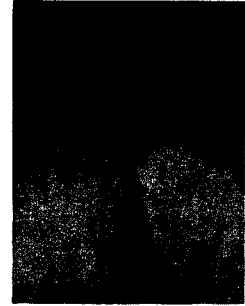


# TAINT HEARINGS: LOOKING FOR RELIABILITY AMIDST INCOMPETENCE WHILE SEARCHING FOR THE "TRUTH"

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1. Did law enforcement officers use "unduly suggestive" procedures? That is, did the procedures give rise to a substantial likelihood of irreparable misidentification?<sup>15</sup>
2. If the procedures were suggestive, were they nevertheless necessary under the totality of the circumstances?
3. If the procedures were both suggestive and unnecessary, was the identification nevertheless reliable under the totality of the circumstances?

In the Fall, 1997 issue of *Bench & Bar*, Mary Jane Phelps devoted her article to the question of the propriety of, and the legal necessity for, "taint hearings." While I have only been on the other side of one case with Ms. Phelps, I consider her to be one of the most conscientious and hard-working prosecutors I have had the privilege to work with in my 15 years as a criminal defense attorney. Additionally, the one case in which we shared a common interest in the outcome was a case where my client was accused of the molestation of a child.

However, notwithstanding my admiration for Ms. Phelps and her abilities, I find myself at odds with her on the issue of whether, and to what extent, Kentucky should adopt the procedural safeguard of "taint hearings" when allegations of child sexual abuse are made. Her article makes clear that she opposes the advent of "taint hearings" and, I suspect, she speaks for most of the attorneys in Kentucky who make the prosecution of crime at least a part of their day-to-day practice.

I, on the other hand, believe in them. I do not believe that such hearings offer a panacea for all of the obstacles encountered by the myriad of citizens who are falsely accused of child sexual abuse and find themselves facing substantial prison terms within our correctional system. However, they do offer a way to check the unlimited--and, to the layman, the unimaginable--power of the state to create, distort and destroy the memories of children in order to produce the false allegations in the first instance.

### What is A "Taint Hearing?"

The legal authority for "taint hearings" comes from the procedure developed, discussed, and adopted by the

New Jersey Supreme Court in what has now come to be known as the *Michaels* decision.<sup>1</sup> In the case cited by Ms. Phelps in her article<sup>2</sup> the state has argued that the *Michaels* decision is wrong because the concept of a "taint hearing" is based on outdated and disproved premises; some of which date all the way back to the time of England's Queen Victoria.

Moreover, it is important to note that the *Michaels* Court based its decision upon an extensive review of social science research.<sup>3</sup> To that extent, it made a number of findings and acknowledgements which appear throughout the text of the *Michaels* opinion consistent with that research. In other words, the whole concept of the "tainting" of children's memories has its basis in the science of the present and not in the superstition of the past, and that basis has been judicially recognized by the highest court of one of Kentucky's sister states.

At the outset, it is indisputable that, at one time or another, children, the elderly, the mentally retarded, the psychologically infirm, women who have suffered rape, and numerous others, have been thought, rightly or wrongly, to be incapable of giving competent or, even, reliable testimony. Additionally, Ms. Phelps also adopts this theme when she suggests that the natural result of allowing such pretrial challenges to the testimony of children will be to subject "the mentally ill, the mentally retarded, the old, the infirm, and the gullible" to the rigors of taint hearings as well. This is not really the issue.

Today, all of these people can be competent to testify in any particular case; provided only that they can accurately perceive, accurately recollect, and adequately express the facts, and do so under the penalties of an oath knowingly taken and understood.<sup>4</sup>

However, problems still exist with regard to children. Ceci and Bruck, in their seminal work, *Jeopardy in the Courtroom*,<sup>5</sup> explain that there exists a clear nexus between youth and suggestibility; *i.e.*, generally, as age decreases, suggestibility increases. This nexus mandates that mental health professionals, social workers, police, therapists, attorneys, judges and everyone else who becomes involved with a child, after an allegation of abuse is made, use extreme care and caution in dealing with the child so as not to suggest information to them and aid in the formation of false memories.

