basis for disability to toll six-year limitations period governing negligence claims under delayed discovery statute;
- (3) six-year limitations period governing negligence claim arising out of sexual abuse was not tolled; and
- (4) six-year limitations period governing claim for fraud was not tolled.

Reversed.

Paul H. Anderson, J., filed dissenting opinion in which Meyer, J., joined.

West Headnotes

[1] Evidence 157 ↪555.2

157 Evidence
 157XII Opinion Evidence
 157XII(D) Examination of Experts
 157k555 Basis of Opinion
 157k555.2 k. Necessity and sufficiency. Most Cited Cases

Before *Frye - Mack* expert testimony can be admitted, the proponent of the evidence must establish that the underlying scientific evidence is generally accepted in the relevant scientific community, and that the particular scientific evidence in the case has foundational reliability. 50 M.S.A., Rules of Evid., Rule 702.

[2] Appeal and Error 30 ↪893(1)

30 Appeal and Error
 30XVI Review
 30XVI(F) Trial De Novo
 30k892 Trial De Novo
 30k893 Cases Triable in Appellate Court
 30k893(1) k. In general. Most Cited Cases

On an appeal from summary judgment, an appellate court reviews a district court's application of the law and its determination that there are no genuine issues of material fact de novo, and examines the evidence in the light most favorable to the party against whom judgment was granted.

[3] Appeal and Error 30 ↪854(1)

30 Appeal and Error
 30XVI Review

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(Cite as: 817 N.W.2d 150)

30XVI(A) Scope, Standards, and Extent, in General

30k851 Theory and Grounds of Decision of Lower Court

30k854 Reasons for Decision

30k854(1) k. In general. Most Cited

Cases

When considering a grant of summary judgment, the appellate court need not adopt the reasoning of the district court; it may affirm a grant of summary judgment if it can be sustained on any grounds.

[4] Appeal and Error 30 ↪863

30 Appeal and Error

30XVI Review

30XVI(A) Scope, Standards, and Extent, in General

30k862 Extent of Review Dependent on Nature of Decision Appealed from

30k863 k. In general. Most Cited Cases

The appellate court will reverse a grant of summary judgment when the district court erred in concluding that there are no disputed material facts.

[5] Appeal and Error 30 ↪863

30 Appeal and Error

30XVI Review

30XVI(A) Scope, Standards, and Extent, in General

30k862 Extent of Review Dependent on Nature of Decision Appealed from

30k863 k. In general. Most Cited Cases

In order to establish on appeal from summary judgment that there is a disputed material fact, the party against whom summary judgment was granted must present specific admissible facts showing a material fact issue.

[6] Appeal and Error 30 ↪970(2)

30 Appeal and Error

30XVI Review

30XVI(H) Discretion of Lower Court

30k970 Reception of Evidence

30k970(2) k. Rulings on admissibility of evidence in general. Most Cited Cases

An appellate court's reviews a district court's evidentiary rulings, including rulings on foundational reliability, for an abuse of discretion.

[7] Evidence 157 ↪508

157 Evidence

157XII Opinion Evidence

157XII(B) Subjects of Expert Testimony

157k508 k. Matters involving scientific or other special knowledge in general. Most Cited

Evidence 157 ↪535

157 Evidence

157XII Opinion Evidence

157XII(C) Competency of Experts

157k535 k. Necessity of qualification. Most Cited Cases

Evidence 157 ↪555.2

157 Evidence

157XII Opinion Evidence

157XII(D) Examination of Experts

157k555 Basis of Opinion

157k555.2 k. Necessity and sufficiency. Most Cited Cases

All expert testimony must satisfy the first three parts of expert testimony test, i.e., that the witness is qualified, that the expert's opinion has foundational reliability, and that the testimony is helpful to the trier of fact; it is only when the proponent offers novel scientific evidence that the fourth part of the test that the testimony satisfies the *Frye – Mack* standard applies. 50 M.S.A., Rules of Evid., Rule 702.

[8] Evidence 157 ↪555.2

157 Evidence

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157XII Opinion Evidence

157XII(D) Examination of Experts

157k555 Basis of Opinion

157k555.2 k. Necessity and sufficiency. Most Cited Cases

Under the *Frye – Mack* standard for determining whether expert testimony on a novel scientific theory is admissible, the proponent of novel scientific evidence must show that the evidence meets two requirements, in addition to the requirements for the admission of expert testimony under the evidentiary rules: first, the proponent evidence must prove that the science is generally accepted in the relevant scientific community, and second, that the particular scientific evidence in each case has foundational reliability. 50 M.S.A., Rules of Evid., Rule 702.

[9] Evidence 157 ⚡555.2

157 Evidence

157XII Opinion Evidence

157XII(D) Examination of Experts

157k555 Basis of Opinion

157k555.2 k. Necessity and sufficiency. Most Cited Cases

Under the *Frye – Mack* standard, foundational reliability of novel scientific evidence, as a prerequisite to admission, requires the proponent of the scientific evidence to establish that the evidence itself is reliable and that its administration in the particular instance conformed to the procedure necessary to ensure reliability. 50 M.S.A., Rules of Evid., Rule 702.

[10] Evidence 157 ⚡555.2

157 Evidence

157XII Opinion Evidence

157XII(D) Examination of Experts

157k555 Basis of Opinion

157k555.2 k. Necessity and sufficiency. Most Cited Cases

At a minimum, foundational reliability of proffered expert testimony on a novel scientific theory must require that the theory forming the basis

for the expert's opinion or test is reliable. 50 M.S.A., Rules of Evid., Rule 702.

[11] Appeal and Error 30 ⚡970(2)

30 Appeal and Error

30XVI Review

30XVI(H) Discretion of Lower Court

30k970 Reception of Evidence

30k970(2) k. Rulings on admissibility of evidence in general. Most Cited Cases

District court's nominal *Frye – Mack* analysis in determining foundational reliability of scientific evidence on repressed and recovered memory, which plaintiff argued as basis for tolling six-year limitations period governing suit against Catholic archdiocese and diocese for alleged sexual abuse committed by priest when plaintiff was minor, was de facto examination of foundational requirements for admission of expert testimony under evidentiary rule governing same, and thus, district court's ruling that plaintiff's proffered evidence was not foundationally reliable was subject to review for abuse of discretion; district court heard three days of testimony from multiple experts from both parties, it reviewed hundreds of studies, it heard expert testimony that studies proffered in support of disability were methodically flawed. M.S.A. § 541.073; 50 M.S.A., Rules of Evid., Rule 702.

[12] Evidence 157 ⚡508

157 Evidence

157XII Opinion Evidence

157XII(B) Subjects of Expert Testimony

157k508 k. Matters involving scientific or other special knowledge in general. Most Cited

Evidence 157 ⚡555.2

157 Evidence

157XII Opinion Evidence

157XII(D) Examination of Experts

157k555 Basis of Opinion

157k555.2 k. Necessity and suffi-

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ciency. Most Cited Cases

Under the evidentiary rule governing expert testimony, foundational reliability analysis relating the novel scientific evidence goes beyond a mere helpfulness standard: first, the district court must analyze the proffered testimony in light of the purpose for which it is being offered; second, the court must consider the underlying reliability, consistency, and accuracy of the subject about which the expert is testifying; and finally, the proponent of evidence about a given subject must show that it is reliable in that particular case. 50 M.S.A., Rules of Evid., Rule 702.

[13] Evidence 157 ⚡555.2

157 Evidence

157XII Opinion Evidence

157XII(D) Examination of Experts

157k555 Basis of Opinion

157k555.2 k. Necessity and sufficiency. Most Cited Cases

While *Frye – Mack* deals with the reliability of a scientific test and the rule governing expert testimony deals with the reliability of an expert's opinion, the underlying foundational reliability analysis is substantially the same. 50 M.S.A., Rules of Evid., Rule 702.

[14] Appeal and Error 30 ⚡970(2)

30 Appeal and Error

30XVI Review

30XVI(H) Discretion of Lower Court

30k970 Reception of Evidence

30k970(2) k. Rulings on admissibility of evidence in general. Most Cited Cases

As long as the district court considered the relevant foundational reliability factors, the appellate court will not reverse its evidentiary finding on the admissibility of expert testimony on a novel scientific theory absent an abuse of discretion. 50 M.S.A., Rules of Evid., Rule 702.

[15] Limitation of Actions 241 ⚡95(4.1)

241 Limitation of Actions

241II Computation of Period of Limitation

241II(F) Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action

241k95 Ignorance of Cause of Action

241k95(4) Injuries to the Person

241k95(4.1) k. In general. Most

Cited Cases

Merely not thinking about the sexual abuse is not enough to delay the running of the six-year statute of limitations governing a civil action based on sexual abuse.

[16] Evidence 157 ⚡555.10

157 Evidence

157XII Opinion Evidence

157XII(D) Examination of Experts

157k555 Basis of Opinion

157k555.10 k. Medical testimony.

Most Cited Cases

Evidence supported district court's finding that proffered evidence on repressed memory and recollection lacked foundational reliability, and thus, was inadmissible on issue whether plaintiff suffered mental disability of repressed memory that tolled six-year limitations period governing action against Catholic archdiocese and diocese for injuries arising out of sexual abuse by priest while plaintiff was minor, under delayed discovery statute; although plaintiff presented experts and scientific studies regarding existence of repressed memory, defendants' experts presented evidence showing that repressed memory disability was hotly disputed in psychiatric community, and therefore, was not generally accepted in scientific community, there were multiple alternative reasons for person's inability to recall certain traumatic event or details surrounding event, and there was no way to validate whether people claiming memory repression were literally unable to remember event or whether they merely suffered from normal memory distortion. M.S.A. § 541.073; 50 M.S.A., Rules of Evid., Rule 702.

[17] Limitation of Actions 241 ⚡95(4.1)

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241 Limitation of Actions
 241II Computation of Period of Limitation
 241II(F) Ignorance, Mistake, Trust, Fraud,
 and Concealment or Discovery of Cause of Action
 241k95 Ignorance of Cause of Action
 241k95(4) Injuries to the Person
 241k95(4.1) k. In general. Most

Cited Cases

Six-year limitations period under delayed discovery statute governing claim against Catholic archdiocese and diocese arising out of sexual abuse by priest when plaintiff was minor was not tolled, and thus, expired six years after plaintiff turned 18, where plaintiff failed to prove that he suffered from disability that prevented accrual of action. M.S.A. § 541.073.

[18] Limitation of Actions 241 ↪95(4.1)

241 Limitation of Actions
 241II Computation of Period of Limitation
 241II(F) Ignorance, Mistake, Trust, Fraud,
 and Concealment or Discovery of Cause of Action
 241k95 Ignorance of Cause of Action
 241k95(4) Injuries to the Person
 241k95(4.1) k. In general. Most

Cited Cases

Under the delayed discovery statute, the statute of limitations for claims based on injuries from sexual abuse begins to run once a reasonable person would know that he is injured, and in this context, one is "injured" if one is sexually abused. M.S.A. § 541.073.

[19] Limitation of Actions 241 ↪95(4.1)

241 Limitation of Actions
 241II Computation of Period of Limitation
 241II(F) Ignorance, Mistake, Trust, Fraud,
 and Concealment or Discovery of Cause of Action
 241k95 Ignorance of Cause of Action
 241k95(4) Injuries to the Person
 241k95(4.1) k. In general. Most

Cited Cases

Plaintiff's subjective assertion that he did not discover facts indicating that Catholic dioceses

knowingly placed priest who had history of child abuse at plaintiff's parish and that dioceses knowingly allowed priest to have access to children until he recovered previously repressed memory of sexual abuse by priest when plaintiff was minor, was not relevant to determination whether plaintiff actually knew or should have known that dioceses concealed priest's history of child abuse, for purposes of tolling six-year limitations period governing claim against dioceses for fraud, especially in view of his deposition testimony that he was aware that priests had sexually abused other boys during same period of time, and that he was aware of sexual abuse in Catholic Church, and in light of hundreds of articles and television news stories regarding priest's sexual abuse of children that were published prior to expiration of limitations period.

[20] Limitation of Actions 241 ↪100(11)

241 Limitation of Actions
 241II Computation of Period of Limitation
 241II(F) Ignorance, Mistake, Trust, Fraud,
 and Concealment or Discovery of Cause of Action
 241k98 Fraud as Ground for Relief
 241k100 Discovery of Fraud
 241k100(11) k. Diligence in discovering fraud. Most Cited Cases

In determining when a cause of action for fraud accrued, for the purposes of the six-year limitations period, the court judges the plaintiff's discovery of the fraud under the reasonable person standard, and the facts constituting the fraud are deemed to have been discovered when they were actually discovered or, by reasonable diligence, should have been discovered. M.S.A. § 541.05(1)(6).

**153 Syllabus by the Court*

1. The district court did not abuse its discretion by excluding, on foundational reliability grounds, expert testimony on the theory of repressed and recovered memory offered to prove a disability delaying the accrual of a cause of action.

2. The district court did not err when it granted appellants summary judgment.

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*154 Amy J. Russell, Winona, MN, for amici curiae National Child Protection Training Center and National Center for Victims of Crime.

Daniel A. Haws, Stacey E. Ertz, Murman Brandt, Saint Paul, MN, for amicus curiae Minnesota Defense Lawyers Association.

OPINION

ANDERSON, G. BARRY, Justice.

This appeal asks us to determine whether John Doe 76C's ("Doe") expert testimony on the theory of repressed and recovered memory offered to prove a disability delaying the accrual of his otherwise untimely negligence and fraud claims is admissible. Doe claims the Archdiocese of Saint Paul and Minneapolis and the Diocese of Winona

("Dioceses") are liable for his damages resulting from alleged sexual abuse in the early 1980s by a priest under the Dioceses' control. Doe filed this action on April 24, 2006; because his claims are subject to 6-year statutes of limitations, Doe's claims are untimely unless they accrued after April 24, 2000. See Minn.Stat. §§ 541.05, subd. 1(6), 541.073 (2010). To support his argument that accrual of his claims was delayed, and that his action was therefore timely, Doe intended to offer general expert testimony on the theory of repressed and recovered memory. The district court concluded that Doe's expert testimony was inadmissible under the *Frye - Mack* standard, making Doe's claims untimely, and granted the Dioceses summary judgment. See *Frye v. United States*, 293 F. 1013, 1014 (D.C.Cir.1923); *State v. Mack*, 292 N.W.2d 764, 768 (Minn.1980). The court of appeals reversed the summary judgment order, concluding that Doe's expert testimony might be admissible under Minn. R. Evid. 702. We conclude that Doe's expert testimony on the theory of repressed and recovered memory, offered to prove a disability delaying the accrual of a cause of action, is inadmissible under Minn. R. Evid. 702 because it lacks foundational reliability and that as a result Doe's claims are untimely. We therefore reverse the court of appeals.

I.

Doe alleges that Father Thomas Adamson ("Fr. Adamson") sexually abused him on four separate occasions in 1980 or 1981, when Doe was a teenager. Doe also alleges that the Dioceses knew that Fr. Adamson was a danger to children before Fr. Adamson was assigned to Doe's parish in 1981. Doe claims that the Dioceses are liable for damages stemming from this alleged sexual abuse on two general theories: first, that the Dioceses negligently allowed the abuse to occur, Minn.Stat. § 541.073, subd. 3, and second, that the Dioceses fraudulently concealed the fact that Fr. Adamson was a danger to children from Doe. Minn.Stat. § 541.05, subd. 1(6).

It is undisputed that Fr. Adamson has a history

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of sexually abusing children and that the Dioceses did not make that history known to the public until the mid-1980s. It is also undisputed that Fr. Adamson and Doe became close acquaintances after Fr. Adamson was assigned to Doe's parish in 1981. Doe claims that Fr. Adamson sexually abused him on four separate occasions in 1980 or 1981. According to Doe, the alleged incidents were brief (each lasting a few seconds) and Doe was fully clothed for three of them. Importantly, Doe claims that, at some unspecified time after these incidents, he repressed his memories of the alleged sexual abuse.

Fr. Adamson's history of abusing children was highly publicized in the mid-1980s when some of his victims sued the Dioceses. See *155Mrozka v. Archdiocese of Saint Paul & Minneapolis, 482 N.W.2d 806 (Minn.App.1992). The local news media extensively covered the allegations against Fr. Adamson in the late-1980s and early-1990s; newspapers ran over 130 articles about Fr. Adamson's wrongful conduct and the Dioceses admitted responsibility for the abuse. See, e.g., Donna Halvorsen, *Two Catholic Dioceses Admit Responsibility for Sexual Abuse by Priest*, Star Tribune, Nov. 3, 1990, at 01A. Doe's parents learned about the allegations against Fr. Adamson and the Dioceses in the 1980s and discussed the allegations with Doe. Doe testified that he was aware of the sexual abuse problem in the Catholic Church by the 1990s.

Despite his actual knowledge of the sexual abuse problem in the Catholic Church generally, and Fr. Adamson's history of sexual abuse specifically, Doe claims that he did not have reason to bring his claims until 2002 because he repressed the memories of Fr. Adamson's alleged sexual abuse from some unspecified time after the abuse occurred until 2002. Doe testified that in the summer of 2002 he had a series of flashbacks to Fr. Adamson touching Doe's upper thigh. After these flashbacks, Doe began therapy to deal with the rage and anger that he felt because of the memory. After Doe started

therapy, he claims that he remembered three other incidents of abuse.

On April 22, 2009, Doe met with Father Thomas Doyle and told him that, at the time of the alleged abuse, he felt emotionally paralyzed, shocked, and isolated, and that at the time of the alleged abuse he felt deathly afraid to tell anyone about the abuse because of his family's close relationship with the Catholic Church and Fr. Adamson.

II.

Doe filed this action on April 24, 2006, claiming that the alleged abuse has, and will continue to, cause Doe emotional and psychological damage, mental health expenses, a loss of income, and a loss of earning capacity. Doe claims that the Dioceses are liable for these damages under theories of negligence, negligent supervision, negligent retention, vicarious liability, fraud, and fraudulent intentional non-disclosure. All of Doe's claims are subject to 6-year statutes of limitations.^{FN1}

FN1. The statute of limitations on actions for damages based on personal injury caused by sexual abuse is "six years [from] the time the plaintiff knew or had reason to know that the injury was caused by the sexual abuse." Minn.Stat. § 541.073, subd. 2(a). As a matter of law, one is injured if sexually abused. *Blackowiak v. Kemp*, 546 N.W.2d 1, 3 (Minn.1996). Nevertheless, if the plaintiff is a minor at the time of the alleged abuse he lacks the ability to know or have reason to know that he was sexually abused, and the 6-year statute of limitations does not begin to run until the person reaches the age of 18. *D.M.S. v. Barber*, 645 N.W.2d 383, 389 (Minn.2002).

The 6-year fraud statute of limitations begins to run when the aggrieved party discovers the facts constituting the fraud. Minn.Stat. § 541.05, subd. 1(6). Discovery of the fraud is analyzed under the

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reasonable person standard. See *Bustad v. Bustad*, 263 Minn. 238, 242, 116 N.W.2d 552, 555 (1962). The facts constituting the fraud are deemed to have been discovered when they were actually discovered or “by reasonable diligence, should have been discovered.” *Toombs v. Daniels*, 361 N.W.2d 801, 809 (Minn.1985).

Doe argues that his claims based on alleged abuse in the early 1980s are timely because he repressed the memory of the abuse until the summer of 2002 and, therefore, he could not have known that he had been sexually abused until that time. In order to prove that he could not know or have reason to know that he had claims until 2002, Doe intended to offer expert testimony on the psychological theory of repressed and recovered memory.

***156 Frye-Mack Hearing**

[1] The Dioceses requested a *Frye – Mack* hearing to determine the admissibility of Doe's expert testimony regarding repressed and recovered memories. The *Frye – Mack* standard governs the admissibility of expert testimony that “involves a novel scientific theory.” Minn. R. Evid. 702; *Goeb v. Tharaldson*, 615 N.W.2d 800, 814 (Minn.2000). Before *Frye – Mack* expert testimony can be admitted, the proponent of the evidence must establish that the underlying scientific evidence “is generally accepted in the relevant scientific community,” and that “the particular scientific evidence in [the case has] foundational reliability.” *Goeb*, 615 N.W.2d at 814. The Dioceses argued that Doe's evidence relating to the theory of repressed and recovered memory was “novel” “scientific” evidence that was neither generally accepted in the relevant scientific community nor foundationally reliable in an individual case and, therefore, inadmissible under the *Frye – Mack* standard. Doe argued that a *Frye – Mack* hearing was not required because repressed and recovered memory theory is not novel.^{FN2}

FN2. It is worth noting that while Doe ar-

gued to the district court that a *Frye – Mack* hearing was unnecessary, he did not argue that *Frye – Mack* was the wrong standard under which to assess the admissibility of his proffered expert testimony.

The district court granted the Dioceses' motion for a *Frye – Mack* hearing to determine the admissibility of “the theory of repressed and recovered memory as a basis for tolling the statute of limitations.” The court correctly concluded that, while repressed memory was a basis for the legislature's enactment of the delayed discovery statute, our court had not yet accepted the theory as a basis “for tolling the statute of limitations for an undetermined period.” Because we had yet to scrutinize the theory under the *Frye – Mack* standard to decide whether it is generally accepted in the relevant scientific community and there is a “significant body of scientific research on both sides of this issue,” the district court concluded that a *Frye – Mack* hearing was required.

The district court then conducted a 3-day *Frye – Mack* hearing in June 2009. Doe presented testimony from Dr. James A. Chu, M.D., and Dr. Constance Dalenberg, Ph.D., who testified that repressed and recovered memory theory is generally accepted in the relevant scientific community and foundationally reliable. The Dioceses presented testimony from Dr. Harrison G. Pope, Jr., M.D., Dr. William M. Grove, Ph.D., and Dr. Elizabeth F. Loftus, Ph.D.^{FN3} The Dioceses' experts testified that repressed and recovered memory theory is not generally accepted in the relevant scientific community and is foundationally unreliable. Because the testimony from the experts at the *Frye – Mack* hearing was crucial to the court's conclusion that the theory of repressed and recovered memory lacks foundational reliability, we summarize that testimony in some detail.

FN3. All of the experts who testified at the *Frye – Mack* hearing have impeccable credentials and neither party argues on appeal that the experts retained by the other party

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do not qualify as experts. Because qualification as an expert is not an issue as to any of the witnesses in this case, we have omitted detailed discussion of the expert witnesses' qualifications.

Dr. Dalenberg

Dr. Dalenberg, the Director of the Trauma Research Institute and a full Professor of Psychology at the California School of Professional Psychology, testified for Doe. According to Dr. Dalenberg, patients with *157 various types of trauma sometimes repress their memories of the trauma.

Dr. Dalenberg presented 328 peer-reviewed scientific research articles purporting to show that repressed and recovered memory exists and that the theory is scientifically reliable. Generally, Dr. Dalenberg testified that researchers in this area consistently find that a small percentage of people who experience trauma totally repress recall of that trauma and that, years later, those people can suddenly and accurately remember the trauma. According to Dr. Dalenberg, the sheer volume of studies finding people with repressed and recovered memories is strong evidence that repressed memories occur.

Dr. Dalenberg testified that of all of the research studies she was aware of that looked for patients with repressed memory, none had ever had a "zero response." To put it another way, no study that searched for patients with repressed and recovered memories had ever failed to find at least one patient who claimed to have repressed and later recovered a memory. On the other hand, Dr. Dalenberg consistently seemed to equate "forgetfulness" with "memory repression." For example, when discussing a well-known research study that purported to find that 19% of the participants suffered from repressed memory, Dr. Dalenberg stated that the study concluded that some participants "*forgot* the abuse for a period of time and later the memory returned." (Emphasis added). Dr. Dalenberg's lack of differentiation between "forgetting" and "repression" lends credence to the Dioceses' ex-

perts, who claim that repression is not distinct from other types of forgetting.

Dr. Dalenberg testified that repressed memories not only exist, but that, when recovered, those memories are accurate. Some of the research articles Dr. Dalenberg presented were "accuracy studies." According to Dr. Dalenberg, accuracy studies measure how accurate repressed memories are as compared to normal, continuous memories. Dr. Dalenberg testified that the accuracy studies proved that repressed memories are as accurate as continuous memories because people make errors in both repressed memories and normal, continuous memories at about the same rate. On the other hand, the Dioceses effectively cross-examined Dr. Dalenberg on the issue of repressed memory accuracy. Under examination, Dr. Dalenberg conceded that she could not give, and did not know how an "error rate" could be calculated as to how often or how accurately people repressed and recovered their memories.

As to whether the theory of repressed and recovered memory is generally accepted in the relevant scientific community, Dr. Dalenberg testified affirmatively but noted that there was a debate over the cause of repressed and recovered memory. Dr. Dalenberg disputed the importance of the debate, however, and compared it to an argument over the causes of cancer in that, just because scientists do not know what causes cancer does not mean that cancer does not exist.

Dr. Chu

Dr. Chu, a psychiatrist and associate professor of Psychiatry at Harvard Medical School who has treated psychological trauma patients for 30 years, testified for Doe. Dr. Chu testified that, during his 30 years of practice, he has seen "[d]ozens if not hundreds" of patients who have had repressed and recovered memories. Dr. Chu testified that it was important to consider the viewpoint of clinicians when considering the theory of memory repression because clinicians see a wide variety of patients with recovered memories while researchers see

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only a small group of patients.

*158 Dr. Chu was on the task force that added a diagnosis for repressed and recovered memory to the DSM.^{FN4} Dr. Chu testified that the DSM is the diagnostic “Bible” in psychiatry, and that before a diagnosis is included in the DSM it must be firmly rooted in peer-reviewed scientific research. Dr. Chu also testified that inclusion of repressed and recovered memory as a diagnosis in the DSM is very strong evidence of the general acceptance of the theory.

FN4. The Diagnostic and Statistical Manual of Mental Disorders (DSM) is a tool used mainly by clinical psychologists and psychiatrists (mental health professionals whose primary work is treatment of patients rather than research) to diagnose mental illness. Repressed and recovered memory is identified as “dissociative amnesia” in the latest version of the DSM. Am. Psychiatric Ass'n., *Diagnostic and Statistical Manual of Mental Disorders* 520–23 (4th ed., text rev. 2000) (DSM–IV–TR).

At the same time, however, Dr. Chu testified that there is a “great debate” about the whole concept of repressed and recovered memory. Unlike Dr. Dalenberg, who testified that the debate was about what causes repression, Dr. Chu testified that the debate in the scientific community is “a heated debate as to whether repressed memory exists.” Finally, as to the accuracy of alleged recovered memories, Dr. Chu testified that the DSM “basically says you can't— *there is no current method for actually establishing the accuracy of recovered or retrieved memories without corroborating evidence.*” (Emphasis added).

Dr. Pope

Dr. Pope, a Professor of Psychiatry at Harvard Medical School, testified for the Dioceses. Dr. Pope testified that the theory of repressed and recovered memory is “highly controversial” and that “[s]ome

have called it the most heated debate currently in psychiatry.” According to Dr. Pope, the theory is not generally accepted in the relevant scientific community because something cannot be both generally accepted and highly controversial and debated.

Dr. Pope testified, generally, about the nature of debate in the psychological community. According to Dr. Pope, “psychiatry has been filled with little offshoots where [a] theory would acquire popularity for a period of time and then there would be a cluster of people very invested in it,” and then the theory would fade. As an example, Dr. Pope described that as late as the 1970s, psychology schools taught that schizophrenia often was caused by an individual's environment and that “you could cure schizophrenia with talk.” Dr. Pope explained that those views faded over time and that today it is conceded that schizophrenia is a biological condition that cannot be talked away. Dr. Pope strongly implied that the same scenario was playing out regarding the theory of repressed and recovered memory.

Dr. Pope also stressed the importance of differentiating repressed and recovered memory theory from other psychological memory processes. The theory of repressed and recovered memory is that “someone could have a terrible trauma and then literally be unable to remember it for a period of time,” such that “I could walk up to [that person] 5 years later and say, do you remember [an event], and [that person] would look me straight in the eye and say, no, I don't remember that.” Dr. Pope explained that this theory is different from:

- (1) ordinary forgetting, in which someone “forgets” something but would be perfectly capable of remembering if reminded;
- (2) not thinking about something*159 for a long time;
- (3) incomplete encoding of a traumatic event, which is “if I threaten you with a gun, you will remember exactly what the gun looked like, but you may not remember what color shirt I was wearing”;
- (4) organic amnesia, which is “when you get

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knocked out in a car accident and you have no memory of what happened, or when you get drunk and you have a blackout”; (5) psychogenic amnesia, a “very rare phenomenon where someone wakes up in a hotel room and has no idea what their name[is] or who they are”; (6) childhood amnesia, which is when an event occurs when a child is too young to remember it; and (7) “nondisclosure,” in which a subject may remember a traumatic event perfectly well but not want to disclose it to a researcher.

See Pope Slideshow, Def.'s Ex. 1003, June 2, 2009. According to Dr. Pope, part of the controversy over repressed and recovered memory theory stems from the fact that psychologists often claim that a patient has repressed and recovered memories when that patient's memory problems can be explained just as easily by one of the other, accepted, types of memory loss. While all scientists agree that there are many types of memory loss, Dr. Pope testified that scientists do not agree that repressed and recovered memories exist.

Dr. Pope disagreed with Doe's experts that inclusion of repressed and recovered memory as a diagnosis in the DSM demonstrates that the theory is generally accepted. According to Dr. Pope, inclusion in the DSM-IV-TR does not demonstrate general acceptance because the DSM-IV-TR itself cautions against its use in legal settings, it is not a scientific work, it also lists repressed and recovered memory as a “feigned” symptom of other diagnoses, and because its diagnoses are added by committees interested in the area of the diagnosis and therefore may not be representative of the scientific community at large.

Dr. Pope did not believe that the existence of repressed and recovered memories had been proven by scientific studies. He reviewed 77 studies involving more than 11,000 individuals who had experienced a wide variety of traumatic events (such as natural disasters and rape) and testified that, out of all of the studies, none contained a single, well-documented case of memory loss that could not be

explained by some other memory process. Similarly, Dr. Pope testified that, even if someone assumed that repressed and recovered memories existed, there is no way to determine whether a person is actually suffering from memory repression or feigning the condition. Dr. Pope also testified that there is “voluminous” literature openly questioning the existence of repressed and recovered memory.

Finally, and most importantly, Dr. Pope testified that all of the 328 peer-reviewed scientific research articles submitted by Dr. Dalenberg purporting to prove the existence of repressed and recovered memories have serious methodological flaws. The most serious flaw Dr. Pope noted was that “there [is] no way to validate that [the participants stating that they suffered from memory repression] were literally unable to remember the event.” When asked whether the sheer volume of studies purporting to prove the existence of repressed and recovered memories was persuasive, Dr. Pope said that it was not persuasive because the studies' methodological flaws made them worthless, stating that “a hundred times zero is still zero.” Because of these serious methodological flaws, Dr. Pope opined that the theory of repressed and recovered memory is not based on science that is foundationally reliable.

***160 Dr. Grove**

Dr. Grove, an Associate Professor at the University of Minnesota and an expert in the scientific methodology of psychology, also testified for the Dioceses. Dr. Grove testified that the theory of repressed and recovered memory has not been scientifically proven because it has not been well demonstrated in research that people can entirely repress memories of traumatic events and that the scientific community has not formed a consensus as to whether repression is even possible.

Like Dr. Pope, Dr. Grove testified that the research studies purporting to prove that repressed and recovered memory exists “are not of sufficiently high methodological quality” to be reliable. Dr. Grove also stated that no scientific study has es-

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established that recovered memories are accurate. Moreover, Dr. Grove testified that there is no way, currently, to tell whether a person claiming to have repressed memories is remembering an actual or false memory because, if a person truly believes that he has repressed a memory (even if the memory can actually be shown to be false), he will exhibit sincerity and “absolutely and confidently” believe the memory is real. On cross-examination, Dr. Grove reaffirmed that all of the studies relied upon by Doe's expert, Dr. Dalenberg, are flawed because they do not sufficiently differentiate between a subject losing all memory of an event with a subject just unable to recall certain details of an event.

Dr. Grove also cautioned against placing too much weight on clinical diagnoses of repressed and recovered memories by even highly experienced clinical psychologists. Dr. Grove testified that there is little evidence supporting the proposition that a more experienced clinical psychologist will provide diagnoses that are more accurate. According to Dr. Grove, an assertion that “if [a clinician] has seen a lot of patients, this extra experience makes [that clinician] more of an expert[and] more accurate in [his] predictions and clinical judgments” is unsupported because “the research in this area shows little or no correlation between the amount of experience that a clinician has had and the accuracy of their judgments when it comes to behavioral science like psychology and psychiatry.”

Dr. Loftus

Dr. Loftus, a Distinguished Professor of Psychology and Social Behavior; Criminology, Law, and Society; and Cognitive Science at the University of California, Irvine, testified for the Dioceses. Dr. Loftus testified that the theory of repressed and recovered memory is “massively controversial.” Because of this massive controversy, Dr. Loftus stated that she did not “see how anyone can, with a straight face, say that there is general acceptance [of the theory].” Like the Dioceses' other experts, Dr. Loftus testified that the number of

studies produced by Doe's experts was unconvincing because the studies were of poor quality. Dr. Loftus also testified that the studies relied upon by Doe are seriously methodologically flawed and thus do not support the theory of memory repression.

Dr. Loftus also discussed her research on “false memory” and memory distortion. Dr. Loftus has conducted numerous studies where she was able to implant a false memory of a childhood event into a subject's mind—Dr. Loftus successfully persuaded subjects to believe, variously, that they had been left at a mall, attacked by an animal, or witnessed a demonic possession when, in fact, none of these events had occurred. Importantly, Dr. Loftus testified that, once implanted in the subject, a false memory “can be held with confidence, expressed with detail, and even experienced [with] emotion” and that it is *161 “virtually impossible without independent corroboration to tell whether you are dealing with a real memory or one that is a product of some other process.” Dr. Loftus also testified that media coverage of an event and other post-event suggestions could distort memory. Dr. Loftus stated that the amount of media coverage in the cases involving Fr. Adamson, the questioning of Doe by his parents in the 1980s about abuse by Fr. Adamson, and Doe's use of questionable therapy techniques to deal with his memories were all post-event suggestions that could have distorted Doe's memory.

On cross-examination, Dr. Loftus conceded that it is possible that there is a psychological mechanism that causes repression; she stressed, however, that she has seen no evidence of it. Dr. Loftus also conceded that many studies cited by Doe have patients who show signs of amnesia, but disagreed that any of the studies showed evidence of anyone with total repression for an event.

The District Court Excludes Doe's Expert Testimony and Grants Summary Judgment

The district court excluded Doe's expert testimony on the theory of repressed and recovered memories because Doe failed to show that the the-

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ory is generally accepted in the relevant scientific community and failed to show “that the theory of repressed and recovered memory is reliable and trustworthy based on well-recognized scientific principles because of the significant methodological flaws in the studies presented by [Doe] in support of that theory and the lack of any test to show reliability.” The court also concluded that inclusion of repressed and recovered memory as a diagnosis in the DSM does not establish general acceptance.

With respect to its conclusion that the theory of repressed and recovered memory is not generally accepted in the relevant scientific community, the district court found that both psychological researchers and clinicians were members of the relevant scientific community and that, generally, clinicians widely accepted the concept of repressed and recovered memories and researchers widely did not. The court agreed with the Dioceses' witnesses, and Doe's witness Dr. Chu, that there was a great debate in the psychological community about whether the concept was valid. It recognized that Doe's best argument for general acceptance of the theory was the inclusion of repressed and recovered memory as a diagnosis in the DSM, but found that inclusion in the DSM-IV does not equate to general acceptance for several reasons: the Supreme Court recognized that a diagnosis in the DSM, “may mask vigorous debate within the profession about the very contours of the mental disease itself,” *Clark v. Arizona*, 548 U.S. 735, 774, 126 S.Ct. 2709, 165 L.Ed.2d 842 (2006); the DSM is not a scientific paper; psychiatrists disagree about whether repressed and recovered memories should appear in the DSM; other courts have recognized that the DSM is an evolving document; and the DSM itself cautions against use in legal settings due to the “significant risks that diagnostic information will be misused or misunderstood [and that] [t]hese dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis.” Am. Psychiatric Ass'n, *Introduction to Diagnostic and Statistical Manual of Mental Disorders*, at xxxii-xxxiii (4th ed., text

rev.2000).^{FN5} Ultimately, because of the serious *162 debate within the relevant scientific community, the court concluded that the theory of repressed and recovered memory was not generally accepted.

