

**MOTION TO CONDUCT *TAINT* HEARING**

[Attorney's Name]  
[Address and Phone Number]  
**Attorneys for Defendant**

**UNITED STATES DISTRICT COURT  
\_\_\_\_\_ DISTRICT OF**

[Plaintiff's Full Name], [Type of entity (e.g., corporation, individual, partnership)]	)	CASE NO.
	)	
	)	
Plaintiff,	)	NOTICE OF MOTION AND
	)	MOTION TO CONDUCT
	)	<i>TAINT</i> HEARING
vs.	)	
	)	
[Defendant's Full Name], [Type of entity],	)	Date:
Defendant.	)	Time:
_____	)	

**TO PLAINTIFF AND ITS COUNSEL OF RECORD:**

PLEASE TAKE NOTICE that on [date], at [time], or prior to the start of trial, Defendant [Name of Defendant] (“Defendant”) will move the Court to conduct a *Taint* hearing of Plaintiff’s proposed witness \_\_\_\_\_.

This motion is made pursuant to Federal Rules of Evidence 104(a), 401, 403, 602 and 703, on the grounds that such evidence is not based upon personal knowledge, irrelevant and pursuant to Federal Rule of Evidence 403, any reference to this evidence would waste valuable court time and be unduly prejudicial.

This motion will be based on this Notice, the attached Memorandum of Points and Authorities, the records on file with this Court, and upon such other oral and documentary evidence as may be presented at the hearing on this motion.

Dated:

*[Signature Block]*

[Attorney's Name]  
[Address and Phone Number]  
**Attorneys for Defendant**

**UNITED STATES DISTRICT COURT**  
**\_\_\_\_\_ DISTRICT OF**

[Plaintiff's Full Name], [Type of  
entity (e.g., corporation,  
individual, partnership)] )

Plaintiff, )

[Defendant's Full Name], [Type of  
entity], )

Defendant. )

CASE NO.

MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
DEFENDANT'S MOTION  
TO CONDUCT  
*TAINT* HEARING

Date:  
Time:

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I.**  
**PRELIMINARY STATEMENT**

Defendant [Name of Defendant] ("Defendant") seeks to conduct a *Taint* hearing of and concerning Plaintiff's proposed lay witness \_\_\_\_\_ . This hearing is needed to ascertain whether the

proposed witness is competent by Federal Rule of Evidence 602, to testify from *personal knowledge*. Proposed lay witness \_\_\_\_\_ has been a patient of proposed expert witness \_\_\_\_\_ and there is reasonable concern that the proposed lay witness's memory of events has been *tainted* by the treatment such that the witness is not competent by FRE 602. This motion is made pursuant to Federal Rules of Evidence 104(a), 401, 403, 602 and 703, on the grounds that should the Court determine that the proposed witness \_\_\_\_\_ has been *tainted* by the process of treatment such that the witness is not likely to testify from personal knowledge, any testimony proffered by this witness will be irrelevant, a waste valuable court time and be unduly prejudicial.

The focus of this motion is on the manner in which the child witness has been questioned and the impact of this questioning on the witness's *knowledge of events*. Defendant asks this Court to consider whether the interview techniques employed by the counselor, by the parents, friends, and others undermined the reliability of the child's knowledge of events and subsequent statements. In consideration of the interview techniques employed by the counselor, by the parents, friends, and others, Defendant asks the Court to determine whether the child witness is competent to make statements reflective of *personal knowledge* at

all<sup>1</sup>. FRE 602 Like confessions and identification, the inculpatory capacity of statements indicating the occurrence of injury and anticipated testimony about these occurrences requires that special care be taken to ensure their reliability. An understanding of whether the questioning, interviews, interrogation or counseling of the child witness was unduly suggestive, requires a highly nuanced inquiry into the totality of the circumstances surrounding verbal interactions between the child and adults<sup>2</sup>.

Defendant asks this Court to determine from this hearing that the child witnesses' statements were founded upon "unreliable perceptions, or memory caused by improper investigative procedures," and any proffered testimony reflecting those accusations would lead to an unfair trial. *A pre-trial taint hearing* is required to assess the competency of the child witness to make statements reliably based upon personal knowledge. FRE 602. This must be accomplished *before* any hearing into whether the child witness's statements were developed

---

<sup>1</sup> As the Court is no doubt aware, there is ample precedent for determinations as to witness competency and personal knowledge. See, *Smith v Jones*, 123 State 456 (1999) [WEST Key Number 410 k 79 (1) & 410 k 79 (2)].

