**BRIEF OPPOSING TAINT HEARING**

**State of Alaska**

**STATEMENT OF ISSUES**

1. Did Judge T. abuse his discretion or violate the defendant’s rights to due process or confrontation when he refused to hold a pretrial hearing to determine whether improper questioning had tainted the memories of the defendant’s victims?

**STATEMENT OF THE CASE**

**The Sexual Abuse of C.P.**

The defendant became friends with D. P. when she was still a teenager. Their friendship

grew closer following the birth of D.’s daughter, C.P., in July of 1990, but The defendant and D.P. were never romantically involved. The defendant spent long periods of time alone with C.P. and the defendant gave numerous gifts to both D. P. and C.P.

The fact that the defendant was sexually abusing C.P. first came to light when she was looking at a nature book with two young cousins. She told them that a photograph of a rat looked like The defendant’s penis (“dee-dee”), and then said that the defendant had put his “dee-dee” in her “wee-wee.” A copy of the photograph of the rat, located at page 874 of Exhibit 27, is in the appendix. C.P. later volunteered the same statement to her aunt, Tanya P., in Ketchikan. D. P.’s sister-in-law, Jeannie P., told D. what C.P. had said to Leo P. and Dorian P. D. P. then recalled that the defendant had taken C.P. on an outing in Ketchikan and that C.P.’s underwear had been missing when they returned. When the defendant and C.P. returned from the outing, C.P. was wearing a new pair of panties from a package of six that the defendant had supplied. At the time, C.P. said that the defendant had put the new pair of underpants on her. C.P. later testified that the defendant had touched her on the vagina with his finger, but did not say when. When the defendant was in regular contact with C.P., she had terrible nightmares. There were additional circumstances indicating that C.P. had been sexually abused: she refused to discuss her nightmares with her mother, she attempted to have oral sex with a babysitter’s child, and she attempted to engage in sexual conduct with R.W., her cousin.

**The Sexual Abuse of C.S. and A.J.S.**

When D. P. told S.C. that the defendant had abused C.P., S. C. reported the defendant to the Ketchikan Police Department. Ketchikan police subsequently spoke to S.C.’s daughters, C.S. and A.J.S., ages five and six, respectively, at the time of trial. S.C. had met the defendant in 1992 through D. P. The defendant and S.C. were not romantically involved; however, the defendant brought C.S. and A.J.S. presents, babysat them, spent a lot of time with them, and on one occasion paid S.C.’s electric bill.

When interviewed by Officer J. of the Ketchikan Police Department, C.S. initially said that the defendant had put his tongue in her mouth and had touched her vagina with his hand, but she recanted at the end of the same interview. When Officer J. reinterviewed C.S., she again said that the defendant had touched her vagina. C.S. testified at trial that the defendant had touched her vagina (“the place where you go to the bathroom”) with his hand and that he had told her not to tell anyone. S.C. later recalled that she had once happened to walk past her bedroom on an occasion when A.J.S. and the defendant were lying on her bed watching a video, and that A.J.S.’s dress had been pulled up and the defendant’s hand had been on A.J.S.’s leg next to her vagina. When Officer J. asked A.J.S. about this incident, A.J.S.’s demeanor changed and A.J.S. changed the subject.   However, she denied that the defendant had touched her. A.J.S. later volunteered to her mother that the defendant had “touched her privates;” she ultimately testified at trial that the defendant had touched her vagina (“private parts”).

The defendant agreed that A.J.S.’s dress was raised when they were together in the bedroom and said that S.C. did a “double-take” as she walked past. The defendant said he was simply patting A.J.S.’s leg.

**The Sexual Abuse of B.S.**

The defendant met S.S., a divorcee and single parent, at a church function in 1992. A “close ... brother/sister” friendship developed between her and the defendant and the defendant became a surrogate father to S.S.’s daughter, B.S. Between May 1992 and October 1993, when B.S. was ten or eleven, the defendant visited B.S. at least once a week and telephoned her frequently. B.S. initially loved the defendant and was eager to spend time with him.

The defendant and B.S. frequently went together to restaurants and “garage saling.” On one occasion, the defendant took B.S. to his bedroom in his house and penetrated her digitally. The defendant told B.S. that he would kill her if she told anyone what he had done. The defendant’s sexual abuse and his threat caused B.S. to have nightmares, suicidal thoughts, and behavioral problems.

**The Sexual Abuse of R.W.**

T.P., who is the sister of D.P., became friends with the defendant after he took her to a revival meeting. She was the mother of a young boy, R.W. In May 1992, when R.W. was four, D.P. arranged for the defendant to travel to Oregon, where T.P. and R.W. were living at the time. The defendant was to return with R.W. to Ketchikan, so that R.W. could live there with his relatives.