FN5. The district court's, and the Dioceses' experts', criticism of the DSM is shared by many in the field of psychology, including Dr. Allen Frances, the former chair of the DSM Task Force. See Allen Frances, *Diagnosing the D.S.M.*, N.Y. Times, May 12, 2012, at A19. Illustrative of the “vigorous debate” that concerned the United States Supreme Court is the more recent warning of Dr. Frances that the psychological “Bible” has become a dangerous tool with a serious lack of oversight. *Id.* Moreover, Dr. Frances cautions that the DSM has been poorly used “in areas well beyond its competence,” noting that, “[i]t is widely used (and misused) in the courts.” *Id.*

With respect to its conclusion that the theory of repressed and recovered memory lacks foundational reliability, the district court stated that the research relied upon by Doe did not “provide sufficient information about the scope of the subject's purported amnesia and that the accuracy of the recovered memories has not been scientifically established.” The court agreed with the Dioceses' experts that all of the studies that purported to establish the existence of repressed and recovered memories had serious methodological flaws. The court was also troubled by the fact that recovered memories cannot be shown to be accurate in the absence of independent corroboration. Accordingly, the court excluded, as not foundationally reliable, evidence of repressed and recovered memories offered for the purpose of establishing a disability to toll a statute of limitations.

After the *Frye – Mack* hearing, the Dioceses moved for summary judgment. The district court granted the Dioceses summary judgment because it concluded that all of Doe's claims were barred by

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the applicable statutes of limitations. The court concluded that because Doe could not establish a legal disability tolling the statute of limitations, Doe's negligence, negligent supervision, negligent retention, and vicarious liability claims were barred by Minn.Stat. § 541.073, subd. 2. The court also concluded that Doe's fraud claims were barred by Minn.Stat. § 541.05, subd. 1(6), because there was overwhelming evidence that Doe could have discovered, with reasonable diligence, the facts constituting the claimed fraud in the 1980s.

Court of Appeals Reverses and Remands

The court of appeals reversed and remanded the district court's summary judgment order. The court of appeals concluded that the district court erred by applying the *Frye – Mack* standard to Doe's expert testimony on repressed and recovered memories because it was akin to “syndrome” evidence. *Doe v. Archdiocese of Saint Paul & Minneapolis*, 801 N.W.2d 203, 207–08 (Minn.App.2011).

The court of appeals relied heavily on *State v. MacLennan*, 702 N.W.2d 219 (Minn.2005), in reaching this conclusion. *Doe*, 801 N.W.2d at 207–08. In *MacLennan*, we recognized a difference between “physical sciences” and “theories and assumptions that are based on the behavioral sciences,” concluding that “expert testimony on syndromes, unlike DNA evidence or other physical science, is not the type of evidence that the analytic framework established by *Frye – Mack* was designed to address.” *MacLennan*, 702 N.W.2d at 231, 233. Because the theory of repressed and recovered memory is not based in physical science, the court of appeals was persuaded that the *Frye – Mack* standard should not be used here. *Doe*, 801 N.W.2d at 207–08.

Because it concluded that the district court erred in applying the *Frye – Mack* standard, the court of appeals reversed and remanded the evidentiary ruling on the admissibility of expert testimony on repressed and recovered memories for determination*163 of admissibility under the “helpfulness”

standard of Minn. R. Evid. 702. *Id.* at 208 (citing *MacLennan*, 702 N.W.2d at 233 (concluding that courts should use Minn. R. Evid. 702 when determining whether syndrome evidence would be helpful to the jury)); see *State v. Obeta*, 796 N.W.2d 282, 293–94 (Minn.2011); *State v. Henum*, 441 N.W.2d 793, 797–99 (Minn.1989) (concluding that expert testimony on battered-woman syndrome would be helpful to the jury under a Minn. R. Evid. 702 analysis). The court, however, did not address either what standard of foundational reliability would be required for the admission of the expert testimony, or the district court's conclusion that evidence on the theory of repressed and recovered memory is not foundationally reliable. See Minn. R. Evid. 702 (“The opinion must have foundational reliability.”); see also Minn. R. Evid. 703 comm. cmt.—1989 (stating that the facts underlying an expert's opinion are foundationally reliable if the answer to the following two questions is “yes”: “1. are these facts and data of a type relied upon by experts in this field when forming inferences or opinions on the subject; [and] 2. is this reliance reasonable?”). If admissible as “syndrome” evidence, the court stated that “the experts' testimony should be limited to a description of memory repression and the characteristics that are present in an individual suffering from repressed memory,” and that the experts “may not testify to the ‘ultimate fact’ of whether [Doe] suffered from repressed memory.” *Doe*, 801 N.W.2d at 209.

Because the court of appeals ruled that Doe's expert testimony might be admissible under Minn. R. Evid. 702, and if admissible would create a genuine issue of material fact as to whether Doe had a disability that tolled the applicable statutes of limitations, it reversed the district court's summary judgment order as to Doe's negligence and fraud claims. *Id.*

III.

[2][3][4][5] The district court granted the Dioceses summary judgment and dismissed each of Doe's claims. On an appeal from summary judg-

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ment, we review a district court's application of the law and its determination that there are no genuine issues of material fact de novo, *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76–77 (Minn.2002), and examine the evidence in the light most favorable to the party against whom judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn.1993). When considering a grant of summary judgment, we need not adopt the reasoning of the district court. See *Winkler v. Magnuson*, 539 N.W.2d 821, 827 (Minn.App.1995). Indeed, we may affirm a grant of summary judgment if it can be sustained on any grounds. *Cambern v. Hubbling*, 307 Minn. 168, 171, 238 N.W.2d 622, 624 (1976) (stating the general rule that if a district court's "rule is correct, it is not reversed solely because its stated reason was not correct"); *Winkler*, 539 N.W.2d at 827. We will reverse a grant of summary judgment when the district court erred in concluding that there are no disputed material facts. See *Sampair v. Village of Birchwood*, 784 N.W.2d 65, 76 (Minn.2010) (reversing summary judgment against appellants whose affidavits created genuine issues of material fact). But in order to establish that there is a disputed material fact, the party against whom summary judgment was granted must "present specific admissible facts showing a material fact issue." *O'Neil v. Kelly*, 307 Minn. 498, 499, 239 N.W.2d 231, 232 (1976).

[6] Because the district court ordered summary judgment on timeliness grounds, *164 the only issue of material fact for us to consider is whether Doe's claims are timely. The district court found that Doe's claims were untimely after it excluded Doe's expert testimony on the theory of repressed and recovered memory, because without expert testimony tending to prove that Doe suffered from repressed memories, there was no question that Doe's claims are time-barred. We review a district court's evidentiary rulings, including rulings on foundational reliability, for an abuse of discretion. *State v. Loving*, 775 N.W.2d 872, 877 (Minn.2009) (citation omitted) (stating that we review a district court's determinations under the foundational reli-

ability prong of *Frye – Mack* for an abuse of discretion); *Jacobson v. \$55,900 in U.S. Currency*, 728 N.W.2d 510, 529 (Minn.2007) (citations omitted) (stating that a district court's determination of the adequacy of foundation offered for expert witness testimony under Minn. R. Evid. 702 will not be reversed absent abuse of discretion).

IV.

The ultimate issue in this appeal is whether the district court properly granted the Dioceses summary judgment. But our resolution of that issue hinges on whether the court correctly excluded Doe's expert testimony on the theory of repressed and recovered memory offered to prove that Doe had a disability delaying the accrual of his causes of action. Therefore, we first consider the district court's evidentiary ruling.

A.

Like all testimony, expert testimony must satisfy the basic requirements of the rules of evidence. Expert testimony is inadmissible if it is irrelevant. Minn. R. Evid. 402; *MacLennan*, 702 N.W.2d at 230. Evidence is irrelevant if it lacks "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401; *State v. Hurd*, 763 N.W.2d 17, 30 (Minn.2009). Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Minn. R. Evid. 403; *State v. Anderson*, 789 N.W.2d 227, 235 (Minn.2010). In addition to these basic requirements, expert testimony is inadmissible unless it satisfies the requirements of Minn. R. Evid. 702. Rule 702 states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. *The opinion must have foundational reliability.* In addi-

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tion, if the opinion or evidence involves novel scientific theory, the proponent must establish that the underlying scientific evidence is generally accepted in the relevant scientific community.

Minn. R. Evid. 702 (emphasis added). In *Obeta*, we stated that expert testimony is only admissible under Minn. R. Evid. 702 if the proponent shows that the testimony passes a four-part test: (1) The witness must qualify as an expert; (2) the expert's opinion must have foundational reliability; (3) the expert testimony must be helpful to the trier of fact; and (4) if the testimony involves a novel scientific theory, it must satisfy the *Frye – Mack* standard. 796 N.W.2d at 289.

[7][8][9] All expert testimony must satisfy the first three parts of the Rule 702 test. It is only when the proponent offers “novel” “scientific” evidence that the fourth *165 part of the test, the *Frye – Mack* standard, applies. When the *Frye – Mack* standard applies, it requires the proponent of novel scientific evidence to show that the evidence meets two additional requirements. *MacLennan*, 702 N.W.2d at 230 (citing *Goeb*, 615 N.W.2d at 814). First, the proponent of novel scientific evidence must prove that the science “is generally accepted in the relevant scientific community.” *Goeb*, 615 N.W.2d at 814. Second, “the particular scientific evidence in each case must be shown to have foundational reliability.” *Id.* Under the *Frye – Mack* standard, foundational reliability “requires the proponent of a ... test [to] establish that the test itself is reliable and that its administration in the particular instance conformed to the procedure necessary to ensure reliability.” *Id.* (citation omitted) (internal quotation marks omitted).

The court of appeals reversed the district court's evidentiary ruling because it concluded that Rule 702, not the *Frye – Mack* standard, governed the admissibility of expert testimony on the theory of repressed and recovered memory. But the *Frye – Mack* standard is the fourth part of the four-part test set out in rule 702. Therefore, if we conclude that

the district court properly excluded Doe's evidence under one of the first three parts of the test, we need not consider whether the theory of repressed and recovered memory is subject to the *Frye – Mack* standard.

B.

Prior to 2006, Rule 702 provided: “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” Minn. R. Evid. 702 (2006) (amended July 18, 2006). Before 2006, therefore, Rule 702 required a proponent of expert testimony to show that (1) the witness qualifies as an expert and (2) the expert's opinion will aid the trier of fact in determining a fact at issue. *Id.* When interpreting this older version of the rule, we often stated that “the basic requirement of Rule 702 is the helpfulness requirement.” *MacLennan*, 702 N.W.2d at 233 (quoting *State v. Helderbride*, 301 N.W.2d 545, 547 (Minn.1980)); see also, e.g., *State v. Saldana*, 324 N.W.2d 227, 229 (1982). The pre-2006 rule did not specifically require courts to consider whether the expert's opinion had foundational reliability. See Minn. R. Evid. 702 (2006).

[10] The 2006 amendment to Rule 702 added these two sentences: “The [expert's] opinion must have foundational reliability. In addition, if the opinion or evidence involves novel scientific theory, the proponent must establish that the underlying scientific evidence is generally accepted in the relevant scientific community.” Minn. R. Evid. 702 (2012). Under Rule 702's current four-part test, courts may be required to consider foundational reliability in two contexts. First, all experts' “opinion[s] must have foundational reliability” before they can be admitted. Minn. R. Evid. 702. Second, if the *Frye – Mack* standard applies, “the particular scientific evidence in each case must be shown to have foundational reliability[, which] requires the proponent of a ... test [to] establish that

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the test itself is reliable and that its administration in the particular instance conformed to the procedure necessary to ensure reliability.” *Goeb*, 615 N.W.2d at 814 (citations omitted) (internal quotation marks omitted). Rule 702 does not define, generally, what “foundational reliability” means. Indeed, the comments to the 2006 amendments specifically decline to do so: “The ... amendment does not purport to *166 describe what that foundation must look like for all types of expert testimony. The required foundation will vary depending on the context of the opinion, but must lead to an opinion that will assist the trier of fact.” Minn. R. Evid. 702 advisory comm. cmt.—2006 amendments. But, at a minimum, foundational reliability must require that the theory forming the basis for the expert’s opinion or test is reliable.

Here, the district court found that expert testimony on the theory of repressed and recovered memory was inadmissible as foundationally unreliable under the second prong of the *Frye – Mack* standard. The court stated that the foundational reliability prong of *Frye – Mack* required Doe to “show that the theory [of repressed and recovered memory] is reliable and trustworthy, based upon well-recognized scientific principles and independent validation, and that its administration in the particular instance conformed to the procedure necessary to ensure reliability.” *Doe v. Archdiocese of Saint Paul & Minneapolis*, 62–C9–06–003962, Order at 26 (Ramsey Cty. Dist. Ct. Dec. 8, 2009) (citing *Sentinel Mgmt. Co. v. Aetna Cas. & Sur. Co.*, 615 N.W.2d 819, 824 (Minn.2000)). Applying this standard, the court found that, while Doe’s experts claimed that 328 peer-reviewed scientific research articles confirmed the existence and scientific reliability of repressed memory, the studies were unreliable. Specifically, the court stated “that the studies [did] not provide sufficient information about the scope of the subject’s purported amnesia and that the accuracy of the recovered memories has not been scientifically established.” *Id.* In making this finding, the court was supported by Doe’s own expert, Dr. Chu, who conceded, “it was really

impossible to know for sure whether or not [participants in repressed and recovered memory studies] actually remembered those events.” Because the district court concluded that Doe’s experts’ opinions were based on studies with overwhelming methodological flaws, it found that evidence on the theory of repressed and recovered memory was not foundationally reliable.

Doe argues that the district court erred in applying the *Frye – Mack* foundational reliability standard, and instead should have subjected Doe’s expert testimony to only the first three parts of Rule 702. According to Doe, the *Frye – Mack* foundational reliability standard only applies when considering whether a specific novel scientific test is reliable, and here, Doe’s evidence is neither novel, scientific, or related to a test.^{FN6} Relying on cases prior to *167 the 2006 amendment, Doe contends that Rule 702 is a helpfulness test, and that the reliability requirement requires only that the theory on which the expert will testify has gone “beyond the experimental stage and has gained a substantial enough scientific acceptance to warrant admissibility.” *Hennum*, 441 N.W.2d at 798–99. Doe contends that his expert testimony may be admissible under this formulation of Rule 702, and therefore, the district court clearly erred in excluding his expert testimony under Rule 702.

FN6. To the extent that *MacLennan* and *Hennum* suggest that expert testimony on the theory of repressed and recovered memory is “syndrome” evidence and “syndrome” evidence is admissible under Rule 702 without regard to foundational reliability, those cases are procedurally and substantively distinguishable. First, both *MacLennan* and *Hennum* were decided before the amendment to Rule 702 specifically added a foundational reliability requirement. See *MacLennan*, 702 N.W.2d 219 (2005 decision); *Hennum*, 441 N.W.2d 793 (1989 decision). Second, in both of those cases, the opponent of the syndrome

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evidence did not argue that the underlying syndrome was not foundationally reliable. Third, the evidence in those cases was introduced for a vastly different purpose. In both cases, the proponent offered general expert testimony on the characteristics of a syndrome to bolster the proponent's credibility. Specifically, the proponents offered the testimony in order to show that conscious behavior that could have seemed odd to the jury was consistent with normal behavior for someone suffering from the syndrome. *MacLennan*, 702 N.W.2d at 226–28, 233–34; *Hennum*, 441 N.W.2d at 798. Here, Doe is offering the expert testimony to prove that an unconscious psychological process prevented him from knowing that he was sexually abused, thus delaying the accrual of his causes of actions. Simply put, evidence relating to conscious behavioral decisions offered to bolster credibility is different from evidence related to unconscious psychological processes offered to delay the accrual of a cause of action. What Doe did—waiting until well after his 24th birthday to bring his claims—is irrelevant. Why Doe waited is the question that matters and *Hennum* and *MacLennan* are no help in answering that inquiry.

C.

[11] Doe is correct that, prior to amendment in 2006, we often discussed the evidentiary standard of Rule 702 as one of “helpfulness.” But we have not considered the phrase, “[t]he opinion must have foundational reliability,” in the amended version of Rule 702. We have also not decided whether a finding that the data supporting a theory is inherently unreliable under the *Frye – Mack* standard would be determinative of a foundational reliability finding under Rule 702. If such a finding is determinative, then Doe's expert testimony was properly excluded, absent an abuse of discretion, and it is irrelevant whether the district court nominally applied the

Frye–Mack standard.

Jacobson v. \$55,900 in U.S. Currency is our only decision on the subject of foundational reliability under the current version of Rule 702. See 728 N.W.2d 510, 529 (Minn.2007). *Jacobson* dealt with the forfeiture of money in connection with drug trafficking. In *Jacobson*, we analyzed whether “dog sniff evidence” was admissible to prove a connection between seized cash and drug trafficking. *Id.* at 518. Specifically, we considered whether “dog sniff evidence” was foundationally reliable under Minn. R. Evid. 702. *Id.* at 528. (“[T]he party seeking to introduce the alert [of a drug sniffing dog] and related testimony must establish an adequate foundation”).

When utilizing Rule 702, we held that district courts should evaluate the admission of expert testimony on a case-by-case basis, determining whether the expert's testimony will be helpful to the trier of fact and supported by adequate foundation. *Id.* at 529. In the context of “dog sniff evidence” offered to prove a connection between cash seized and drug trafficking in a forfeiture case, we concluded that adequate foundation would comprise “facts such as the certification(s) the dog has achieved, and the nature and extent of the training both the dog and the handler have completed.” *Id.* (citations omitted). Next, we stated “[a] drug detection dog's accuracy rate is also critical to establishing an adequate foundation.” *Id.* In describing the accuracy rate, we stated that both the number of instances where the dog accurately alerted to drugs and the number of instances where the dog failed to alert to the presence of drugs or alerted in the absence of drugs measured accuracy. *Id.* Finally, we insisted that the proponent of the “dog sniff evidence” must establish the steps taken to ensure a reliable test in the particular case. *Id.* Ultimately, we concluded that the “dog sniff evidence” in *Jacobson* was inadmissible as foundationally unreliable. *Id.* at 530–31.

[12][13][14] *Jacobson* illuminates the defining features of a Rule 702 foundational reliability analysis and takes it beyond a mere helpfulness stand-

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ard. First, the district*168 court must analyze the proffered testimony in light of the purpose for which it is being offered. *Id.* at 518, 529. Second, the court must consider the underlying reliability, consistency, and accuracy of the subject about which the expert is testifying. *Id.* at 529. Finally, we clearly stated that the proponent of evidence about a given subject must show that it is reliable in that particular case. *Id.* This analysis is nearly identical to the analysis done under the second prong of the *Frye – Mack* test. We have variously stated that foundational reliability under the *Frye – Mack* standard requires that “the particular scientific evidence in each case must be shown to have foundational reliability,” *Goeb*, 615 N.W.2d at 814, “whether the laboratory conducting the tests in the individual case complied with appropriate standards and controls,” *State v. Roman Nose*, 649 N.W.2d 815, 819 (Minn.2002), or simply as “whether the novel scientific evidence offered is shown to have foundational reliability.” *MacLennan*, 702 N.W.2d at 230. While *Frye – Mack* deals with the reliability of a scientific test and Rule 702 deals with the reliability of an expert’s opinion, the underlying foundational reliability analysis is substantially the same. Therefore, it makes little difference whether the district court called the analysis a “*Frye – Mack*” analysis or a “Rule 702” analysis. As long as the district court considered the relevant foundational reliability factors, we will not reverse its evidentiary finding absent an abuse of discretion. See *State v. Glaze*, 452 N.W.2d 655, 660 (Minn.1990).

[15] Here, Doe intended to offer general testimony about the theory of repressed and recovered memory for the purpose of proving a disability delaying the accrual of his causes of action. If admissible as “syndrome” evidence, Doe’s “experts’ testimony [would] be limited to a description of memory repression and the characteristics that are present in an individual suffering from repressed memory,” and the experts could “not testify to the ultimate fact of whether [Doe] suffered from repressed memory.” ^{FN7} *Doe*, 801 N.W.2d at 209 (citation omitted) (internal quotation marks omit-

ted). For Doe’s claims to be timely, then, he must still show that he actually suffered from the disability of repressed memories from at least the day before his 18th birthday until sometime within 6 years before he filed his claim, because “[m]erely not thinking about the abuse is not enough to delay the running of the statute of limitations.” *169 *W.J.L. v. Bugge*, 573 N.W.2d 677, 682 (Minn.1998).

FN7. These limitations are consistent with our case law on expert testimony relating to “syndrome” evidence. See *MacLennan*, 702 N.W.2d at 234 (limiting testimony on battered child syndrome to a general description of the syndrome and the characteristics exhibited by someone suffering from the syndrome); *Hennum*, 441 N.W.2d at 799 (limiting testimony on battered woman syndrome similarly). Apart from foundational reliability concerns, we note that Doe’s proposed evidence may have insurmountable Rule 403 problems. See Minn. R. Evid. 403. Doe must prove not only that repressed and recovered memory theory exists and is foundationally reliable, but that he actually suffered from it for the entire period from before his 18th birthday until sometime within 6 years of the date he filed this action. See Minn.Stat. § 541.073, subd. 2(a) (“An action for damages based on personal injury caused by sexual abuse must be commenced within six years of the time the plaintiff knew or had reason to know that the injury was caused by the sexual abuse.”). General testimony about the nature of memory repression offers little probative value about the question of whether Doe actually suffered from memory repression, such that he literally was unable to remember the alleged abuse, for that entire period. Given that the studies, at a minimum, are not particularly successful in distinguishing repressed memory from other types of forgetting that would not delay the accrual

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of a cause of action, expert testimony on repressed and recovered memory would have a serious tendency to confuse the jury and unfairly prejudice defendants.

The district court's order cut to the heart of the foundational reliability question, analyzing the underlying reliability, consistency, and accuracy of the theory of repressed and recovered memory—much as we contemplated in *Jacobson*, 728 N.W.2d at 529. After hearing 3 days of expert testimony and reviewing hundreds of studies, the court, in a thorough and painstaking analysis, found that evidence on the theory of repressed and recovered memory lacked foundational reliability when offered to prove a disability delaying the accrual of a cause of action. In other words, the court concluded that, because of serious methodological flaws, the scientific literature relied upon by Doe's experts simply did not support an argument that “someone could have a terrible trauma and then be literally unable to remember it for a period of time.” The studies did not successfully differentiate repressed memory from other types of memory loss that would not delay the accrual of a cause of action, which is a critical distinction. *See Bugge*, 573 N.W.2d at 682. Because only bona fide repressed memories could delay the accrual of a cause of action for injuries based on sexual abuse, Doe needed the studies relied upon by his experts to show a distinction between repressed memories and other types of forgetting. Because they do not, they could not reliably support an argument that someone repressed memories. Moreover, the district court found that “the accuracy of the recovered memories has not been scientifically established,” and Doe's experts conceded that there was no way to tell whether a person was actually suffering from repressed memories in any given case.

Nominally, the district court conducted a *Frye – Mack* foundational reliability analysis, but its conclusions and findings on the theory of repressed and recovered memory were a *de facto* Rule 702 analysis. Rule 702 requires a district court to consider the

purpose for which the expert testimony is being offered, the reliability of the underlying theory, and the reliability of the evidence in the particular case. The court clearly considered all of these aspects of Doe's proffered expert testimony. Therefore, we will review the district court's evidentiary ruling for an abuse of discretion. *Jacobson*, 728 N.W.2d at 529.

D.

[16] After conducting a 3-day hearing, consisting of the testimony of five experts, the district court concluded that the data and studies that purported to prove the existence of repressed and recovered memory lacked foundational reliability. In judging the overall reliability of the theory, the court found that while there are hundreds of studies on the theory of repressed and recovered memory, it was unconvinced that any of the studies had proved the existence of, much less the accuracy or reliability of, repressed and recovered memories.

In short, based on the testimony of the experts (detailed above), this finding is more than adequately supported by the record. Specifically, Dr. Chu testified that there is no method for actually establishing the accuracy of recovered memories without corroborating evidence and Dr. Pope testified that “there [is] no way to validate that [the people claiming memory repression] were literally unable to remember the event.” Doe's expert, Dr. Dalenberg, also conflated “memory repression” with “forgetting.” Moreover, Dr. Loftus testified that the significant post-event “suggestions” in this case made it more likely that Doe had suffered from memory distortion. Because there is ample evidence in the record supporting a *170 conclusion that the theory of repressed and recovered memory lacks foundational reliability when offered for the purpose of proving that Doe had a disability delaying the accrual of his causes of action, the district court did not abuse its discretion when it excluded Doe's expert testimony.^{FN8}

FN8. The dissent's suggestion that we have focused our analysis on the *Frye – Mack*

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standard is puzzling to say the least. As we have noted several times in our opinion, the real issue here is whether the evidence proffered by Doe was foundationally reliable. As we described in section IV.C., it is immaterial that the district court *nominally* conducted a *Frye – Mack* foundational reliability analysis because, in doing so, it conducted a *de facto* Rule 702 analysis. The district court concluded that the evidence was not foundationally reliable, and because we can find no abuse of discretion in that finding, we must reverse the court of appeals. While in some cases it may be crucial to decide whether or not the district court properly undertook a *Frye – Mack* analysis (for example, a case where the district court excluded evidence *solely* on general acceptance grounds), this is not that case.

The district court has already determined that Doe's evidence is foundationally unreliable. As such, Doe's evidence is inadmissible under Rule 702, and a remand for a Rule 702 analysis would serve no purpose.

We acknowledge that courts in other jurisdictions have reached different conclusions on this issue and recognize that some have admitted evidence on the theory of repressed and recovered memory under differing evidentiary standards when offered for a variety of reasons. *See Phillips v. Gelpke*, 190 N.J. 580, 921 A.2d 1067, 1068 (2007) (holding that in a timely action for damages resulting from sexual abuse, a plaintiff could testify about her claim of repressed and recovered memories without expert testimony on the theory because the case was one of “I forgot and then I remembered,” and jury did not need an expert to help them understand that process) (emphasis added).^{FN9} However, many *171 jurisdictions have, for a variety of reasons, ruled that evidence of repressed memories is insufficient to toll statutes of limita-

tions. *Travis v. Ziter*, 681 So.2d 1348 (Ala.1996); *Barre v. Hoffman*, 326 S.W.3d 415 (Ark.2009) (holding that memory repression was not a disability tolling a statute of limitations); *Nuccio v. Nuccio*, 673 A.2d 1331 (Me.1996); *Doe v. Maskell*, 342 Md. 684, 679 A.2d 1087, 1092 (1996) (“After reviewing the arguments on both sides of the issue, we are unconvinced that repression exists as a phenomenon separate and apart from the normal process of forgetting. Because we find these two processes to be indistinguishable scientifically, it follows that they should be treated the same legally.”); *Lemmerman v. Fealk*, 449 Mich. 56, 534 N.W.2d 695 (1995) (holding that memory repression cannot toll the statute of limitations and that the opposite holding would eviscerate the statute of limitations); *State v. Hungerford*, 142 N.H. 110, 697 A.2d 916 (1997); *Pratte v. Stewart*, 125 Ohio St.3d 473, 929 N.E.2d 415 (2010) (discussing that its case law allowing memory repression to toll the statute of limitations was abrogated by statute); *Lovelace v. Keohane*, 831 P.2d 624 (Okla.1992); *Dalrymple v. Brown*, 549 Pa. 217, 701 A.2d 164 (1997); *Doe v. Archdiocese of Milwaukee*, 211 Wis.2d 312, 565 N.W.2d 94 (1997) (holding that, as a matter of public policy, the unreliability of repressed memory theory prevented it from tolling the statute of limitations); *see also Smith v. Smith*, 830 F.2d 11 (2d Cir.1987).

FN9. Most recently, the Supreme Court of Massachusetts held that expert testimony on the theory of memory repression was admissible under a standard somewhat similar to our *Frye – Mack* standard. *Commonwealth v. Shanley*, 455 Mass. 752, 919 N.E.2d 1254, 1263 (2010) (citing *Commonwealth v. Lanigan*, 419 Mass. 15, 641 N.E.2d 1342 (1994) for its evidentiary standard).

Shanley is distinguishable on substantive and procedural grounds. First, the criminal action in *Shanley* was clearly timely and therefore it was immaterial whether

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the complainant had repressed his memories or simply recalled them after a period of ordinary forgetting. As such, the court had no need to, and did not, differentiate between ordinary forgetting and repressed memory because in a timely action the distinction is irrelevant. See *Shanley* at 1272 n. 31 (stating that a jury instruction on the necessity that the complainant repressed his memories was unnecessary because “*memories of childhood sexual abuse may be forgotten and remembered without being repressed*”) (emphasis added). Here, however, the difference between “forgetting” and “repression” is of utmost importance because only a mental disability that shows Doe had no reason to know of his cause of action due to repressed memories could delay the accrual of Doe's claims. See *Bugge*, 573 N.W.2d at 682. Therefore, *Shanley* simply does not address the question we face here. Second, the *Shanley* court did not even discuss whether evidence on the theory of repressed and recovered memory has foundational reliability when offered to prove a disability delaying the accrual of a cause of action. Third, *Shanley* reached the Massachusetts Supreme Court in a procedural posture different from that in which *Doe* reached us. Like in Minnesota, appellate courts in Massachusetts review evidentiary findings for an abuse of discretion. See *Shanley*, 919 N.E.2d at 1266. In *Shanley*, the trial court, contrary to the district court in this case, ruled that the evidence was admissible. While noting that there are significant doubts about the validity of the theory, the Massachusetts Supreme Court concluded that the trial court had not abused its discretion in admitting the evidence. *Id.* Because the *Shanley* court applied the same standard of review to an opposite district

court evidentiary finding on admissibility of the expert testimony, offered for a different purpose, its decision is of little value here.

V.

Having determined that the district court properly excluded Doe's expert testimony on the theory of repressed and recovered memory, we now consider whether the district court erred in granting the Dioceses summary judgment. We note again that, because the district court granted the Dioceses summary judgment and dismissed Doe's claims on statutes of limitations grounds, the timeliness of Doe's claims is the only question of material fact we need consider.

A.

[17][18] Doe brought his negligence claims under the so called “delayed discovery statute.” Under the delayed discovery statute, the statute of limitations for claims based on injuries from sexual abuse begins to run once a reasonable person would know that he is injured. *D.M.S. v. Barber*, 645 N.W.2d 383, 389 (Minn.2002). As a matter of law, one is injured if one is sexually abused. *Blackowiak v. Kemp*, 546 N.W.2d 1, 3 (Minn.1996). But, as a matter of law, “a reasonable person under the legal disability of infancy is incapable of recognizing or understanding that he or she has been sexually abused,” and therefore the 6-year statute of limitations in the delayed discovery statute does not begin to run until the person reaches the age of 18. *Barber*, 645 N.W.2d at 389.

Doe claims that Fr. Adamson sexually abused him in 1980 or 1981. Because Doe was a minor at that time, the delayed discovery statute did not begin to run until Doe's 18th birthday on June 11, 1985. See *Barber*, 645 N.W.2d at 389. Without expert testimony tending to prove that Doe actually suffered from repressed memories from sometime before June 11, 1985, until sometime after April 24, 2000, he cannot show that his claims are timely. ^{FN10} Cf. *172 *Harrington v. Ramsey Cty.*, 279 N.W.2d 791, 796 (Minn.1979) (holding that a

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“[p]laintiff’s mere assertion of insanity to toll the statute of limitations does not create a factual dispute to be resolved by the jury.”). Because Doe cannot show that his negligence claims accrued after April 24, 2000, Doe’s claims expired after his 24th birthday on June 11, 1991. Therefore, the district court did not err in concluding that Doe’s claims were untimely.

FN10. We acknowledge that, in enacting Minn.Stat. § 541.073, the Legislature relied on discussions about the theory of repressed and recovered memories. See *Bugge*, 573 N.W.2d at 680 n. 5. But the delayed discovery statute itself neither expressly adopts nor validates the theory of repressed and recovered memory. Instead, by creating a 6-year statute of limitations from “the time the plaintiff knew or had reason to know that the injury was caused by the sexual abuse,” the statute creates a possible avenue for delaying the accrual of a cause of action if the theory can be validated or developed to the point where evidence relating to it would be reliable enough to be admissible. Statutes of limitation are creatures of legislative action; the Legislature could abolish statutes of limitation as applied to specific types of actions or could choose to specifically recognize repressed and recovered memories as an exception to a limitation on actions. Here, the Legislature did neither, and only enacted a general “knew or had reason to know” limitation. *Id.* at 680.

Moreover, the “limitations period found in section 541.073 was not intended to be open-ended,” *id.*, and we judge when a plaintiff “knew or should have known” he had injuries caused by sexual abuse under an objective standard. *Barber*, 645 N.W.2d at 387. As the expert testimony at the *Frye – Mack* hearing made clear, there is essentially no defense to a claim

of repressed memory because the plaintiff claiming repressed memory cannot be effectively cross-examined about his honestly held belief that the memory was repressed. Doe’s own experts conceded that there is no way to determine whether the supposedly repressed memories are accurate, absent independent corroboration. And the Dioceses’ experts testified that there is little, if any, evidence suggesting that memory repression is a process different from other memory processes that cannot toll a statute of limitations. When we consider all of these factors, under current scientific understanding of the theory, allowing repressed memories to delay the accrual of a cause of action eviscerates an objective statute of limitations and allows any plaintiff to bring stale abuse claims simply by uttering the words “I repressed my memory.”

B.

[19][20] Doe claims that his fraud claims are subject to the 6-year fraud statute of limitations, not the statute of limitations in the delayed discovery statute.^{FN11} The 6-year fraud statute of limitations begins to run when the aggrieved party discovers the facts constituting the fraud. Minn.Stat. § 541.05, subd. 1(6). We judge discovery of the fraud under the reasonable person standard. *Bustad v. Bustad*, 263 Minn. 238, 242, 116 N.W.2d 552, 555 (1962). The facts constituting the fraud are deemed to have been discovered when they were actually discovered or, “by reasonable diligence, should have been discovered.” *Toombs v. Daniels*, 361 N.W.2d 801, 809 (Minn.1985).

FN11. The Dioceses contend that the delayed discovery statute of limitations applies to all of Doe’s claims because all of Doe’s claims are predicated on injuries caused by sexual abuse. Because we conclude that Doe’s claims would be untimely

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under either statute of limitations, we assume, without deciding, that the fraud statute of limitations in Minn.Stat. § 541.05, subd. 1(6), governs Doe's fraud claims.

Without expert testimony that he suffered from repressed memories, Doe's only evidence that his fraud claims are timely is Doe's bare assertion that he did not subjectively know that the Dioceses defrauded him until 2001 or 2002. Doe claims that he "did not discover that the [Dioceses] knowingly placed a child molester at Risen Savior and allowed that child molester to access kids, including himself, until sometime after he had a memory that he was sexually abused in 2001 or 2002."

Doe's subjective claim that he did not actually know the facts constituting the fraud is not relevant because the standard is an objective one. There is no dispute in the record that as an objective matter, Doe should have known those facts in the 1980s *173 or 1990s. First, in 2009 Doe told Fr. Thomas Doyle that, *at the time of the alleged abuse*, Doe felt emotionally paralyzed, shocked, and isolated and that he was afraid to tell anyone about the abuse. Doe also "was aware that Fr. Adamson had sexually abused other boys in the 1980's." Clearly, if Doe knew that Fr. Adamson had abused Doe and other children in the 1980s, he actually knew that Fr. Adamson was a danger to children.

There is also no dispute that Doe should have known that the Dioceses concealed Fr. Adamson's history of abuse well before he filed his claims. Briefly, there were over 130 local newspaper articles written about Fr. Adamson's history of abuse in the late 1980s and early 1990s. Doe's mother asked Doe in 1986 if Fr. Adamson had ever abused Doe, to which Doe responded in the negative. And Doe testified that, in the 1990s, he was aware of the problem of sexual abuse in the Catholic Church. Because the evidence establishes that Doe should have known about the facts constituting his fraud claim by at least the early 1990s, there is no genuine issue of material fact as to whether Doe's fraud claims are timely. Therefore, the district court did

not err in concluding that Doe's fraud claims were untimely.

Because Doe's claims are time-barred, we hold that the district court did not err in granting the Dioceses summary judgment on, and dismissing, all of Doe's claims.

Reversed.

STRAS, J., took no part in the consideration or decision of this case.

ANDERSON, PAUL H., Justice, dissenting.

I respectfully dissent. Unlike the majority, I would affirm the court of appeals' holding that the district court erred when it (1) used our *Frye – Mack* standard to exclude plaintiff's expert testimony on repressed-memory theory, and (2) granted summary judgment in favor of the defendant religious organizations. I would hold that in this action based on alleged child sexual abuse, the admissibility of expert testimony regarding repressed-memory theory must be determined under the relevant provisions of Rule 702 of the Minnesota Rules of Evidence.

I reach the conclusion that *Frye – Mack* is not the proper standard here because we have said that the *Frye – Mack* standard does not apply to all questions involving scientific evidence. *See State v. MacLennan*, 702 N.W.2d 219, 230–31 (Minn.2005). More specifically, we have said that our *Frye – Mack* standard only applies to evidence based on "emerging scientific techniques." *Jacobson v. \$55,900 in U.S. Currency*, 728 N.W.2d 510, 528 (Minn.2007) (stating that "the technique of using trained dogs to detect drug odors is neither emerging nor scientific"). Unlike the majority, I conclude that the expert testimony that John Doe seeks to have admitted here does not fit comfortably within the parameters of the type of evidence we have held is governed by our *Frye – Mack* standard, i.e., expert evidence based on emerging scientific techniques.