<sup>2</sup> See: *New Jersey v Margaret Kelly Michaels*, 136 N.J. 299, 642 A 2d 1372, at 1377 (1994). And [WEST Key Number 410 K 40(1)].

with a sufficient *indicia of trustworthiness* to be admitted in this matter.

## II.

### ***THE SCIENTIFIC BASIS FOR TAINT HEARINGS***

Woven into the consideration of this case is the question of a child witnesses's susceptibility to influence through coercive, suggestive or even benign questioning. There is a constantly broadening body of scholarly authority existing on the question of children's memory and interrogation<sup>3</sup>. The expanse of that literature encompasses a variety of views and conclusions. Among the varying perspectives, however, there is a consistent and recurring concern over the capacity of the interviewer and the interview process to distort a child witnesses's

---

<sup>3</sup> *For example*: "We note that a fairly wide consensus exists among experts, scholars, and practitioners concerning improper interrogation techniques. They argue that among the factors that can undermine the neutrality of an interview and create undue suggestiveness are a lack of investigatory independence, the pursuit by the interviewer of a preconceived notion of what has happened to the child, the use of leading questions, and a lack of control for outside influences on the child's statements, such as previous conversations with parents or peers." *New Jersey v Margaret Kelly Michaels*, 136 N.J. 299, 642 A 2d 1372, at 1377 (1994). And [WEST Key Number 410 K 40(1)].

recollection<sup>4</sup>. Many interview practices are sufficiently suggestive or coercive to alter irremediably the perceptions of child witnesses.

There are many other scientific and psychological propositions that courts have addressed in analogous contexts among those being: (1) the availability of battered women's syndromes as self-defense in criminal cases, (2) the determination of the reliability of hypnotically refreshed testimony, (3) the consideration of testimony at pre-trial hearings regarding taint, *Mason v Braithwaite* 432 U.S. 98 (1977) and *Stovall v Denno* 388 U.S. 293 (1967), *U.S. v Wade* 388 U.S. 218 (1967), *Gilbert v California* 388 U.S. 263 (1967). [WEST Key Number 110 K 339.8(1)].

The notion that a child witness is peculiarly susceptible to influence, while comporting with our intuition and common experience, is in fact an extensively

---

<sup>4</sup> See: Ceci, Toglia & Ross (Eds), *Children's Eyewitness Memory*, (New York: Springer-Verlag, 1987); Ceci, Ross & Toglia (Eds), *Perspectives on Children's Testimony*, (New York: Springer-Verlag, 1989); John Doris (Ed), *The Suggestibility of Children's Recollections*, (Washington, D.C.: American Psychological Association Press, 1991); Ceci & Bruck, *Jeopardy in the Courtroom - A Scientific Analysis of Children's Testimony*, (Washington, D.C.: American Psychological Association Press, 1996); and Campbell, T. *Smoke and Mirrors: The Devastating Effect of False Sexual Abuse Claims*. New York, Insight Books (1998).

well researched topic. In this regard, courts across this nation, are recognizing this phenomena and taking concerted action to ascertain children's evidentiary competency<sup>5</sup>.

The broad question of whether children as a class are more susceptible to suggestion than adults is one that has been definitively answered in psychological research<sup>6</sup>. But *this* inquiry is more focused. The issue the Court must determine is whether the interview, questioning and counseling techniques used with the child witness in this case were so suggestive that they had a capacity to substantially alter the child's recollections of events and thus compromise the reliability of the child's personal knowledge.

That an investigatory interview or counseling of a young child can be suggestive and thus shape the child witness's recollection and responses has been

---

<sup>5</sup> See: *People v Meeboer*, 439 Mich 310, 324-325; 484 NW2d 621 (1992); *State v Huss*, 506 NW2d 290 (Minn Sup Ct 1993); *Felix v State of Nevada*, 849 P2d 220 (Nev Sup Ct 1993); *New Jersey v Margaret Kelly Michaels*, 136 N.J. 299, 642 A 2d 1372 (1994). And [WEST Key Number 410 K 79 (2)].