### More Than A Difference of Perspective

Let me start by disagreeing with the typical prosecutorial characterization of what a taint hearing is; *i.e.*, a hearing on the *credibility* of a child victim's statement(s). In fact, the hearing addresses the *reliability* of the child accuser's current memory given what has happened during the investigation of the claims in the past.

Ms. Phelps draws heavily on the Myers article<sup>6</sup> for her view of how the *Michaels* universe is designed. Under the view of the *Michaels* universe, as set out in the Myers article, the issue of taint revolves around the *credibility* of child witness. The argument is that the true focus of *Michaels* was on either the status or on the competency of the child witness *per se*.

Under this view, the citizen-accused can get a fair trial simply by reference to the Confrontation Clauses of both the United States and Kentucky Constitutions. A trial court need never conduct a "taint hearing." The court should just let everybody testify at trial and merely allow extensive cross-examination by defense counsel. Cross-examination, alone, is sufficient to insure the protection of even the most falsely-accused of citizens.

This view is dangerously wrong. It ignores the very real distinction between children who give factually-incorrect<sup>7</sup> testimony in the belief that what they are saying is factually-correct, and those children who take the stand and deliberately testify to facts they know to be false. In the case of the latter group of witnesses--the liars--properly prepared and executed cross-examination *can be* an effective method of developing the truth. This is because the central issue when dealing with lying witnesses is credibility.

When dealing with those child accusers who believe what they are saying, but who are factually incorrect, cross-examination, even if properly prepared and executed, will rarely be able to uncover the truth. Such witnesses believe that they are testifying "truthfully" in accordance with their actual memories, despite the false origins of those memories.

The difference is that witnesses who *believe* they are telling the truth are not going to suddenly break-down, and confess to lying about someone sexually abusing them and explain that they did so only because

someone else told them to say so. The *reliability* of a witness' memories cannot be impeached through the cross-examination of the witness. The cross-examiner can only hope to impeach the source of the memories by attacking those who have investigated the case and created the memories.

Cross-examination into the credibility of what a witness is saying about "an event" and not the origin and subsequent reliability of a witness' memories of that "event," is *never* sufficient to protect an accused from the witness who has been subjected to suggestive and leading investigatory and interrogation techniques. There must be other procedural safeguards for the citizen-accused.

In the more accurate view of the *Michaels* universe, the issue of taint focuses on the competency of the state's validators;<sup>8</sup> social workers, police, prosecutors, and in some cases even state-sponsored doctors and therapists. The issue is whether these validators, out of incompetence, negligence, or their improper assumption of the role of an advocate, have irrevocably damaged or destroyed the memories of the child witness through improper investigatory techniques.

The scope of the inquiry in this area is much broader than has been argued Ms. Phelps. The issues raised when an individual is accused of sexual abuse by a child are two-fold: credibility *and* reliability. A pretrial hearing is not necessary to deal with the issue of credibility because cross-examination at trial is sufficient to deal with this problem. However, *only a pretrial hearing* provides the procedural due process safeguards necessary in dealing with the issue of reliability. Cross-examination is insufficient to deal with the memory-shaping processes to which the child has been exposed during the investigation of the allegations.

#### What About The Practical Effects Of "Taint Hearings?"

Ms. Phelps' argument makes various references to the practical effects of allowing taint hearings but ignores the most important of practical effects which occurs when such hearing are not allowed: it is impossible to cross-examine the state's validators regarding the proper procedures for conducting interviews, or the latest research in the field of child sexual abuse, or inter-rater reliability, or source monitoring problems, or interviewer bias, or the requirement of taping

interviews, because *none of them know anything about any of these issues.*

The validators don't read peer review journals. They don't keep-up in their fields through independent study. They have virtually no incentive to increase their knowledge base in these areas. They have no idea who the experts in the field are; for the prosecution or for the defense. At trial, trying to cross-examine the validators shortly becomes an exercise in utter futility for even the best criminal defense attorney.