Rather, I conclude that the admissibility ana-

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lysis of John Doe's proffered expert testimony on repressed memory theory fits much more naturally within the ambit of Rule 702. Under a Rule 702 analysis, expert testimony is admissible if it will assist the trier of fact to understand the evidence or determine facts at issue and has foundational reliability. John Doe asserts that his proffered expert testimony meets both the foundational reliability and helpfulness mandates of Rule 702. I agree with the underlying premise of Doe's assertion. Doe has made a sufficient showing*174 such that he is entitled to have the district court make a determination whether his proffered testimony meets the foregoing relevant provisions of Rule 702. Further, I conclude that because there may be a genuine issue of material fact as to when John Doe became aware of his memory that Father Thomas Adamson may have sexually abused him, the district court erred when it used the statute of limitations as the grounds upon which to grant summary judgment in favor of the defendant religious organizations.

On April 24, 2006, plaintiff John Doe commenced this action for negligence and fraud against the defendant religious organizations—the Archdiocese of Saint Paul & Minneapolis and the Diocese of Winona. In his action, John Doe alleges that the defendant religious organizations were negligent in allowing Father Thomas Adamson, a priest whom they supervised and controlled, to sexually molest him. Doe also alleges that the defendant religious organizations fraudulently concealed and intentionally failed to disclose that Father Adamson was a child molester.

The story that provides the backdrop to John Doe's action overflows with tragedy, sorrow, and pathos. It also presents a profoundly sad tale about how the leadership of the defendant religious organizations failed to fulfill their responsibility to act in an appropriate manner to adequately protect vulnerable young children and adolescents entrusted to their care. Those in leadership positions within the defendant religious organizations failed to act in a manner that would provide sufficient protection

of the health, welfare, and safety of these children and adolescents.

More specifically, the record before us demonstrates that it is beyond dispute that Father Adamson had a long history of sexually molesting children. It is well established that between the early 1960s and the 1990s, Father Adamson molested several children who were members of parishes where he served as a priest. It is also beyond dispute that the defendant religious organizations knew that Father Adamson molested children entrusted to their care. The record shows that the defendant religious organizations received reports that Father Adamson was molesting children; and, in fact, Father Adamson admitted to certain persons in leadership positions within the defendant religious organizations that he had been a party to several separate indecent incidents with young boys who were members of his parishes.

While the defendant religious organizations did in 1974 and 1981 refer Father Adamson to medical facilities for treatment of his condition, it is also beyond dispute that they did not make Father Adamson's history of sexually molesting children public before the mid-1980s. More problematic is the defendant religious organizations' response to the situation once they knew that Father Adamson was molesting children entrusted to their care. The defendant religious organizations' long-term and recurring response was to transfer Father Adamson to a different parish.

John Doe belonged to one of those different parishes to which Father Adamson was reassigned after the defendant religious organizations received reports that Father Adamson was sexually molesting children in the parish to which he was assigned. More specifically, in February 1981, after approximately 1 month of treatment at a hospital, Father Adamson was assigned to John Doe's parish—Church of the Risen Savior in Burnsville, Minnesota. It was during the time period when Father Adamson was assigned to Risen Savior parish that the acts of child abuse involving John Doe

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allegedly occurred.

*175 While the facts in the story that provides the backdrop to John Doe's action are generally beyond dispute, what is in dispute is whether Father Adamson sexually molested John Doe while serving as Doe's parish priest at Risen Savior. Doe alleges that Father Adamson sexually molested him on four occasions in 1980 or 1981. Doe claims that at some unspecified time after those incidents he repressed his memories of the alleged sexual abuse. Doe asserts that it was not until the summer of 2002 that he recovered some memory of these incidents and sought therapy from mental health professionals. He alleges that this therapy enabled him to more fully recover the memories of sexual abuse by Father Adamson that he had previously repressed. Doe commenced this action only after he allegedly recovered his memory of these alleged acts of sexual abuse.

The timing of the alleged recovery of Doe's memory is very important here because the parties agree that the statute of limitations applicable to Doe's negligence-based claims is Minn.Stat. § 541.073 (2010). Section 541.073 provides that an action for damages based on personal injury caused by sexual abuse or negligently permitting sexual abuse "must be commenced within six years of the time the plaintiff knew of or had reason to know that the injury was caused by the sexual abuse." We have said that because the "concepts of sexual abuse and injury within the meaning of this statute are essentially one and the same, not separable—as a matter of law one is 'injured' if one is sexually abused." *Blackowiak v. Kemp*, 546 N.W.2d 1, 3 (Minn.1996).

The "ultimate question" we must answer when determining whether the statute of limitations prohibits Doe's action is quite simple when stated in the abstract—we must determine "the time at which" John Doe knew or should have known that he was sexually abused. *Id.* While the question can be stated simply, the answer is often difficult to ascertain and the route to be taken when seeking the

answer is often open to dispute. But, our court has already provided some benchmarks for making this determination. We have said that our determination is subject to "the objective, reasonable person standard." *Id.* We have also said that the limitations period for tort claims "begins to run once a victim is abused unless there is some legal disability, such as the victim's age, or mental disability, *such as repressed memory of the abuse*, which would make a reasonable person incapable of recognizing or understanding that he or she had been sexually abused." *W.J.L. v. Bugge*, 573 N.W.2d 677, 681 (Minn.1998) (emphasis added).

In addition, the Legislature has provided some of its own benchmarks for determining when the statute of limitations begins to run in a sexual abuse case. One such benchmark is provided by the legislative history of Minn.Stat. § 541.073. In drafting section 541.073—also known as the "delayed discovery statute"—the Legislature "acknowledged that repressed memory ... may prevent sexual abuse victims from coming forward with actions against their alleged abusers in a timely fashion." *Bugge*, 573 N.W.2d at 680 n. 5 (citing Hearing on S.F. 315, S. Judiciary Comm., Criminal Law Div., 76th Minn. Leg., Feb. 17, 1989 (audio tape)). The Legislature "sought to address this phenomenon by giving sexual abuse victims additional time to recognize the abuse they suffered while placing a limit on when such claims may be brought." *Id.* at 680.

At the district court level during the pretrial in this case, John Doe proffered expert testimony in support of his repressed-memory theory. The defendant religious organizations asked the court to *176 conduct a *Frye – Mack* hearing to determine the admissibility of Doe's proffered testimony. The defendant religious organizations claim that Doe did not object to the court's use of the *Frye – Mack* standard and appear to argue on appeal that because there was no objection our analysis on appeal must focus on whether Doe's proffered testimony is admissible under *Frye – Mack*. But the record reflects that Doe did object to the court's use of the *Frye –*

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Mack standard.^{FN1} Because Doe made an objection before the district court, I conclude that Doe has properly preserved for appeal the issue of which standard is the proper standard for the court to apply—*Frye-Mack* or Rule 702. Thus, for purposes of this appeal, the issue before us concerns which of the two evidentiary standards the court should apply when determining the admissibility of Doe's proffered expert testimony on repressed memory. When we conduct this type of analysis, Rule 702 emerges as the proper standard.

FN1. Despite his objection to the use of the *Frye – Mack* standard, Doe argues in the alternative on appeal that the two expert opinions he seeks to admit in support of his claims related to repressed memory meet the *Frye – Mack* standard. Perhaps because of this argument, the majority has chosen to focus its analysis on *Frye – Mack*.

The admissibility of expert testimony is governed by Minn. R. Evid. 702, which provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. The opinion must have foundational reliability. In addition, if the opinion or evidence involves novel scientific theory, the proponent must establish that the underlying scientific evidence is generally accepted in the relevant scientific community.

Expert testimony is admissible under Rule 702 if: (1) the witness is qualified as an expert, (2) the expert's opinion has foundational reliability; (3) the expert testimony is helpful to the jury; and (4) if the testimony involves a novel scientific theory, it must satisfy the *Frye – Mack* standard. *State v. Obeta*, 796 N.W.2d 282, 289 (Minn.2011).

At issue is whether the *Frye – Mack* standard applies to Doe's proffered expert testimony about repressed memory in cases involving child sexual abuse victims. See *Frye v. United States*, 293 F. 1013, 1014 (D.C.Cir.1923); *State v. Mack*, 292 N.W.2d 764, 768 (Minn.1980). The *Frye – Mack* test has two prongs:

Under the first prong, the court asks whether experts in the field widely share the view that the results of scientific testing are scientifically reliable. Under the second prong of the *Frye – Mack* test, the court considers whether the laboratory conducting the tests in the individual case complied with appropriate standards and controls....

State v. Hull, 788 N.W.2d 91, 103 (Minn.2010) (footnote omitted) (citations omitted) (internal quotation marks omitted); see also *Goeb v. Tharaldson*, 615 N.W.2d 800, 815 (Minn.2000) (stating that questions of “general acceptance in the relevant scientific field” are questions of law, but questions of foundational reliability are reviewed under the abuse of discretion standard).

As previously noted, we have said the *Frye – Mack* standard does not apply to all questions involving the admissibility of scientific evidence. See *MacLennan*, 702 N.W.2d at 230–31. Application of the standard is limited to evidence based on *177 “emerging scientific techniques.” See *Jacobson*, 728 N.W.2d at 528. We have explained that the application of the *Frye – Mack* standard supports a distinction between different types of expert testimony. More specifically, we stated that “[t]he requirements of the *Frye – Mack* standard support” a “distinction between scientific evidence derived from a specific test or diagnosis and expert testimony that offers an explanation for a person's behavior.” *MacLennan*, 702 N.W.2d at 232–33; see also *State v. Hennem*, 441 N.W.2d 793, 797–99 (Minn.1989) (declining to use *Frye – Mack* standard for expert testimony regarding battered woman syndrome).

In *MacLennan*, a case which addressed the ad-

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missibility of expert testimony on battered child syndrome, we engaged in an extensive discussion on the proper use of the *Frye – Mack* standard. Our discussion in *MacLennan* is relevant and helpful here because that discussion took place in the context of circumstances that were significantly similar to the circumstances presented by this case. 702 N.W.2d at 230–35. We noted in *MacLennan* that we had previously “applied *Frye – Mack* to evidence falling into the general field of psychology,” but had not “applied *Frye – Mack* in cases addressing the admissibility of ‘syndrome’ evidence offered to explain behavior.” *Id.* at 230. In *MacLennan* we cited the following cases in support of this statement:

State v. Borchardt[,] 478 N.W.2d 757 (Minn.1991) (concluding that the trial court did not abuse its discretion in excluding expert testimony of “male sexual victimization”). Compare *Mack*[,] 292 N.W.2d at 768 (applying *Frye* to hypnotically-induced testimony), [and] *State v. Anderson*[,] 379 N.W.2d 70, 79 (Minn.1985) (applying *Frye* and excluding the results of a personality assessment), with *State v. Hennem*[,] 441 N.W.2d 793 (Minn.1989) (holding that expert testimony on battered woman syndrome is admissible); *State v. Hall*[,] 406 N.W.2d 503 (Minn.1987) (holding that the trial court did not abuse its discretion in admitting expert testimony concerning the behavioral characteristics typically displayed by adolescent victims of sexual assault); *State v. Myers*[,] 359 N.W.2d 604 (Minn.1984) (holding that expert testimony about the emotional and psychological characteristics often observed in children who are victims of sexual abuse was admissible); [and] *State v. Saldana*[,] 324 N.W.2d 227 (Minn.1982) (holding that expert testimony on rape trauma syndrome was inadmissible).

702 N.W.2d at 230 n. 3. In our analysis, we drew a specific distinction between cases involving physical science and cases involving syndromes. We said:

Unlike a case involving physical science such as DNA testing, in the area of “syndromes” experts do not administer a specific set of tests to discern whether a defendant suffers from either battered woman syndrome or battered child syndrome. Further, such experts may not testify about whether a particular defendant actually suffers from a syndrome. Rather, experts on “syndromes”—including battered child syndrome—are only permitted to testify about the syndrome in a general manner, provided that the testimony is “helpful” to the jury.

Id. at 233 (citations omitted). In essence, in *MacLennan* we concluded that expert testimony on syndromes, unlike DNA and other physical science evidence, is not the type of evidence that the analytical framework established by *Frye – Mack* was designed to address. *Id.*

The court of appeals, in concluding that the district court erred when it applied the *Frye – Mack* standard to Doe’s proffered *178 expert testing, stated that the “reasoning in *MacLennan* persuades us that *Frye – Mack* is not the appropriate analytical framework for evaluating the admissibility of the proffered expert testimony on the repressed-memory theory in this case.” *Doe v. Archdiocese of St. Paul & Minneapolis*, 801 N.W.2d 203, 207 (Minn.App.2011). The court of appeals went on to explain:

Unlike DNA evidence, for example, in this case, no “technique [or] procedure [] based on chemical, biological, or other physical sciences” exists for evaluation by the scientific community. Instead, the community is left to disagree about a social or psychological theory of behavior that cannot be subjected to a definitive scientific test. No “method” of testing the condition of repressed memory exists for general acceptance or non-acceptance by the scientific community. Similarly, no “scientific techniques” or “fancy devices” exist for presentation in court that could “mislead lay jurors awed by an aura of mystic infallibility.”

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Id. at 207–08 (citations omitted).

I agree with the court of appeals' analysis. That court correctly understood what we were getting at in *MacLennan* and applied the proper standard. The court then remanded this case to the district court for a determination of the admissibility of Doe's proffered expert testimony under the relevant evidentiary standards articulated in Minn. R. Evid. 702. I would do the same.

I would remand this case to the district court and leave the question of the admissibility of Doe's expert testimony to that court's sound discretion. On remand the district court should evaluate whether Doe's proffered expert testimony would assist the jury to understand the distinction between repressed memory and the ordinary process of forgetting—a distinction that may well be beyond the normal understanding of a layperson. Further, the court should consider our already articulated explanation for the delayed discovery statute. We have said:

The underlying rationale for the limitations period contained in Minn.Stat. § 541.073 is that many sexual abuse victims, especially young children, are psychologically and emotionally unable to recognize that they have been abused. As a result, these victims are often incapable of bringing their claims within the [ordinary] limitations period....

Bugge, 573 N.W.2d at 680. Here it is important to reflect upon the previously discussed benchmark established by the Legislature. As noted, the Legislature has “acknowledged that repressed memory, denial, shame, and other similar factors may prevent sexual abuse victims from coming forward with actions against their alleged abusers in a timely fashion.” *Id.* at 680 n. 5. And as the court of appeals said in this case:

The reaction of a child to sexual abuse, under the circumstances alleged in this case, may be outside the common understanding of an average juror. Armed with the additional understanding provided through expert testimony, the jury may

be able to determine whether [Doe] suffered from repressed memory of his abuse, tolling the limitations period under Minn.Stat. § 541.073.

Doe, 801 N.W.2d at 209.

If upon remand the district court admits Doe's expert testimony, that does not mean his experts have free rein to render their opinions on all matters involving repressed memory that are specific to Doe's case. Any expert testimony should be limited to a description of memory repression and the characteristics that are present in an individual suffering from repressed memory. If allowed to testify, the experts *179 may not testify to the ultimate fact of whether Doe suffered from repressed memory. Further, the defendant religious organizations can attempt to rebut Doe's expert testimony through cross-examination and the presentation of their own expert testimony.

At this point, there is a need to address the defendant religious organizations' argument that any decision affirming the court of appeals will establish a new standard of proof that will have far reaching consequences and will open up the court to many different kinds of psychological evidence. The defendant religious organizations also argue that if we affirm, we will be ignoring overwhelming scientific evidence in the record that supports the district court's finding that the theory of repressed and recovered memory has not achieved general scientific acceptance and does not have foundational reliability—a finding they assert is supported by opinions from courts in other jurisdictions that have increasingly expressed concern over the validity of recovered memories.^{FN2}

FN2. See *Friedman v. Rehal*, 618 F.3d 142, 160 (2d Cir.2010) (discussing “consensus within the social science community that suggestive memory recovery tactics can create false memories”); *State v. Hungerford*, 142 N.H. 110, 697 A.2d 916, 923–24 (1997) (applying *Daubert* and concluding that “a case-by-case approach,

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tempered with skepticism, is most appropriate in this context”); *Franklin v. Stevenson*, 987 P.2d 22, 28 (Utah 1999) (concluding that testimony concerning therapeutic recovery techniques used in connection with revived memories was unreliable).

I acknowledge that the arguments of the defendant religious organizations have some merit. Courts in other jurisdictions are divided on the issue of whether a *Frye* or *Daubert*^{FN3} hearing is needed to assess the admissibility of repressed memory evidence, and courts are also divided on the ultimate admissibility of this type of evidence.^{FN4} But, that is not the situation in Minnesota. We have endorsed a distinction between “scientific evidence derived from a specific test or diagnosis” and “expert testimony that offers an explanation for a person's behavior.” *MacLennan*, 702 N.W.2d at 232–33. In *MacLennan* we decided that the *Frye – Mack* analytic framework is not suitable to expert testimony in the area of syndromes—specifically, battered child syndrome. But, we also acknowledged that we had applied the *Frye – Mack* test to psychological evidence. *Id.* at 230. That said, I cannot ignore the *180 fact that the Legislature has enacted the delayed discovery statute, which enactment indicates that the Legislature has already concluded that repressed memory and “other similar factors may prevent sexual abuse victims from coming forward ... in a timely fashion.” *Bugge*, 573 N.W.2d at 680 n. 5. The Legislature's decision to codify the concept of repressed memory should be a clear indication that in Minnesota expert repressed memory testimony should not be viewed under the lens of the *Frye – Mack* “emerging scientific techniques” standard. Rather, given the position taken by the Legislature and the other reasons I have listed, the analysis to be undertaken when determining the admissibility of Doe's proffered expert testimony falls much more comfortably within the ambit of the foundational reliability and helpfulness provisions of Rule 702.^{FNS}

FN3. Like *Frye – Mack*, the terms *Frye* and *Daubert* refer to rules of evidence which are used in other jurisdictions on the admissibility of scientific evidence and again, like *Frye – Mack*, the terms take their respective names from the court cases that originally articulated the rule of evidence they represent. See *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923).

FN4. See, e.g., *Shahzade v. Gregory*, 923 F.Supp. 286, 289–90 (D.Mass.1996) (applying *Daubert* and finding general acceptance and admitting evidence); *Logerquist v. McVey*, 196 Ariz. 470, 1 P.3d 113, 133–34 (2000) (holding that *Frye* does not apply and admitting evidence); *Wilson v. Phillips*, 73 Cal.App.4th 250, 86 Cal.Rptr.2d 204, 208 (1999) (concluding that *Frye* does not apply and admitting evidence); *Doe v. Shults–Lewis Child & Family Servs., Inc.*, 718 N.E.2d 738, 750–51 & n. 6 (Ind.1999) (applying *Daubert* but refusing “to declare repressed memory syndrome unreliable”); *State v. Hungerford*, 142 N.H. 110, 697 A.2d 916, 929–30 (1997) (applying *Frye* and precluding evidence); *Moriarty v. Garden Sanctuary Church of God*, 334 S.C. 150, 511 S.E.2d 699, 710–11 (S.C.Ct.App.1999) (concluding that repressed memory syndrome is a valid theory under South Carolina standard for admission of scientific evidence), *aff'd*, 341 S.C. 320, 534 S.E.2d 672 (2000). Sometimes the result depends on how the memory was recovered—for example, whether the memory was recovered as a result of counseling or suggestive memory techniques. See generally 6 Clifford S. Fishman & Anne T. McKenna, *Jones on Evidence* § 41:20 (7th ed.1992).

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FN5. The majority asserts that there is no need to remand to the district court for a foundational reliability determination under Rule 702 because the court engaged in a “de facto” Rule 702 analysis. I disagree with following this procedure. It is undisputed that the district court analyzed John Doe’s proffered testimony under the *Frye – Mack* standard. As I have discussed in this dissent, *Frye – Mack* is the wrong standard. There is no guarantee, given the nuances in the *Frye – Mack* standard and Rule 702, that the court’s result would be the same if the foundational reliability determination were made under Rule 702. John Doe is entitled to have his proffered expert testimony on repressed memory analyzed under the correct standard.

For many of the same reasons I have articulated for reversing the district court’s grant of summary judgment on Doe’s negligence claim, I would also reverse the district court’s grant of summary judgment on Doe’s fraud claims. I conclude that once the court has sorted out the admissibility of Doe’s expert testimony under the proper evidentiary standard, the court will be in a much better position to make a decision on whether Doe’s fraud claims are timely under the relevant statute of limitations.

For all the foregoing reasons, I would affirm the court of appeals’ decision reversing the district court and would remand to the district court so that it can properly evaluate and consider the admissibility of Doe’s proffered expert testimony under the relevant provisions of Rule 702.

MEYER, Justice (dissenting).

I join in the dissent of Justice Paul H. Anderson.

Minn.,2012.
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END OF DOCUMENT

Appendix G

Dr. Trowbridge Report, Date January 19, 1996

Brett C. Trowbridge, Ph.D., J.D.
Licensed Psychologist #541, Attorney at Law #12433
Fellow, American College of Forensic Psychology
209 East Fourth Ave., #208
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(360) 754-3372
January 19, 1996

RECEIVED

PSYCHOLOGICAL REPORT

JAN 19 1996

NAME: Marvin Faircloth

MASON COUNTY
PROSECUTOR

AGE: 19 (D.O.B. 9-8-'76)

CONFIDENTIAL REPORT! This report has been authorized only for limited distribution. Any distribution of this report beyond that authorized requires the prior written consent of the client named above or legal guardian. Please respect the client's privacy and avoid unauthorized distribution.

REASON FOR REFERRAL:

Mr. Faircloth was referred by Mason Co. Deputy Prosecuting Attorney Amber Finlay. Mr. Faircloth and another individual, Keith Murphy, are charged with murder in the first degree in connection with the February, 1995, death of Frank Faircloth, who was Marvin Faircloth's adoptive father, at the home where all three of them were living. Although Mr. Faircloth initially told the police he had not been involved in the incident, eventually both Mr. Murphy and Mr. Faircloth made confessions in which they admitted they were involved in the killing.

Mr. Faircloth was first evaluated by a by a neuropsychologist, James Maxwell, Ph.D.; in his October 17, 1995, report Dr. Maxwell did not offer any forensic opinions concerning any of the issues in this case, but did find Mr. Faircloth to show mild impairments of language and attentional skills, and suggested the possibility of an attention deficit/hyperactivity disorder or a sensory integration disorder. Dr. Maxwell measured his IQ at 89 on one instrument, and at 99 on another; a variety of other tests were administered as well.

Mr. Faircloth was also evaluated by a psychiatrist, Sean Killoran, M.D. Marvin Faircloth told Dr. Killoran that he had been sniffing paint with Mr. Murphy on the evening of the incident, when Frank Faircloth came upstairs and caught them sniffing, at which time Marvin became angry and decided to "go

kick his ass". Marvin Faircloth grabbed a sharpened stick and stabbed Frank with it. After that Mr. Murphy hit the victim with a bottle and table among other things. Marvin Faircloth told Dr. Killoran that he went up stairs and threatened another youth, telling him not to come downstairs and witness the attack. Marvin Faircloth also admitted to Dr. Killoran that after that he returned and then hit Frank in the head with a hammer. After Frank died Mr. Faircloth decided to "clean up the mess", and then the two young men put the body in Frank's car and drove to an isolated location, where they removed the victim's teeth from his body to hamper identification, after which Mr. Faircloth burned the body.

Dr. Killoran diagnosed Mr. Faircloth as having a major depressive disorder, with polysubstance dependence, in an antisocial personality disorder. He did not find evidence of attention deficit disorder. Dr. Killoran felt that at the time of the killing Mr. Faircloth had been capable of distinguishing right from wrong, apparently rejecting the possibility of any insanity defense. However, Dr. Killoran indicated that at the time of the killing Mr. Faircloth's "ability to refrain from committing the crime was significantly compromised by the following: 1) evidence of homosexual panic associated with the defendant's marked ambivalence towards his foster parent, 2) impaired impulse control associated with active abuse of paint sniffing and alcohol, and 3) the severity of the depressive symptoms and their associated feelings of hopelessness and poorly modulated anger."

Marvin was also evaluated by a psychologist, Kathleen O'Shaunessy, Ph.D., who had previously evaluated Marvin Faircloth in 1984. She diagnosed Marvin Faircloth as suffering from a post traumatic stress disorder (resulting from childhood abuse), major depression, and a borderline personality disorder, and indicated that at the time of the incident he was intoxicated on inhalants and alcohol. She opined, "Under such conditions, it is unlikely that Marvin would be able to recognize or appreciate the consequences of his actions or to reason with clarity." She indicated she felt at the time of the killing Marvin's judgment "could be considered severely impaired", such that he "could not grasp the full consequences of his actions". In a longer subsequent report she added, "It is unlikely given such circumstances that he was capable of fully comprehending the impact and consequences of his actions". Thus, although no formal insanity plea has been entered, it appears that to some degree Dr. O'Shaunessy's findings are supportive of an insanity defense.

Ms Finlay asked me to evaluate Marvin Faircloth, and to give my own opinions concerning the issues raised by the defense experts.

SOURCES OF INFORMATION:

- 1.) Review of the police reports of the alleged incident.
1-15-'96
- 2.) Review of the reports of Dr. Maxwell, Dr. Killoran, and Dr. O'Shaunessy. 1-15-'96
- 3.) Interview and testing session with Marvin Faircloth in the Mason Co. Jail. 1-15-'96
- 4.) Review of records from Mason Co. Juvenile Probation, which included records of some counseling Marvin had attended. 1-15-'96
- 5.) Review of records from St. Peter Chemical Dependency Center. 1-15-'96

TESTS ADMINISTERED:

A variety of tests had already been administered, and I saw no reason to duplicate those, but I did administer a Millon Clinical Multiaxial Inventory--II on 1-15-'96.

BACKGROUND:

Mr. Faircloth made numerous statements about significant people in his life, but I had no way of verifying this information, and it should be made clear that I am not making any judgment as to the validity of Mr. Faircloth's reports about other people; all statements in this section of the report are made solely from what Mr. Faircloth told me, and from what was obtained from the various reports.

Mr. Faircloth indicated both his biological parents were substance abusers. He was the oldest in a sibship of six. He was fairly close to his sister, Christi, who is one year younger than he, and somewhat close to his twin siblings, Desiree' and Jeb. There were numerous CPS contacts. Marvin Faircloth was the first child removed from the family by CPS; this occurred when he was seven years old. He was placed in one foster home, and soon after that was placed in another foster home with his sister, Christi. He states they left that family when the foster father "touched my sister", after which he and his sister lived with a foster family in Kelso for a few months and then first with one foster family in Shelton for one year, and then with another foster family there for another year. Marvin then lived at "Grandma Oakleys" (without Christi) near Shelton from about age twelve until age fifteen when Marvin ran away and eventually was placed with Frank Faircloth. According to Marvin he was "already deep into drugs, although Frank did not know it."

Marvin Faircloth spent February, 1993, at St. Peter Chemical

Dependency Center. This occurred after he was apprehended for stealing hood ornaments from automobiles. Marvin Faircloth stayed clean and sober for a few months. Twice in 1994 he was treated at Sundown Ranch, for a month each time. These substance abuse treatments were arranged for by Frank Faircloth, who adopted Marvin between the two trips to Sundown Ranch. Marvin did not stay clean and sober for long after his release either time.

Marvin Faircloth attended Shelton High School for a time, but spent the last two years before the killing in CHOICE, an alternative school, and he had not been attending school for the past two months leading up to the killing. Marvin Faircloth has no work history at all except for a paper route he had some years ago. Frank had bought Marvin a car for his eighteenth birthday, but Marvin had been unable to pass the written driver's test.

At the age of sixteen Marvin Faircloth was an accomplice to a car theft; he and his friend were found sleeping in the car in a parking lot in Bend, Oregon. Marvin has also been in trouble before for breaking into summer houses.

Marvin Faircloth had had some physical altercations with Frank in the past. On one occasion Marvin tried to take some cigarettes away from Frank, and according to Marvin, Frank "grabbed me by the balls". Once "Frank called the cops on me because I had hit him while I was drunk."

Marvin Faircloth indicated he had abused substances every day during the period leading up to the killing. These substances included LSD and alcohol on a very frequent basis, as well as marijuana, inhalants and "crank". He sold LSD to partially finance his habits, and obtained alcohol from his girlfriend. He told me, "I'd go through a case of beer a day!" A week before the incident he reportedly drank a glass of gasoline. A short time before the incident he had purposively burned his own arm with propane; Frank had taken him to the hospital for treatment, but he told hospital staff and Frank that the burn had been accidental. Although he was eighteen years old at the time of the killing he had "no plans, and no goals in life", except that he was on a waiting list to be treated at another chemical dependency center.

Marvin Faircloth indicated his relationship with Frank had been a difficult one. He indicated he would frequently leave home after Frank would "kick me out", but then Frank would come looking for him and beg him to come home, professing his love for him. Marvin said, "He didn't want to let go of me." Marvin complained Frank was "always depressed", and said Frank frequently went into his room alone and stayed by himself. Furthermore, Marvin Faircloth believed that Frank was withholding the location of his biological father from him. In regards to the killing, Marvin told me, "I knew this was the only way I could get contact -- when I was a kid I always wanted to be on TV so my Dad could find me!" Indeed,

since the killing Marvin Faircloth has indeed re-established contact with his biological father.

When I asked Marvin directly why he had killed his father, he told me, "He touched me quite a few times, but I didn't like it." He said he thought Frank was "gay", and thought Frank sometimes stood too close to him and brushed his body up against him. He told me, "I didn't feel comfortable around him." He described an incident in which, "One time he was rubbing my leg and I woke up." Although he stated there were no actual incidents in which Frank propositioned him or actually initiated sexual behavior, Marvin "thought he wanted to have sex with me the way he made passes at me." According to Marvin, "sometimes I beat him up for it!"

BEHAVIORAL OBSERVATIONS:

During our interview and testing session Marvin Faircloth was alert, cooperative and oriented. No hallucinations or delusions were noted, and he appeared to be in good reality contact at all times. He appeared to be of less than average intelligence. He was somewhat depressed, as might be expected of someone in his legal predicament. At times he mumbled, making it somewhat difficult to understand him. He seemed socially isolated and withdrawn. He did not express remorse concerning the alleged incident. He said the killing should have some effect on CPS, as, "Somebody has to do something about all these homes -- CPS should get things going in the right direction. All foster parents should go through a parenting class."

TEST FINDINGS:

On the MCMI--II Marvin Faircloth showed a mild tendency to overemphasize his problems, perhaps in an effort to gain sympathy. Results suggest alcohol and drug dependence, and show a significant level of depression. In terms of his personality functioning he appears to be suffering from a schizotypal personality disorder with avoidant features.

CONCLUSIONS AND RECOMMENDATIONS:

In my opinion Marvin Faircloth is certainly competent to stand trial, as he fully understands the nature of the proceedings against him, and he is able to assist his attorney in preparing a defense. My diagnostic impression is schizotypal personality disorder in an individual with polysubstance abuse who is experiencing a reactive depression.

Mr. Faircloth indicated to me he did understand the wrongfulness of his actions at the time of the incident. In my view he was not

suffering from any major mental illness which could have incapacitated him from knowing right from wrong, or could have caused him to be unable to appreciate the nature and quality of his conduct. Thus, in my view he was not insane at the time of the killing.

Marvin Faircloth seems to be indicating he killed his adoptive father because he was "gay". However, he admits no actual sexual behavior ever occurred. Clearly if he had been afraid Frank was going to have sex with him he could have left, as he was eighteen years old. Indeed, he had left home and stayed at friends' houses several times before. Marvin Faircloth was not afraid of Frank -- indeed, he often "beat him up". Under these circumstances it does not appear that any type of self-defense defense would be appropriate.

Marvin Faircloth's actions immediately before and after the killing seem to me to show logical goal-directed organized purposive behavior despite the fact that he was "high" from sniffing paint at the time. Marvin Faircloth admits deciding to kill Frank, arming himself with a weapon, going downstairs, stabbing Frank with the stick and fighting with him, preventing Frank from escaping out of the sliding glass door, and finally hitting him with a hammer. He threatened another boy who was in the house that he should not come downstairs to witness the killing. After the death of Frank Faircloth he carried the body to the car, drove the car to a secluded area, knocked out the victims's teeth, and burned the body. When apprehended he at first said he had not been involved. Under these circumstances it seems clear to me that he was thinking clearly enough to be capable of forming the "intent" and "premeditation" requisite for murder in the first degree.

Dr. Killoran raises the issue of whether Marvin Faircloth could "refrain from committing the crime". As far as I am aware this issue of whether a given defendant had free will when he committed his crime is not germane to any mental defense recognized in the State of Washington. There is certainly no scientific way for a psychologist or psychiatrist to determine to what degree a given person had free will at a given time, as that question is not a scientific question that lends itself to scientific inquiry. Indeed, most psychological theories, including the Freudian theory adopted by Dr. Killoran, contend that there really is no free will, as all human behavior is thought to be determined completely by psychological factors beyond the control of the actor.



Brett C. Trowbridge, Ph.D., J.D.
Licensed Psychologist #541

□ **Diagnostic criteria for 309.81 Posttraumatic Stress Disorder** (*continued*)

- (2) the person's response involved intense fear, helplessness, or horror. **Note:** In children, this may be expressed instead by disorganized or agitated behavior
- B. The traumatic event is persistently reexperienced in one (or more) of the following ways:
- (1) recurrent and intrusive distressing recollections of the event, including images, thoughts, or perceptions. **Note:** In young children, repetitive play may occur in which themes or aspects of the trauma are expressed.
 - (2) recurrent distressing dreams of the event. **Note:** In children, there may be frightening dreams without recognizable content.
 - (3) acting or feeling as if the traumatic event were recurring (includes a sense of reliving the experience, illusions, hallucinations, and dissociative flashback episodes, including those that occur on awakening or when intoxicated). **Note:** In young children, trauma-specific reenactment may occur.
 - (4) intense psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event
 - (5) physiological reactivity on exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event
- C. Persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness (not present before the trauma), as indicated by three (or more) of the following:
- (1) efforts to avoid thoughts, feelings, or conversations associated with the trauma
 - (2) efforts to avoid activities, places, or people that arouse recollections of the trauma
 - (3) inability to recall an important aspect of the trauma
 - (4) markedly diminished interest or participation in significant activities
 - (5) feeling of detachment or estrangement from others
 - (6) restricted range of affect (e.g., unable to have loving feelings)
 - (7) sense of a foreshortened future (e.g., does not expect to have a career, marriage, children, or a normal life span)
- D. Persistent symptoms of increased arousal (not present before the trauma), as indicated by two (or more) of the following:
- (1) difficulty falling or staying asleep
 - (2) irritability or outbursts of anger
 - (3) difficulty concentrating
 - (4) hypervigilance
 - (5) exaggerated startle response

(*continued*)

Appendix H

Dr. O'Shaunessey Report, Dated January 8, 1996

RECEIVED JAN 10 1996

Kathleen O'Shaunessy, Ph.D.
Licenced Clinical Psychologist
2617 B Suite C
12th Court S.W.
Olympia, WA 98502

PSYCHOLOGICAL EVALUATION

NAME: Marvin Sides Faircloth
DOB: 9-8-76
DATE OF EVALUATION: 12-6-95
DATE OF REPORT: 1-8-96

TESTS ADMINISTERED: Clincial Interview and Rorschach. (Note: Since the defendant had completed a neuropsychological assessment on 10-17-95, the Wechsler Adult Intelligence Scale-Revised and the Minnesota Multiphasic Personality Inventory were not re-administered. Additionally, he was scheduled to have a psychiatric evaluation which was conducted on 12-20-95). This evaluation relies primarily on the defendant's history as documented in his extensive CPS file, behavioral observations and clinical interview and projective testing.

REASON FOR REFERRAL: The defendant, Marvin Sides Faircloth, was referred by his attorney, Sam Davidson and mitigation specialist, Marjory Hellman, following his arrest for first degree murder of Frank Faircloth, his recently adoptive father. (During the initial interview, the client indicated he preferred to be addressed as Marvin or to use his given surmane, Sides). The evaluation was conducted in the Mason County jail where Marvin is currently being held pending trial in January.

The referral was requested to assess the client's current psychological status and to aid in determining his mental state at the time of the murder. Since this evaluator had done a psychological assessment on Marvin in 1984 when he was eight years old, the referral was made to provide some continuity and comparison with the client's prior assessment.

SUMMARY OF RELEVANT HISTORY: Marvin Sides is the eldest of six children in a family which has a lengthy history of involvement with the courts and social services. Marvin has an extensive history of severe physical, sexual and emotional abuse and neglect as documented in his CPS file. His file dates back to 11-19-76 when Marvin, age 6 months, was hospitalized for "failure to thrive." In 2-77, Marvin was declared a ward of the court following his mother's arrest for statutory rape of Marvin. The CPS file documents repeated incidents of severe physical abuse, including broken bones and cigarette burns, neglect, leaving small children unattended in squalid, unsafe conditions. At one point

the family of eight was living in an 8x15 foot space in a trailer which had no running water or electricity. There were several CPS reports of sexual activity between the Sides children and their parents and among the children.