<sup>6</sup> Id at note 3

generally accepted in the scientific community<sup>7</sup>.

A wide consensus exists among experts, scholars, and practitioners concerning questioning and interrogation techniques with children. This research argues that among the factors that can undermine the neutrality of an interview and create undue suggestiveness are:

- a lack of investigatory independence;
- the pursuit by the interviewer of a preconceived notion of what has happened;
- a lack of control for outside influences on the child's statements;
- a lack of control for cooperative conversationalist effects;
- a lack of control for source monitoring failures;
- the use of leading questions;
- the use of repeated questions<sup>8</sup>.

---

<sup>7</sup> For example, see: Goodman & Helgeson, *Child Sexual Assault: Children's Memory and the Law*, 40 U. Miami L. Rev. (1985); Myers, *The Child Witness: Techniques for Direct Examination, Cross-Examination, and impeachment*, 18 Pac. L.J., 801 889 (1987); Younts, *Evaluating and Admitting Expert Opinion Testimony in Child Sexual Abuse Prosecutions*, 41 Duke L.J. 691 (1991).

<sup>8</sup> For example, see: Lorandos & Campbell, *Myths and Realities of Sexual Abuse Evaluation & Diagnosis: A Call For Judicial Guidelines*, vol. 7 Issues in Child Abuse Accusations 1 (1995).

Defendant contends that every one of these difficulties have occurred in this case.

The use of repeated questions adds a manipulative element to questioning, interview and counseling. When a child is asked a question and gives an answer, and the question is immediately asked again, the child's normal reaction is to assume that the first answer was wrong or displeasing to the adult questioner<sup>9</sup>. The insidious effects of repeated questioning are even more pronounced when the questions themselves over time suggest information to the child.

The explicit vilification or criticism of the person charged with wrongdoing is another factor that can induce a child to believe inaccurately. Similarly, an interviewer's bias with respect to a suspected person's guilt or innocence can have a marked effect on the accuracy of a child's recall of events. The transmission of suggestion can also be subtly communicated to children through more obvious facts such as the interviewer or counselor's tone of voice, mild threats, praise, cajoling, bribes and rewards, as well as resort to peer pressure.

---

<sup>9</sup> For example, see: Poole & White, *Effects of Question Repetition on Eyewitness Testimony of Children and Adults*, 27 *Developmental Psychology* 975. November (1991) and Poole, D. & Lamb, M. (1999). *Investigative Interviews with Children*. Washington, D.C. American Psychological Association Press.

Ceci and colleagues,<sup>10</sup> examined how re-interviewing children can alter their recollection of events. Each week for 10 or 11 consecutive weeks, preschool children were individually interviewed by a trained adult. During each brief interview the interviewer would play cards with the child and each time, ask: “Do you remember going to the hospital with a mousetrap on your finger?” After ten weeks of thinking about both real and fictitious events, the preschool children were interviewed by a new adult who simply asked: “Tell me if this ever happened to you: Did you ever get your finger caught in a mousetrap and have to go to the hospital to get the trap off?” 58% of the preschool children produced false narratives and the elaborateness of their narratives by the final week astounded the experimenters. When pressed, the experimenters offered “We think that these children are so believable because at least some of them have come to believe these false stories themselves.”

When ABC’s news program 20/20 reported the research results, John Strossel, the 20/20 interviewer, met with one of the parents and her 4-year-old son . Responding to their ethical obligations, the researchers explained to the children that the mousetrap event had never occurred. The mom said that her son initially

---

<sup>10</sup> Ceci, Crotteau-Huffman, Smith & Loftus, Repeatedly thinking about non-events.

refused to accept this debriefing. When Strossel challenged him, asking if it was not the case that his parents had already explained that this event never happened, the child protested, “But it really did happen. I remember it!”<sup>11</sup>

Goodman and Clarke-Stewart<sup>12</sup> describe a study conducted by Clarke-Stewart, Thompson and Lenore<sup>13</sup> with 5- and 6-year-old children. The children interacted with a confederate named “Chester” who posed as the janitor and followed one of two scripts. In both scripts, Chester cleaned a classroom. Following this, in one script, Chester cleaned various toys including a doll. In the other script, Chester handled the doll roughly and suggestively.