At a Ketchikan motel, the defendant “touched [R.W.’s] wiener with his mouth”; the defendant also made R.W. touch The defendant’s penis with his (R.W.’s) hand. R.W. did not put his mouth on the defendant’s penis because it was “too big.” The defendant took pictures of R.W. outside the motel.

When T.P. became aware that the defendant had sexually abused C.P., she questioned R.W. [Tr. 1511] R.W. said that the defendant had “touched” him and had threatened to kill R.W.’s mother, T.P., if he told.

**Other Evidence**

When the police searched the defendant’s home, they found organized files containing correspondence with a large number of children, about 700 separate pictures of children, notes concerning the defendant’s experiences with children, and a collage of photographs of C.P., C.S., A.J.S., R.W., and another child. The collage was in an album under the defendant’s bed.

The defendant denied ever sexually abusing any of the children. However, he told Sh.S., an acquaintance and the mother of a two-year-old child, that a man’s sexual prerogative was his own business. He admitted that his life was centered around children.

**COURSE OF PROCEEDINGS**

On September 16, 1994, the defendant was indicted for first-degree sexual abuse of minor for penetrating C.S.(m).[[1]](#footnote-1) (All charges relating to C.S.(m) were subsequently dismissed. They have no bearing on the present case.) At the same time, he was indicted for attempted second-degree sexual abuse of a minor for attempting to engage in sexual contact with C.P. The state later filed a bill of particulars amending the attempt charge; it alleged the defendant had sexually abused C.P. between March 12, 1993, and March 12, 1994, and that the defendant “took a substantial step toward committing the crime of sexual abuse of a minor in the second degree by removing C.P. from her mother’s presence and removing C.P.’s underpants.”

Other charges were added as the investigation progressed. In December 1994, the defendant was indicted for second-degree sexual abuse of a minor for engaging in sexual contact with C.S. between July 1993 and August 1994. In July 1995, the defendant was indicted for first-degree sexual abuse of a minor for sexually penetrating B.S. between May 1992 and October 1993.

At the first trial, which began in late August 1995 and ended on September 2, 1995, the defendant was acquitted of the charge of first-degree sexual abuse of a minor based on C.S.(m)’s allegation. But the jury hung on the lesser-included offense of second-degree sexual abuse of a minor and all other pending charges relating to other victims.

On January 25, 1996, the defendant was indicted for first-degree sexual abuse of a minor for sexually penetrating R.W. between April 1992 and April 1993 and for second-degree sexual abuse of a minor for engaging in sexual contact with A.J.S. between December 1992 and December 1994.

The second trial began on April 29, 1996. The jury convicted the defendant of sexually abusing C.P., C.S., B.S., R.W., and A.J.S. as charged in the indictments. The defendant was sentenced to a composite term of 30 years with 17 years to serve and 13 suspended on condition that he successfully complete a ten-year term of probation. [Exc. 43-46]

This appeal followed.

**ARGUMENT**

**I. JUDGE T. CORRECTLY REFUSED TO CONDUCTA PRETRIAL HEARING TO ASSESS THE RELIABILITYOF STATEMENTS MADE BY THE VICTIMS**

**A. Introduction and Standard of Review**

On January 27, 1995, the defendant filed a motion asking Judge T. “to conduct a hearing to assess the reliability of the [state’s] child witnesses.” A short memorandum of law accompanying the motion cited *State v. Michaels*, 642 A.2d 1372, 1383 (N.J. 1994), where the New Jersey court held that a defendant is entitled to a pretrial “taint” hearing upon a showing that a child sexual assault victim has been exposed to suggestive interviewing. The defendant’s memorandum purported to rely on a letter written by R.C.U., Ph.D., but the letter was not attached to the motion. The state opposed, pointing out that it is the function of the jury to assess the reliability of witnesses and that the proposed testimony would, contrary to the operable Alaska rule, necessarily involve one witness commenting on the credibility of other witnesses.

The defendant subsequently filed R.C.U.’s letter. The letter asserted that he had reviewed audiotape and videotape interviews “of children by Ketchikan, Alaska Social Services,” and that “the adult behavior and interviewing techniques used in the questioning of the children in this case are highly coercive, leading, and suggestive.” Citing, among other things, his own book, *The Real World of Child Interrogations*, and the Ceci and Bruck review of child suggestibility studies,[[2]](#footnote-2) R.C.U. claimed generally that suggestive questioning of children can affect the reliability of their testimony. R.C.U. concluded by asserting that the final interview of C.P. was “a powerful, highly coercive exercise of adult influence.”[[3]](#footnote-3)

[*Accusations of Child Sexual Abuse*] contains almost 420 text pages and the authors cite over 700 references, but they do not really review this body of literature, they cross-examine it. When a given reference fails to support their viewpoint they simply misstate the conclusion. When they cannot use a quotation out of context from an article, they make unsupported statements, some of which are palpably untrue and others simply unprovable.