When this evaluator assessed Marvin and his younger sister, Christi, in 10-84, the recommendation was for foster placement of Marvin and Christi together and no parental contact. At that time, Marvin was experiencing all the symptoms of a post-traumatic stress disorder. Despite his lengthy history of abuse and neglect, he reported that he loved his parents alot and that he missed them although he did not think it would be good to see them. His closest bond was to his sister, Christi, from whom he had been separated since they had been placed in different foster homes. Marvin was severely depressed, was reported to have angry outbursts, disrupted sleep and nightmares and was confused about his sexual identity. The intelligence testing portion of the assessment could not be completed because of both children's inability to concentrate and focus on the task. Marvin, who was eight at the time, had been in school for only one year and was fearful and resistant to try any tasks which seemed "academic". Projective testing supported the diagnoses of severe post-traumatic stress disorder and major childhood depression. Most of his images on the Rorschach consisted of pieces of animal bones and people's insides while his Thematic Apperception Test results were replete with themes of senseless physical violence by men against women and children praying that their parents would stop doing "stuff." In 1986, the Sides parental rights were terminated for Marvin.

Although Marvin started school late, at age seven, his performance was generally in the average range from kindergarten through fifth grade. By sixth grade, his academic performance began to deteriorate and his teachers were reporting behavior problems. He was moody, emotionally volatile, and often discourteous to teachers. While there were reports of Marvin being physically abusive with other children on the playground in sixth grade, most of his aggression appeared to be directed at inanimate objects such as kicking a chair or hitting something. He completed 9th grade with a 1.5 GPA and was reported to be absent frequently and not complete assignments. At the time of his arrest (2-95), he was in 10th grade and was attending the alternative high school (Choice) in Shelton. The deterioraton in Marvin's grades and his acting-out coincide with his drug and alcohol involvement which he reports increased dramatically in 6th grade. Except for a five-month period following a 33 day inpatient stay at St. Peter Chemical Dependency Center in 2-93, Marvin reports he was rarely sober or drug-free since 6th grade.

Marvin has had numerous foster placements prior to his recent foster/adoptive placement with Frank Faircloth in 1992 and the CPS record indicates a history of running away, the first time being when he was three years old. In terms of aggression towards others, there are reports indicating that Marvin was violent and cruel to animals when he was younger (under eight) but there are no

reports of physical assault against others. The early school record and therapy progress notes indicate some fighting with peers on the playground and some acting-out and self-directed aggression such as hitting the wall, throwing things and injuring himself by cutting or burning his arms. The overall record indicates emotional moodiness and primarily avoidant and self-directed aggression rather than aggression towards others.

INTERVIEW AND BEHAVIORAL OBSERVATIONS: Marvin is a slightly built young man, 19 years old, with a neatly trimmed short beard and hair just below his ears. He was polite and cooperative throughout the interview and testing although at one point he said that he did not like having visitors in jail and that he didn't like to talk much. Despite these comments, Marvin seemed to talk freely and easily with the evaluator.

When asked if he remembered meeting with the evaluator when he was eight, he vaguely recalled such a meeting with his sister, Christi, but said that he has a poor memory for his early years. He said he has few memories of the time with his biological parents although he said "I know it's bad." He remembered his father setting two of their dogs on fire while he watched. He said he felt horrified because he loves animals. He has no memories of his mother other than seeing her sitting in their trailer and washing clothes at the laundromat.

He reported a history of foster placements, recalling at least nine different homes, adding that he felt only two of them were positive (the Stumpejes (?) and the Oakleys). ~~He reported that there was physical and sexual abuse in some of the foster homes,~~ adding that he was especially upset to learn that his sister, Christi, has been sexually abused in one of these homes. He confirmed a history of running away, dating back from age three when he was living with his parents to the recent past when he was living with the Oakleys and Mr. Faircloth. At one point when he was talking about his placement history, Marvin said "I'd like to see some justice, to see families saved, kids saved. Lives are ruined." When asked who he has felt closest to in his life, Marvin mentioned his sister, Christi, and Mrs. Hausinger, the mother of two of his friends. Of Christi, he said that "we had a loyalty bond, that we would try to stay together." He said that he did not want to be adopted by anyone, including Mr. Faircloth and that Christi was upset when he was adopted. Although Marvin has had very little recent contact with his sister, his affection and positive feelings for her persist. He seemed pleased to report that she was living in a foster home in Spokane and that he heard she was doing well. The adult for whom Marvin feels the most affection is Mrs. Hausinger, the mother of his friends, Jake and Sam. He said that he spent a lot of time at their home and that Mrs. Hausinger "was like the Mom I always wanted and Frank (Mr. Faircloth) was like the Mom I didn't want."

When asked about his adoption by Mr. Faircloth, Marvin said he didn't want it but felt he needed to "go along" with it. He said

that he ran away from his previous foster placement at the Oakley's because he felt it was too physically and socially isolated. They lived in the country and Marvin wanted to be in town. In retrospect, he said this was a foolish move on his part because the isolation kept him away from friends who were not a good influence on him. He clearly regrets leaving the Oakleys and later indicated that this family was a positive placement and that he liked them. He had been with the Oakleys for a year-and-a-half before he went to CPS and requested that CPS place him with Mr. Faircloth. He requested this placement because it was in town and he knew there were several older foster boys in the home. Marvin reports that he found Mr. Faircloth (Frank) "kind of wierd." When asked to elaborate, he said that when he first met Frank, Frank asked him if he masturbated and told him if he did that he should do it in private. Marvin found this a strange comment which seemed "out of the blue" at the time. He further indicated that he felt uncomfortable around Frank because he believed that Frank was gay and that he found excuses to touch Marvin. Marvin described a game in which every time Frank saw a monkey tree first, he (Frank) would pinch Marvin's inner thigh when they were riding in the car. He reported other times when Frank rubbed against him and grabbed his genitals in a kind of mock play. Once when Marvin was ill and asleep, he awoke to find Frank sitting on his bed, rubbing his legs. Marvin found this upsetting and pulled away. He said he found pornographic magazine photos under Frank's bed of adult males masturbating and that he felt uncomfortable because Frank would buy him "wierd" shirts (shirts that were purple or pink stripped) which Marvin would not wear. Marvin denied explicit sexual contact with Frank although Dr. Maxwell reported that Marvin said Frank "...was touching me sexually." It is clear that Marvin felt physically uneasy and that did not like to be touched or hugged by Frank.

The other complaints Marvin had about Frank were more typical teen-parent complaints. He said that Frank enforced rigid curfews even on weekends and that no phone calls were allowed after 10 P.M. He describes Frank as "going to work, coming home and hibernating in his room most of the time." He did add that they often had dinner as a group. Marvin felt that Frank was "a tightwad" about taking Marvin to the doctor or dentist even though Marvin reported persistent back pain. It was apparent that Marvin felt that Frank's behavior changed after the adoption was finalized and that Frank became more restrictive and controlling. As examples, Marvin said that Frank would kick him out of the house for small things like being late and that Frank withheld information about the whereabouts of Marvin's biological father. One episode which was clearly painful to Marvin occurred a week after the adoption was final. Frank was angry because Marvin would not tell Frank that he loved him. Frank ripped up Marvin's birth certificate, saying "you are not my son" and told Marvin to burn it. Marvin did burn it, stating that it felt "kind of good" because he did not want to be Frank's son.

Marvin freely discussed his drug and alcohol involvement, stating that he has rarely been sober since 6th grade and that he was a

Marvin
per
-

poly substance abuser (alcohol, pot, LSD, crank and spray inhalant). He reported that loved to take LSD and go running long distances, that he found it meditative, that it made him feel good. The longest period of sobriety he has had prior to his arrest was the five-month period following discharge from the St. Peter Chemical Dependency Center. Marvin spontaneously reported " I got my freedom in here (jail) because in here my mind is free from drugs." He also reported that he "found the Lord" since being in jail and that this was of great comfort to him.

When asked to describe himself, Marvin laughed and said "I'm a follower, not a leader...very definitely." He says he is not a fighter, that he was "kicked" back except when he was drunk and high. He said that "it difficult being around people. I don't like talking one-on-one; I feel best when I am alone." He said he hated school and that "I feel like I'm an idiot alot; I don't know nothing." He spontaneously reported that "I feel like my mind is just eating me up. I've always hated myself." At this point, Marvin rolled up his sleeves to show old scars where he had cut and burned himself with cigarettes. He said he wanted to die slowly, to feel the pain. He said he tried to hang himself three times, the first time when he was eight-years-old and his sister saved him. Six months prior to the murder, Marvin said he was miserable that he had made nooses to use to hang himself and that he had been cutting and burning on himself.

In describing the events the night of the murder, Marvin said he and another youth, Keith, had been in his room, that he had consumed over half a case of beer "as quickly as possible" and that he had "huffed" a large can of spray paint. He said he began "tripping, seeing demons" and that Frank came into the room yelling about the spray paint smell. It was this intrusion which enraged Marvin and Keith and after Frank left the room, they violently attacked him, striking him with objects, stabbing him and finally hitting him in the head with a hammer, killing him. Another youth named Bryce was present but, according to Marvin, Bryce did not come downstairs nor participate in the killing. Following the killing, Marvin described listening to music, watching MTV and drinking coffee before removing Frank's body from the house. Keith and Marvin loaded the body into the car and drove it to a remote area where they attempted to burn it. After this, he went to a friend's house to sleep. The friend's mother found him and asked him to leave. After he left, Marvin turned himself in to the police. While he was able to report the sequence of events surrounding the murder, he said "I did not really know what I had done until after I came off the spray paint" which he said took about 10 days.

Marvin feels that he was saved by the Lord that night after the killing when he heard a song on MTV by the group, Live, which was about an old mother dying and a new baby coming into the world. He believed this song contained a message for him about his salvation. When recounting the events of that night, Marvin showed no emotion; he simply reported the sequence of events as best he remembered.

He said that didn't have any feeling about what he had done until they tried to burn the body, at which point he felt nauseous. He said that he couldn't imagine killing Frank without being drunk and high. When questioned about physical violence in the relationship, Marvin reported that on two occasions in the two weeks prior to the murder, he had hit Frank and that he had also physically attacked a man who had raped his girlfriend. He said that he grabbed this man by the throat, threw him down and kicked him. No report was filled by either party. Marvin said that he called the police to the Faircloth home twice, once when Frank threw knives at him and once when Frank had written a suicide note and was trying to leave. Marvin reported that the police took Frank to the psychiatric ward and that the knife throwing incident was the only occasion on which Frank initiated physical violence towards him. Although Marvin reported the events surrounding the murder in flat, factual way, he said that there was no way that Frank deserved to die. He made no attempt to deny or minimize his crime or to transfer responsibility or blame to anyone else.

CLINICAL IMPRESSIONS AND TEST RESULTS: Projective test results essentially support the behavioral observations and clinical impressions of Marvin as a severely depressed young man of low average intelligence who, because of his extensive history of violent physical and sexual abuse and neglect, has a poorly defined sense of self. His responses were typical of a young man who has not experienced attachment and connection to others. His protocol contained no human figures and almost no human movement responses which is highly unusual for older children and adults. The absence of such responses generally indicates either high interpersonal anxiety and/or avoidance of interpersonal relationships and depression. Intimacy and attachment are very difficult for such people. While most of Marvin's responses were of adequate form level, he had difficulty supplying much detail. Most of his images were very concrete and spartan, consisting of rather frightening creatures (demons, monsters or animal-like creatures) who were portrayed as simply sitting or standing. There was no evidence to support a diagnosis of either a psychotic thought disorder or of chronic brain syndrome. Rather, his overall protocol was somewhat constricted, indicating that his violent, impulsive attack was more likely the result of drug and alcohol induced toxicity rather than any on-going psychotic process or sociopathic personality disorder.

The clinical interview and test results along with the extensive CPS file indicate a severely depressed, drug and alcohol addicted young man who has a history of violent abuse and severe early cognitive and social-emotional deprivation. It should be noted that Dr. Maxwell's summary of Marvin's MMPI results are congruent with these findings.

Marvin's polysubstance and alcohol abuse has been severe and longstanding. He acknowledges that he frequently drank to excess and got high to feel better momentarily. He says he began drinking seriously in 6th grade to "feel in", to feel like he belonged. Marvin's current very sketchy report of his early years and his

factually
Marvin
check
notes

Appendix I

Bob Zornes Interview, Dated July 27, 1995

**PERSONAL HISTORY AND BACKGROUND
INTERVIEW QUESTIONNAIRE**

This is Bob Zornes. Today is Thursday, July 27, 1995. The time is 5:21 p.m. I am in an interview room which is also a DWI processing room at the Mason County Jail. I am proposing to tape record my initial interview with Marvin Faircloth.

Q. Mr. Faircloth, how do you prefer to be called? Do you want to be called Marvin, Marv?
A. Marvin.

Q. Marvin, okay. We'll call you Marvin for the purposes of this interview. And you and I have discussed about recording it, but I still need to have your permission to record this interview. Do I have your permission?
A. Yes, you do.

***THIS REPORT IS COMPRISED OF INFORMATION SUPPLIED BY THE CLIENT
AND HAS NOT BEEN INDEPENDENTLY CONFIRMED***

THIS IS NOT A VERBATIM TRANSCRIPT

CONTACT INFORMATION:

Name: Marvin Eugene Sides Faircloth

Nicknames/Aliases: "Melvin"

Mailing Address: ^{E21} 821 Redwood Court, Shelton, Washington 98584

Emergency/Message Contact: Marvin Eugene Sides (Father)
321 Sides Way
Belfair, Washington

Telephone/Message Number: (360) 372-2780

GENERAL IDENTIFICATION DATA:

Sex: Male

Date of Birth: September 8, 1976

Place of Birth: San Diego, California

Social Security Number: Unknown

Driver's License: None

Citizenship: United States

PHYSICAL CHARACTERISTICS:

Height: 5'8"

Weight: 162 lbs.

Hair Color: Blond

Eye Color: Hazel

Complexion: Fair

Scars, Marks, Tattoos: Scar on left forearm, circular pattern; large, three-inch diameter; looks like a burn mark
Homemade tattoos on left forearm; one with hearts
Tattoo of cross on left wrist, anterior side
Tattoos in web of right hand
Tattoo of cross on right little finger
Tattoo on right breast area that says "SKA" (stands for Skateboarder)
Tattoo that spells "POT" on right my arm with cross on top
"Everlasting Peace"
"Anarchy" sign with spade (inverted arrow head)
Cigarette burn scars on right upper arm
Linear scar approximately 3" long caused by barbed wire located on inside of right upper arm
Birthmark on right hip shaped like a bolt of lightening

CULTURAL INFORMATION:

Race: Caucasian

Ethnic Origin: German

Religious Preference: Nondenominational/Christian

Unconventional Customs: None

ADDITIONAL DATA:

Left/Right Handed: Ambidexterous; writes with ^{Right}~~left~~ hand

Read and write the English language: Yes

FAMILY BACKGROUND DATA:

Parents/Step-parents/Guardians name, age, address, telephone:

Father: Marvin Eugene Sides
321 Sides Way, Belfair, Washington

Mother: Joyce Sides
(Whereabouts unknown)

Step-mother: Cheryl Sides
321 Sides Way, Belfair, Washington

Adoptive Father: Frank Faircloth (victim/deceased)

Siblings Names, ages, addresses and telephone:

Brother(s): Jeremy Sides (age unknown; resides with
sister Cristi Sides)
Spokane, Washington

Jebediah Sides (age unknown)
(Resides with an aunt; whereabouts unknown)

Sister(s): Cristi Sides (age unknown)
Spokane, Washington

Desiree Sides (age unknown)

Half-Sister(s): Jessica (age unknown)
(Whereabouts unknown)

Lacey Sides (age unknown)
Resides with Father and Step-mother

Half-Brother(s): Shane Sides
Resides with Father and Step-mother

Step-Brother(s): Mike, Tommy, Nick (ages unknown)
Reside with Father and Step-mother

Family History: Dysfunctional family life. The children were physically abused by both parents. Punishment would consist of tying the children up individually to vertical support beams that came down through the trailer home. Client would be forced to feed the younger siblings while they were tied up on these beams. This punishment was meted out because of the children getting into the food.

All the children were punished by being forced to sit in a corner in a squatting position while holding a heavy log in their arms. Client states he was sexually abused (little or no memory; told by a sister.)

Natural father was physically and mentally abusive. Client states he witnessed his father, who was angry at two of the family dogs, throw them while alive in a fire killing both dogs. Client also believes his father took a sledge hammer to another family dog.

Client and siblings witnessed sexual intercourse between parents as there were no privacy in the family home (one large room.)

Client was removed from the family home at approximately age seven and began many years of residing with different foster families. Client states that Frank Faircloth, who adopted him as a teenager, was also physically and sexually abusive to him.

MARITAL HISTORY:

None.

RESIDENCE HISTORY:

When client was approximately seven-years old, his mother left with all the siblings leaving client home with the father. Client subsequently taken into police custody and questioned about the physical/sexual abuse in the family home.

Client was temporarily placed in a foster home with Pam Matson. For the next seven years he was placed in various foster homes (approximately seven) sometimes with his sister, Cristi, eventually ending up with Frank Faircloth when he was approximately fourteen-years old.

EDUCATIONAL HISTORY:

Pre-school(s): Unknown

Elementary School(s): Unknown

Junior High/Middle School(s): Pioneer Middle School (Seventh grade)
Shelton, Washington

Shelton Middle School (Eighth grade)
Shelton, Washington

High School(s): Shelton High School (Ninth grade)
Shelton, Washington

Choice Alternative High School (working on GED)
Shelton, Washington

High School Grade Point Average: Unknown (C's and D's)

Subjects excelled in: PE and Art

Subjects with difficulty: Science and Math.

College(s): None

Vocational School(s): None

Military Training: None

Scholastic Awards/Recognition: None

School Sports Affiliation: Grade school football, baseball, soccer

Disciplinary Problems: Numerous suspensions. Never expelled.

ACTIVITIES & INTERESTS:

Community/Social: None

Hobbies/Interests: Music, long-distance running, playing cards.

MEDICAL HISTORY:

Current Physician: Doctor at Mason County Jail

Vision Impairment: Hallucinates occasionally

Hearing Impairment: Hard of hearing in right ear
Left ear has clogged on occasion

Disfigurement: None

Other Physical Impairment(s): None

Current Medical Problems: Depression

Current Medications: Doxepin (100 milligrams/2 x day)

Medical Disability Compensation Recipient: No

Childhood Illnesses: Chickenpox

Bone Fractures: Broken nose ("a few times")

Head Injuries: Riding on handlebars of bicycle driven by a relative when very young and fell onto cement resulting in eighteen stitches across forehead

Fainting Episodes: None

Hospitalization: None

Treating Physician(s): Unknown

Mental Health: Saw at least one counselor when residing with Tams. Does not believe he was seen by psychiatrist or psychologist.

SUBSTANCE USE AND/OR ABUSE:

Cigarettes: Yes

Alcohol: Yes. Began consuming beer at approximately age two (told this by father.)

Marijuana: Yes.

Other: Hallucinogens: Acid, Mushrooms, Opium, Prescription medicines (not his own)

Treatment: St. Pete's in Olympia, Washington (approximately age sixteen)
Sundown M Ranch in Yakima, Washington (approximately age sixteen)
Sundown M Ranch in Yakima, Washington (approximately age seventeen)

EMPLOYMENT HISTORY:

Employment Record: Paper route at approximately age fifteen.

MILITARY SERVICE: None

CRIMINAL HISTORY:

Juvenile Offenses: TAMVWOP (approximately age fifteen)
Breaking and Entering/Burglary
Theft

Adult Offenses: Currently charged with murder

OTHER RELEVANT DATA:

Co-defendant information: Keith

Other:

This is Bob Zornes. Today is Thursday, July 27, 1995. The time is 5:21 p.m. I am in an interview room which is also a DWI processing room at the Mason County Jail. I am proposing to tape record my initial interview with Marvin Faircloth.

Q. Mr. Faircloth, how do you prefer to be called? Do you want to be called Marvin, Marv?
A. Marvin.

Q. Marvin, okay. We'll call you Marvin for the purposes of this interview. And you and I have discussed about recording it, but I still need to have your permission to record this interview. Do I have your permission?
A. Yes, you do.

Q. Okay. We'll start off here with what I call some basic contact information. What I need from you is I need to have you tell me what all of your names are, your first, your last, your middle initial, that sort of thing, and spell each of those names for me.
A. Marvin Eugene Sides. And my mother's name is Joyce Faircloth.

Q. Tell me about the first name. Where does that name come from?
A. That comes from my dad.

Q. Okay, spell that for me, all of those names.
A. M-A-R-V-I-N, E-U-G-E-N-E, S-I-D-E-S.

Q. And that would be from your biological father? The one who with your mother gave birth?
A. Yes.

Q. Okay. And, you also have another name, a sir name, which is the last name of Faircloth, right?
A. Yes.

Q. Would you spell that last name?
A. F-A-I-R-C-L-O-T-H.

Q. Where did you get that name from?
A. Frank.

Q. Frank, who is also the victim, right?
A. Yes.

- Q. He was your step-father or adopted father; which one?
A. He was my adopted father.
- Q. Do you have any nicknames or aliases that you go under?
A. None. There was "Marvin" initially.
- Q. Just Marvin. They don't call you Marv. They don't call you a street name like "Tinker" or --
A. No. They just called me Melvin.
- Q. Melvin?
A. Right.
- Q. M-E-L-V-I-N?
A. Yeah, M-E-L-V-I-N.
- Q. Why did they call you Melvin?
A. I don't know. It was kind of a nickname. They just called me Melvin. I don't know.
- Q. When you said "Skater," then you were talking about typically groups at school, like with Skaters there's Jocks?
A. No, Skaters go skateboarding a lot, so, I don't know, everybody called us Skaters.
- Q. Where were you living before you were arrested? What was the address?
A. ~~821~~ Redwood Court (inaudible).
E21
- Q. City?
A. Oh, Shelton, Washington 98584.
- Q. 985 --
A. 84, yeah.
- Q. If we needed to contact somebody about you, who would that person be? Like an emergency contact.
A. That would probably be my dad. He lives in Belfair.
- Q. And his name is?
A. Marvin Eugene Sides.

Q. His telephone number?

A. 372-2780

Q. And that would be area code 360; is that right?

A. Yeah, but it don't work; 206 works.

Q. Does he live with anybody?

A. Yes, he lives with Cheryl, Cheryl Sides.

Q. Do you know how she spells her name?

A. I believe it's C-H-E-R-Y-L.

Q. And is she his wife?

A. Uhm, yeah.

Q. All right. Do they have an answering machine, or a way to leave a message with?

A. Well, they're supposed to be moving here pretty soon. So, I don't know.

Q. When you say "moving here," do you mean moving or moving --

A. Yeah, they're moving from their home they're at right now. They've got a place they're moving to.

Q. In the local area?

A. Yeah, I mean Belfair, I think.

Q. General identification data. Your sex is male, obviously. And what's your birth date?

A. 9-8-76.

Q. September 8, 1976. Where were you born?

A. San Diego, California.

Q. Was your dad in the navy or something?

A. (No response)

Q. I was born in San Diego, also. My dad was in the navy. Do you have a social security number?

A. Yeah, I don't know it, though.

Q. And incidentally, my dad's middle name is Eugene.

A. That's cool.

- Q. Well there's something in common. And the police in Kitsap County would like to have you in jail, so if I was in jail we'd have that in common.
- A. (Laughter)
- Q. When you got your social security number, what state were you living in?
- A. I'm not sure.
- Q. Because we can determine some things by that. Are you licensed to drive?
- A. No.
- Q. Your physical characteristics, Marvin. How tall are you?
- A. I'm about 5'8", 5'9".
- Q. And your weight?
- A. About 162.
- Q. Your hair color?
- A. It's blonder right now I dyed it black.
- Q. But your natural hair color is kind of a dishwater blond?
- A. Yeah, dishwater blond.
- Q. What's your eye color?
- A. Hazel.
- Q. And as far as your complexion, I guess I would describe it as "fair." Would say it was fair, ruddy, light, dark?
- A. Yeah, fair.
- Q. I notice you have some scars and that's one of the things I'm looking for in my background interview. Scars, marks and tattoos, okay.
- A. Yeah, I've got lots of tattoos, scars.
- Q. What is you have a large, probably a three-inch diameter scar. It looks like a burn mark; is that right?
- A. Yeah.
- Q. Okay. It's on your left forearm, circular pattern. What's that from?
- A. From a hot burner.

Q. When did that occur?

A. February, I think, the beginning of February.

Q. What year?

A. This year.

Q. Was that accidental or did you do that on purpose?

A. On purpose.

Q. Okay, we'll talk about that a little later. You have some -- they appear to be homemade tattoos. A bunch of them on your left forearm. What are they significant of? Do they mean anything? There's one with some hearts.

A. No, not really. Don't mean nothin'.

Q. Did you put them on yourself or did someone put them on you?

A. I drew them and put on me.

Q. When were they done?

A. (Inaudible) I don't know, about five years -- about four years ago, I'm not sure.

Q. You have some tattoos on your left wrist, on your anterior side. What is that significant of? It looks like a kind of a cross or something.

A. Yeah, it's a cross.

Q. Did it mean anything?

A. No.

Q. You have a tattoo in the web of your hand, on your right hand, and also one of your fifth -- well, your fourth finger, your last finger, the little finger.

A. Uh-huh.

Q. What do they mean?

A. Nothin'. Just somethin' to put there. (Laughter)

Q. You have a -- I see a scar, it looks like a cross or a dagger on your right neck.

A. It's a cross.

Q. Does that mean anything?

A. Uhm, no.

- Q. Do you have any other tattoos?
A. I got a tattoo on my -- right side of my chest.

(Interruption in interview by jailer.)

- Q. You were telling me about a tattoo on your right breast area?
A. Yeah, I have a tattoo that says "SKA."

- Q. S-K-A?
A. Yeah.

- Q. What does that stand for?
A. Skateboarder.

- Q. Do you have any other tattoos?
A. I gotta' tattoo, "POT" on my arm.

- Q. You're pointing to your right upper arm?
A. Yeah, with a cross on top of it. "Everlasting Peace" (Inaudible) -- "Anarchy" sign with a spade on my other arm.

- Q. Your left upper arm that says "Anarchy"?
A. No, it's got an "Anarchy" sign with a spade on it.

- Q. Anarchy sign with a spade. Okay. That looks like an inverted arrow head. Okay, that's good. Anything else?
A. No, not really, so --

- Q. Not really. Any other scars?
A. (Inaudible)

- Q. These almost look like cigarette burn scars to me.
A. They are.

- Q. They are, okay. They are located on your right upper arm. And how did you get those? Obviously you were burned, but --
A. I (inaudible) on me.

- Q. When?
A. Oh, (inaudible) when I was living at Frank's house.

Q. Why did you do that?

A. I don't know. Just kind of keep the pain away, I guess. I don't know.

Q. What pain?

A. Pain of what was going on in my head. Tell myself (inaudible.)

Q. Were you on drugs or alcohol when you did that?

A. No, just (inaudible).

Q. You said it happened when you were at a friend's house?

A. I was at Frank's.

Q. Oh, Frank's. I'm sorry. Frank Faircloth?

A. Yeah.

Q. Okay. Did he do any of those to you?

A. No. (Inaudible)

Q. What you've done is you've pointed to your right upper arm near the elbow joint. And it's on the posterior. How did that happen?

A. I was stabbed with a stick.

Q. Frank Faircloth stabbed you with a stick?

A. Yeah.

Q. When?

A. That night when they killed him.

Q. Okay. Was that after the killing had started or before or what?

A. It was after it started.

Q. A defense kind of wound?

A. Yeah.

Q. All right. Do you have any other scars?

A. On my -- barbed wire.

Q. You're pointing to your right, the inside of your upper arm. It's a linear scar that's about three inches long, two and a half to three inches long. And that's from barbed wire?

A. Yeah.

Q. Okay. Do you have anything else like appendectomy scars? You haven't had open heart surgery or -- ?

A. No. Just stupid ones.

Q. Okay. Any other marks? Birthmarks?

A. Uhm, yeah. I got a lightening bolt on the side of my -- down my hip.

Q. Well, is that a scar or tattoo?

A. It's a birthmark.

Q. Oh, a birthmark on your right hip?

A. Yeah, I think so. It's my right or my left, I'm not sure.

Q. You mean like on your butt?

A. No, it's over here.

Q. You're Caucasian. As far as your ethnic background, would you -- are you like European Caucasian or --

A. Ger -- I don't know.

Q. German?

A. Yeah.

Q. Okay. Me too. Something else we have in common. Do you have any unusual customs? And I don't necessarily mean "unusual" unusual. Sometimes people of different ethnic backgrounds have customs that are not typically familiar to the rest of the white --

A. (Inaudible)

Q. Well, if you -- actually, it's more like a religious thing. There are certain things that you follow, that you do that people typically don't do.

A. No, (inaudible).

Q. Okay. How about religion? Are you religious?

A. Yeah, I'm trying to get into the Lord and do somethin'.

Q. Catholic? Protestant?

A. No, just Christian.

Q. Christian religion. Were you religious before you got arrested?

A. Uhm, not really. I didn't believe in nothin' but witchcraft.

Q. All right. Are you left or right handed?

A. I'm both.

Q. You're both. When you throw a ball, are you left handed or right handed?

A. I throw both hands.

Q. You do?

A. Yes, I do.

Q. Have you ever shot a gun?

A. Yes. I shoot with both hands; I can do that too. I shoot a bow left handed. I write left-handed. That's the only thing I do different.

Q. Are you able to read and write the English language?

A. Yes, I am.

Q. Let's talk about your family history a little bit. The lady who's going to type this up, this is kind of disjointed because my computer changed from one program to another. We got a little bit off whack. You said that your father is Sides?

A. Yes.

Q. And what was his first name?

A. Marvin.

Q. Marvin Eugene Sides. How old is he, do you know?

A. He's forty, as of last night.

Q. And you gave me his address earlier. So that we have it again, go ahead and tell me what his address is.

A. 321 Sides Way.

Q. Sides Way?

A. Yeah.

Q. In what city?

A. Belfair. I don't know the zip code.

Q. And you had an adopted father. That would be Frank Faircloth. He was the victim in this case. How about your mother? What's her name?

A. Joyce Sides.

Q. J-O-Y-C-E?

A. Yes.

Q. Where does she live?

A. I don't know.

Q. No idea? When was the last time you saw her?

A. When I left. When I got sent to a foster home.

Q. Which is?

A. Eleven -- Eleven years ago.

Q. Okay. Do you have a step-mother or a foster mother or adopted mother?

A. Uh, Cheryl, my dad's wife, new wife.

Q. Do you get along with her pretty good?

A. She's (inaudible.)

Q. What about brothers and sisters?

A. (Laughter)

Q. Any brothers?

A. Yeah, I got brothers. I got step -- I got four step-brothers and two real brothers.

Q. Let's talk about the real brothers first. Are they also Sides?

A. Yes.

Q. What are their names?

A. Jeremy and Jebediah.

Q. Jeremy? Do you know how that's spelled?

A. J-E-R-E-M-Y.

Q. How old's he?

A. Uhm, -- you got me. I don't know.

Q. Is he older or younger than you?

A. He's younger than me. All of them are younger than me.

Q. Is he still in school?

A. Yes.

- Q. Is he in grade school or junior high?
A. Junior high or high school, I'm not sure.
- Q. Where at?
A. He lives in Spokane.
- Q. With who?
A. My sister, Cristi.
- Q. Cristi?
A. Yeah.
- Q. How does she spell her name?
A. C-R-I-S-T-I.
- Q. Is she older or younger than you?
A. She's younger.
- Q. Okay. Is she married?
A. No, she's not.
- Q. He just lives there and goes to school?
A. Yeah.
- Q. All right. And the other brother was, did you say Jebediah?
A. Yeah.
- Q. How does he spell his name?
A. I don't know. I guess it's J-E-B-I-T-I-A-H.
- Q. Let me take a guess. J-E-B-E-D-I-A-H. Would that work?
A. (No audible response)
- Q. Okay. And he's also younger than you?
A. Yeah, he's younger than me.
- Q. Where's he at?
A. I don't know.
- Q. Is he in school?
A. I don't know.

- Q. Is he younger than Jeremy?
A. Yes, he is.
- Q. He is. All right. No idea where he's at?
A. No.
- Q. Foster care?
A. No. One of my aunts, I guess, took him (inaudible).
- Q. Any other sisters?
A. Yes. I've got three sisters.
- Q. Your real sisters?
A. Well, one (inaudible) -- my mom's kind of rough, but other than that --
- Q. What about the ones who were fathered by Marvin Sides? What are their names?
A. Cristi and Desiree.
- Q. Cristi's in Spokane.
A. Cristi's in Spokane. Desiree, I haven't seen -- she lives somewhere, whatever.
- Q. Do you know how Desiree spells her name?
A. Uhm, D-S-E-R-H --
- Q. Let me -- let me -- I'll take a stab at it. If you don't know, I'll try. D-E-S-E-R-E-E or D-E-S-I-R-E-E, probably. And do you know how old she is?
A. No, I don't. (Inaudible) -- Jebediah (inaudible).
- Q. Okay. So she's younger than you?
A. Yeah.
- Q. And then there's a half sister?
A. Yes, Jessica. She's Indian. She's part Indian.
- Q. And is her -- Who's the father?
A. Uhm, I don't know.
- Q. Who's her mother?
A. Joyce.

Q. Joyce is her mother?

A. Yeah, my mom.

Q. Is she younger than you also?

A. Yes, she is.

Q. So you're the oldest of the whole brew; is that right?

A. Yes.

Q. Where is your sister Jessica?

A. I don't know.

Q. You don't know where she's at either?

A. No.

Q. And you have some step-brothers, did you say?

A. Yes, from my step-mom.

Q. Okay. And that would be Cheryl?

A. Yeah, Cheryl's kids.

Q. What are their names?

A. Shane --

Q. Shane?

A. Yeah.

Q. S-H-A-N-E?

A. That's right.

Q. Last name Sides? S-I-D-E-S?

A. As far as I know, yeah. Mike, and that's M-I-K-E. Tommy, T-O-M-M-Y. Can't remember who's the last one. His name is Nick, that's right.

Q. Nick?

A. Yeah, N-I-K.

Q. Did she have her kids before she married your dad?

A. Yes, she did.

- Q. Do you know what their last names were or might be?
A. No, I have no idea. Then they've got a daughter, too, Lacey.
- Q. You say "they"?
A. Oh, Cheryl has a daughter named Lacey. L-A-C-E-Y.
- Q. Are these kids older than you? Younger than you?
A. They're all younger.
- Q. They're all younger. Are they still in school?
A. Yeah, I think so. They're up in Belfair.
- Q. At the family home with Marvin and Cheryl?
A. Yes.
- Q. Marvin, I want you to tell me a little bit about your family history, living with your real father and real mother. Did you have any problems?
A. Yeah, lot's of problems.
- Q. Well, I want you to tell me about your problems.
A. (Laughter)
- Q. How long did you live with them? What age were you when you didn't live with them?
A. I moved out when I was seven.
- Q. Moved out when you were seven. Do you know why you moved?
A. Not really. But I guess it was sexual abuse (inaudible)
- Q. Somebody told you that?
A. Well, no. I found, you know, out about it myself.
- Q. You remember it, is what you're saying?
A. No, I don't remember it. I remember a little bit, not a whole lot, you know.
- Q. Tell me what you do remember.
A. (Inaudible)
- Q. This is the important stuff, okay?
A. I know. But I'm trying to think.

Q. Okay. How about if I just kind of pick at your brain a little bit?

A. It would be better to figure it out.

Q. Okay. You mentioned that you were physically abused. You have a recall of how that was. And I'm not going to put words in your mouth, but let me throw some things out.

A. Well, I know some things I can say to you right now. For punishment, we'd sit in corners for hours holding logs.

Q. Holding what?

A. Holding logs.

Q. Logs? Okay. You're demonstrating -- your cradling in both your arms is what you're demonstrating?

A. Yeah. It had to be in a squat position. Sit there for a couple of hours.

Q. A squat?

A. Yes, squat position.

Q. Would you demonstrate so I can describe it on the recorder?

A. (Client demonstrates) (Inaudible)

Q. Okay. What you're demonstrating is you're actually squatting down as though you were to go to the bathroom. But you're not sitting on the ground, you have to squat.

A. Yeah. (Inaudible)

Q. Who would make you do that?

A. Dad would.

Q. Did your mother know about it?

A. Yes, she knew about that. She was there most of the time.

Q. What sort of thing would you have to do for you to get that punishment?

A. I don't know. Me and Cristi were playing one time and I hit her in the head by accident with the metal bar. We were playing around and kicking and stuff and I hit her in the head. I cut her head open a little bit, you know. I didn't mean to do that.