In addition to ignoring the bad effects of *not* having "taint hearings", Ms. Phelps sets forth a number of ways which she thinks prosecutions will be harmed if taint hearings are allowed. However, if one looks closely, it can be seen that these concerns are nothing more than ghosts and shadows.

Ms. Phelps first argues that having a taint hearing might afford defense counsel a full blown attack on the children; the effect of which might be to traumatize the child into not testifying at trial. I think this argument is wrong and demonstrates just how poorly the whole idea of "taint hearings" is understood by the prosecutorial community.

Now, while it *is* possible for children to testify at such a hearing, defense counsel should not, except under the most extreme of circumstances, have them actually take the stand. That is because the process of letting them testify and tell their stories yet again contributes to the taint. In reality, a "taint hearing" would challenge a child witness' prior statements and current memories by showing that improper interrogation and investigation techniques by state-sponsored validators have produced *unreliable* (not uncredible) memories and, hence, testimony.

Ms. Phelps also suggests that such hearings might be used as discovery devices by defense counsel. Let me say categorically that if a defense attorney is attempting to conduct a "taint hearing" for the purpose of obtaining discovery, he or she is misusing the procedure. If the parties in the case do not already know what all of the evidence at trial would be *prior* to defense counsel asking for a "taint hearing," then the issue cannot be properly before the trial court. There isn't any "discovery" at such a hearing. The parties must cooperate to learn all they can about the case and obtain all the relevant documentation and statements, *prior* to the hearing, in pre-trial discovery. Prior to the "taint

hearing" both sides must be fully informed of the evidence.<sup>9</sup>

Moreover, Ms. Phelps seems concerned that defense counsel are likely to "over-utilize" taint hearings. That is to say, she believes defense counsel will ask for such hearings in a large percentage of cases, with relatively little regard for the quality of pretrial, validator interviews of the complaining children. I believe that this blanket indictment of the entire defense bar does not hold water.

The fundamental flaw with this argument is that to lump all lawyers who practice criminal defense law together is nonsense. The group is so diverse it makes the bar scene in Star Wars look like an IBM management seminar. Further, the number of different approaches taken by these attorneys in practicing their cases is similarly varied.

I believe that, on the whole, criminal defense attorneys do not tend to err on the side of being *over-zealous* in the representation of their clients but, generally, exercise prudence and caution in deciding what motions to file and what hearings to ask for during the pendency of their cases.

Additionally, whether the client can avail himself or herself of a "taint hearing" will depend upon numerous factors such as the availability of an expert; whether funds exist with which to pay the expert; the particular trial strategy of the attorney and her client; the weight of the evidence against the client; and a host of other factors.

Like anything else, there are both good and bad reasons for asking for, and conducting, a "taint hearing." "Taint hearings" can be more dangerous to the defense than to the prosecution and, it seems to me, that only a fool would ask for such a hearing to be conducted unless it was clearly indicated by the specific facts of the case. Prudence dictates that an attorney ask for such a hearing only when it is genuinely in the client's interests given the attorney's reasoned analysis of all of the facts and circumstances of the case. Using this benchmark, the end result will be that the number of taint hearings held will *not* cause our criminal justice system to implode.

#### Analogous Procedures

In addressing the argument that "taint hearings" in child sex abuse cases are a relatively new phenomenon, I can do nothing other than freely admit that fact. But, just

because the idea is new in this specific context does not mean that the idea is new in the much broader framework of the criminal law.