---

*Consciousness & Cognition*, 3, 388-407 (1994).

<sup>11</sup> Ceci & Bruck. (1996) *Jeopardy in the Courtroom - A Scientific Analysis of Children's Testimony*, Washington, D.C.: American Psychological Assoc. Press pp 218 -220.

<sup>12</sup> Goodman, G. S., & Clarke-Stewart, A.(1991). *Suggestibility in children's testimony: Implications for sexual abuse investigations*. In J. Doris (Ed.), *The suggestibility of children's recollections: Implications for eyewitness testimony* (pp. 92–105). Washington, DC: American Psychological Association.

<sup>13</sup> Clarke-Stewart, A., Thompson, W., & Lenore, S.. *Manipulating children's interpretations through interrogation*. Presented at the biennial meeting of the Society for Research in Child Development, Kansas City, Missouri. (1989, April)

Each child was then questioned about the event by an interviewer who was either 1) accusatory in tone, saying Chester had been inappropriately playing with the toys instead of cleaning; 2) exculpatory in tone, suggesting that Chester was just cleaning the toys and not playing; or 3) neutral and non-suggestive. Each child was then questioned a second time by an interviewer who either reinforced or contradicted the first interviewer.

In response to neutral interviews, the children reported accurate information. When interviewers suggest *inaccurate* scenarios (whether accusatory or exculpatory), the children's stories quickly conformed to the interviewer's suggestions. At the end of the first interviews, 75% of the children's stories about Chester were consistent with the interviewer's suggestions. By the end of the second interview, 90% of the children complied with at least some of the interviewer's suggestions. When the second interview was contradictory to the first, most children changed their answers to conform to the second interview.

Research undertaken by Ceci, Ross, and Toglia<sup>14</sup> yielded similar results.

---

<sup>14</sup> Ceci, S. J., Ross, D. F., & Toglia, M. *Suggestibility of children's memory: Psycholegal implications*. *Journal of Experimental Psychology: General*, 116, 38–49. (1987); Ceci, S. J., Ross, D. F., & Toglia, M. P. *Age differences in suggestibility: Narrowing the uncertainties*. In S. J. Ceci, M. P. Toglia, & D. F. Ross (Eds.), (1987). *Children's eyewitness memory* (pp. 79–91),

They found that children are very susceptible to modifying their story based upon an adult's post-event suggestions. They also found that children are susceptible to suggestions by older children. Leichtman and Ceci<sup>15</sup> reported an experiment with a character named "Sam Stone." Sam Stone was described to 3- to 6-year-olds over a one month period as someone who was clumsy and who broke things that belonged to others. After this stereotype-induction period, Sam Stone visited the children's nursery school where he spent two minutes amiably interacting with the children during story time. He did not behave clumsily or break anything.

The day after the visit, very few children accused "Sam Stone" of being the culprit responsible for a book being ripped or a teddy bear soiled. But, after a series of leading questions where the children were interviewed once a week for two minutes over a ten week period, 72% of the children said "Sam Stone" had ruined at least one of the items. When explicitly asked, 44% of the 3- and 4-year-olds said they had actually seen him do these things.

Defendant is asking this Court to conclude that a *taint hearing* must be held to determine whether the questioning, interrogation and counseling utilized with

---

New York: Springer-Verlag.

<sup>15</sup> Leichtman, M. & Ceci, S. (1995). *The effects of stereotypes and suggestions on preschoolers' reports*. *Developmental Psychology*, 31, 568-578.

this child undermined her ability to know and understand the allegedly abusive events. **If**, as the research and scientific literature clearly demonstrate, the child's sense of what occurred has been *tainted* by adult questioning, interrogation and counseling, **then** any statement the child may make cannot be grounded in *personal knowledge*.

Petit, Fagan, and Howie (1990)<sup>16</sup> examined how an interviewer's information about events affected their style of questioning and the accuracy of 3- to 5-year-old children's reports. The children participated in a staged event in their school and were later interviewed about it. Three sets of interviewers were used. The first set of interviewers was given full and accurate details about the staged event, the second set was given inaccurate information about the staged event, and the third set was given no information about the staged event at all.