Q. This was back between the ages of zero and seven; is that right?

A. Yeah.

Q. Okay. Do you remember any other punishment?

A. Yeah. They tied us kids up with a pole.

Q. They. Who's they?

A. Mom and Dad. And then they'd make me run around and feed them.

Q. They tied then up on a pole?

A. Yeah, with their hands behind their backs (laughter). Kind of weird.

Q. Like a flag pole or something, or --

A. No. We lived in a trailer and we had like this log (inaudible). It went down the middle of the trailer.

Q. So, you're describing vertical logs that come down from the trailer?

A. Yeah. And they'd put their curtain on it but the curtain wasn't on it. And there was one for each one of us. So the kids were all on those and tied them up and -- (inaudible)

Q. How many kids would there be?

A. There was all of them. That was just after we had them all. (Inaudible)

Q. They must have been babies?

A. Yeah, they were. They were just little kids, you know.

Q. And you had to feed them?

A. Yeah.

Q. You mean like their dinner?

A. Yeah. I would feed them like this. (Inaudible) -- hands tied behind their backs.

Q. Why would they tie them up?

A. Because they got into the food.

Q. I see. Was that your dad or your mom or both?

A. Uhm, I remember both of them being there, but, I don't know, really.

Q. Marvin, you're kind of slurring a little bit.

A. I'm sorry. I --

Q. I understand. It's just that somebody else would have to listen to the tapes.

A. (Inaudible)

Q. It was both of them?

A. Yes.

Q. Okay. Any other physical abuse?

A. Uhm, --

Q. Okay. What about -- were you ever hit?

A. (No response)

Q. I know you're going to have problems with this. So just take your time.

A. (No response) (Weeping)

Q. I wouldn't make you relive this except it's important to your case.

A. (Weeping) I don't know.

Q. Well, something kind of shook your head there.

A. (No response)

Q. Are you embarrassed? Is that what it is?

A. (Weeping) I don't know.

Q. Well, let's move on to something else and maybe we'll come back to that. We talked about mental abuse when you were living with your mom and dad?

A. (Weeping) Yeah, I guess so.

Q. Would you describe for me what you mean by mental abuse?

A. (Inaudible) I don't know, really. I just don't know.

Q. Were you sexually abused?

A. Yeah.

Q. How?

A. I don't know. I guess it was just --

Q. Well, has somebody read you reports or anything?

A. No, just what she read me.

Q. When you say "she," you mean Jennifer, right?

A. Yes.

Q. What did she read to you?

A. I'm not sure. I can't remember. Everything's going blank.

- Q. So I'd be able to find out from her about the sexual abuse?
A. (No response)
- Q. You're nodding your head "yes." That's all right. What about after you moved on? Where did you go to then?
A. (Inaudible) -- from my parents?
- Q. Yes.
A. To foster homes.
- Q. Did you go with your brothers and sisters?
A. No.
- Q. Did any of them go with you?
A. No.
- Q. So you were split up from the rest of the family?
A. Yeah. Dad was there by himself and Mom took off to New Jersey.
- Q. Your dad did what?
A. Dad and me were there at the house and then the rest of them took off to New Jersey. My mom was ticked off and the kids were all over at Grandma's house. They took me.
- Q. Where did they take you to?
A. Cop Shop in Belfair.
- Q. And then what happened to you?
A. They just questioned me. They offered me shit to fucking lie to them, tell them shit.
- Q. You mean about your parents?
A. Yeah.
- Q. And this is when you were seven-years old?
A. Yeah.
- Q. But ultimately you went to a foster home?
A. Yes.
- Q. Do you remember those people's names?
A. Yes. Val and Gary (inaudible).

- Q. Val and Gary --
- A. No, wait a minute. Actually, I went to Pam Matson's house but that was only for a couple days.
- Q. Pam Matson. P-A-M, M-A-T-S-O-N?
- A. Yeah.
- Q. Do you know how to get a hold of her?
- A. She don't even remember me moving in there 'cuz I asked her about it and she don't remember.
- Q. All right. And whose house was next?
- A. (Inaudible) -- Stomteaches' house.
- Q. Could you spell their last name for me?
- A. S-T-M -- S-T-O-M-T-E-A-C-H-E-S, I think that's what it is.
- Q. Where do they live?
- A. They live in Puyallup now.
- Q. They're still there?
- A. Yeah.
- Q. Okay. Do you have a phone number for them?
- A. Uhm, at my dad's house. I got a book with their address.
- Q. All right. So we can get that from your dad?
- A. Yeah. It's in my spare room.
- Q. And where did you go next?
- A. Them I moved to Toutle Lake to Trams' house.
- Q. Trams?
- A. Yeah.
- Q. How's that spelled?
- A. T-R-A-M-S.
- Q. Give me an idea where we're at here by age. You were taken away at seven. How long did you stay in these houses? Do you have some recollection?
- A. A year, two years.

Q. Do you know why you were moved?

A. They moved me from the Stomteaches' house because they moved. They were pretty cool people. Then they -- I don't know. Then they put me over to these other peoples' house. We -- we were going to get adopted so we went to this other house.

Q. You mean back with your other brothers and sisters by then?

A. No, no we weren't together at all.

Q. You were still separated from them?

A. Yes. And then (inaudible) me and Cristi got together again. And we met there. This is when we could have visitation with the others. Then our aunt and uncle told us we couldn't do that no more because they said we were hurtin' the kids. You know, with mental --

Q. Who's the aunt and uncle?

A. Mike and Tina.

Q. What's their last name?

A. Sides.

Q. Sides. Where're they at now?

A. The aunt is the one who took the kids. (Inaudible) -- I hate them. They suck.

Q. Well, where do we get a hold of them?

A. I don't know. Don't want -- I don't even want them being part of this.

Q. Well, maybe they're not going to be a part of it but we have to explore every possible thing, you see. Who would know how to get in touch with them? Would your dad know?

A. I don't know. I think so. I don't know. Possibly.

Q. And where did you go after that?

A. Some people's house in Kelso, I think it is.

Q. Do you remember about how old you were then?

A. I don't remember the age. I'm not good with age.

Q. Do you remember if you were in school, what grade you were in?

A. I think it was the summer.

Q. Summertime, between grades?

A. Yeah. And I remember --

Q. Can we narrow it down to elementary school or junior high school?

A. Yeah, elementary school.

Q. Elementary in Kelso?

A. Yeah. I believe it was around third grade. Then I moved up here. Got up to the fourth grade.

Q. Who'd you stay with up here?

A. I don't know. Wait a minute. What's their name? Matheny.

Q. Do you know how that's spelled?

A. Yeah. M-A-T-H-E-N-Y.

Q. Are they still around?

A. Yeah, they're still at the same place.

Q. Where's that at?

A. It's on Shelton Valley Road.

Q. What Valley?

A. Shelton Valley Road. Shelton Valley.

Q. Oh, Shelton. I'm sorry. How about a phone number? Have you been in contact with them?

A. Uh, no, I haven't talked to them for a while. That was quite a while.

Q. How long did you stay with them?

A. About a year or so. And then we were at (inaudible).

Q. Do you know why you moved from there?

A. No. They just -- kind of got rid of us.

Q. You say "us"?

A. Me and Cristi. Cristi and I were at the same place.

Q. Okay. Where'd you go next?

A. To a lady named "Ann's" house.

Q. Ann?

A. Ann. I don't know her last name.

Q. What town?

A. Shelton. We lived in Shelton most of our lives.

Q. Do you remember or have some idea how long you were with her?

A. No. I would say about a year, maybe a little bit longer. I don't know.

Q. Do you know why you moved on from there?

A. No, not really.

Q. You were with your sister there?

A. Yeah. Me and Cristi were there together. I think it was because her boyfriend didn't want us. I don't know. He just -- The lady was going to adopt us, but the guy came into her life right (inaudible) -- and booted us.

Q. Where'd you go from there?

A. We went to Oakwood.

Q. Oakwood?

A. Yeah, Grandma Oakwood's. She lived on (inaudible)

Q. What town?

A. Shelton.

Q. Shelton. All right. She still around?

A. Yes, she is.

Q. Who would know how to get a hold of her?

A. I got her number. Actually, her number is 426-0699.

Q. 426-0699. Okay. I'm repeating this just so one of our voices will be on there, okay? That's why I'm doing it. Have you been in contact with her?

A. Yeah, I called her a couple times.

Q. Since this?

A. Yes, since I've been in here.

Q. How's she been?

A. She's been okay. She's a real nice lady.

- Q. Has she visited you?
A. No. I wish I wouldn't have met her.
- Q. How long did you stay with her?
A. We lived there a couple years. Two or three years.
- Q. Was Cristi with you then?
A. She was at first and then she moved over to the people next door.
- Q. Oh. So you were still able to see your sister on a regular basis?
A. Yeah.
- Q. What happened after Grandma Oakwood?
A. I ran away.
- Q. Why'd you do that, do you remember?
A. No. I just -- 'Cause I said she was being mean and stuff but -- I don't know.
- Q. But that wasn't true?
A. No. They did a little bit. Not like as much as I said, though. She did a little tiny bit.
- Q. What did she do to you?
A. She didn't do it. Her husband hit me a couple times.
- Q. How did he hit you? Open hand?
A. Open hand, yeah.
- Q. Upon your body or your face?
A. He hit me -- Once he hit me on the arm and I don't remember the other time he hit me.
- Q. How old were you?
A. I don't know, it's like sixth grade.
- Q. So probably around twelve or thirteen?
A. I was probably older than that. I was (inaudible) to cry. So I was probably about thirteen or fourteen.
- Q. Okay. So you ran away. And what happened when you were brought back?
A. They didn't bring me back. I told them I wanted to live somewhere else and they put in Frank's home.

Q. Frank Faircloth. About what year would that have been, Marvin?

A. I don't know -- It was '92 or '91, I'm not sure.

Q. Did you know Frank before that?

A. No, I didn't.

Q. So he was just somebody who was on the foster home list, is that it?

A. No. Pete Scott knew somebody --

Q. Excuse me. Pete Scott?

A. Yeah, Pete is a social worker through DSHS -- for CPS.

Q. In Shelton or Belfair?

A. Shelton.

Q. Okay. So, I don't know, he thought he knew somebody -- if Frank could take (inaudible) boys. So they put me there and it was only supposed to be a week (inaudible). I don't know, the rest of the guys talked Frank into keeping me there. So I stayed there. And was there (inaudible).

Q. How many kids were there at that time?

A. I don't know. About six.

Q. And their ages?

A. Ranged from my age all the way up to seventeen.

Q. So from fourteen to seventeen? You're nodding your head "yes"?

A. Yes.

Q. Okay. That's all right. I catch on some of these things. It's just that the secretary won't be able to see you nod your head, you see. So I'll do that. Just bear with me. You're doing great.

About how many boys were there?

A. When?

Q. When you first went there.

A. One, two, three, four, five, six, seven.

Q. Seven?

A. Yeah. There was two little kids. There was Kim Russell, --

- Q. Kim Russell?
A. Yeah.
- Q. And that's a boy?
A. Yeah, it's a boy. Juli. (inaudible). He was in treatment at the time but he came back. Robert Shutenlee (phonetic).
- Q. Robert who?
A. Shutenlee.
- Q. Would you spell, please, to the best of your ability.
A. Ah, I don't know. S-H-E-R-T-E-N-L-I-E-E.
- Q. All right. That's okay. I don't have a guess on how myself.
A. Somewhere around that ball park?
- Q. Who?
A. Somewhere in that ball park.
- Q. All right. Who else?
A. (Inaudible)
- Q. Was Frank married?
A. No, he wasn't.
- Q. Had he ever been married?
A. No, he wasn't.
- Q. Okay. So there's seven kids there and Frank. How many bedrooms were there?
A. There was three bedrooms.
- Q. So you shared bedrooms. Did you share a room?
A. Yes. I shared --
- Q. With how many people?
A. Uhm, two, when I moved in.
- Q. Who were they?
A. Uhm, one of the little boys and Kim.

- Q. When you say "little boys," what age are you talking about?
A. They were, I don't know, around ten, eleven, twelve, I don't know.
- Q. So there were some probably younger than teenagers?
A. Yeah, they were younger than teenagers. They were two little Indian boys. Their names were Randall and Russell.
- Q. Were any of these kids Frank's? Did he adopt any of them?
A. No. I'm the only one he adopted.
- Q. All right. How long did kids typically stay there?
A. Uh, I don't know. It was kind of a long term with most people. A year. Some were there for a year. Most of them were there for a year, actually, I can't say. Maybe a little longer than that.
- Q. Were they special needs kids?
A. Yeah. There was one there that was kind of a sex offender case, some of that stuff. And then there was -- I know there were a couple of kids that were totally (inaudible) gangsters. I wannabes.
- Q. Gangster wannabes?
A. Yeah.
- Q. So what year are we talking about?
A. About '92, '91, I think.
- Q. '91 or '92. And, how was that for you, living with all those kids?
A. I don't know. It was all right. At first it was pretty good.
- Q. Because you had somebody to play with, is that it?
A. Yeah, I had somebody to hang around with. I had somebody to talk to, somebody to do stuff with, you know? I got in trouble my first (inaudible).
- Q. What'd you do?
A. Stole hood ornaments.
- Q. Stole hood ornaments? What'd they do to you?
A. Put me on probation.

Q. Okay. Let's talk a little bit more about your family history. And then we've got a lot more ground to cover after that. But I don't think it will take as long as talking about your family history.

We need to talk about Frank.

A. All right.

Q. Tell me about Frank.

A. Well, when I first moved in, (inaudible) -- it may not be nothin', but when he first (inaudible) he asked me if I beat off. And I said, "No," and he said, "Well, if you do, do it in your own privacy," was one of the questions he asked. (Inaudible) -- letting me know.

I mean, Frank -- see, at first he was a pretty nice guy, you know, seemed pretty cool. But there was a lot of kids there, too. He joked around with us. And he was cool. And then towards the end, you know, like the year, you know, year and a half, two years, he started -- he turned. You know, he turned real bad.

Q. Like what?

A. He was real mean, you know. And doing all kinds of weird things.

Q. What sort of things?

A. I remember one time when we were in Olympia. He let the guys and I -- I don't know - - Keith and I were in the car and Frank jumped out of the car, left us in the car. And we were at a red light. Frank jumped out of the car. And I didn't have my license and nothin' and (inaudible). (Inaudible) -- drive all over. (Inaudible) pulled over and got arrested.

Q. Frank jumped out of the car and let him drive?

A. At a red light. Got mad at us.

Q. (Inaudible)

A. (Inaudible)

Q. What's his last name?

A. Aikman (phonetic).

Q. Okay.

A. And then there were times when we'd be -- I'd just be sleeping, you know, and I woke up and Frank would be standing there. He'd rub my legs more when I was sleeping. I thought that was kind of weird. Creeped me. So I put a lock on my door and, I don't know, he'd try bullshit. He cracked my door in half trying to get in.

Q. Was anyone else living at the house then?

A. Well, this was towards -- I don't know. I don't think so. There was a lot of kids in and out of that house.

Q. Well, we're looking for witnesses here who can corroborate your story. Because this guy, apparently a lot of people liked him and didn't think there was anything wrong.

A. Well, that's half of it.

Q. That's half of it?

A. Huh?

Q. What'd you say?

A. That's the half of it (inaudible).

Q. Well, that's why we need some help.

A. Yeah. It's hard -- I got a real bad memory (inaudible) -- think of things. I don't know.

Q. Did he molest you?

A. Like sexually?

Q. Yes.

A. No, he didn't, he didn't molest me or nothin', but he tried a couple of times.

Q. What did he try to do?

A. He grabbed me and touched my butt. And -- (inaudible) -- tried to rub his hands all over me, you know.

Q. Were you clothed?

A. Yeah, this is when we were in his room hugging and, you know, talking and stuff, and he'd try to do those things. He'd like give me a hug, you know, said he'd help me out. (Inaudible) -- be in the wrong spot.

Q. Where would it be?

A. It'd be on my butt.

Q. Okay.

A. And, you know, it's like, "Hey, whoa, stop that," you know. I didn't like it. And I'd leave, you know. And another time time when I tried to get my cigarettes he came over and grabbed my (inaudible).

- Q. Were you clothed?
A. Yeah, I was clothed. I never took my clothes off when he came around. I was too afraid.
- Q. Do you know if the other kids had problems with him?
A. Yeah. Keith had a couple problems sometimes. I don't know. Like sexual-wise, I don't know. I wouldn't be able to say, you know, 'cuz nobody would say something. I mean, we don't tell everybody what's going on.
- Q. Well, did anybody tell you that he had done something to them?
A. (No verbal response)
- Q. Nobody at all?
A. Nobody told me nothin'. Keith told me one time that he locked his bathroom and that was it. That's the only other story I've heard of it. Nobody said (inaudible).
- Q. Well, you never know. I mean I've got to ask the question. There could be something out there.
A. I don't know -- (inaudible)
- Q. Did you tell anybody at the time?
A. It's not my style. I don't tell people what's going on with me. (Inaudible)
- Q. No, I mean a lot of times people have a certain friend that they --
A. No, I don't tell people -- I told Jake and Sam.
- Q. Jake and Sam. Who are they?
A. The house seniors. They went down there. Those are the people I want you to get a hold of because I'd tell them stuff, you know, I'd tell them a lot of different things.
- Q. Is that a man and a woman?
A. No. It's two different boys that lived in Oak Park. They were teenagers.
- Q. Oak Park?
A. Yeah. That's where I was living. They lived down the block -- their mom was a -- she's a real nice lady. But, I don't know.
- Q. Jake and Sam. What's their address? Where in Oak Park?
A. Uhm, Oak Park, up on the hill. I don't know.

- Q. How do you spell their last name?
A. H-A-U-S-I-N-G-E-R.
- Q. How old would they be now?
A. Eighteen and seventeen, I think.
- Q. Have you been in contact with them since?
A. Yeah, I talk to them once in a while. Not that much.
- Q. What is it that you remember telling them before the murder? What kind of things did you talk to them about?
A. I told 'em that Frank was a pervert, he's gay, and stuff like that, you know. Stuff like that. I wouldn't tell them that he touched me. I'd tell them -- Frank kicked me out -- They let me live at their house for a while until I (inaudible) a job. (Inaudible)
- Q. Why would Frank kick you out, or did you just leave?
A. No, he kicked me out a lot. He kicked me out a lot. Said if I didn't clean the house once, you know, or something like that. Something stupid, you know. He'd say, "Get outta' my house." One time I called the cops on him because he was trying to kill himself. He was going to be killed -- (inaudible) wrote down a suicide note. Kicked me out for that.
- Q. Did the cops find the suicide note?
A. I gave them the suicide note. I gave the cops the suicide note when they got there.
- Q. And that was the one that Frank wrote?
A. Yeah, Frank wrote it. And then he put it in on his desk and I ran into the room and grabbed the note and put it my pocket. And, I called the cops.
- Q. When was that?
A. That was last summer, around August, I think. I'm not sure. I went to the neighbors and told them about it.
- Q. Now, when you say you called the cops, you mean the Shelton police?
A. Yes, the Shelton police.
- Q. Okay. And what happened with that?
A. I don't know. They took him to the psycho ward.

Q. They did?

A. Yeah. For four days, four or five days. And I was -- left Keith there at the house for those four days. Keith was there. And Frank came back to the house.

Q. Well, was the state paying Frank for foster care?

A. Yes, they were.

Q. And didn't you have to see your -- not your counselor -- but your -- what do they call them? Somebody who does your case -- Case manager?

A. Oh, caseworker?

Q. Yes, caseworker. Didn't you have to see your caseworker sometimes?

A. No, I never really saw my caseworker at all. I saw him a few times, but --

Q. What's the person's name?

A. Scott. That was Pete Scott.

Q. Oh, yeah, Pete Scott. Okay.

A. And when I got adopted I didn't see nothin' of him, no more.

Q. Did you want to be adopted?

A. Not really, no. I didn't at all, actually.

Q. Why did it happen?

A. Because, I don't know, Frank just kept nagging on me for about five or six months. Kept nagging on me, nagging on me. "Please be my son. I love you so much. I love you so much." I was like, "No, I ain't doin' it. I just ain't doin' it. It's not my thing. I don't want it." And that's why at seventeen they finally stopped it, you know? Somethin' I don't want. And so, I don't know, after six months of him (inaudible) -- I said, "Fine (inaudible)."

Q. Okay. Was there an attorney?

A. Yes, there was an attorney.

Q. Do you know the name of the attorney?

A. I think it was Jeannette Booth.

Q. Jeannette Booth. She's right here in town, isn't she?

A. Yeah, she is. She works (inaudible).

- Q. Ahh, okay. Well, I'm wondering. Is she the one who's in with Sam Davidson?
A. I don't think so.
- Q. Oh, okay. I'm not going to get into too much about Frank right now. Let's move on to some other things, okay?
Let's talk about your education. How far did you get?
A. (Laughter) Well, I think I got to the tenth grade.
- Q. Tenth grade. What are the names of the junior high schools that you went to?
A. Junior high school, like the middle schools?
- Q. Right.
A. Oh, Pioneer.
- Q. Pioneer. Where's that at?
A. It's out by (inaudible).
- Q. It's in Shelton?
A. It's in Shelton.
- Q. Oh, I know where it is. It's out by Deer Creek --
A. Deer Creek.
- Q. Little tiny place.
A. Yeah, really little.
- Q. Okay. What grades were you there?
A. I was there for the seventh grade. And then I went to the Shelton Middle School which is Shelton. I went there for the eighth grade.
- Q. And did you move around to these different schools because you were put in different foster homes?
A. Yes, I did.
- Q. All right. Any other middle schools?
A. Nope, that's the only middle schools I went to.
- Q. How about high school?
A. Shelton High School which is in Shelton. I went through the ninth grade there. And then I went to Choice High School.

- Q. Choice?
A. Yeah, that's in Shelton too, downtown.
- Q. Would that be C-H-0-I-C-E?
A. Yep.
- Q. Okay. What grades?
A. I was working on a GED.
- Q. Is this like an alternative high school?
A. Yes, it is.
- Q. For kids who have trouble in the regular mainstream?
A. Yeah.
- Q. Tell me about the subjects that you felt you did well in.
A. PE and Art.
- Q. PE and Art. Okay. And ones you had most difficulty with?
A. Most difficult -- Yeah, I had a lot of difficulty with the main subjects, science, math. Well, actually, math was starting to get a little bit easier. But they were all pretty hard subjects for me to learn. Real hard.
- Q. What kind of grades did you get in those?
A. Not really (inaudible) -- so I don't know. Some C's and D's, sometimes B's.
- Q. Do you know what your high school grade point average was?
A. No. Pretty low.
- Q. Safe to assume you didn't go to college?
A. Yeah, I didn't go to college.
- Q. How about any vocational schools?
A. No.
- Q. But I don't guess that you've had any military training?
A. No.
- Q. All right. Did you ever participate in any school sports?
A. Yes, I did, when I was younger. I played (inaudible) -- did everything in track, football, baseball, soccer.

- Q. What grades?
A. I'm not sure. I did baseball and soccer when I was little. I don't know, about --
- Q. Grade school?
A. Fourth, about third or fourth grade, maybe younger than that. Yeah, even younger than that.
- Q. Any sports in high school?
A. No, I didn't do any sports in high school.
- Q. Any disciplinary problems in school?
A. Yeah, just -- I don't know. Not real cooperative (inaudible).
- Q. Okay. Well, what kind of things did you get in trouble for at school?
A. I don't know. Stupid things. Yelling at the teachers. Yelling back at 'em. Stuff like that.
- Q. Did they -- What would they do?
A. Just put me in the office..
- Q. Were you ever suspended?
A. Yeah, I was suspended a lot.
- Q. Were you ever expelled?
A. Oh, no, I wasn't expelled, just suspended.
- Q. Okay. Marvin, if you had to kind of catalogue the things that you're interested in, what would you say they are?
A. Music. I like playing music. I play cards a lot. I like cards.
- Q. I can tell you like cards.
A. And, uh, I like to run.
- Q. Run?
A. Run long distance.
- Q. Long distance?
A. Yeah.
- Q. Have you ever been in any marathons or half-athons?
A. No, not at all.

Q. You are sick. Somebody your age who likes to run! Man!

A. I like running for my own satisfaction.

Q. Clears your head, doesn't it?

A. Yeah, it clears it. Gets clean, you know. Takes my mind away from a lot of things, the bad things. (Inaudible) Kind of like a meditation for me.

Q. Do you know what endorphins are? It's kind of like the runner's high. Your body releases this chemical after you get so far along. Some people actually become addicted to that.

A. Yeah, I get addicted to it.

Q. Okay. Were you ever in Cub Scouts, Boy Scouts?

A. No, I wasn't in any of that.

Q. Nothing, huh?

A. Nothing like that, no.

Q. All right. Let's talk about your medical history. Have you -- Well, do you wear glasses?

A. No, I don't.

Q. Do you have any vision problems at all?

A. No, not really. Hallucinate a little bit.

Q. You hallucinate. We're going to get into that in a second. Any hearing impairment?

A. Oh, yeah. I have a real bad ear -- I think it's from my spine.

Q. Bad hearing because of your spine?

A. Yeah. It's real hard to figure out (inaudible).

Q. Okay. You have hard hearing in your right ear and your left ear clogged up?

A. Yeah, right (inaudible).

Q. Do you have ringing in your ears?

A. Yeah.

Q. Tinnitus? That's what it's called, tinnitus.

A. Tinnitus.

- Q. Do you have any disfigurements?
A. Like?
- Q. I guess you don't.
A. Uh-huh.
- Q. Any physical impairment? Are there things that you can't do because of your physical condition?
A. I don't think so. No, not really.
- Q. Any resulting problems because of being forced to squat like that?
A. Uh, just John Wayne!
- Q. (Laughter) Did you have a regular doctor?
A. No, not really. Kind of traveled around.
- Q. Traveled around. Okay. What about childhood illnesses? Do you remember if you had measles?
A. I had chickenpox.
- Q. Chickenpox. How about mumps?
A. No.
- Q. No mumps. Have you ever had a head injury?
A. Yeah, I've had head injuries.
- Q. Tell me about those and when they were.
A. I had a head injury when I was real little. I was about -- when I was living with my family, with my real family. I had eighteen stitches -- my uncle put me on the handlebars of his bicycle and I fell off when we were riding on cement. Split my head open and had eighteen stitches, across my forehead.
- Q. All right. What else?
A. And (inaudible)
- Q. Was that the half of it or the whole of it?
A. That's the whole of it.
- Q. No other injuries from like when you were running you fell down, or somebody --
A. Oh, I've broken my nose quite a bit. Like, you know, just every time --

Q. How have you broken your nose?

A. Running into trees.

Q. Were you on drugs or something?

A. Yeah. (Laughter)

Q. Have you ever been knocked unconscious?

A. No, I haven't.

Q. Have you ever had any fainting episodes?

A. No.

Q. Have you ever been hospitalized overnight?

A. No.

Q. Have you ever seen any mental health professionals?

A. Yeah, I've seen a few.

Q. Okay. Let's go as far back as we can. Tell me about the first one you remember.

A. I don't really remember names, but I just remember, you know, -- the only one I've ever seen.

Q. Well, maybe not names but let's try and think what age you were or what grade you were in and what city you were living in.

A. I was living at Toutle Lake when my first (inaudible) came in.

Q. Toutle Lake. And that was at a private home?

A. Yeah, that was --

Q. Not the Boy's Ranch?

A. No, it wasn't at the Boy's Ranch. It was at the Trams' house.

Q. Trams' house?

A. Yeah. It was in Longview, I think, that I went to my counselor. (Inaudible)

Q. Do you remember what they were talking to you about?

A. A lot of the sexual abuse. They talked to me a lot about that.

Q. Okay. You and I didn't talk about that too much.

A. Yeah, I don't remember a lot of it at all.

- Q. Would this be sexual abuse that occurred from your biological family?
A. Yes.
- Q. Up to age seven?
A. Yeah
- Q. Okay. What other counselors have you talked to for your mental health? Had this been going on continuously that you've seen mental health professionals?
A. No, it's not been a continuous thing. I've had a recent -- (end of side 1)
- Q. Okay. Marvin, we're on side two. And you were telling me about a recent counseling or examination that you've had. When was that?
A. Couple of years ago. Name was Tom Wilke.
- Q. Spell it, please?
A. T-O-M, W-I-L-K-E.
- Q. And where was that?
A. That was in Shelton. He just came and picked me up and we drove around and counsel.
- Q. Is he a mental health professional like a psychologist or something?
A. No, he was just a counselor. I don't know, just like a counselor. That's all we had.
- Q. Have you ever seen anyone who's actually been a psychologist or a psychiatrist?
A. No, I haven't. Actually, I don't recall. Are you a person?
- Q. No, I'm not a psychiatrist or psychologist.
A. Oh, you're not a psychologist?
- Q. No. I'm your investigator.
A. Oh, okay.
- Q. Remember?
A. Yeah. I thought you were a psychologist.
- Q. I'm trying to get into your head here. No, I'm just asking you all kinds of questions about your history so we can try and put something together here. You give me some leads on some stuff and then we know where to go from there.
A. All right.

- Q. Okay? Okay. How about any problems with alcohol?
A. Yeah, I drank a lot since the age of two.
- Q. Since the age of two?
A. Maybe even younger than that.
- Q. How do you know that?
A. Because my dad told me.
- Q. What kind of stuff would he give you or whoever it was?
A. Beer, lots of beer. I drank lots of beer. Smoked marijuana too when I was real young.
- Q. That was my next question. Okay. Did you ever do this with your parents?
A. Yeah, my dad. Dad and I smoked pot together quite often.
- Q. And that was before the age of eight?
A. Yeah, before the age of three.
- Q. Before the age of three? Has he told you about that or do you remember it?
A. He told me about it. He told me that I was doing drugs. And I remember a lot of the drugs. I mean --
- Q. Were there other drugs?
A. There was just marijuana and beer. That's all I drank and smoked.
- Q. But how about after that? Did you take --
A. Yeah, I've taken a lot of hallucinogenics.
- Q. What kind?
A. Like acid and mushrooms.
- Q. Peyote bites?
A. No.
- Q. (Inaudible), I mean. Excuse me.
A. No. Opium.
- Q. In what form?
A. Just smoking it. And then, I don't know, I took a few pills, not a lot. Not a lot of pills.

- Q. Like uppers or downers?
A. Both uppers and downers. Speed and took cross tops (phonetic).
- Q. That's probably like Dexadrine.
A. Yeah, it is. And then I'd take (inaudible). I took a whole bunch of those. Just --
- Q. What kind?
A. I don't know. They were in Frank's room. I took them. He had a whole bunch of those things.
- Q. Were they prescription medicine?
A. Yeah, they were prescription.
- Q. Do you know the names of them?
A. Naw, just a whole bunch of them.
- Q. Did he know you were taking them?
A. No. Morphine.
- Q. How did you take morphine?
A. It was like -- no, I don't know if it was morphine. It was a pill. They were pills.
- Q. Have you ever injected anything?
A. No. Never used IV's.
- Q. Okay. Have you ever been treated for substance abuse?
A. Yes, three times.
- Q. Where and when?
A. First time up in St. Pete's.
- Q. St. Pete's. What's that?
A. It's a chemical dependence center.
- Q. Where?
A. Up in Olympia.
- Q. And how old were you? Or maybe you can tell me where you were living.
A. Sixteen, possibly. I was living at Frank's house. All my treatment centers, I was living at Frank's house.

Q. Did he send you there or was it a voluntary commitment?

A. No, I've never volunteered to go to treatment myself.

Q. How long were you there?

A. A month.

Q. And, what about the next time?

A. Sundow M Ranch. It's up in the --

Q. Excuse me? Sundown what?

A. Sundown M Ranch.

Q. Sundown M?

A. Yeah, M Ranch.

Q. Okay, like the initial "M"?

A. Yes.

Q. Where's that at?

A. It's up in Yakima. Actually, it's near Ellensburg. So, --

Q. How long were you there?

A. I was there for 28 days.

Q. Another in-patient treatment program. Was that for alcohol or drugs or both?

A. Both, probably.

Q. How old were you?

A. I was -- I think I was seventeen.

Q. And what was the next occasion?

A. Same place. Sundown M Ranch. Back there.

Q. How long after you were released?

A. Not very long. Maybe eight to eleven months. I don't know.

Q. Was that another 28-day treatment?

A. Yeah, it was another 28-day treatment. Actually, I think I was sixteen the first time going to Sundown because I remember going to treatment twice in the same year.

- Q. Well, St. Pete's, you originally said you were sixteen.
A. Yeah. I was fifteen.
- Q. Okay. Fifteen at St. Pete's in Olympia.
A. No. I was sixteen at St. Pete's, that's right. Sixteen at St. Pete's, sixteen at Sundown. And then at seventeen I was at Sundown again.
- Q. Have you ever taken any -- or are you taking now any prescription drugs?
A. Yeah. They've got me on these doxepin pills.
- Q. Doxepin. What -- How many? What milligram?
A. Just one, 100 milligrams.
- Q. Morning or night?
A. Both morning and night.
- Q. Okay. So you take two 100 milligrams of doxepin a day.
A. A day.
- Q. It's like an anti-depressant type of medication?
A. Yes.
- Q. Just kind of keeps you flat so you're not high or low?
A. Yes. When I get happy, I get over happy. And when I get depressed I get really --
- Q. It's like a manic depressive.
A. Yeah.
- Q. This keeps you kind of more like flat lined.
A. Yeah, it keeps me flat lined.
- Q. Who prescribed that for you?
A. The nurse here did.
- Q. Oh, she did?
A. Yeah. The doctor put me on sulma (phonetic).
- Q. Excuse me. What kind of pills?
A. Sulma (phonetic).

- Q. Sulma (phonetic).
A. Yeah. I only took four of those. They just -- I don't know. They were terrible.
- Q. What doctor?
A. The doctor here. Doctor whatever his name is. I don't know. It just -- they -- I don't know. They made the anger come back in me and I didn't want it to come. So, I told them to take me off of them. I didn't want those.
- Q. Have you ever overdosed on drugs?
A. No, I can't say I've overdosed on drugs.
- Q. Do you have any work history?
A. No. I just worked on a farm, farms, cutting wood, baling hay, that kind of stuff.
- Q. Have you ever had like a regular job where somebody else paid you?
A. Yeah. I had a paper route for a while.
- Q. When was that?
A. When I was fifteen, when I started doing all my hard core drugs. Spent all my money on drugs.
- Q. Okay. Tell me about your criminal history. Any juvenile offenses?
A. Yeah. I've got some juvenile offenses. I've stolen cars.
- Q. When?
A. I don't remember. Fifteen, I think that's when I was. I've breaking and entering.
- Q. You mean burglary?
A. Yeah, burglary. I don't know. That's when I was living at the Oakley's house when I was about fourteen. Paid off a fine for that. Dropped probation, came back and got put back on probation not even three months later.
- Q. For what?
A. For stealing hood ornaments.
- Q. You have a thing for hood ornaments, huh?
A. Well, that was the only time I stole hood ornaments. That's what I got busted for, hood ornaments. And then the rest of them were mostly PV's for drinking and stuff like that. (Inaudible) Frank would be narcing on me for doing drugs and stuff like that. I had a real bad problem with drugs.

- Q. Was all that stuff around here?
A. What?
- Q. Juvenile stuff?
A. Uhm-mm.
- Q. And as far as your adult criminal history?
A. This is the only thing I've got.
- Q. This is it. Okay.
A. This is it.
- Q. And the co-defendant is Keith.
A. Yeah.
- Q. How long have you known Keith?
A. I've known Keith for a few years. We met back in the eighth grade. That was the first time I ever really met him. I didn't know him, I just met him. And when he moved into Frank's house. I'd say about three or four years I've known Keith.
- Q. Were you at Frank's house first?
A. Yeah. That's where I was when I met Keith.
- Q. All right. Anything else about your background that you'd like to tell me?
A. Like -- what background? Like my childhood?
- Q. Yeah. Anything we haven't discussed. Anything that may have come to mind.
A. Yeah. I remember -- I don't like talking about it, but I remember having sex with my little sister once.
- Q. Which little sister?
A. Jessica. (Inaudible) -- Desiree.
- Q. Did anybody ever know about that?
A. No, nobody found out about that.
- Q. How old were you?
A. I don't know. Five, probably, around. Used to have lots of sex with my (inaudible).