For example, the due process clauses of the Fifth and Fourteenth Amendments provide analogous protections against unfair *identification procedures* used by law enforcement officers. In *Stovall v Denno*,<sup>10</sup> the Supreme Court held that a due process violation occurs if the pretrial identification procedures are "unnecessarily suggestive and conducive to irreparable, mistaken identification." The following year the Supreme Court further clarified the contours of the due process right as it relates to identification procedures. The Court held in *Simmons v United States*,<sup>11</sup> that the admission at trial of an identification procedure offends the due process clause only if the pretrial identification (a display of photographs in *Simmons*) was so "impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."

Thus, the linchpin of the due process analysis was the likelihood of an irreparable misidentification of the suspect. In *Neil v Biggers*,<sup>12</sup> and *Manson v Braithwaite*,<sup>13</sup> the Court clarified that an identification procedure which was both suggestive and unnecessary did not require *per se* exclusion. If an identification arising from the unnecessarily suggestive procedure was reliable under the totality of the circumstances, testimony about the out-of-court identification was nevertheless admissible at trial. The same analysis applies to the admissibility of a later in-court identification by the same witness.

To summarize, identification procedures raise the following issues to the Defendant's due process rights:<sup>14</sup>

4. Did law enforcement officers use "unduly suggestive" procedures? That is, did the procedures give rise to a substantial likelihood of irreparable misidentification?<sup>15</sup>
5. If the procedures were suggestive, were they nevertheless necessary under the totality of the circumstances?
6. If the procedures were both suggestive and unnecessary, was the identification nevertheless reliable under the totality of the circumstances?

The defendant bears the burden of proving that the identification was suggestive and unnecessary under

numbers 1 and 2, above. If the defendant meets these burdens, then the prosecution bears the burden of proving that the identification was nevertheless reliable under the third prong of the test.

This long-standing, generally-accepted line of cases starts to sound a whole lot like what the New Jersey Supreme court was trying to do in *Michaels*: the due process rights extend only to those procedures employed by state agents or employees;<sup>16</sup> the Defendant bears the initial burden to justify the need for a hearing; upon meeting this burden, the burden shifts to the state to prove reliability; a totality of the circumstances test is used; etc. And, in thinking about the "taint" hearing issue in an historical sense, prosecutors must have been saying all of the same things in *Stovall*, *Simmons*, *Biggers*, and *Braithwaite* as Ms. Phelps and other prosecutors are saying now. Yet, the concept of conducting pre-trial reliability hearings for out-of-court, pretrial identifications has not caused criminal prosecutions to be abandoned or an eternal backlog of cases.

Lastly, purely as a matter of fairness, prosecutors should remember that the presumption of innocence must be something of substance and not just an empty platitude. The complaining children are not "victims" in the legal sense, unless and until the guilt of the citizen-accused is proven beyond a reasonable doubt in a fair trial. If the state is responsible for creating memories and the concomitant testimony which goes with those memories, then the trial is not fair and the results are not just.

The whole issue of "taint hearings" is all about whether the citizen-accused will be deprived of a very real and meaningful opportunity for pretrial due process in cases where it is exceedingly difficult to get a fair trial, because of the very nature of the allegations. There must be a judicially-approved method of checking on the quality of the investigations and interrogations of the state validators; police, social workers, "therapists," etc.

### In Conclusion

The importance of "taint hearings" cannot be understated. The understanding of this concept is essential to everyone who navigates this mine field of criminal law. The approval of these procedures is vital to the citizen-accused's due process rights to a fair trial. "Taint hearings" are not obstacles to conscientious and hard-working prosecutors. They are only obstacles to

prosecutors who, unlike Ms. Phelps, simply don't care whether they are prosecuting and attempting to incarcerate the falsely accused. Kentucky needs to adopt this form of procedural due process now.

### Footnotes

<sup>1</sup> *State v Michaels*, 642 A.2d 1372 (N.J. 1994).

<sup>2</sup> *Commonwealth v Jerry Rainwater*, 96-CA-1394-MR, (affirming the trial court's decision to hold a taint hearing), petition for discretionary review filed with the Kentucky Supreme Court in early November, 1997.