All of the interviewers were told to question each child until they found out what had happened, but were cautioned against the use of leading questions. On average, the children were asked 50 questions each in 20- to 30-minute interviews. In this way, the children were put under a great deal of pressure to provide information.

---

<sup>16</sup> Petit, Fagan & Howie, Interviewer effects on children's testimony. Paper presented at

Petit et al. report that, despite the cautions to avoid leading questions, 30% of all the questions were leading and 50% of these were frankly misleading. Interviewers with no information at all asked a greater frequency of leading and misleading questions. As their interviews wore on, they obtained progressively increasing levels of inaccurate information from the children. Interviewers with inaccurate information asked four to five times as many misleading questions as the other interviewers. Children who were questioned by the mis-informed interviewers, provided the most *inaccurate* information. Across all groups, the children agreed with 41% of the misleading questions.

### III.

#### ***THE LEGAL BASIS FOR TAINT HEARINGS***

There is a great deal of jurisprudential precedent describing the deleterious effects of improper questioning, interrogation or counseling on a child witnesses's memory. Many courts have recognized that once tainted, the distortion of the child's memory is irremediable.

“Once this tainting of memory has occurred, the problem is irremediable. That memory is, from then on, as real to the child as any other.”  
*State v. Wright*, 775 P.2d 1224, 1128 (1989) [WEST Key Number 110 K 662.8].

“Thus, unless an affirmative reason, arising from the circumstances in which

---

the International Congress on Child Abuse and Neglect, Hamburg, Germany (1990, September.

the statement was made, provides a basis for rebutting the presumption that a hearsay statement is not worthy of reliance at trial, the Confrontation Clause requires exclusion of the out-of-court statement.” *Idaho v Wright*, 497 US 805, 110 S Ct 3139 at 3149-3151 (1990) [WEST Key Number 110 K 662.8].

“[When].. a child's recollection of events has been molded by an interrogation, that influence undermines the reliability of the child's responses as an accurate recollection of actual events.” *New Jersey v Margaret Kelly Michaels*, 136 N.J. 299, 642 A 2d 1372, 1377 (1994) [WEST Key Number 410 K 40 (1) & (2)].

The debilitating effects of improper questioning, interrogation, and counseling have an even more pronounced effect on younger children<sup>17</sup>.

The conclusion that improper questioning, interrogation or counseling generate a significant risk of *tainting* the memories of young children is confirmed by government and law enforcement agencies. Some of these agencies have adopted standards for conducting interviews designed to overcome the dangers of improper questioning, interrogation and counseling children. The National Center for the Prosecution of Child Abuse, in cooperation with the National District Attorney's Associations and the American Prosecutor's Research Institute, have

---

<sup>17</sup> For example, see: King & Yuille, *Suggestibility and the Child Witness in Children's Eyewitness Memory*, in Ceci et al eds.,(1987). *Children's Eyewitness Memory*, (New York: Springer-Verlag, 1987); and Ceci, *Age Difference in Suggestibility in Children's Eyewitness Memory* Id.

adopted protocols detailing standards for the proper questioning, interrogation and counseling of suspected child-abuse witnesses. Those interview guidelines require that an interviewer remain “open, neutral and objective.”<sup>18</sup>

The prosecutor’s research group recommends that interviewers: (1) avoid asking leading questions, (2) never threaten a child, (3) avoid forcing a reluctant child to talk, (4) avoid telling a child what others, especially other children, have reported, and (5) avoid multiple interviews with various interviewers. Defendant argues that all the problems noted above have occurred in this case.

It is informative to note the way in which American law has developed in this regard. In *Idaho v Wright*, 497 U.S. 805 (1990), the United States Supreme Court

noted with approval the conclusion of the Idaho Supreme Court that *the failure to video tape interviews* with alleged child victims made the interviews suspect. [WEST Key Number 110 K 662.8]. The Idaho Court went on to point to the *use of leading questions*, and the presence of *an interviewer with preconceived idea* of what the child should be disclosing, as indicative of *tainted* processes. Finally, the Court wrote that these phenomena, in addition to children’s susceptibility to

---

<sup>18</sup> American Prosecutor’s Research Institute, National Center for Prosecution of Child

suggestive questioning, all indicated the strong potential for the creating unreliable information.