- Q. Who's that?
- A. I don't know her name. Just a little kid. I remember that. I remember my parents -- when we'd go to parties, you know, Mom and Dad always going and having sex and stuff we'd be watching, you know. We'd see it.
- Q. You'd watch your folks have sex?
- A. Well, it wasn't like they had any choice. It was like right there.
- Q. Well, no, I'm not saying that you're the bad guy in this. I'm just trying to make it clear that I understand what you're saying.
- A. I know. It was like, we would be sitting in the trailer and they'd just have sex right there on their bed. It was just a trailer without any walls or anything, you know. I don't know. I remember going to parties. It was all cool, playing around with Mom and stuff like that. I don't remember him playing around with me too much. But if I did it was from my subconscious mind where I can't think about it. Really that much if I do, it's like, "oh, boy." I've had lots of nightmares. I don't know, about big boobs. (Laughter).
- Q. Those are nightmares?
- A. Well, I don't know.
- Q. Maybe they were dreams, huh?
- A. Yeah, they were dreams. But other than that, it was weird. But, I don't know, it was kind of a dream, you know, because my dad would get in, you know, and start up like this figure and it would just get huge. And, you know, it's like blocked my whole mind out, you know. And my mind just had this one figure and then it would just be one figure for so long, you know. It was weird.
- Q. One figure, did you say?
- A. Yeah. It was like a tit or something, you know, or a penis or something. You know, it was kind of bad, you know.
- Q. Probably just your hormones kicking in. Well, actually, you said your dad. That would be like before age eight, right; is that right?
- A. Yeah. Before age eight, yeah.
- Q. Okay. Anything else you can think of?
- A. I don't know. They put me in a hole.
- Q. A what?
- A. A hole. Made me dig a hole.

- Q. They put you in a hole. Who put you in a hole?
A. My dad did. Made me dig a hole all day. I don't know. He burned dogs.
- Q. Burned dogs?
A. Yeah, my dad burned my dogs.
- Q. What do you mean he burned your dogs?
A. Well, he said my dogs were being bad and he burnt my dogs. Took my two dogs and threw them in the fire while they were alive.
- Q. Did he kill them?
A. Yeah, he killed them. They burned up, right in front of me. And took a sledge hammer to one of my dogs. He denies that he did that, but --
- Q. Did you see him?
A. No. I saw the dog. (Inaudible) was smashed.
- Q. What is your relationship to your dad now?
A. I don't know. We're pretty close now. I don't know.
- Q. He's visited you here?
A. Yeah, he's visited me here, since I've been here. Doesn't visit no more, though. He can't.
- Q. Why?
A. Because the therapist says he shouldn't come in because it's not good. Because you'd get too close and you won't want to talk about him. I don't know. I won't visit him. They haven't visited since.
- Q. They haven't, huh?
A. No.
- Q. Are you the one who told your dad not to visit?
A. Yes.
- Q. You did. What did he say?
A. He got upset. He got real angry. He said, "I'm gonna' come down here and blah, blah, blah, blah." Whoa, slow down, man.

- Q. You think he's going to admit to any of this stuff if we talk to him about it?
- A. I don't know. I don't know, really. I don't know my dad that good, you know. I just know him just for the few months I've been in here.
- Q. What kind of things did you talk about?
- A. I don't know. He told me about the dogs. Those dogs really haunt me. You know, they haunt me a lot, real bad, you know. I love animals, you know. I love animals. I wouldn't harm an animal, you know. If they came up and bit me, you know. I mean, I got bit by a dog. I didn't do nothin' to the dog.
- Q. Okay, Marvin, I think that's about it.

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End of interview: 6:34 p.m.

Appendix J

Bob Zornes Interview, Dated September 1, 1995

This is Bob Zornes. Today is September 1, 1995 and the time is 4:12 p.m. I'm located in the breathalyzer room at the Mason County Correction Center. And I'm here with my client, Marvin Faircloth.

Q. Marvin, first of all, I want to tell you that as you can see here I've got a tape recorder in my hand. The little red light means that it's running, it's recording my voice. And I know we've been through this before, but I just like to point everything by the rules and make sure that we're all covered here.

I want to ask you at this point. Do you have any objection to my tape recording your voice?

A. No, I don't.

Q. Would you please state your full name and spell each of those names for me?

A. Marvin Eugene Sides Faircloth. M-A-R-V-I-N, E-U-G-E-N-E, S-I-D-E-S, Faircloth is F-A-I-R-C-L-O-T-H.

Q. All right. How're you feeling today? Are you ready to interview?

A. No, I'm feeling nervous.

Q. Well, pretend that the recorder's not there. I know it's sitting right in front of you. But you've been recorded a number of times, actually three times by the police, at least three times. And I tape recorded you last time, remember? You're nodding your head.

A. Yes, yes.

Q. That's all right. And, I'm going to help you out a little bit here. But what I intend to do is try and pick your brain about what was going on, particularly the few days before the homicide. And then I'm going to take you through that thing step by step.

A. Okay.

Q. And when I say step by step, I mean you're the video tape generation. I was the 35mm generation. That's a camera that's up in the top of the -- or the projector that's up in top of the movie house that has these rolls of film. And they're each in a frame. And at times I'm going to say I want you think of it in a slow motion, frame by frame sort of situation. It's probably going to be painful for you to try and remember this, but, you know, we need to do it.

A. Yes.

Q. Okay. I want to begin with, you know, to the best of your recollection overall, what was going on the couple weeks prior to the homicide?

A. I don't know. I began to drink a lot and stuff. Actually, that week we --

Q. Who's "we"?

A. Me and Frank, Keith and couple Frank's family members. We'd go in the house. We were doing the rugs and painting and stuff like that. I helped them do that. And I wasn't there to help 'em put the rugs in so I got kicked out of the house because I didn't help them put the rugs in.

Q. Okay. Marvin, when you say you got kicked out of the house, how did those kicking outs go? I mean, how was it done?

A. Well, it was "Just leave. And if you don't leave I'm gonna' call the cops and the cops will take you to jail." And so I had no real choice, you know, either go to jail or have to leave, you know.

Q. Would he do that with other foster kids?

A. No. He only did it with me.

Q. Do you have some idea whether or not that was because you were a particular problem or he felt he could do that to you because you were actually his adopted son?

A. 'Cuz I was his son. He told me that. He goes -- I'd ask him why he did this and he goes, "'Cuz I can."

Q. Now, when you were his foster son before you consented to the adoption, did you ever get kicked out?

A. No, I didn't.

Q. And you say that in the week or several weeks prior to the homicide you were getting drunk. More so than you had in the past? What was unusual about it?

A. Uhm, stuff just started to really get to me. I had a girlfriend that was really into drinking and stuff. And so I'd be drinking a lot with her and stuff.

Q. What was her name?

A. Tracy Brady.

Q. Tracy Brady. B-R-A-D-Y?

A. E-Y.

Q. E-Y?

A. E-Y. I think that's what it is.

Q. Okay. I'm looking at my notebook here and it's -- Tracy is T-R-A-C-Y and Brady is B-R-A-D-Y. No "E."

A. Oh.

Q. That's okay. That's why we have these reports.

What sort of liquor would you drink?

A. Oh, we were drinking lots of beer at that -- I bought a fifth of Jack Daniels about the week before and drank the fifth in one day.

Q. By yourself?

A. Naw, I shared a little bit with Keith and a couple of other friends. And I -- I don't know. I was pretty drunk that day and came home and Frank started yelling at me because I wasn't at the house. And --

Q. Is this is when you were not at the house to help install the carpeting?

A. Yes. And he was yelling at me for that. And he told me to get out and stuff. And I kinda' -- I guess I got a little angry and --

Q. What do you mean by a little angry?

A. Not a little angry, pretty angry.

Q. What did you do?

A. I threw a t.v. at the wall and I broke a light that was in the house. And I hit Frank. And I left.

Q. You hit him. How did you hit him?

A. Just hit him with my fist.

Q. Okay. One time? Two times?

A. One time.

Q. And where on his body did you hit him?

A. I think I hit him in the back.

Q. Like back here where I'm pointing (indicating)?

A. Yeah, in the back.

Q. Okay. Well, that's definitely the back. You didn't hit him the face then, huh?

A. No, I didn't hit him in the face.

Q. Were there any witnesses around who observed the confrontation?

A. Uhm, I don't think so. I think Keith was upstairs. I'm not sure 'cuz I was pretty drunk. And I came back and Frank told me this is what I'd done.

Q. Okay. So after you threw the t.v. at the wall and hit Frank, did you leave, or what did you do?

A. Yes, I leaved -- I left. And I was gone about three days.

Q. Where did you stay?

A. Over at Tracy's house.

Q. And was this in the week immediately preceding the homicide?

A. Yes.

Q. Okay. Now, the homicide was February 26th, wasn't it?

A. Yes, it was. Or the night of the 25th, morning of the 26th.

Q. All right. And, so then we must be talking about sometime around from February 20th to the 25th or so that this happened?

A. Probably, somewhere around there.

Q. Did or do you know if he reported this to the police, that you had run away?

A. Yes, he reported to the cops. And the cops said if they caught me that they would take me in. But, if they didn't catch me they couldn't do nothin'. And they saw me, they saw me a couple days later and I wasn't around (inaudible) parts so they couldn't do nothin' about it. So, --

Q. How old were you then?

A. I was eighteen.

Q. And, so what were the cops going to be able to do other than arrest you for minor consumption?

A. Well, they didn't arrest me 'cuz they couldn't. They had nothin' to arrest me on.

Q. That's what I mean. I mean, what was Frank going to have you picked up for?

A. You know, just for leavin', I guess.

Q. Okay.

A. And being drunk.

Q. So, after several days at Tracy's house, how did you manage to get back into the good graces of Frank?

A. Well, I called the treatment center and told them I needed to go --

Q. Excuse me. And I told you before I'd be interrupting you a lot and here I'm starting.

When you say the treatment center, which one are you talking about?

A. Uh, St. Peters. I called St. Peters and talked to some lady up there. And she told me to call back.

Q. Is that the one that you had been to before?

A. Yeah. It's the one I went to the first -- my first time going to treatment.

Q. Where's it located?

A. It's located in Olympia.

Q. All right. So, you called there and you talked to a female who said what?

A. She just told me that she couldn't do nothin' right now but to call her back in a few hours. So, I said, okay, and in that few hours I went back to Frank's house and I told him that I got in touch with the treatment center. And he said, okay. We talked and stuff. And he said -- I apologized to him, you know, for hittin' him and stuff. And he was kind of abuse -- kind of upset at me but he forgave me for it. And, uh, I don't know, things were going pretty good for couple days there -- for that day until the next day. And I had my girlfriend over. I didn't call the treatment center back. I don't know, don't know why I didn't. I had my girlfriend over the next day and Frank came over, came upstairs, and didn't want my girlfriend in the house so he kicked her out.

Q. Was there a reason he didn't want her there?

A. No, he just -- we were just sittin' there watchin' t.v. He comes up and goes, "I don't want her in here. I want her outta' here right now."

Q. Was there a rule in the house that said you couldn't have girls in your bedrooms?

A. Well, the door was open. He said if you're doors are closed you can't have girls in your rooms. Our door was open and we were watching t.v. and I was just, you know, playing it cool and stuff. And Frank comes up there and got angry and told us -- told her to leave so I left with her. And Keith left and we all went over to Ryan Giddings' house.

Q. Okay. Let me spell that for the secretary. That's R-Y-A-N, G-I-D-D-I-N-G-S.

A. And, uh, we sat there for a while, and --

Q. Who all was there?

A. Ryan, me, Keith, Tracy, Greg.

Q. Greg who?

A. Greg Frazier.

Q. Okay. F-R-A-I --

A. Z.

Q. I-Z-U-R-E, or --

A. F --

Q. No. F-R-A-Z-I-E-R.

A. Yeah.

- Q I'm confusing myself. I can't recall off the top of my head how he was involved. Is he one of the foster kids or --
- A. No, he was just a friend.
- Q. Did he live in the area?
- A. Yeah, he lived next -- down the (inaudible) from me.
- Q. Anybody besides the names you have already mentioned?
- A. Yeah. There was a girl named Crystal that was there too. And, uh, we sat over there at Ryan's house for a little while and stuff. And it was cool, you know, just hangin' out there. And, uh, me and Crystal, Mike, Keith --
- Q. Mike?
- A. Mike Miller.
- Q. Miller.
- A. Yeah, Mike Miller was over there too.
- Q. Okay.
- A. And, uh, me, Tracy, Mike, Crystal and Keith all went back to the house and we sat there watching t.v.
- Q. And this is the house you were living in, Frank's?
- A. Yes, at Frank's house. And Frank come upstairs and he told the girls just to leave, just the girls, you know. And I was like, well, what's the deal with this, you know. I said, there's a guy in here and you're just telling the girls to leave and you're not telling the guys to leave. I said, that's not right 'cuz you're always kicking just the girls out and you're not saying nothin' about the guys being here, you know. And, you know, we had a conflict with that.
- Q. What do you mean you had a conflict?
- A. Like an argument. We were just arguing about that, and stuff. And --
- Q. Was it just you and Frank arguing or did the other --
- A. Yeah, it was just me and Frank. And, uh, everybody else left. And -- I think they went over to Mike's house after that. And I left. I went and -- oh, yeah. We went out and I got drunk that night. Tracy went home.
- Q. Drunk drinking what?
- A. Drinking just beer, just a bunch of beer. Wasn't like real drunk just buzzed out.
- Q. Did you use any drugs?
- A. Well, I'm gettin' to that.

Q. Okay.

A. And we out and we got drunk. And my girlfriend went home. And then everybody else went home. And me, Ryan and a guy named John --

Q. John who?

A. John Thurston.

Q. Thurston. T-H-U-R-S-T-O-N?

A. Yes. And we were out drinking. We come back and me and Ryan just sat down in the gazebo talking for a little while.

Q. Where's the gazebo at?

A. It's down by the creek in Oak Park.

Q. It's -- Now that isn't the place you called the Tepee, is it?

A. No. That's just a gazebo. Just a building with a roof on it. And, uh, we sat there and talked for a little while. And, I don't know, we was going pretty good. And I went home. And I got home and I was pretty buzzed up. And then Frank, Keith and Brice --

Q. Okay, that's Brice, B-R-I-C-E, and his last name is West, W-E-S-T. Don't they call him Mickey?

A. No, they just called -- we called him Brice. That's what his name was.

Q. And, uh, we were watching the (inaudible). It was goin' on, alright? And then went out to smoke a cigarette and that's when everything started happening. Frank --

Q. Who's "we"?

A. Me and Keith went out to smoke a cigarette. Everything started goin' down. Frank started gettin' mad and stuff.

Q. What was he -- What was Frank upset about?

A. Because we left the door open a crack, you know, so we can hear the t.v. also while we were watching the movie. And Frank just gets real angry when we done that, you know. I mean, it would just be a little crack. It wasn't enough to harm anything. And, so, he got angry about that and slammed his door, went into his room all angry, like he always does. And me and Keith went back upstairs and we were watching our own movie. We had a movie upstairs. And Brice was there with us.

Q. Okay. Now, Marvin, are you at the point where we're talking about the night of the murder?

A. Yes, this is that night.

Q. Okay. So this is February 25th?

A. This is February 25th.

Q. Let me back you up for just a second here. Now, I've read in some of the reports that some of the kids say that you had mentioned a week before the murder that you wanted to kill Frank. You remember that?

A. No, I don't remember saying that.

Q. You ever sat around and made plans in anybody's presence, or --

A. No. Me and Keith said it a couple times just, you know. I was an angry kid. You know, a lot of angry kids say that when they're angry at their parents. I mean, I don't know if you guys know any kids but a lot of kids I have known always said that when they were angry at their parents. "I wanna' kill my parents," you know, "I hate 'em," you know, "They suck," you know, and stuff like that. We just -- we said stuff like that, you know.

And Keith would say, you know, "I gotta' way," and I don't -- you know, I don't know what it is but, "I got a way." I don't know. You know, it was just somethin' I didn't really realize, you know. I wasn't -- I didn't pay attention to it too much. But said that a couple times a week or two before that, you know. And --

Q. Okay. And back to the evening, about what time was it that you and Keith went outside to smoke?

A. Oh, man, I don't know. I was pretty buzzed up. It had to be around ten or so.

Q. Well, how much alcohol would you estimate that you had consumed by that time?

A. About a case of beer.

Q. Over what period?

A. Over an hour's worth of time.

Q. Okay. Now, that --

A. I'm a pretty heavy drinker.

Q. That doesn't fit for me, though. You're talking what, cans?

A. Yeah, cans.

Q. Okay. Twenty-four twelve-ounce cans by yourself?

A. Yeah. We had two -- You'd be surprised how much I can drink. I can drink like a fish. I'm serious. I can drink a lot.

Q. Was anybody with you who watched you drink that night?

A. Yes, Ryan Giddings and John Thurston.

Q. Did they participate?

A. Yeah, they drank some. We had a case and a half by this time.

Q. A case and a half between three of you.

A. Between three of us.

Q. And you would estimate that you drank twenty-four of those cans?

A. I don't know a whole twenty-four. Maybe a little less than that but I drank quite a bit. I drank a lot of beer that night. I know I drank a lot 'cause we came back and we only had three left. And I had 'em in my pocket and I took 'em in my room.

Q. Okay. So you and Keith are out there and Frank comes out. And he's upset because you guys didn't completely close the door?

A. Yes. And he went in his room and slammed his door. And so we just turned off the movie that was on downstairs.

Q. What were you watching?

A. I don't remember.

Q. What type of a movie was it?

A. I wouldn't know. I wasn't really paying attention to it too much.

Q. Well, let me ask you this. Do you think it was a western movie? Cowboys and Indians? Was it an adventure story?

A. I don't know.

Q. Was it a science fiction movie?

A. Uhm, I wasn't paying attention.

Q. Was this one of the movies that you guys had rented?

A. Yeah, Frank and Keith and Brice went out and rented three or four movies that night.

Q. Do you remember watching a movie called "Ten 'Til Midnight"?

A. Yeah, that's the one we were watching in our bedroom. That's the one we watched.

Q. Okay. We haven't gotten to that point yet, though, right?

A. Yeah. That's -- I was just gettin' to that.

Q. Okay, go ahead.

A. Okay. So me and Keith, we went upstairs and turned it on. And Brice came in there and we put on the V --

Q. You and Keith shared a room together?

A. Yes.

Q. All right.

A. I slept in the chair and he slept on the bed.

Q. In a chair?

A. Yeah.

Q. Why would -- Why wasn't there a bed for you?

A. 'Cuz we only had two beds upstairs, you know. I had a chair, a lounge chair. I don't know. It was one of those rockin' chairs that lean back.

Q. That's what you always slept in?

A. Yeah. (Inaudible) -- slept there.

Q. What did you sleep in when you were a foster kid?

A. I had a bed.

Q. And who wound up getting that bed when you got adopted?

A. Keith would sleep in that bed.

Q. Did Frank just say, well, you're my adopted kid now and I've got a foster kid, he needs to stay in that bed, or what?

A. I don't know. I was just his kid so he can do anything he wanted with me pretty much. That's the way it was with him, you know. Anything didn't matter, you know? I was his kid and he said, you know, when I first moved he was gonna' treat me like a normal kid, you know? And I thought, cool, you know. I have a real parent here to watch out for me, you know, and be there for me, and, I don't know, ended up wrecking my life.

Q. Okay. So you would sleep in the chair and Keith would sleep in the bed. You guys went up to your room and you were watching a movie. And did you say Brice was there?

A. Yeah, Brice was in the bedroom too watching the movie with us.

Q. And what was he like, sixteen-years old at the time? Wasn't he new to the house?

A. Fifteen, sixteen. Yeah, he was a newcomer. He'd been there about two or three, maybe four months. And he was just there for a couple months.

And, you know, I pulled out a can of spray paint, after drinking another beer. Pulled out a can of spray paint and, I don't know, me and Keith started huffing the spray paint. I went through a lot of spray paint. We went consistently back and forth, back and forth.

Q. What did you spray it into?

A. Into a large paint bag.

Q. A paint bag?

A. Yeah. They're bags that you paint in and they won't -- the paint won't stick to it. You can blow it back up and it'll blow back up.

- Q. So, where did you get this paint from?
A. Uhm, when they spray paint -- when they were doing the house. They had an extra can and we -- I snagged it.
- Q. What color was it?
A. It was white.
- Q. Did Brice participate?
A. Uhm, no, Brice didn't. We asked him and he said no because he had asthma. So he didn't participate.
- Q. So, you would spray the -- spray paint into the bag and then put the bag up to your face and then you'd inhale very deeply?
A. Yes.
- Q. And that's called "huffing," right?
A. Yeah. Numerous times (inaudible) until you're pretty high, until you feel lightheaded. And then you start to see spots and --
- Q. How many times do you think you had done that before this occasion?
A. Oh, I don't know. I've been doing it for about three years.
- Q. And what did it typically do to you?
A. I don't know. Fries your brain cells and makes you hallucinate. I don't know. Makes you feel all lightheaded. I don't know. Kind of weird high. I don't know.
- Q. Do you ever black out?
A. Uhhh, yeah, I blacked out a couple times.
- Q. Have people told you later on what you have done and you -- well --
A. Yeah.
- Q. What have they told you you did?
A. Well, one time I was over at my -- I was at my house. This was when I first started huffing. And this kid named Bob Dailey was there and I was huffing and he came in the room after and I -- I don't remember but he said I hit him in the face 'cuz, I don't know, I was just tripping out and I didn't realize it but he said I hit him in the face.
- Q. Was that while you were living at Frank's house?
A. Yes. That was when I was a foster kid.
- Q. Did Frank ever find out about that?
A. No, he didn't.

- Q. What happened to Bob Dailey? Was he a foster kid too?
A. Yeah, Bob was a -- Bob's a good kid. He just moved on. I don't know. Like most foster kids. They're there for a little while and they just -- out to another place, out to another home. Can't remember what happened with him though.
- Q. So back to the huffing action. By the way, that's h-u-f-f-i-n-g. You and Keith passed the bag back and forth several times?
A. Yes.
- Q. And did you need to keep replenishing the spray paint in it?
A. Yes, we did.
- Q. Okay. How many times do you think that happened?
A. I don't know. It was over watching that whole movie. We were doing that through the whole movie.
- Q. Do you remember what that movie was about?
A. Yeah, I've seen it -- I've seen it quite a few times.
- Q. Tell me about it.
A. It's about a dude that, I don't know, kind of -- he takes all his clothes off and runs around killing people, killing girls and stuff. But --
- Q. How does he kill them?
A. I don't know. With a razor blade or somethin'. I'm not sure. Knife or somethin'.
- Q. Any hammers involved?
A. No. No hammers.
- Q. Have you ever had any discussion when you've been sober about that movie?
A. No.
- Q. Had you -- How many times do you think you had seen that movie before this incident?
A. Uhhh, about three or four, maybe five times.
- Q. Do you ever recall acting out any of the scenes in the movie?
A. No.
- Q. I mean not actually --
A. It's a corny movie. I just watched a few times.

Q. Like a horror movie?

A. Yeah, it's kinda like that, kinda. I don't know. It's got Charles Bronson in it. He's like a detective that runs around trying to figure out if this guys the killer. Runs around killing people and stuff.

Q. So, do you have some estimate of how long it would have taken for you and Keith to huff?

A. I don't know, about two, two and a half hours.

Q. Did you -- How much of the can did you use up?

A. We used the whole can.

Q. Was it full when you started?

A. Uh, almost all of it we had, about a quarter empty.

Q. Okay. So two and a half hours you're sniffing paint. And, anything else happened that you remember?

A. Yeah, I remember Brice left the room, went into his room. And then Frank came upstairs and told us to turn down our music or somethin'. I turned up the t.v. I can't remember --

Q. How did he say that?

A. He was -- He asked us nicely, at first. And we did. We turned it -- We turned off the t.v. and we were playing our music. It was like normal every night music. It wasn't that loud. And he came upstairs and he slammed open the door and said, "Told you to turn that shit down." And, I was like, what? You know, it was like, we weren't even playing it that loud, you know? And Brice's room is right over Frank's room so it could have been Brice that he was listening to also. 'Cuz, I don't know, Brice -- well, like Brice was kind of a noisy kid. So, and, I don't know. He came up there in his underwear and stuff. It kind of creeped me out.

Q. Why?

A. I don't know. He just -- He always -- I don't know, ran around the house naked almost, always, and stuff.

Q. Tell me about that. I wanted to get into that. A lot of times when I do a sexual crime investigation I ask people what the general atmosphere is around the house because some people, they're always completely covered up. And then others, like families from Europe and that sort of thing, it's no big deal for them to all bathe together. What was the general -- Were there rules about clothing attire in the house?

A. No, there was not.

Q. Did you walk around the house in your underwear?

A. No, I didn't.

Q. What about Keith?

A. No.

Q. What about Brice?

A. No.

Q. Did any of the boys?

A. No, just Frank.

Q. Did you and Keith or any of the other kids shower together?

A. No, we didn't.

Q. What about Frank? Would he ever shower with anybody?

A. Not that I knew of.

Q. Did he ever to your knowledge walk in on anybody when they were in the shower?

A. Uh, yeah, he walked in on me a couple times while I was in the shower, he walked in.

Q. Okay.

A. I asked him why he was in there.

Q. Were you actually in the shower?

A. Yeah, I was in the shower.

Q. Was it a curtain or a door?

A. It was a curtain.

Q. And, when he came in, what did he do?

A. He just kind of fumbled stuff around in the bathroom and then left.

Q. He didn't pull the curtain back and look at you?

A. No. I would've seen through the curtain in the bathroom.

Q. Was it clear?

A. Yeah, it's clear. Don't have to -- don't have to pull it.

Q. Wasn't there a lock on the door?

A. No. The locks -- Locks for our rooms or somethin', I don't know. It didn't work.

Q. Do you know if he ever walked in on any of the other boys?

A. Uhhh, yeah. Keith told me a time where he walked in on him when Keith was taking a dump, going poop.

Q. Did Mr. Faircloth have his own bathroom?

A. Yes, downstairs.

Q. It did have a lock on it?

A. No, his lock didn't work. None of the locks worked.

Q. In any of the rooms?

A. On any of the bathrooms.

Q. And none of the bathroom locks worked?

A. Yeah, only the bedroom doors.

Q. Okay. Did you ever see him naked?

A. Not completely naked; in his underwear.

Q. And when you say underwear, do you mean briefs, boxers, what?

A. Just -- I don't know. Those regular white kind of underwear.

Q. The night he was murdered, he apparently had no socks on, no shoes, no shirt, no pants, just --

A. Underwear.

Q. Underpants. Okay.

A. Yeah.

Q. Around the house, were there any kind of men's magazines?

A. Yeah, there was but I guess they were gone or somethin' when they came in.

Q. What kind of magazines were they?

a. Uhmm, guys jerking off.

Q. What?

A. Guys jerking off.

Q. Where were those magazines?

A. They were underneath his bed. I showed 'em to a couple of my friends.

Q. Which friends?

A. A kid named Chris Norton. He lives in Oak Park. Keith saw 'em. He saw the pictures.

Q. Norton. N-O-R-T-O-N?

A. Yes.

Q. And how old is Chris?

A. Uhmm, I don't know, about fourteen, maybe fifteen now.

Q. Did you take Chris into Frank's room and show him or did you take the magazines out of Frank's room and show him or what?

A. Yeah, I took Chris into the bedroom and showed him.

Q. Do you know the names of any of the magazines?

A. No. It wasn't like magazine magazines. They were just pictures

Q. Oh, pictures.

A. Just pictures of men doing that kind of thing.

Q. Okay. Polaroid pictures or what?

A. No. It was like Playboy pictures. Like come out of Hustler or somethin'.

Q. So it looked -- The impression I'm getting is, is that they were pictures cut out of a magazine then?

A. Yeah.

Q. Is that right?

A. Or just the full page with stuff.

Q. And, exactly what did these pictures depict? What did they show?

A. Well, one showed a girl sitting with her legs open and holding a penis in both hands, right by her mouth. And showed some of 'em jerking off on the woman. So, stuff like that. I don't know.

Q. Did it show any type of homosexual acts?

A. Uhm, I don't know. It just had two men and one woman on there. That's it. I don't know.

Q. How did you find these pictures?

A. I -- well, he kept stuff from me. And he took my stuff all the time. He took my mail. He'd take anything that he wanted of mine. He'd go through my room any time and take it. So, I went in there and I'd look for my stuff and I came across this stuff. And came around a -- well, we called it a shit stick 'cuz, I don't know, it was white in the form of a penis and it had shit on the tip of it. I don't know. So we called it a shit stick.

Q. Where was that at?

A. It was in his drawer closest to his window, bottom drawer. I don't know. I guess when the lawyers and all them went through there they didn't find none of this stuff.

Q. So, who saw that? That would be a phallus, p-h-a-l-l-u-s. You know, a dick.

A. Yeah.

Q. And obviously if it smelled like feces --

A. Well, I don't know if it -- we didn't smell it.

Q. But you said there was shit on it.

A. Yeah, there was shit on it, you could see it.

Q. Okay. Anything else unusual in Frank's room?

A. Uhmm, I don't know, just empty condoms.

Q. Empty condoms. I need to back up just a second here so I can keep things in sequence.
Did anybody else see the shit stick?

A. Yes, some friends but I can't remember who else saw it. Chris I know saw it. I showed Chris. See, he's one of my skater buddies. We used to skateboard all the time and stuff together. So, I -- I don't know. Just kind of a joke would show him and stuff, you know? Because it was pretty sick looking, you know? If you don't -- don't every day go into your parent's room and find somethin' like this, you know.

Q. Okay. The open condoms. What do you mean?

A. Yeah. Just empty condom bags with condoms within stuff in them.

Q. Well, were they used?

A. Yes.

Q. And where were they located?

A. In his drawers.

Q. Now, when I say "used," I'm talking about, you know, somebody had ejaculated into them.

A. Yeah.

Q. You know, they came in them.

A. Yeah. I wouldn't touch 'em or nothin'. I mean you could see 'em. He left 'em on top of the drawers.

Q. Did you ever see him with any women in the house?

A. No. Well, he had a lady there for a while. But they kind of just parted, you know, 'cuz Frank was -- I don't know -- (inaudible). I don't know. He talked about how the relationship was going all the time. He never really, you know, actually got into a relationship. Always saying what's going wrong with the relationship and what's going right and stuff like that. And then when she asked him to get married he broke up with her.

Q. What was her name?

A. Mary -- Mary Chapman, somethin' like that.

Q. Chapman. Do you know where she was from?

A. She lived in Shelton.

Q. Shelton. Okay.

A. She worked at the DSHS with him.

Q. All right. As long as we're talking about Frank, anything else unusual, you know, his lifestyle or his bedroom?

A. Oh, yeah. There was lots of weird things. I mean, when you'd be in the kitchen -- me and -- When I was working in the kitchen, you know, like cleaning or cooking or somethin', he'd be like right there over your shoulder, you know. You'd be afraid to, you know, move around in a certain way in the kitchen, you know, 'cuz he'd be too close and you wouldn't wanna' get into, actually feel you or somethin'. I'd be afraid to just put dishes in the dishwasher when he was home.

Q. Why?

A. Because I wasn't sure what he would try to do if I was bent over. That's -- you know -- I was so afraid -- that if I put dishes in the dishwasher I'd make sure I was towards the (inaudible) wall to him so the doors went outside.

Q. Did any of the other kids ever tell you they felt that way?

A. I don't know. Keith felt that way quite a bit. Me and Keith, we lived there for a long time, you know. Brice (inaudible) -- I don't know. Brice said he felt like that but I don't know if he feels that way now. But that's what he said when he was there. He said, you know, he talked about Frank like that, you know. Frank, I think gave a person, you know, all that kind of stuff, you know. I mean, we always talked about it because it was kind of freaky, you know, your parent being gay and all that, you know, or somethin', or whatever, you know. And just afraid to do anything, you know, in the house. That's why I kept to myself and tried to keep apart from him.

Q. But he never touched you?

A. Yeah, he touched me. He touched -- He grabbed my balls one night.

Q. Okay. Was that the night that you got into a fight with him, though?

A. No. See, what happened is, I went out to the car -- We worked around the house for cigarettes and stuff. It was like four days and he hadn't bought me no cigarettes or nothin' and I worked a lot around the house. And I went in the car and I found a bag that had cigarettes in it and stuff. And I when I went in there Frank come running out, grabbed the bag from me. And I -- and he went in his room and threw it on the farther side of his bed, you know. And I went in there to grab the bag. He came in and -- his hand -- I don't know if he was trying to grab the bag or what, but he reached up and grabbed me by the nuts. And -- It got me angry so I hit him, you know, for it. And I grabbed him by the back of the neck and I put my knee in his back. I don't know. I pushed him back on the bed and I left.

- Q. Any other occasions when he touched you?
A. Well, when we were in the room talking and stuff, you know, he'd hug me and stuff.
- Q. Where were his hands?
A. Be on my butt -- or my back, just rubbin', you know. And I'd ask for the -- and poppin' my back, or somethin'. And he worked the lower part of his back a lot, you know, (inaudible) --
- Q. When you say the lower part, will you point where he point his hands.
A. Well, towards my hips, down towards my -- almost my butt.
- Q. Stand up and show me.
A. Right around here (indicating).
- Q. Okay. You're right at the top of your buttock, right at the waist line.
A. Yeah.
- Q. All right. Who's idea was the popping your back? Was that yours?
A. Well, yeah, that was when I first moved in. It was like for a while and we were -- I needed my back popped real bad. I mean I got a real bad spine and stuff from --
- Q. How would he pop your back?
A. He's put lotion on his hands. And he'd -- I don't know -- rub it with that. I'd ask him why he put it on there, "So I could get better friction," or somethin' like that, he said. I don't know. I thought, okay, you know, whatever. He'd massage my back and try to pop it and it would pop.
- Q. Okay. What you're doing, you're motioning with the heel of your hand there. This part is the heel of your hand.
A. Yeah.
- Q. Okay. And that would pop your back?
A. Yeah, he'd push right down the spine area.
- Q. When he did that with you, how was he dressed?
A. I don't know, just depending on what time of the day it was. It was usually around night time. So, I don't know, he'd have a pair of shorts on.
- Q. When you mean shorts, underwear or --
A. No, shorts. Shorts.
- Q. All right. Ever notice any unusual reactions?
A. I don't know.

Q. Well, did he have a hard on at any time?

A. I never paid attention.

Q. Okay. He didn't rub up against you?

A. Uhm, right there doing my back. So, I never noticed it. I don't know.

Q. Okay. You said that he rubbed your butt when you were hugging before.

A. Yeah, he done that a couple times. That's why I, you know, I didn't -- I don't like talking with him in his room 'cuz he had his door closed and his curtains were closed. And, you know, and (inaudible) went on in there. It just kind of freaked me out, you know. I didn't like talking to him in there. I'd kind of -- he'd say, "Sit down." I'd say, "No, that's all right. I'll stand here," or "I'll just wait over here," or somethin'.

Q. Did you ever have any pictures taken of you?

A. Yes.

Q. What condition? What were you doing?

A. (Inaudible) -- professional pictures.

Q. I mean did he ever take any pictures of you?

A. Birthday pictures. I hate cameras. I'm not a camera person. I hate cameras.

Q. Were any of the pictures ever taken of you or any of the other boys when you were only partially clothed?

A. Yeah. I was in treatment -- bathrobe.

Q. Oh, that doesn't count. Okay. I want to move on with this homicide. But before I do that I want to make sure that we've tried to cover all the areas about Frank. Anything else that was unusual? You found a dildo.

A. Yes.

Q. Okay. Used condoms in his drawer.

A. Yes.

Q. And there were some photographs -- well, cut out from a magazine.

A. Yes.

Q. And where were they?

A. Underneath his bed.

Q. Anything else?

A. Uhhh, I just -- Naw, not really.

- Q. Okay. Well, I'm not exactly sure where we left off, but I remember he came up and yelled at you.
- A. He came up and yelled at us. He slammed open our door and yelled at us again, second time. You know, I was just sittin' there. I was surprised, you know, he even came back up 'cuz we had our music louder than that, usually at night time, then what we had it, you know. And he came upstairs. He was tweaking about that, you know.
- Q. What do you mean "tweaking"?
- A. Angry, very angry, "Turn that shit down. Turn it down now!" And we thought, whoa, you know! Not even up that loud. We could hardly even hear it. What are you yelling about? You know, we couldn't understand really what the words were sayin'. Could've been also 'cuz we were high, but -- He came up there and all tweaking and stuff. And I kinda' just looked at Keith, you know. And said, "Hey, you wanna' go down there and do somethin' about this?" And he said, "Yeah."
- Q. Well that was after --
- A. That was after he came up and yelled at us.
- Q. After Frank come up and had left, then you said to --
- A. Keith.
- Q. Keith. "Do you want to do something about this?"
- A. Yeah.
- Q. And what did you have on your mind when you said that?
- A. I don't know. Kicking his ass, maybe, and kill him, I don't know.
- Q. Kicking his ass is a lot different from killing him.
- A. No, not really. Not in my -- Not in the sense that I was thinkin' of kicking ass. I wasn't saying kicking ass like kicking ass and beatin' him up. I mean, really beatin' him up. You know, hurt him bad. And then what it is, Keith grabbed the Jack Daniels bottle and --
- Q. Well, what did Keith say when you said you wanted --
- A. He just -- He said, "Okay." He goes, "You sure you want to do this?" And I said, "Uh-huh, yeah, I guess so." And he said, "All right."
- Q. Was it some kind of understanding that you were going to go down and beat Frank up or was it understood that you were going to go down there and kill him?
- A. Well, I don't know. I don't know. 'Cuz Keith was the kind of a person that just stays to himself, you know. He doesn't --

- Q. Well, what did you -- What was your understanding?
A. Well, I wanted to go down there and beat him up pretty bad. I grabbed a hammer but when I got down there I put the hammer away, you know. I put it down on the counter thing.
- Q. Where was the hammer at when you first got it?
A. It was upstairs in my room.
- Q. What was it doing there?
A. I don't know. I was fixin' somethin' with hammer but I can't -- Oh, yeah, got seams on our closet doors, on our closet doors that were still locked when they were fixing up the carpet.
- Q. Where's the hammer usually kept?
A. In the garage.
- Q. In the garage. Okay. So, Keith said whatever he said, yeah, let's go do it, or whatever. And then Keith picked up the Jack Daniels bottle.
A. And he said, "I'm gonna' use the Jack Daniels bottle." I said, "Well, let's huff one more time before we go." And we did. We huffed real quick, you know. Got a little bit high again.
- Q. Why'd you do that?
A. I don't know. I knew I couldn't do it if I was sober. When I went down there -- Well, I grabbed the spear -- one of my sticks, big stick that I have.
- Q. Why do you call it a spear?
A. 'Cuz it was somethin' I used to close windows. I was long. It was real long. It was about six feet long.
- Q. Well, besides just being a stick, was --
A. And it had a screw on it too.
- Q. A screw. On the tip of it?
A. Yeah.
- Q. This stick, was it like a mop handle or a broom handle or a branch?
A. No, it was for these things we had in our houses for cupboards and stuff. I don't know, has different layers -- or three different layers or four -- like shelves you put in a house. And then it kind of formed into a cool shape. I don't know. It just had spikes on there so you can stick another one and then screw it on there.