<sup>3</sup> In fact, Drs. Stephen Ceci and Maggie Bruck--both of whom are cited in the state's pleadings in the Kentucky appellate courts in the *Rainwater* case--wrote an amicus brief in the *Michaels* case which was presented by the Committee of Concerned Social Scientists. The New Jersey Supreme Court cited extensively from their brief in its opinion.

<sup>4</sup> KRE 601; and, *Pendleton v Commonwealth*, 685 S.W.2d 549 (Ky. 1985).

<sup>5</sup> Ceci, Stephen J. and Bruck, Maggie, *Jeopardy in the Courtroom: A scientific analysis of children's testimony*, American Psychological Association, 1995.

<sup>6</sup> Myers, J., *Taint Hearings For Child Witnesses? A Step in the Wrong Direction*. 46 *Baylor Law Review* 873 (1994).

<sup>7</sup> By "factually-incorrect," I am referring to testimony which could be shown to be wrong if everyone at the trial could be transported back in time to witness the event(s) being testified about and see for themselves that the testimony is in error.

<sup>8</sup> As apposed to "investigators." The difference is that an investigator takes the position that an allegation must be proved by reference to objective evidence. In their search for such evidence, investigators are careful not to destroy or damage other evidence. They do not ignore evidence which tends to disprove an allegation. In fact, they welcome such evidence because it allows them to be thorough in their work, fair in their method, and to test the credibility of the people they have interviewed during the investigative process. Like good doctors, they are concerned with being able to *rule out* alternative hypotheses and will come to their conclusions only after all alternative hypotheses have been eliminated. Like Sherlock Holmes, good

investigators know that it is error to theorize before all the facts are known. Once all of the facts are gathered, those theories which are impossible, given the facts, must be discarded. Whatever theory remains, however improbable, is the truth.

<sup>9</sup> "Validators," on the other hand, always believe the allegation without regard to other proof; usually don't have the first idea of how to conduct an investigation; are utterly unfamiliar with the research and scientific literature in their field; *rule in* abuse; theorize just as soon as they can without being burdened by the facts; and frequently destroy meaningful opportunities to gather and preserve evidence, as well as the evidence itself.

<sup>10</sup> In this vein, I might remind Ms. Phelps of the case we worked on together. She had provided me with "all the discovery she had in her file" which included 12 pages of CHR records. Once an Order was signed which authorized me to see and obtain the CHR file for myself, an additional 174 pages of records were photocopied and given to both sides. The records contained much exculpatory material. The case was quickly settled after both counsel's review of the new material. This story shows importance of *both* sides possessing all of the relevant information.

<sup>11</sup> 388 U.S. 293 (1967).

<sup>12</sup> 390 U.S. 377 (1968)

<sup>13</sup> 409 U.S. 188 (1972).

<sup>14</sup> 432 U.S. 2243 (1977).

<sup>15</sup> See, *Unites States v Concepcion*, 983 F.2d 369 (2d Cir. 1992) for as general discussion of the law controlling due process scrutiny of identification procedures.

<sup>16</sup> *Ledbetter v Edwards*, 35 F.3d 1062 (6th Cir. 1994).

<sup>17</sup> Of course, more difficult is determining the degree of governmental complicity in a suggestive procedure sufficient to implicate the due process clause. However, this is addressed in *United States v Emanuele*, 51 F.3d 1123 (3rd Cir. 1995) where the appellate court held that the government's intent may be one factor in determining the risk of misidentification but it is not an essential element of the Defendant's proof. A series of suggestive events that is suggestive and creates a substantial risk of misidentification is no less a due process violation, even absent evil intent on the part of the government. [...] On the other hand, evidence that the government intended and arranged such an encounter would be a substantial factor in the court's analysis.

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## DPA Seeks Equal Employment

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