In *People v Meeboer*, 439 Mich 310, 324-331; 484 NW2d 621 (1992), the Michigan Supreme Court analyzed a situation involving proposed hearsay from a young declarant. The *Meeboer* Court determined that such hearsay must be analyzed “with more precision because of the young age of the declarants.” *Meeboer*, 439 Mich at 326. The *Meeboer* Court went on to describe an inquiry into interviewer and family influences and specified stringent criterion for inquiry and admissibility. [WEST Key Number 110 K 367].

In *Felix v State of Nevada*, 849 P2d 220 (Nev Sup Ct 1993), the Supreme Court of Nevada reversed the conviction of *Martha Helen Felix* following an inquiry into the *personal knowledge* of a child witness. [WEST Key Number 110 K 367 & 211 K 20]. In *State v Huss*, 506 NW2d 290 (Minn Sup Ct 1993), the Minnesota Supreme Court conducted an inquiry into the *personal knowledge* of a child witness. The *Huss* Court concluded that the use of suggestive methodology by a therapist completely undermined that child’s capacity for unaltered *personal knowledge* of events. [WEST Key Number 211 K 20].

In *New Jersey v Margaret Kelly Michaels*, 136 N.J. 299, 642 A 2d 1372

---

Abuse, *Investigation and Prosecution of Child Abuse* at 7 (1987).

(1994) the New Jersey Supreme Court reversed the conviction of a woman wrongly imprisoned for mass child abuse and instructed that in these situations, *taint hearings* are a must.[WEST Key Number 410 K 79 (2) & 410 K 40 (1)].

The *Michaels* court reasoned:

“[A]ssessing reliability as a predicate to the admission of in-court testimony is a somewhat extraordinary step. Nevertheless, it is not unprecedented. [Citing to *Mason v Braithwaite*, 432 US 98, 97 S Ct 2243, 53 L Ed2d 140 (1977) & *Jackson v Denno*, 378 US 368, 84 S Ct 1774, 12 L Ed2d 908 (1964)]” 136 N.J. 299,642 A 2d 1372, 1381 (1994) [WEST Key Number 410 K 79(2)].

The *Michaels* court went on to instruct:

“[T]o ensure defendant's right to a fair trial a pretrial taint hearing is essential to demonstrate the reliability of the resultant evidence.” 136 N.J. 299, 642 A 2d 1372, 1382 (1994) [WEST Key Number 110 K 412 (4) & 110 K 415 (1) & 110 K 417 (1)].

Responding to an extensive review of the conduct of therapists, interviewers, and police investigators by their Court of Appeals, the New Jersey Supreme Court in the *Michaels* case found:

“A lack of objectivity also was indicated by the interviewer's failure to pursue any alternative hypothesis that might contradict an assumption of defendant's guilt, and a failure to challenge or probe seemingly outlandish statements made by the children. The record is replete with instances in which children were asked blatantly leading questions that furnished information the children themselves had not mentioned.” *Michaels* 136 N.J. 299, 642 A 2d 1372, 1380 (1994) [WEST Key Number 110 K 1222.1].

A compilation of the serious problems the *Michaels* Court noted are helpful:

1. Failure to videotape initial interview;
2. Lack of control for outside (family) influences;
3. Absence of spontaneous recall in the supposed victims;
4. Interviewer bias - A preconceived notion that alleged wrongdoer, “did it”;
5. Repeated leading questions;
6. Incessant questioning, either by examiners or by family members;
7. Multiple interviews;
8. Transmission of suggestion to children ie: tone of voice;
9. Positive reinforcement of inculpatory statements;
10. Negative reinforcement of exculpatory statements;
11. Failure to probe outlandish statements;
12. Contact with peers and reference to their statements;
13. Use of mild threats, bribes or cajoling;
14. Vilification of alleged wrongdoer.  
[WEST Key Number 410 K 79 (2)].

This Defendant argues that exactly these difficulties are extant in this case.

This Court is well aware of its responsibility to ensure that evidence admitted at trial is sufficiently reliable so as to aid the finder of fact. Obviously, our judicial system desires that only reliable evidence aids the trier of fact to draw ultimate conclusions of guilt or innocence. Reliability is the linchpin for determining admissibility of evidence under fairness standard as required by the Due Process Clause of the Fourteenth Amendment. *Mason v Braithwaite*, 432 US 98, 97 S Ct 2243, 53 L Ed2d 140 (1977). [WEST Key Number 110 K 339.8(1)]. Competent and reliable evidence is the foundation of a fair trial; and therefore,

competent and reliable evidence must be the basis upon which the fact finder determines the truth. If inculpatory evidence is obtained from unreliable sources, due process interests are at risk.