Q. Oh, okay. I see. A threaded screw on the end so you could screw and extension onto it; is that what you're saying?

A. Yeah, that's what it was.

Q. And, this threaded end, was it pointed or blunt?

A. It was pointed.

Q. How pointed was it? Was it like, you know, like a regular wood screw, was it pointed like that?

A. Yeah, that's the kind of screw it was.

Q. All right. So you grabbed the spear. Where was the spear at when you grabbed it?

A. Uhhh, right there by the chair, against one of the cupboards in our room.

Q. In your room?

A. Yeah, the dresser. It came out of Keith's room.

Q. Is that where it was normally kept?

A. Yeah. But, I didn't want to give it up and I just used it for other things. Turn around, to the window, shut the window with it. That's how I shut my window.

Q. Okay. So who leads -- Well, did you discuss anything at all about what you were doing to do before you got down there?

A. No.

Q. Who led the way out of the bedroom?

A. Well, I started and Keith went down the stairs first. And, uh, he went into the bedroom.

Q. "The" bedroom; Frank's bedroom?

A. Yes, Frank's bedroom.

Q. When he went into Frank's bedroom, was the light on or not?

A. No, it wasn't. It was no lights on. And, uh, I put the hammer down on the counter. I had my spear in my hand and Keith was -- started walking in and I was gonna' say somethin', you know, like, "Naw, never mind," you know. He walked in there and goes pow! Hit him over the head with it.

Q. Well, did anybody turn a light on first?

A. No, no, nothing got turned on.

Q. Could you see in the room?

A. Yeah.

- Q. How were you able to see in the room?
A. There's -- His curtains were open at night.
- Q. And it was a bright moonlit night?
A. Yeah, it was pretty bright that night. We could see in his room.
- Q. Was there a hallway that leads down to his room? Was there a light --
A. Here we go. Our room is -- This was a two-story house and it goes stairs. And we got out entertainment center here (indicating) and then take a right and there's his bedroom right there (indicating).
- Q. Okay. Well, were there lights on outside of the bedroom that provided light into the bedroom?
A. No, there wasn't.
- Q. Okay. So the light you had was the light that was coming in through the window?
A. Yes.
- Q. But, I thought those blinds were usually closed.
A. They usually were but sometimes he left them open. Like around nighttime he'd open his window a little bit.
- Q. All right. So, Keith walks in first and, are you standing where you can actually see Keith swing the bottle?
A. Yeah, I'm just inside the doorway and Keith's up against the bed and he hit Frank over the head with the bottle. And then Frank gets up and starts saying, "Ow, ow ow," you know, 'cuz he hit him in the head. And, uhmm --
- Q. Did Keith say anything when he swung the bottle?
A. I think he said somethin'. I don't recall what he said. Somethin' like, "Fucker," or somethin' like that, you know. Frank was -- Frank got up and he started running and when he ran I stabbed him with the spear.
- Q. Where did you stab him at?
A. I don't know. It was like in the stomach or somethin'.
- Q. So in front of him?
A. Yeah. With the -- probably about a two-inch screw -- it was about that long (indicating) -- about a two-inch screw.
- Q. Okay.
A. And I stabbed him with it, you know. When I stabbed him, --

Q. Was this still in the bedroom?

A. No. He come running out the room -- He come running out the room and I stabbed him with the spear. And I held him there and I fought with him a little bit.

Q. When you say you fought with him, what did you do?

A. I pulled the stick out -- I started hittin' him with the stick.

Q. Where did you hit him on his body?

A. On -- just like his arms and stuff.

Q. Were they overhand hits or sideways hits or what?

A. They were overhand hits. Spear broke first hit. It was real weak wood, it wasn't a strong wood, it was real weak. And it broke and when it broke he took it and he stabbed me in the arm. And I got angry and I started hittin' him and stuff.

Q. When you hit him, how did you hit him?

A. With the fist.

Q. And do you know where you were hitting him on his body?

A. In the head. And then I started kickin' him.

Q. Where was Keith at?

A. He went into the kitchen.

Q. Why?

A. I think he got the knife. That's -- That's when the knife came in. 'Cuz I don't remember -- I didn't grab a knife. The knife came in when I went upstairs, okay? I was fightin' with Frank. Either he ran in the kitchen or he sat there at the table and started crying and, you know -- That's what happened, okay. Keith started pounding this table on Frank.

Q. This table, was it like an end table?

A. Yeah, it was an end table. Grabbed it and started throwing it at Frank and hittin' him with it, you know. And I'm standin' there watchin' it. And then when he was done with that, he ran into the kitchen. And I stood there and I was beatin' him with the stick and stuff.

Q. Did you know why Keith ran into the kitchen? Did you know at the time why he did?

A. No. I didn't really realize it until, you know, he came back, 'cuz he was standin' at the end of the couch. He was standin' over here watchin' me beat Frank up with the stick and stuff.

- Q. Okay. So, Frank is being beat up. Is this going on while he's on his feet or have you got his --
- A. He's laying. He's laying on his back, you know, and his side and on his stomach. Just rolling all over the place.
- Q. Rolling over. All right.
- A. And then I went upstairs. I told Keith (inaudible) for a while and I'm gonna' go upstairs. When I went upstairs I went up to talk to Brice. And I said, "Hey, man, I'm supposed to kill you but I can't do it."
- Q. Why did you tell him you were supposed to kill him?
- A. Because we weren't supposed to leave witnesses.
- Q. Whose idea was that?
- A. Keith told me to kill Brice. And I said, "No, I ain't gonna' do it," you know. I didn't tell Keith that. But I told Brice, you know. I went up there and said, "Hey, man, I can't do this. I can't kill you. I can't go through with it," you know, "Can barely go through with what I'm going through with right now."
- Q. Did you have anything in your hand when you went up there?
- A. No, I didn't.
- Q. And was this plan about getting rid of the witnesses, was that made before you and Keith went downstairs?
- A. No, that was made during.
- Q. During the fight?
- A. During the fight.
- Q. Okay.
- A. And, uh --
- Q. What did Brice do?
- A. I dunno. He just sat there and, I mean, he looked kinda scared. And I told him, "Just don't go downstairs. I don't want you to see this and nothin'." He said, "Okay." And I said, "Can I get a drag off your cigarette?" And he gave me a couple of drags off his cigarette. I gave his cigarette back. I went downstairs and when I went downstairs Frank and Keith were struggling at the door.
- Q. Were they on their feet?
- A. No. Keith was sitting down holding him in a head lock position. And they were right between the door. I grabbed Frank and pulled him in the house.

Q. Okay. Is this the sliding glass door?

A. Yes, it is. And I pulled Frank in the house, put him down. And I went and shut the sliding glass door and locked it and pulled the blinds. And what happened is Frank was laying there and I grabbed the hammer 'cuz I stopped. So I just left him or somethin' like that. No, I grabbed the knives and I tried to cut his throat and he wouldn't die.

Q. Were you able to cut his throat?

A. No, it was just like a plain cut 'cuz they weren't sharp knives, real sharp knives.

Q. Did you use the knives that Keith brought into the room?

A. I think he brought them in there. But they weren't there when I went upstairs. But when I came back downstairs they were there and they were stuck into his side and stuff.

Q. So did you have to pull one of the knives out of his side to try and cut his throat?

A. Yes. It was like right in the side of his stomach and I pulled it out.

Q. And you're gesturing with your left hand to your left side. And so that's where the knife was?

A. Yeah. It was like the left side or somethin'.

Q. Okay. I want to go back to the lighting situation again. How were you able to see?

A. I don't know. It was just -- I could see.

Q. But there weren't any lamps on?

A. I don't know. I could see. I've good night vision because I ran around a lot at night.

Q. Were you and Keith talking?

A. I don't know, I can't remember.

Q. What was going on in your head at that time? What were you thinking?

A. I don't think I was thinkin'. I was just angry, just real angry. I was angry.

Q. Well, by that time, were you still planning on just beating him up very badly or was it once you --

A. No, I knew at that point that it'd gone beyond -- gone beyond beatin' up.

Q. When did you realize that?

A. When -- As soon as he got stabbed.

Q. But you didn't see him get stabbed, right?

A. No, I stabbed him with the spear. As soon as I stabbed him.

- Q. Oh, I'm sorry. I thought we were talking about the knives.
- A. No. See, when I stabbed him with the spear, that's when I knew it's -- he's gonna' have to die. 'Cuz I -- I don't know what it was, it was just --
- Q. Well, why did you think then that he had to die?
- A. I don't know. Somehow I'd get locked up and if he survived I was afraid -- scared I'd get in trouble. And, I -- I don't know.
- Q. But you and Frank had been in fights before, right?
- A. Yeah. But it was nothin' like this. Nothin' like this.
- Q. Yeah, but he wasn't close to even being dead. I mean at that point he had only been hit with a bottle and then also stabbed with the stick.
- A. I don't know. I don't know.
- Q. I'm simply asking you these kinds of questions because I suspect, at least in my other cases, is what's happened is my interviews have been provided to the medical doctors for them to try and get some insight as to how things were going, you know, before they actually talk to you. And I want to point out at this point, I want to point out on the tape that you're beginning to cry. And you're starting to get silent.
- Why are you crying?
- A. I don't know. It shouldn't have happened, you know?
- Q. Were you upset because you're looking at life in prison then, or are you -- What are you upset about?
- A. I'm upset because, you know, I think about it a lot. And, you know, he shouldn't have died, you know? You know, even though what he had done was wrong.
- Q. What did he do that was wrong?
- A. You know, touching me and stuff. Stuff like that. Just that it was wrong. He shouldn't have done it. But I shouldn't have killed him.
- Q. So you're sorry because Frank died or you're sorry because you're in a jam?
- A. No, I'm sorry for him being dead. I don't care if I'm in jail. At least this time I can learn somethin'.
- Q. Okay, Marvin, let's go to the part where you came back down the stairs and you took one of the knives out of his side and you tried to cut his throat, but it was a superficial cut.
- A. Uhm-mm.
- Q. What happened the next thing after that?
- A. Well, I gave it to Keith and I told him to use it. And I was kicking him and stuff.

Q. Kicking him meaning?

A. Kicking Frank.

Q. Frank. Where were you kicking Frank?

A. I don't know, just kicking him. I don't know.

Q. What kind of shoes did you have on? Did you have shoes on?

A. Yeah, I had shoes on. I had (inaudible) shoes.

Q. Is that just like a running shoe or a tennis shoe, it doesn't have a steel toe on it?

A. Yeah, I think that's what it is. It wasn't my shoes. I was wearing Brice's shoes 'cuz my shoes were wet.

Q. It wasn't the kind that had steel toes on them?

A. No, it didn't.

Q. Okay.

A. And then at that point I knew he wasn't dead yet. So I grabbed the hammer and he told me, he goes, "Let me die in peace."

Q. He being Frank?

A. Yeah. And I said, "I can't do that." I hit him in the head with the hammer.

Q. How many times do you think you hit him in the head with the hammer?

A. I hit him in the head two times.

Q. Twice?

A. Twice.

Q. Were they in rapid succession or did you hit him and then wait and then hit and then wait?

A. I hit him and I hit him again. I hit him three times. I hit him a third time.

Q. Like boom, boom, boom, real fast?

A. Naw, full swings. Full swings I hit him.

Q. And was your intent at that point to put him out of his misery? You're nodding your head yes. Okay.

A. Yes.

Q. So, what was Keith doing?

A. Just standing there watching.

- Q. So, after you hit him three times with the hammer, what's the next frame in this continuing picture?
- A. Well, I can't remember. I think I took the phones out.
- Q. How did you take the phones out if you did?
- A. I just disconnected them.
- Q. Were they the kind that just kind of clip into the wall?
- A. Yeah. Disconnected them and then --
- Q. Why did you do that?
- A. Because I didn't want Brice, when he came downstairs, to call the cops.
- Q. But couldn't he just plug them back in real easily?
- A. Yeah, but I hid them. I don't remember where I took 'em to. Underneath Frank's bed. And I --
- Q. How many phones downstairs did you do that to?
- A. Two, maybe three.
- Q. And how many phones are in the house?
- A. Three or four.
- Q. Is there one in your room?
- A. No, there wasn't.
- Q. One in Brice's room?
- A. Uh, no there wasn't. The one upstairs -- just kind of stairs area.
- Q. Just in a common area upstairs? Okay. So, you did two or three or four of the phones?
- A. Yeah, I can't remember.
- Q. Do you know what Keith was doing at the time?
- A. No, I wasn't paying attention. I think he went upstairs and grabbed the radio.
- Q. A radio?
- A. Yeah. Grabbed the radio so we could listen to some music.
- Q. Was Frank dead at that time?
- A. Yeah, he was lying there.
- Q. But you don't know if he was dead?
- A. Yeah, he was dead.

- Q. How do you know?
A. 'Cuz I watched him die.
- Q. Well, what happened that convinced you that he was dead?
A. Choked on his own blood. And he wasn't breathing or nothin' and just lyin' there.
- Q. Okay. One of the reports as I recall from my independent recollection says that he asked for a hug before he died you picked him up part way and just let him flop back. Do you remember that at all?
A. No, I don't.
- Q. All right.
A. I don't remember that. I just remember him saying, "Let me die in peace."
- Q. So after he died, and you believed he choked on his own blood, --
A. He was dead.
- Q. What --
A. We took him -- We put him in a sleeping bag.
- Q. Okay. Now, who was "we"?
A. Me and Keith.
- Q. And whose idea was this?
A. It was my idea. And we dragged him out to the garage and --
- Q. I think we kind of skipped over something here. Did you ever go back up to Brice's room after that one time?
A. I think so. Yeah. I went up there and I told him it was done. And I asked him if he wanted to help clean up. And he said he would. And I said, "Cool." And then we went downstairs and we cleaned it up.
- Q. Well, how did he know what you meant by "it was done," that Frank was dead?
A. Because I just said it was done. He's dead.
- Q. Now, did you actually ask Brice or did you say, "If you don't cooperate I'm going to kill you too," or what?
A. No, I just -- I said, "Could you help us clean this up?" and he said, "Yes, I would."
- Q. But he by that time already knew that there had been some sort of threat because you came up and said, "I'm supposed to kill you but I can't"?
A. Yeah. I and I said I can't do it.

- Q. Okay. So you went up to his room. You said it's done. Will you help us clean up.
A. Okay. Brice said that when he went downstairs he saw Frank with a knife in his back.
Q. Might have been a knife in his back. I don't recall another knife being in his back.
- Q. Did you ever stab him?
A. No, I didn't stab him.
- Q. You just tried to cut his throat?
A. Yes, I just tried to cut his throat.
- Q. Did Keith ever use the hammer on him?
A. No. I just used the hammer.
- Q. So the only stabbings were the ones that were done by Keith? You're nodding your head
yes.
A. Yes. I'm sorry.
- Q. Okay. That's all right. Okay. So, in this continuum now, Brice comes downstairs and
what's the very next thing that happened? Who's talking and who's saying what?
A. Well, I'm the one that does all the talking. I said -- I said this never happened. And I
said you didn't see nothin' and I didn't see nothin'. I said nothin' happened, you know.
So we started making plans, you know, to say somethin' happened with Frank, you
know. Some kind of an excuse for what happened, you know, that he was gone, that he
left somewhere and it was one of his suicide missions. And he left and he was gone, you
know.
- Q. What do you mean one of his suicide -- Oh!
A. Because he was suicidal. He tried to kill himself several times.
- Q. Right. We talked about that. Was Keith participating in this plan?
A. Uhhh, naw, he was just kinda sittin' there. Keith's a pretty silent person. He doesn't
-- He didn't talk a whole lot, you know, after it happened. He just kind of sat there and
went about doing his own thing, you know.
- Q. How were you feeling about it at that point?
A. I was feeling pretty bad. A song came on, on MTV called "Lightening Crashes" and --
- Q. Excuse me. What --
A. It's called "Lightening Crashes." It's by Live. I don't know, it hit me that night, you
know, that song hit me so hard that it's kind of an emotional break for me. You know,
it was life going out, you know. But, in the same sense the life coming in, you know?
And so I --

- Q. Why would it have been coming in?
A. I don't know. Life coming back into me, you know. I'm not saying, like, a bad life, you know? I mean like a good life, you know? Somethin' that's going to change. You guys probably just think it's crock (inaudible).
- Q. Well, I'm not going to be judgmental. I'm asking questions because I'm an investigator. I'm not an expert about anything. I have no expertise. I'm a specialist in some things, but I'm getting this information to help me but also to help others so they don't have to re-invent the wheel, you know. Okay. So, were you -- How long did this planning take?
A. Uhhh, not very long. I don't know. Well, we made a pot of coffee so it took it over a pot of coffee.
- Q. Who made the coffee?
A. I made the coffee.
- Q. Whose idea was that?
A. That was my idea.
- Q. And why did you do -- Why did you make the coffee?
A. (Laughter) I don't know. Somethin' to drink, I guess.
- Q. And who drank the coffee?
A. Me, Keith and Brice. We all drank some coffee. He gave us, me and Keith, some cigarettes and we smoked some cigarettes.
- Q. Now was this while Frank is lying there in front of you?
A. No. We took him out to the garage.
- Q. Okay. Let's talk about that part.
A. We just -- We put him in the sleeping bag --
- Q. Excuse me. When you say who -- when you say "we," who is "we"?
A. Me and Keith.
- Q. Brice didn't help?
A. No. Brice just helped in cleaning up all the blood stains.
- Q. Okay. How did you carry Frank out?
A. Well, we put him in the sleeping bag. We just dragged the sleeping bag out.
- Q. So you didn't actually one of you pick up his hands and the other one pick up his feet?
A. No, we just put him on the sleeping bag and put the sleeping bag over him, zipped it up and dragged it out to the garage.

- Q. It must not be a mummy-type bag. It must be one of those that's kind of square that you had?
- A. I'm not sure. It's just a sleeping bag.
- Q. Frank was kind of a fat guy, wasn't he?
- A. Yes. He fit in it, barely.
- Q. But he would have had to unzip it to get him in it? I mean, you can't stuff somebody in one of those tight little mummy bags unless you can unzip it all the way.
- A. There was a zipper on the bag. I don't know.
- Q. Well, I won't labor this point --
- A. It was open. And we put him on the bag, threw the bag over him and zipped it up.
- Q. All right. And then you dragged him out?
- A. Yeah, we dragged him out to the garage and put him in the garage and left him there for a while we cleaned up the garage -- or cleaned up the house.
- Q. Whose idea was it to clean up the house?
- A. Uhm, mine and Keith and Brice's. We all kinda thought of it, all just cleaned up the house.
- Q. Did you do any good at it?
- A. I don't know. We did pretty good, I thought. It looked pretty decent. All we needed to do was just vacuum it up.
- Q. You couldn't see the blood stains?
- A. I couldn't see 'em, no.
- Q. And was this on the brand new carpet?
- A. Yeah, it was on the brand new carpet.
- Q. All right. How long did it take you to clean up?
- A. Couple hours.
- Q. Anything going on as far as substance abuse, do you know?
- A. No.
- Q. Drinking?
- A. Just coffee and cigarettes, that's it.

- Q. You guys talking about what happened?
- A. No, we didn't. We didn't talk about it. We just said it didn't happen, you know. It just kind of pushed away like it didn't happen. And said it just didn't happen, just didn't happen, you know. Kept saying that. Told Brice, you know, "It didn't happen, Brice," you know. It didn't happen. And he didn't -- you didn't hear nothin' and you didn't see nothin', you know.
- Q. When you said that, what were you thinking?
- A. I was thinking, cool, we're not going to get caught, you know, that's what I was thinking. First thing that came across my mind. And then --
- Q. Are you thinking that it actually did happen?
- A. I knew it --
- Q. Do you understand that it happened?
- A. Yes, I knew it happened. I was trying to just push it away, you know, like it didn't happen.
- Q. Okay. Now, the object of the remainder of the exercise is to cover up the evidence; is that right?
- A. And what we did is cleaned it all up. Took clothes, anything that had blood on it, we tried to wash it. And we washed the knives.
- Q. How did you wash the knives?
- A. Put them in the dishwasher.
- Q. Did you run the dishwasher?
- A. Yes.
- Q. Okay. And when you washed clothes, did you -- you mean -- did you do that by hand or put it in the washing machine?
- A. Washing machine.
- Q. Was that clothes that -- Well, he was only wearing his underpants, right?
- A. Yeah. We washed mine and I think Keith's clothes. If there was any blood on the clothes, we threw 'em in the washer and washed them.
- Q. Okay. What all clothing did that include then?
- A. I can't remember. I think a shirt, pants.
- Q. Were those the Levis that were cut off short?
- A. No. I put those on after. And the blood from that was when we were -- threw him on the ground and put him in the car.

Q. Okay. I understand this is Frank's car. It's a Mercury Cougar. Is that right?

A. Yes.

Q. And was it parked outside the garage?

A. Yes, it was.

Q. Who brought it in the garage?

A. I brought it in the garage.

Q. Had you ever driven that car before?

A. I'd driven it several times before.

Q. Did you have a license?

A. No. Frank -- Frank would be in the car usually. There was only one time that I drove without him in the car. And that was because he jumped out of the car at a red light.

Q. Oh, I remember talking about that. Did you have a learner's permit?

A. Yeah, I had a permit.

Q. On every occasion did Frank let you drive, you had a learner's permit?

A. Yes, I did.

Q. Okay. So as long as there was an adult, like twenty-five years of age or whatever the rule is, with five years driving experience, I think, yeah. It's been a long time --

A. I could drive, yeah.

Q. So you knew where to get the car keys.

A. Yes. They were in a pair of pants.

Q. Okay. You went outside and got in the car. Aren't there motion lights out there?

A. Uhhh, out where?

Q. Around the house? That come on when they sense --

A. Yeah, that's only if it was on.

Q. Oh.

A. So if you turned it off it wouldn't come on.

Q. Is that what you did?

A. Yeah, turned it off, turned off all the lights.

Q. So the people couldn't see into the garage, was that the idea?

A. That was the idea.

Q. Okay. So, who opened the garage door?

A. Uhhh, I think Keith did.

Q. Is that an automatic door opener or do you have to do it by hand?

A. Well, it's an automatic but he just opened it so the light wouldn't come on.

Q. Where was Brice?

A. He was in the house still cleaning.

Q. So then you drove the car into the garage?

A. Yeah, and we put it --

Q. Oh, what happened after you got in? Did you close the door?

A. Yeah, we closed the garage door.

Q. Who did that?

A. Ahh, I think I did.

Q. Is one or the other of you giving orders at this point?

A. No. Neither one's giving orders. We just pretty much know that we're doing it.

Q. Okay. You knew you had to get him in the car and you were going to take him somewhere. So where in the car did you put him?

A. In the trunk.

Q. And did you line the trunk with anything?

A. Yes. We put garbage bags and we put rugs in there.

Q. Was that to keep the blood from getting into the car itself?

A. Yes.

Q. Okay. So did you put those in first?

A. Yes, we did. And then we put Frank in with the sleeping bag. Actually, I think we put another sleeping bag in there too and then put Frank in there. And then we put more -- another sleeping bag -- or garbage bags over him and put all (inaudible).

Q. Were there some tables too?

A. Yeah, there was one table.

Q. Is that the one that Keith crashed on Frank's head? You're nodding your head yes.

A. Yes. I'm sorry.

- Q. That's all right. I've been doing this a lot longer than you have and sometimes those things escape people's attention.
- By this time, did you already know that you were going to take him out to the woods and burn his body? Had you made that plan yet?
- A. No. No. The plan was either one or the other. Either dig a hole and throw him in the hole or we were going to have to burn it, you know, get rid of it so there was no evidence at all.
- Q. I guess you discussed this in front of Brice; is that right?
- A. We might have but I'm not sure.
- Q. So after you get Frank and all the evidence loaded into the trunk, close the trunk, and then what's the next thing that happens?
- A. We get in the car -- Well, I grabbed a flashlight. And I grabbed some -- couple cans of beer that I drank.
- Q. Were those the two or three that were remaining from the case and a half?
- A. Yeah. Well, there was two left, I think. They were in the fridge, I put in the fridge. They was a different kind of beer.
- Q. Did Frank drink?
- A. No, he didn't.
- Q. Do you remember what you were drinking that night?
- A. I'm not sure. Schmit, I think.
- Q. Schmit Ice?
- A. Yeah, Schmit Ice.
- Q. So what's going on with Brice before you go? I mean, --
- A. Nothin'. He just -- told him to stay home. He said, "All right." And then me and Keith left.
- Q. And you're driving?
- A. And I'm driving.
- Q. And Keith is in the front passenger seat, is that right?
- A. Yes.
- Q. Did you have some discussion about where you were going to go?
- A. We just said we was gonna' go down some road, going back farther. I don't know what the name of the road is, down by the park.

Q. But you both knew what road it was?

A. Yeah, we knew what road it was.

Q. One of you said let's take him down that road, or something?

A. Yeah. We said let's take -- Let's go down that way and we'll find somewhere to take him.

Q. Okay.

A. And we went down one Simpson Road.

Q. When you say Simpson, you're talking about Simpson Timber Company, aren't you?

A. Yeah, went down one of their roads. And we got out -- out to a place. And I -- It had a lot of water in there so I said, no, never mind. And we turned around and went back out. And then we went to the place where we went. And it was like a long road down by the park. And we --

Q. When you say a park, you--

A. Oak Park. Oak Park.

Q. Oh, okay.

A. And we got out. And we took Frank. And we took all the stuff and put it aside. Then we took Frank. Put him on the ground. And then we took the stuff and put it on top and I just put the sleeping bag on fire.

Q. And the sleeping bag caught fire that easily, huh?

A. Oh, yeah. Just like that (indicating) and just caught on fire real fast. And it just went whoo! Just burned up real quick.

Q. Okay. There were a couple of cans found around the scene.

A. Uhm-mm. Yeah, we had -- Well, we were sittin' there and we were puttin' some scotch fir on top of it, you know, to keep it going. Keith came back from the car with a can of WD-40.

Q. Where'd he find that?

A. In the car somewhere. I don't know. Just came out bringing the can. And, uh, took it and sprayed it -- tried to make the body burn longer. And, I don't know, I started gettin' paranoid so I went up and I sat up on a hillside watching for any cars. And Keith was down, down at the fire, stayed with the fire. And I was up --

Q. Did you see him from where you were?

A. Oh, yeah, 'cuz, you know, just his face. His face -- I don't know -- it was not like real, real clear.

- Q. Did you see him do anything?
A. Ah, I wasn't really paying attention. I was paying attention to the road more than (inaudible).
- Q. Did he tell you later on what he did?
A. No, he didn't.
- Q. When you sprayed the WD-40, that's pretty flammable stuff, right?
A. Yeah.
- Q. In fact, if you were to shoot it out and over the top of a burning lighter, it just kind of spews a flame, doesn't it?
A. Yeah, quite a bit. We had that red nozzle on it too. Made it shoot even farther.
- Q. One of those little, like a tiny straw, those kind of things?
A. Yes. Yeah. It had one of those. And, I sat there for a long time just spraying the stuff 'cuz I was trying to get it done. And that's when I put down the can and Keith said, well, go ahead and go up on the hillside and, you know, watch, 'cuz, I don't know. I think he sensed somethin', I don't know. And I just went up there and I was just thinking about it, you know.
- Q. What were you thinking?
A. About how crappy of a deal it was.
- Q. Did you cry?
A. I don't know, might have.
- Q. Did you pray?
A. Yeah, I was praying.
- Q. What were you praying?
A. I don't know. I just prayed that, forgive me, help me. I don't know. I never really prayed to God before, you know, and never before that so I wasn't used to it. Satanism type of stuff, you know. Trying to be cool, you know. Trying to act like I was somethin' that I wasn't.
- Q. Okay. Did you guys take any paint out there with you?
A. Uh, I think we just took the bag out there. I'm not sure if we took the paint out there. Might have done that.
- Q. There were two aerosol cans found out there, I think.
A. I don't -- We probably took the spray paint out there with us. I'm not -- I can't recall.

Q. Okay. You don't remember huffing anymore?

A. No, we didn't huff no more.

Q. Okay.

A. Oh, and I was gonna' drink the beers and I poured one 'cuz I didn't like the taste of 'em after that, made me sick to my stomach.

Q. That was my next question. Did you ever get sick?

A. Yeah, I got sick. I was trying to drink those beers. It just made me sick to my stomach. So I poured it out.

Q. Did you and Keith sit around and watch the body burn?

A. Yeah, for a little while. That's when I was spraying with the spray paint. And then we just got in the car, it was like --

Q. Well, you're skipping something, aren't you?

A. What?

Q. Or did you go and then come back?

A. No, we didn't come back. We were going to.

Q. Okay. But you and Keith decided to do something else to try to seal the identity --

A. Oh, yeah.

Q. Whose idea was that?

A. That was mine. I took a rock and smashed his teeth in.

Q. Okay. Who actually smashed the teeth with the rock?

A. Keith smashed the teeth with the rock. But I pulled the teeth out

Q. Was this before you burned the body or after?

A. No, this was right before we left, I pulled the teeth out. And we were gonna' --

Q. Okay. How did you pull the teeth out?

A. Well, smashed 'em with the rock and I had my knife and tried to pry 'em and they wouldn't --

Q. Actually out of the jaw, you tried to cut them out of the jaw?

A. Yeah. We'd get 'em out of the jaw and I'd pull them out with my teeth -- my hands. And I threw them over on the ground and then Keith smashed them up. Threw the rock in the water. And I went over and washed my hands. And we got in the car and we left. We drove straight down through this big puddle of water. The car died on us the first time but it started right back up. Surprised us that it started up. And we left the car over there and went back to the house. And, -- I don't know.

Q. Okay. When did you actually think about the part of smashing the teeth?

A. Right then and after.

Q. It wasn't before you left the house?

A. No, it wasn't.

Q. And it wasn't when you lit the body on fire?

A. No, we didn't -- It was after. It was right before we left that we actually thought of it. I said, "Oh, we'd better get rid of these too." You know, so then no dental records.

Q. Right.

A. Plus (inaudible) the teeth out.

Q. Okay. I don't think I really need to ask you anything more about what happened that day or what the police did with you.

A. Well, I turned myself in that day.

Q. Yeah. Why did you turn yourself in?

A. Because there was no sense in running from myself. I wasn't necessarily running from the law. I would have been on a lifetime running from myself. And I knew I had to face myself.

Q. Well, some people run anyway. Lot of people run anyway.

A. Well, I didn't want -- I just -- I don't know. I felt bad enough, you know, that we killed him.

Q. Did you cry?

A. I don't -- I don't remember. I just remember shaking real bad, real scared. I was real shaky. And, uh, I went over to a friend's house 'cuz I thought he was home and he wasn't home.

Q. Whose house was that?

A. John Thurston's house. And so I went into his house. And I slept for a couple hours on his floor.

Q. On the floor or in the closet?

A. On the floor for a while. And then his dad came in, just looked in there. I got into the closet and I changed my clothes to some of John's clothes, you know, so I could have some clean clothes. And there was this thing of water in there and I washed myself off with that.

Q. A thing of water, where?

A. In his bedroom, John's bedroom. And I washed myself off with that. Washed my hands and my face, and whatever else, you know. And --

- Q. Did you have a plan at that time what was going to happen next? You're nodding your head no.
- A. No, I didn't.
- Q. Okay.
- A. And then, uh, John's mom came in the room. And she opened the closest door 'cuz she was cleaning his room and she saw me. She goes, "What're you doin'?" So, I go, "I was here sleeping and John was here," you know. I told her (inaudible). She said, "Well, the cops are looking for you." And I said, "Are they?" And she said, "Yes." And I said, "What's for?" And she said, "Well, they think you're a suspect for killing Frank." And I said, "Really?" And she goes, "Yeah." I goes, "All right," you know. And she said, "Well, you should -- you better leave." I said, "All right." She said, "Go out the window 'cuz my husband don't know you're here." So I went out the window and I got -- was walking. I was gonna' go over to Ryan's house and right then before, you know, right at the cross-section I turned and I ran back down to the house. Turned myself in. I didn't say, here I am. I said, "What happened here?" you know. And they said, "Well, we've been looking for -- " They go, "Who are you?" I go, "Marvin." And, "Well, we've been looking for you." And I said, "I know." And they said, "All right. Well, get up against the car." And I said, "All right." And they just brought me here. They were real nice to me.
- Q. All right, Marvin. Anything else you can think of to tell me about that was going on in your head?
- A. Well, I'm real sorry -- I was real sorry that it happened, you know? I feel bad, you know. Wish there would have been other measurements to take, you know. But I knew turning him in wouldn't have done nothin' 'cuz it didn't do nothin' for my sister and it ain't gonna' do nothin' for me.
- Q. Well, are you talking about him touching you?
- A. Yes.
- Q. Set me straight if I'm wrong here. I thought he only touched you on that one occasion when he --
- A. He touched me on a few occasions. Grabbed my butt. Grabbed my balls, you know. And he just -- rubbing up against, you know. Walking in the bathroom and stuff, you know. Not normal parents do that kind of stuff.
- Q. When he grabbed your balls, wasn't that when you thought that maybe it was, well, it was might have been possible that he was trying to get the cigarettes, grab the bag of cigarettes?
- A. Well, I don't know. The cigarettes can't be in the same place you're growing, you know, and when your hands are down on the floor and, you know -- I was down on the -- I was like this reaching down and grabbing the bag (indicating) and he come up and grabbed me by the nards. And that's when I got angry.

- Q. Well, but -- Okay. Here's the key element of that, whether or not any of these times that he touched you was for his own personal sexual gratification?
- A. Well I think it was, you know. It seemed like it was. A lot of the time it really did. It seemed like he was doing it to get off on it, you know?
- Q. Did you ever tell this to anybody?
- A. No, I had people ask me about it, you know. I said --
- Q. Who would ask you about it?
- A. Chris Eisley, a teacher down at Choice. He asked me if Frank was doing anything like that. And I said, no, I can handle it.
- Q. Why did she ask you that question?
- A. 'Cuz she knew something was wrong with me.
- Q. Oh, yeah?
- A. Yeah, 'cuz I suffered with real bad from depression, suicidal depression, you know. I mean --
- Q. That's the Choice program, right?
- A. Yes, it's the Choice program.
- Q. Where're they at?
- A. Down -- Downtown Shelton.
- Q. Shelton. And that person was Chris Eisley. Is that a female?
- A. Yes, it is.
- Q. Okay. How many discussions did you ever have with her about it?
- A. She just asked me that one occasion.
- Q. And how did she ask you the question?
- A. She goes, "Marvin, has Frank been touching you?" I don't know. "No, and I can handle it."
- Q. You said what?
- A. I said, no, he hasn't, I can handle it.
- Q. Okay. Well, did she ever indicate to you in any fashion that she had reports from other people?
- A. No, she didn't tell me nothin' like that.