Chadwick, Book Review, 261 *Journal of the American Medical Association* 3035 (May 26, 1989), quoted in *Underwager*, 22 F.3d at 731. When R.C.U. sued Salter for defamation, the trial judge granted summary judgment to Salter and the Seventh Circuit affirmed. *Id*.

Other available information about R.C.U. casts grave doubt on his credibility. When R.C.U. was asked in an interview whether paedophilia is a responsible choice for the individual, he responded:

Certainly it is responsible....Paedophiles are too defensive....

[P]aedophiles can make the assertion that the pursuit of intimacy and love is what they choose.

*Interview: Hollandia Wakefield and Ralph Underwager*, 3 *Paidika* 1 at 2 (Amsterdam 1993). R.C.U. also said:

I’m suggesting that paedophiles become much more positive. They should directly attack the concept, the image, the picture of the paedophile as an evil, wicked, and reprehensible exploiter of children. *Id*. at 6.

He stated further:

Paedophiles need to become more positive and make the claim that paedophilia is an acceptable expression of God’s will for love and unity among human beings. *Id*. at 12.

The Office of Special Prosecutions and Appeals is in possession of this issue of *Paidika* and will make it available to The defendant and the court on request.

On March 2, 1995, Judge T. denied the motion in a written order.

Judge T.’s refusal to hold a hearing to determine whether the statements of the victims were reliable should be reviewed for abuse of discretion. *See Watkins v. Sowders*, 449 U.S. 341, 350, 101 S.Ct. 654, 659, 66 L.Ed.2d 549 (1981) (decision of trial judge not to hold hearing out of the presence of the jury to permit challenge of identification evidence is normally reviewed for abuse of discretion); *Adkinson v. State*, 611 P.2d 528, 532 (Alaska 1980) (decision to admit evidence is reviewed for abuse of discretion).

**B. Even If Taint Hearings Should Be Available In An Appropriate Case,**

**The defendant’s Showing Did Not Warrant Such a Hearing**

The defendant’s showing was inadequate to warrant a taint hearing. The only argument that the defendant presented with adequate specificity to Judge T. was the claim (in the R.C.U. letter) that the interview of C.P. was improperly suggestive. But even this claim was presented to Judge T. without supporting evidence.

On appeal, the defendant devotes a large part of his argument hearings were necessary to a criticism of Officer J.’s questioning of the victims. He states that Officer J. employed “parental pressure, negative stereotyping, leading and suggestive questioning, and above all else, the highly evident interviewer bias.”[[4]](#footnote-4) However, the defendant relies on his cross-examination of Officer J. at the second trial, not on material he specifically brought to the attention of Judge T. in support of his request for a taint hearing. Indeed, the defendant relies heavily on the testimony of his expert witness, Dr. D.R., at the second trial, to support his view that the interviews of the victims were improper and to support his position that a taint hearing was necessary. However, the defendant did not rely on Dr. D.R.’s testimony or Officer J.’s testimony at the first trial to support his request for a taint hearing.

Indeed, the R.C.U. letter does not even identify the children, other than C.P., who appeared in the videotapes that he reviewed, much less refer to specific indications of how any interview other than C.P.’s was suggestive. Further, the defendant did not submit to the court the videotapes or any tape recordings or transcripts of the interviews or ask the judge to review them. The defendant relied exclusively on R.C.U.’s broad, conclusory pronouncement without making any effort to establish a factual basis for either the need for a factual hearing or for the relief he sought.

It is significant that the defendant did not renew his motion for a taint hearing after the victims, Officer J., and R.C.U. had testified at the first trial. Given the defendant’s failure to provide the videotapes to Judge T. for his review, the failure to provide the R.C.U. letter to the state in timely fashion, the inadequacies of the letter, and the defendant’s failure to renew the motion for the taint hearing after the first trial, the defendant should only be permitted to rely on the excerpt of the interview of C.P. in the R.C.U. letter in this court to show that Judge T. should have granted the taint hearing. *United States v. Parra*, 2 F.3d 1058, 1065 (10th Cir. 1993) (appellate court will not consider trial evidence relevant to pretrial motion when motion is not renewed after evidence is presented) (citing *United States v. Thomas*, 875 F.2d 559, 562 n. 2 (6th Cir. 1989); *United States v. Longmire*, 761 F.2d 411, 418 (7th Cir. 1985); *United States v. Hicks*, 878 F.2d 722, 724-25 (D.C.Cir. 1992)); Alexander *v. State*, 838 P.2d 269, 273 (Alaska App. 1992) (failure to renew motion for change of venue constitutes waiver of motion and citing authority); *Jonas v. State*, 773 P.2d 960 (Alaska App. 1989) (party must raise issue in trial court and obtain ruling before appellate court will rule on it); *see also Braham v. State*, 571 P.2d 631, 639 (Alaska 1977) (when defense counsel failed to renew request for psychiatric examination of witness after cross-examination, point was abandoned).