Reliability assessments with respect to the admissibility of out-of-court statements are commonplace. When faced with extraordinary situations in which police or prosecutorial conduct has thrown the integrity of the judicial process into question, our courts have not hesitated to use the procedural protection of a pre-trial hearing. This is most important to cleanse a potential prosecution of *tainted* recollection. Seeing this as a predicate to any inquiry about the admission of in-court testimony, is a recent phenomena that has grown with the scientific research.<sup>19</sup>

The law governing the admissibility of eye-witness identification testimony

---

<sup>19</sup> See *Mason*, supra, 432 U.S. 98 authorizing hearing to determine admissibility of in-court identification testimony because of pre-trial suggestiveness and *Jackson v Denno*, 378 U.S. 368 (1964) [WEST Key Number 92 K 266.1 (5)]. requiring pre-trial taint hearing to determine admissibility of evidence See also: *United States v Simmons*, 390 U.S. 377, 384 (1968) ruling that evidence would be excluded if pretrial identification procedures “give rise to a very substantial likelihood of irreparable misidentification”. [WEST Key Number 110 K 339.7 (1) & 110 K 339.7 (3)].

provides a helpful perspective in addressing the concerns at issue here. The United States Supreme Court has insisted that a pretrial hearing be held to determine the reliability and admissibility of proffered in-court testimony based on suggestive identification, see *Mason*, supra, 388 U.S. at 114. Like the investigatory interview in cases such as this one, a pre-trial identification procedure can be a critical moment in the course of a criminal prosecution. *United States v. Wade*, 388 U.S. 218 (1967).[WEST Key Number 110 K 412 (4) & 110 K 415 (1) & 110 K 417 (1)].

Here, pretrial events relate not to the identification of an offender; but more crucially, to the occurrence of the offense itself. Those pre-trial events: questioning, investigatory interviews, and suggestive counseling, are fraught with the elements of untoward suggestiveness and the danger of unreliable evidentiary results. To ensure the defendant's right to a fair trial, a pretrial *taint hearing* is essential to demonstrate the reliability of the resultant evidence.

#### IV.

##### ***PROCEDURAL ISSUES IN PRE-TRIAL TAIN T HEARINGS***

A pretrial *taint hearing* should be conducted pursuant to FRE 104. The basic issue to be addressed at such a pre-trial hearing is whether the pretrial events, the questioning, investigatory interviews, interrogations and suggestive counseling were so suggestive that they give rise to a substantial likelihood of irreparably

mistaken or false recollection of material facts bearing on the Defendant's culpability.

Consonant with the presumption that child witnesses are to be presumed no more or less reliable than any other class of witnesses, the initial burden to trigger a pretrial taint hearing is on the petitioner *Watkins v Sowders*, 449 U.S. 341(1981). [WEST Key Number 110 K 339.11 (1) & 110 K 339.11 (2)]. The petitioner must make a showing of "some evidence" that the alleged witness's statements were the product of suggestive or coercive questioning, interview or counseling techniques.

Respectfully, this Defendant argues that through citation to the scientific literature, the law of pre-trial taint hearings and, if necessary, through additional expert testimony, Defendant has met that threshold and this Court will hear, that there is more than enough evidence to justify a *taint hearing*.

Procedurally, the party proffering this witness should then be made to prove, by clear and convincing evidence, that the statements and testimony elicited be the questioning, interview, interrogation and suggestive counseling techniques nonetheless retain a sufficient degree of reliability to warrant admission at trial. Then, and only then, can the Court safeguard the fairness of the Defendant's trial. If proper testimony of the child survives the pretrial hearing, the trier of fact will have to determine the credibility and prove the worth of such testimony.

## CONCLUSION

For the foregoing reasons, Defendant respectfully requests that this honorable Court conduct a *Taint Hearing* to determine whether the proffered child witness is reasonably capable of testifying from personal knowledge.

Dated:

[*Signature Block*]