- Q. All right. Were there other people you talked to about this?
- A. Oh, I talked to Crystal. I told her about that incident when Frank grabbed me, you know. And, I don't know, there's people that just kind of knew things were going on around there.
- Q. You mentioned Crystal's name much earlier in this interview. Did you give me her last name?
- A. Stacey, S-T-A-C-E-Y.
- Q. Okay. Do you know Breanna Fuller?
- A. Yes, I do. She was over at our house quite a bit also.
- Q. Well, I'm personal friends with her dad.
- A. Oh, really?
- Q. You know who he is?
- A. No, I've never met her dad.
- Q. Started with the Bremerton Police Department.
- A. Ah, I never met him before. She's told me about him, though.
- Q. Oh, okay. I'm probably going to talk to him. And I went to school with her mother, Tippy Jones, was her name.
- Okay. Well, I think that's going to do it. I'm going to turn the tape recorder off. And I'm going to ask you a few questions. Well, actually, let's just -- We've got a little tape. I'm going to put this on tape. I found out a few things that I want to ask you about.
- Were you ever a part of any of the hearings, the dependency hearings, where --
- A. Yes, the last one.
- Q. The last one?
- A. The very last one.
- Q. And, I remember you telling me on the telephone probably just last week that you were told you would get to see your parents but you never did?
- A. Yeah. I asked Frank, I said, "Well, can you help me find my dad?" And he said, "Yes, I can do that. I can get you the address and stuff." And apparently my dad sent a letter and he sent, also sent the phone number for me to call him two months, three months before this even happened and I didn't receive it from Frank at all.
- Q. Okay. I think, you know, as a possible explanation for some of it is, is that your father had, or may have been diagnosed as a pedophile. Do you know what that is?
- A. No, it's not.

- Q. Someone who preys on young children.
A. That's what they say. I don't believe that. I don't believe it. Don't seem like the type.
- Q. Okay. You don't ever remembering anything happening to you along that nature?
A. No, not with my father, no.
- Q. But with Joyce, your mother, you did?
A. With my mother and my uncle, yes.
- Q. Okay. The uncle, which uncle is this?
A. Uncle Dennis. They didn't get him busted for any of it. He just -- I don't know.
- Q. Was he the one that took you and Cristy for a while?
A. No, he didn't.
- Q. Okay. So what do you actually remember about your mother being involved with you sexually? What do you remember from your own recollection?
A. I remember her being nude, running around nude a lot. And I also, my uncle had one them lifelike penises. He'd stick it in his pants and my mom and him would fumble with each other, play with each other in front of us. You know, real high all the time. I don't know. I don't remember a whole lot of the sexual stuff. A lot of stuff I've blocked out of my mind. It's so far (inaudible) -- you know.
- Q. Well, what have you been told by others about your mother?
A. Not nothin' I can remember. I remember that she did things with us.
- Q. Like what?
A. I don't know, played with us.
- Q. How?
A. I don't know, played with our penis and -- I don't know. I'm not sure. I don't know.
- Q. Okay. All right. That's your answer.
This nickname "Melvin" --
A. Yes.
- Q. We talked about that before. Do you have any recollection of where that came from?
A. Well, when I was a real little kid I used to get called Little Mel a lot by my mom and my dad. They called me Little Mel. My grandma and my aunts and all them called me Little Mel. And that's from my mom's boyfriend, I guess. It's somethin' -- they called me Little Mel 'cuz (inaudible). I got up, grew up and, I don't know. Went to started skatin' and one of my friend's named Raph.

Q. His name's what?

A. Name's Raph.

Q. R-A-F-F?

A. No, R-A-F -- R-A-P-H. Raphael.

Q. Raphael. Okay.

A. And, uh, I don't know. He just told me, he goes, "What's your name?" I go, "It's Marvin." He goes, "Hey, Melvin," you know. Never called me Marvin. It's a skate name. Got different names, Mr. Ed, not me but just different skater names.

Q. Okay. Do you ever remember doing anything to a dead animal?

A. No, I don't. I got a -- had a dead dog but I buried it.

Q. How'd the dog die?

A. My friends came over and when they went home they -- the dog followed 'em and he got hit by a car.

Q. Okay. Did your father ever kill any animals in front of you?

A. Yeah, he did.

Q. Tell me about that.

A. He took my two dogs and threw 'em in the fire.

Q. How old were you?

A. I don't know, real little kid, I don't know.

Q. Do you remember it?

A. I --

Q. You can remember it in your mind's eye?

A. Yeah. I remember it. It's as clear as day. I remember it every day. I always think about it, you know, how bad it was and --

Q. Why did he do that?

A. Because he said they were mean dogs, so.

Q. How old were they?

A. I don't know. One of them, I know one of them was real mean dog. And --

Q. Were they alive when he threw them in the fire?

A. Yes, they were.

- Q. How could he keep them in the fire?
A. That was a pretty big fire. Just threw 'em in the fire. I don't know.
- Q. He burned them alive?
A. Burned them alive.
- Q. And what do you remember seeing and hearing?
A. I don't remember hearing. I just remember watching 'em burn.
- Q. Did your dad tell you you had to watch?
A. I don't know, he just told me to stay there. And I stood there and watched it.
- Q. Was there a lesson he was trying to teach you?
A. Uhmm, I don't know.
- Q. Okay.
A. I remember making a cross though for 'em. Stuck it by a tree.
- Q. And you think about that all the time?
A. I think about it a lot, you know, every time my -- (inaudible). Like I talked to my dad and I confronted him on it, you know.
- Q. What does he say?
A. "They were real mean dogs, they deserved it." I don't know.
- Q. What other kinds of things that you've confronted your dad about?
A. I don't know. About my childhood and stuff, asking things about it. And, I don't know, he just tries to keep all the good memories. He's got a few bad memories, you know, like --
- Q. Which one?
A. Like drivin' in the heat and stuff like that. And nothin' like sexual stuff. He said -- He denies it. He says he didn't do nothin', so. That's why I don't think he did anything, you know? So I don't remember him doing it.
- Q. Do you ever think about your dad when you were at Frank's house? I mean you hadn't seen your dad for years.
A. I thought about my dad every day.
- Q. What kind of circumstances -- Was there any particular circumstance that you thought about him?
A. I just wanted to see him, meet him.

- Q. Did you --
A. See who he was, you know? See why it happened and what happened, you know, and get the real story. You know. I was tired of hearing lies, you know. To me they were all just lies.
- Q. From who?
A. (Inaudible) and foster parents. I don't know. It's -- So much of it was seemed like lies to me that I didn't wanna' hear it no more.
- Q. There's going to be indication in one of the files that you may have been molested in a foster home.
A. I don't know.
- Q. You don't know?
A. I don't remember.
- Q. Okay. Well, Marvin, you need to be up front with me.
A. I am being up front with you. I don't got a clear memory from so much drugs, like the huffing. The huffing's real bad on your mind. It kills a lot of brain cells.
- Q. You can't ever remember anybody sexually molesting -- touching you in a way that they shouldn't have touched you? You wouldn't try to protect somebody, would you? I mean now is not the time to protect people.
A. I don't remember. I just remember a foster sister. We used to do things like that all the time. Have sex. She was a seventh grader and I was a third grader.
- Q. Lucky you!
A. I know! (Laughter) (Inaudible)

Well, let's turn off the tape recorder. And the time now is 5:47 p.m.

(End of interview.)

Appendix K

People v. Cogswell,
48 Cal. 4th 467, 227 P.3d 409, 106 Cal. Rptr. 3d 850 (2010)

Westlaw.

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48 Cal.4th 467, 227 P.3d 409, 106 Cal.Rptr.3d 850, 10 Cal. Daily Op. Serv. 4092, 2010 Daily Journal D.A.R. 4897
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H

Supreme Court of California
The PEOPLE, Plaintiff and Respondent,
v.
Henry Ivan COGSWELL, Defendant and Appellant.

No. S158898.
April 1, 2010.

Background: Defendant was convicted by jury in the Superior Court, San Diego County, No. SCN201693, John S. Einhorn, J., of three counts of forcible rape, one count of rape by foreign object, and one count of forcible oral copulation, in trial in which preliminary hearing testimony of victim, who was in Colorado and refused to testify, was admitted. Defendant appealed. The Court of Appeal reversed. Attorney General petitioned for review. The Supreme Court granted review, superseding the opinion of the Court of Appeal.

Holding: The Supreme Court, Kennard, J., held that prosecution was not required to request that victim be taken into custody to establish that she was unavailable witness.

Reversed and remanded.

Opinion, 68 Cal.Rptr.3d 28, superseded.

West Headnotes

[1] **Criminal Law 110** ⚡543(2)

110 Criminal Law
110XVII Evidence
110XVII(U) Evidence from Prior Proceedings
110k540 Grounds for Admission of Former Testimony
110k543 Absence of Witness
110k543(2) k. Sufficiency of pre-

dicade to authorize admission of evidence. Most Cited Cases

The prosecution exercised reasonable diligence in seeking to procure attendance at trial of a sexual assault victim who lived in another state, thus supporting the use of victim's preliminary hearing testimony against defendant at trial, even though prosecution did not invoke the custody-and-delivery provision of the Uniform Act to Secure the Attendance of Witnesses from without the State in Criminal Cases, where victim's refusal to testify at defendant's first scheduled trial led to a dismissal, the prosecution refiled the charges against defendant, victim again told the prosecution she would not testify against defendant, and victim ignored a subpoena ordering her to appear at defendant's trial; the prosecutor could reasonably conclude that invoking the Uniform Act's custody-and-delivery provision would not have altered victim's decision not to testify. West's Ann.Cal.Evid.Code §§ 240(a)(5), 1291(a); West's Ann.Cal.Penal Code § 1334.3(a). See *Annot., Sufficiency of efforts to procure missing witness' attendance to justify admission of his former testimony state cases* (1981) 3 A.L.R.4th 87; *Cal. Jur. 3d, Evidence, § 260*; *Cal. Jur. 3d, Criminal Law: Rights of the Accused, § 289*; 2 *Witkin, Cal. Evidence* (4th ed. 2000) *Witnesses, § 9*.

[2] **Criminal Law 110** ⚡662.9

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses

110k662.9 k. Availability of declarant.
Most Cited Cases

Under statutes requiring that prior testimony be admissible at trial only when the person who previously testified has later become unavailable to testify, the defendant's right of confrontation may be overcome only if the necessity is clearly demonstrated. West's Ann.Cal.Evid.Code §§ 240, 1200(a), 1291(a).

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[3] Criminal Law 110 ↪543(2)

110 Criminal Law

110XVII Evidence

110XVII(U) Evidence from Prior Proceedings

110k540 Grounds for Admission of Former Testimony

110k543 Absence of Witness

110k543(2) k. Sufficiency of predicate to authorize admission of evidence. Most Cited Cases

“Reasonable diligence” in attempting to secure the presence of a witness sufficient to support admission of prior testimony at trial, often called “due diligence,” connotes persevering application, untiring efforts in good earnest, efforts of a substantial character. West’s Ann.Cal.Evid.Code § 240(a)(5).

***850 Patricia A. Scott, under appointment by the Supreme Court, for Defendant and Appellant.

***851 Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Donald E. De Nicola, Deputy State Solicitor General, Gary W. Schons, Assistant Attorney General, Steve Oetting, Rhonda Cartwright-Ladendorf, Kristen Kinnaird Chenelia and Melissa Mandel, Deputy Attorneys General, for Plaintiff and Respondent.

KENNARD, J.

*471 **409 A witness’s preliminary hearing testimony is admissible at trial if the witness is “unavailable” despite the exercise of “reasonable diligence” by the party seeking the witness’s **410 attendance. (Evid.Code, § 1291.) At issue is whether, to show “reasonable diligence” in obtaining the presence at trial of a sexual assault victim living outside California, the prosecution in this case had to ask a court to order the victim taken into custody and transported to California to testify at defendant’s trial.

On a visit to California, a Colorado woman was

sexually attacked. At the preliminary hearing, she testified against defendant Henry Ivan Cogswell, her attacker, but thereafter she refused to return to California to testify at his trial. The prosecution then sought to compel her attendance at trial through a law that has been adopted in all 50 states and is known as the Uniform Act to Secure the Attendance of Witnesses from without the State in Criminal Cases. (Uniform Act; Pen.Code, § 1334 et seq.) Under the Uniform Act, as adopted in California, a party in a criminal case can ask a court in the state where an out-of-state material witness is located to subpoena the witness and also to have the witness taken into custody and brought to the prosecuting state to testify.

At the prosecution’s request, a Colorado court issued a subpoena to the sexual assault victim. When she did not appear at defendant’s California trial, the California trial court declared her to be unavailable as a witness, and it permitted the prosecution to use the victim’s preliminary hearing testimony as evidence at defendant’s trial. A jury convicted defendant of various sexual assaults. He appealed.

The Court of Appeal disagreed with the trial court’s determination of the Colorado witness’s unavailability. In the Court of Appeal’s view, the prosecution had not used reasonable diligence in securing her presence at defendant’s California trial because it did not avail itself of the Uniform Act’s provision allowing for an out-of-state material witness’s detention and transportation to the prosecuting state. Unlike the Court of Appeal, we conclude that the prosecution did use reasonable diligence in obtaining the witness’s presence.

I

Defendant was accused of sexually assaulting Lorene B., a Colorado resident, while she was vacationing in California. Lorene returned to California to testify at defendant’s preliminary hearing, where she was thoroughly cross-examined by defense counsel. Based on that testimony, defendant was held to answer on the charged sexual offenses.

*472 Because Lorene had previously been cooperative, the prosecution had not subpoenaed her to testify at defendant's California trial. On the date of trial, Lorene told the prosecution she would not testify against defendant. Without Lorene's testimony at trial, the prosecution could proceed against defendant only if it could use, as evidence of defendant's guilt, the testimony that Lorene had previously given at the preliminary hearing.

Because the prosecution could not show that it had used reasonable diligence in securing Lorene's attendance at defendant's trial (**852Evid.Code, § 240, subd. (a)(5)), and because without such a showing it could not use at trial the testimony that Lorene had given at the preliminary hearing, it asked the trial court to dismiss the case. A new complaint against defendant was then filed. The parties stipulated that defendant could be held to answer on the complaint and that the complaint could be deemed the information. The case was set for trial on December 20, 2005.

On November 2, 2005, the prosecution asked the San Diego Superior Court that, in accordance with the Uniform Act, a request be made to the Denver District Court in Colorado for the issuance of a subpoena to Lorene. The court did so. As required under the Uniform Act, the subpoena request was accompanied by a round-trip airplane ticket from Denver to San Diego, plus a daily allowance for food and hotel expenses.

In mid-December 2005, the San Diego Superior Court vacated the December 20 trial date, and set a new trial date for January 31, 2006. On December 20, in a telephone call to the prosecution in California, Lorene said she would not testify at defendant's trial. Thereafter, the prosecution made no further efforts to contact Lorene, fearing that she would **411 view this as "intimidation," and that if she were told about the new January 31, 2006, trial date *before* she had been subpoenaed she would try to evade service of the subpoena. Instead, the prosecution again asked the San Diego Superior Court to have the Denver, Colorado court subpoena Lorene

to appear as a material witness at defendant's San Diego trial, rescheduled for January 31, 2006. Again, the request was accompanied by a round-trip airplane ticket to San Diego and a daily allowance for food and hotel expenses. The prosecution did not request, as permitted under the Uniform Act, that Lorene be taken into custody and brought to San Diego to testify.

The Denver, Colorado court issued the subpoena, and the Denver District Attorney then confirmed that the subpoena was served on Lorene on January 20, 2006, and that Lorene was given the requisite plane ticket and witness fees.

When on February 1, 2006, the first day of defendant's trial in San Diego, Lorene did not appear, the prosecution asked the trial court that, because *473 Lorene was "unavailable as a witness" (Evid.Code, § 1291, subd. (a)) notwithstanding the prosecution's use of reasonable diligence in attempting to secure her presence (*id.*, § 240, subd. (a)(5)), the prosecution be allowed to use as evidence at defendant's trial Lorene's previously given preliminary hearing testimony. The prosecutor explained: "[Lorene] has stated to me and to my investigator ... that she has had as much of this matter as she can possibly handle. [¶] She's had contact from the family members of the defendant, from her prior friends. Given the small nature of the deaf community,^[FN1] she lives in Colorado to escape what she has lived through here. And she has emotional issues with coming back here to court. She informed me prior to yesterday at the last trial call that she would not be here." Defendant objected, unsuccessfully, that the prosecution had not used reasonable diligence to secure Lorene's attendance as a witness because of its failure to ask a Colorado court to order that, as allowed under the Uniform Act, Lorene be taken into custody and brought to San Diego to testify at defendant's trial.

FN1. Both defendant and Lorene are deaf.

Based primarily on Lorene's preliminary hearing testimony, the jury convicted defendant as

charged. In a bifurcated proceeding,***853 the jury found that defendant had a prior serious felony conviction (Pen.Code, §§ 667, subds. (a), (b)-(i), 668), that he had served a prison term for that conviction and had not remained free from any new offense for 10 years after his release (*id.*, §§ 667.5, subd. (a), 667.6, subd. (a)), and that a previous conviction for forcible rape made him a habitual sex offender (*id.*, § 667.61, subds. (a), (c), (d)). The trial court sentenced defendant to consecutive indeterminate terms of 50 years to life on two counts of rape, and it imposed a consecutive term of five years for his prior serious felony conviction. On the remaining counts, the court imposed concurrent sentences.

On appeal, defendant reiterated the argument he had made in the trial court that to show reasonable diligence in securing Lorene's presence at trial, the prosecution should have invoked the Uniform Act's custody-and-delivery provision. The Attorney General responded that the prosecution could not resort to that provision because Code of Civil Procedure section 1219's subdivision (b) (hereafter section 1219(b)) prohibits the confinement of a sexual assault victim who refuses to testify about the arrest. That provision states: "Notwithstanding any other law, no court may imprison or otherwise confine or place in custody the victim of a sexual assault ... for contempt when the contempt consists of refusing to testify concerning that sexual assault...." (*Ibid.*)^{FN2}

FN2. As discussed later, the Attorney General no longer argues that this provision barred the prosecutor from asking that Lorene be taken into custody under the provisions of the Uniform Act.

*474 The Court of Appeal reversed defendant's convictions, holding that section 1219(b) "does not ... limit the power of a California court to utilize the custody and delivery provisions of the Uniform Act." The purpose of section 1219(b), the Court of Appeal stated, is to forbid the confinement of a sexual assault **412 victim based on "a *finding of contempt* arising from a refusal to testify." (Italics

added.) But, the court explained, the "custody and delivery provision of the Uniform Act is a device to assure the attendance of a witness at trial and not a punishment for contempt arising from a refusal to testify." Thus, the Court of Appeal held, section 1219(b) "did not forbid the use of the act's custody and delivery provisions to secure Lorene's attendance at trial."

The Court of Appeal further stated that because "the prosecution was on notice that it was highly probable Lorene would not return to California even if ordered by a court to do so," the prosecution did not use "every reasonable means to secure her attendance and, therefore, did not exercise reasonable diligence" in securing Lorene's presence at defendant's California trial. Therefore, the Court of Appeal concluded, the trial court erred in declaring Lorene unavailable as a witness and in allowing the prosecution to use at defendant's trial Lorene's preliminary hearing testimony. This error, the Court of Appeal held, was prejudicial, because without the use of that testimony at defendant's trial there was no evidence of his guilt.

We granted the Attorney General's petition for review.

II

We here consider the interaction among four statutes: the Uniform Act, which allows a prosecutor or a defendant in a criminal case to request that an out-of-state witness be subpoenaed and be taken into custody and transported to the prosecuting state in which trial is pending; Evidence Code sections 240 and 1292, which ***854 permit the use of prior testimony by an unavailable declarant; and Code of Civil Procedure section 1219(b), which prohibits the confinement of a sexual assault victim for contempt based on a refusal to testify about the assault. A brief review of each follows.

A. The Uniform Act

The Uniform Act was initially approved by the National Conference of Commissioners on Uniform State Laws in 1931. The commissioners approved a

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revised version of the act in 1936, which California adopted in 1937. There are slight differences between the version of the Uniform Act adopted in Colorado (Colo. Rev. Stats., § 16-9-201 et seq.)—the state where sexual assault victim Lorene was living at the time of the trial in this case—and the version adopted in California (Pen.Code, § 1334 et seq.), but none is pertinent here.

***475** Under the Uniform Act, as adopted in California, when a person located in a sister state that has also adopted the Uniform Act is a “material witness” in a “prosecution pending in” California, the judge of the court in which the prosecution is pending “may issue a certificate ... specifying the number of days the witness will be required,” which “shall be presented to a judge of a court of record in the county of such other state in which the witness is found.” (Pen.Code, § 1334.3, subd. (a); see also Colo. Rev. Stats., § 16-9-203(1).) A witness who travels by airplane is compensated for the flight, and a small allowance is provided to cover the witness's expenses. (Pen.Code, § 1334.3, subd. (a); see also Colo. Rev. Stats., § 16-9-203(2).) The witness is paid statutory witness fees, is reimbursed “for any additional expenses of the witness which the judge ... shall find reasonable and necessary” (Pen.Code, § 1334.3; the Colo. law does not contain this requirement), and may not be arrested or served with legal documents while present in the state where the witness is testifying (Pen.Code, § 1334.4; see also Colo. Rev. Stats., § 16-9-202(2)).

Under the Uniform Act, a sister state court that receives a certificate described in the preceding paragraph must direct the witness named on the certificate to appear at a hearing. (Pen.Code, § 1334.2; see also Colo. Rev. Stats., § 16-9-202(1).) If at that hearing the sister state court “determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify” (Pen.Code, § 1334.2), that “the laws of the state in which the prosecution is pending” will give the witness protection from arrest while the witness is present, and

that the witness will ****413** be paid the fees mentioned in the previous paragraph, the court “shall issue a subpoena ... directing the witness to attend and testify in the court where the prosecution is pending” (*ibid.*; see also Colo. Rev. Stats., § 16-9-202(2)).

At issue here is a provision of the Uniform Act that permits a party in a criminal case to ask the trial court to “recommend[] that the witness be taken into immediate custody and delivered to an officer of this state to assure his or her attendance in this state” (Pen.Code, § 1334.3, subd. (a); see also Colo. Rev. Stats., § 16-9-202(3)), and that gives the court in the state where the witness is located the power to act upon that recommendation. This provision of the Uniform Act mirrors statutes in California and in most states allowing a trial court to order the confinement of material witnesses to ensure their presence at trial. (See Pen.Code, §§ 879, 881, 882; Studnicki, *Material Witness Detention: Justice Served or Denied?* (1994) 40 Wayne L.Rev. 1533.)

*****855 B. Evidence Code sections 240 and 1291**

Hearsay evidence, which is “evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove ***476** the truth of the matter stated” (Evid.Code, § 1200), is generally inadmissible in California (*id.*, subd. (a)). But there are several statutory exceptions. Pertinent here is the one that allows admission at trial of a person's former testimony if that person is “unavailable as a witness” and “[t]he party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has” at trial. (*Id.*, § 1291, subd. (a).) A witness is considered to be unavailable if “the proponent of his or her statement has exercised *reasonable diligence* but has been unable to procure his or her attendance by the court's process.” (*Id.*, § 240, subd. (a)(5), italics added.)

C. Code of Civil Procedure section 1219

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Code of Civil Procedure section 1219, originally enacted in 1872, provides that when a person has been found in contempt of court for refusal to perform an act that the person is capable of performing, the court may order the person jailed until that act is performed. (*In re Mark A.* (2007) 156 Cal.App.4th 1124, 1143, 68 Cal.Rptr.3d 106.) Section 1219(b), added to section 1219 in 1984, stated at the time of defendant's trial in this case: "Notwithstanding any other law, no court may imprison or otherwise confine or place in custody the victim of a sexual assault for contempt when the contempt consists of refusing to testify concerning that sexual assault." (Stats.1993, ch. 219, § 69.7, p. 1587.) (After defendant's trial, the Legislature in 2008 amended section 1219(b) to include victims of domestic violence.)

III

[1] In this court, the Attorney General has abandoned the argument he made in the Court of Appeal that section 1219(b) *prohibited* the prosecution from invoking the Uniform Act's custody-and-delivery provision. He now accepts the Court of Appeal's holding that section 1219(b), which prohibits the *jailing* of sexual assault victims for *contempt of court* based on their refusal to testify, does not preclude the prosecution from using the Uniform Act's custody-and-delivery provision. The Attorney General now argues that even though the prosecution in this case *could have* invoked that provision of the Uniform Act, it was not *required* to do so in order to show in this case the sexual assault victim's unavailability as a witness at defendant's trial. We agree, as discussed below.

[2] In requiring that prior testimony be admissible at trial only when the person who previously testified has later become unavailable to testify, the Legislature sought to ensure that "only when necessary" is prior testimony to be substituted for live testimony, which is generally "the preferred form of *477 evidence." (*People v. Reed* (1996) 13 Cal.4th 217, 225, 52 Cal.Rptr.2d 106, 914 P.2d 184.) Live testimony compels a witness "to stand

face to face with the jury" so it "may look at him and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." **414 (*Mattox v. United States* (1895) 156 U.S. 237, 242–243, 15 S.Ct. 337, 39 L.Ed. 409.) But that assessment by the jury " 'is severely hampered' " when the " 'witness is absent and when his prior testimony is read into evidence. [Citation.] Only if the necessity ***856 ... is clearly demonstrated may the defendant's right of confrontation be overcome....' " (*People v. Louis* (1986) 42 Cal.3d 969, 983, 232 Cal.Rptr. 110, 728 P.2d 180.) Such necessity is shown, for instance, if a witness is unavailable to testify at trial notwithstanding a party's use of "reasonable diligence" in attempting to secure the presence of the witness. (Evid.Code, § 240, subd. (a)(5).)

[3] Reasonable diligence, often called "due diligence" in case law, " 'connotes persevering application, untiring efforts in good earnest, efforts of a substantial character.' " (*People v. Cromer* (2001) 24 Cal.4th 889, 904, 103 Cal.Rptr.2d 23, 15 P.3d 243.) Here, the Court of Appeal faulted the prosecution for not doing enough to obtain Colorado resident Lorene's presence as a material witness at defendant's trial. What the prosecution should have done, the Court of Appeal said, was to invoke the Uniform Act's provision that would have permitted the prosecution to ask a Colorado court to have Lorene taken into custody and transported to California as a witness for the prosecution.

As there is no published California case involving the Uniform Act's provision on custody and delivery of a material witness, the parties here rely on decisions from other states that have considered the issue. Three of these cases—*Gray v. Commonwealth* (1993) 16 Va.App. 513, 431 S.E.2d 86, *People v. Thorin* (1983) 126 Mich.App. 293, 336 N.W.2d 913, and *People v. Arguello* (Colo.Ct.App.1987) 737 P.2d 436—generally support the Attorney General's view that to establish an out-of-state witness's unavailability at trial, a party is not required to invoke the Uniform Act's cus-

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tody-and-delivery provision. A fourth case— *State v. Archie* (1992) 171 Ariz. 415, 831 P.2d 414—generally supports defendant's contrary view. In all four, however, the facts are quite different from the case before us. None of them resolves the issue before us here: Did the prosecution have to invoke the Uniform Act's custody-and-delivery provision before it could establish its use of due diligence in securing sexual assault victim Lorene's presence at defendant's trial? Our answer is “no,” as explained below.

To have a material witness who has committed no crime taken into custody, for the sole purpose of ensuring the witness's appearance at a trial, is a measure so drastic that it should be used sparingly. (See, e.g., *478 *State v. Reid* (1976) 114 Ariz. 16, 559 P.2d 136, 145 [“Confinement of a witness, even for a few days, not charged with a crime, is a harsh and oppressive measure which we believe is justified only in the most extreme circumstances.”].) Confinement would be particularly problematic when, as in this case, the witness is a sexual assault victim.

Although any crime victim may be traumatized by the experience, sexual assault victims are particularly likely to be traumatized because of the nature of the offense. To relive and to recount in a public courtroom the often personally embarrassing intimate details of a sexual assault far overshadows the usual discomforts of giving testimony as a witness. And the defense may, through rigorous cross-examination, try to portray the victim as a willing participant. (See generally, Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom* (1977) 77 Colum. L.Rev. 1.) Also, seeing the attacker again—this time in the courtroom—is for many sexual assault victims a visual reminder of the harrowing experience suffered, adding to their distress and discomfort on the witness stand. (See Ellison, *The Adversarial Process and the Vulnerable Witness* (2001) pp. 16–17.) It comes as no surprise, ***857 therefore, that often a victim of sexual assault is hesitant to

report the crime. Even fewer such crimes would be reported if sexual assault victims could be jailed for refusing to testify against the assailant.

Recognizing these concerns, the California Legislature in 1984 amended Code of Civil Procedure section 1219 to add subdivision (b). (Sen. Bill No. 1678 (1983–1984 Reg. Sess.) § 2.) That provision, as mentioned earlier, prohibits a trial court from *jailing for contempt* a sexual assault victim who refuses to testify against the attacker. As the author **415 of that legislation explained to his fellow senators: “The purpose of [section 1219(b)] is not only to protect victims of sexual assault from further victimization resulting from imprisonment or threats of imprisonment by our judicial system, but also to begin to create a supportive environment in which more victims might come forward to report and prosecute [perpetrators of] sexual assault.” (Sen. Floor Statement by Sen. Dan McCorquodale on Sen. Bill No. 1678, May 1, 1984.) Enactment of section 1219(b) reflects the Legislature's view that sexual assault victims generally should not be jailed for refusing to testify against the assailant.

In this case, the prosecution acted reasonably when it chose not to request—even though permitted under the Uniform Act's custody-and-delivery provision—to have sexual assault victim Lorene taken into custody and transported from Colorado to California to testify at defendant's trial. As mentioned earlier, Lorene's refusal to testify at defendant's first scheduled trial led to a dismissal of the case against defendant. Thereafter, the prosecution refiled the charges against defendant. Lorene again told the prosecution *479 she would not testify against defendant, and she ignored a subpoena ordering her to appear at defendant's trial. It is highly unlikely that had Lorene been taken into custody, she would have become a cooperative witness. Moreover, if she had been transported against her will to California and then refused to testify, the trial court could not have held her in contempt and jailed her until she agreed to testify, because that remedy (ordinarily available when a witness refuses

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to testify) is not available when the witness who refuses to testify is a sexual assault victim. (§ 1219(b) .) Having spoken directly to Lorene, the prosecutor was in the best position to assess the strength of her determination not to testify at defendant's trial. Based on that assessment, the prosecutor could reasonably conclude that invoking the Uniform Act's custody-and-delivery provision would not have altered Lorene's decision not to testify again about the sexual assault, and thus it would have been a waste of time and resources.

In holding that the prosecution in this sexual assault case did not use reasonable diligence in securing Lorene's presence at defendant's California trial, the Court of Appeal pointed to the prosecution's failure to invoke the Uniform Act's custody-and-delivery provision. In the court's words: "Lorene was an essential witness in this case, her appearance was crucial. The prosecution did not, under the circumstances of this case, use every reasonable means to secure her attendance and, therefore, did not exercise reasonable diligence." But confinement of a sexual assault victim to ensure her presence at the assailant's trial would, for reasons we discussed earlier, not be a reasonable means of securing the witness's presence.

Pertinent here is our decision in *People v. Smith* (2003) 30 Cal.4th 581, 134 Cal.Rptr.2d 1, 68 P.3d 302. In that case, the trial court ruled that a sexual assault victim's refusal to testify at the defendant's ***858 trial made her unavailable as a witness. We rejected the defendant's argument that to get the victim to testify the trial court should have threatened to fine her. We said: "Trial courts 'do not have to take extreme actions before making a finding of unavailability.' " (*Id.* at p. 624, 134 Cal.Rptr.2d 1, 68 P.3d 302.) In this sexual assault case, the prosecution's resort to the Uniform Act's custody-and-delivery provision to ensure victim Lorene's presence at defendant's trial would have been an action far more extreme than the fine at issue in *Smith*. Thus, the Court of Appeal here erred in reversing the trial court's ruling that Lorene was

unavailable as a witness notwithstanding the prosecution's use of reasonable means to secure her presence at defendant's trial, and that therefore the prosecution could use at that trial the testimony that Lorene had previously given at defendant's preliminary hearing.

*480 DISPOSITION

We reverse the judgment of the Court of Appeal. We remand the matter to that court for consideration of defendant's remaining claims, which the Court of Appeal did not address.

**416 WE CONCUR: GEORGE, C.J., BAXTER, WERDEGAR, CHIN, MORENO, and CORRIGAN, JJ.

Cal.,2010.

People v. Cogswell

48 Cal.4th 467, 227 P.3d 409, 106 Cal.Rptr.3d 850, 10 Cal. Daily Op. Serv. 4092, 2010 Daily Journal D.A.R. 4897

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Appendix L

Beards v. Dailey, 38 Ore. App. 309, 589 P.2d 1207 (1979)

Westlaw

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C

Court of Appeals of Oregon.
 Harvey BEARDS, Respondent,
 v.
 Dale D. DAILEY and William M. Dailey, dba
 Dailey's Inn, Appellants,
 Thomas Dailey, Defendant.

TC A 77 06 08071; CA 11279.
 Argued and Submitted Dec. 20, 1978.
 Decided Jan. 29, 1979.

Defendants, who failed to engage lawyer to enter appearance on their behalf, filed motion to set aside default judgment entered against them. The Circuit Court, Multnomah County, Jeff Dorroh, Senior Judge, denied motion, and defendants appealed. The Court of Appeals, Tongue, J. pro tem., held that denial of motion was not abuse of discretion, in view of failure to make any showing that the more than two-month delay in filing the motion after defendants were informed of entry of the default judgment was an excusable delay.

Judgment affirmed.

West Headnotes

[1] Judgment 228 ↪153(1)

228 Judgment
 228IV By Default
 228IV(B) Opening or Setting Aside Default
 228k153 Time for Application
 228k153(1) k. In General. Most Cited

Cases

Defendant seeking relief from default judgment, in addition to showing that judgment was entered against him through mistake, inadvertence, surprise or excusable neglect, must show that he acted with reasonable diligence after acquiring knowledge of the default judgment; inexcusable delay in doing so will preclude him from obtaining relief. ORS 18.160.

[2] Judgment 228 ↪153(1)

228 Judgment
 228IV By Default
 228IV(B) Opening or Setting Aside Default
 228k153 Time for Application
 228k153(1) k. In General. Most Cited

Cases

Denial of defendants' motion to set aside default judgment, which was entered against them after they failed to engage lawyer to enter appearance on their behalf, on ground that the judgment was entered through mistake, inadvertence, surprise or excusable neglect was not abuse of discretion, in view of absence of any showing that delay of more than two months in filing motion to set aside judgment after defendants were informed of the judgment was an excusable delay. ORS 18.160.

***309 **1208** Robert L. McKee, Portland, argued the cause and filed the briefs for appellants.

William Aitchison, of Franklin, Bennett, Ofelt & Jolles, P. C., Portland, argued the cause for respondent. On the brief was Larry N. Sokol, of Franklin, Bennett, Ofelt & Jolles, P. C., Portland.

***310** Before SCHWAB, C. J., and RICHARDSON and JOSEPH, JJ., and TONGUE, J. pro tem.

***311** TONGUE, Judge Pro Tem.

Defendants appeal from an order denying their motion to set aside an order of default and judgment entered against them.

While recognizing that relief from the entry of a default judgment is within the discretion of the trial court, defendants contend that such discretion must be exercised in such a manner as not to defeat the ends of substantial justice. Defendants then recite facts to support their contention that it was unjust to enter a judgment against them. Defendants seek to excuse their failure to engage a lawyer to enter an appearance on their behalf when served

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with plaintiff's complaint and summons and thus to show that the default judgment was entered against them through "mistake, inadvertence, surprise or excusable neglect" within the meaning of ORS 18.160.

[1] Regardless of the sufficiency of that showing, however, it is well established that a defendant seeking relief under ORS 18.160 from a default judgment must not only show that the judgment was entered against him through "mistake, inadvertence, surprise or excusable neglect," but must also show that he acted with reasonable diligence after knowledge of the default judgment. Inexcusable delay in doing so will preclude him from relief. *St. Arnold v. Star Expansion Ind.*, 268 Or. 640, 646, 521 P.2d 526, 522 P.2d 477 (1974); *Rogue Valley Mem. Hosp. v. Salem Ins.*, 265 Or. 603, 609, 510 P.2d 845 (1973); *Koukal v. Coy et ux.*, 219 Or. 414, 419, 347 P.2d 602 (1959); *Reeder v. Reeder*, 191 Or. 598, 601, 232 P.2d 78 (1951), and *Steeves v. Steeves*, 139 Or. 261, 265, 9 P.2d 815 (1932).

[2] It appears from the record in this case that the order of default and judgment for \$9,500 was entered on December 14, 1977, and that defendants did not file a motion to set aside that judgment until March 20, 1978. It also appears from the affidavit of plaintiff's attorney in opposition to that motion that in addition to a telephone conversation with one of the defendants *312 after the service of the complaint and summons and prior to the entry of judgment, a letter was mailed to each of these two defendants at their separate addresses on December 28, 1977, informing them of the entry of that judgment.

Defendants filed no affidavit denying the receipt of these letters or alleging any facts to show that they acted with reasonable diligence after knowledge of the default judgment or to show that the delay until March 10, 1978, in the filing of their motion to set aside that judgment was an excusable delay. On this record, we cannot say that the trial court abused its discretion in denying that motion.

The judgment of the trial court is affirmed.

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