The claim that a taint hearing was warranted because a portion of Officer J.’s second interview C.P. was suggestive is absurd. The interview did not cause C.P. to make new allegations of abuse. C.P., age four at the time, first volunteered that the defendant had abused her in July of 1994 in Yacolt, Washington while visiting her aunt, Jeannie P. While looking at a nature book with her cousins Dorian P., age six, and Leo P., age ten, C.P. said that a photograph of a rat looked like the defendant’s “dee-dee.”[[5]](#footnote-5)   Leo asked C.P. why she “said that”, and C.P. explained that the defendant (her “God-dad”) had “put his dee-dee in her wee-wee.” At about this time, C.P. volunteered the same statement -- that the defendant had put his “dee-dee” in her “wee-wee” -- to her aunt, T.

When Officer J. interviewed C.P. in July of 1994, C.P. refused to acknowledge that any abuse had occurred until her mother whispered to Officer J. “what had happened. At that point, C.P. whispered to Officer J. that “Dan touched her wee-wee.” After making this statement, C.P. continued to refuse to acknowledge the abuse, but did state that the defendant was “in trouble.”

After the first interview, C.P. volunteered to her then approximately eight-year-old cousin, L.C., that the defendant had “licked her wee-wee.” [Tr. 1444] At the second interview on August 11, 1994, C.P. talked “baby talk” and refused to discuss the defendant with Officer J. After asking C.P. to tell her mother what the defendant had done, Officer J. left the interview room. When Officer J. heard C.P. say twice (over a speaker outside the interview room) that the defendant put his “dee-dee” in her “wee-wee,” and that the event had occurred at her father’s home, she reentered the room. C.P. again refused to answer Officer J.’s questions, but finally said that the defendant had hurt her, that she had cried, and that the defendant had not said that he was sorry.

In short, neither interview of C.P. had any material effect on C.P.’s testimony. C.P. did not make new or more serious allegations against the defendant as a result of either of Officer J.’s interviews. C.P. had told her young cousins -- before she spoke with any adult -- that the defendant had put his “dee-dee” in her “wee-wee.” She said the same thing -- nothing more serious -- to her mother while Officer J. listened during the second interview. Further, C.P.’s trial testimony was less damning than what she had told anyone previously.[[6]](#footnote-6) Since Officer J.’s interview did not cause C.P. to expand her allegations, it is manifest that the questioning did not prejudice the defendant.

In short, the showing the defendant made to obtain a taint hearing was inadequate and the defendant is not entitled to relief.

1. **Psychological Research Does Not Prove That Child Victims of Sexual Abuse Are Unreliable Witnesses**

In *Michaels*, the New Jersey court found, based on the psychological research it had reviewed, that highly suggestive interrogation of children can create a significant risk that the interrogation itself will distort the child’s recollection, thereby undermining the reliability of the answers and subsequent statements. 642 A.2d at 1376-79. The defendant similarly claims that “uncontroverted research” demonstrates that children are “highly susceptible to suggestive interviewing techniques.”

The defendant’s argument implicitly relies on opinions offered by R.C.U. concerning the effect of the police interviews on child sex abuse victims. However, before R.C.U.’s opinions may be considered, The defendant should have to show that R.C.U.’s evidence satisfied the *Frye* standard (*Frye v. United States*, 293 F. 1013 (D.C.Cir. 1923)), under the rule of *Contreras v. State*, 718 P.2d 129, 134-136 (Alaska 1986). *See also Plate v. State*, 925 P.2d 1057, 1064 (Alaska App. 1996) (proponent of psychologist’s testimony must show opinions are “based on scientific analysis that satisfies the *Frye* test”). In other words, the defendant would be required to show through relevant literature that scientists significant in number or expertise do not disagree with R.C.U.’s theories. *See Contreras*, 718 P.2d at 136.

The defendant cannot satisfy the *Frye* test because substantial numbers of psychologists disagree with R.C.U.’s theories. Indeed, the Supreme Court of Washington upheld a trial court finding that R.C.U.’s theories do not satisfy *Frye*. *State v. Swan*, 790 P.2d 610, 632 (Wash. 1990). *See also United States v. Rouse*, 111 F.3d 561, 571 (8th Cir. 1997) (en banc) (upholding exclusion of R.C.U.’s opinions concerning credibility of witnesses and testimony about suggestibility research of persons other than himself because research has not produced “a consistent body of scientific knowledge” so that battle of experts would result); *Timmons v. State*, 584 N.E.2d 1008 (Ind. 1992) (sustaining substantial trial court limitations on R.C.U.’s testimony).

In any event, the defendant was not denied due process at his trial. He was able to cross-examine the victims and Officer J., and was permitted to present the testimony of expert witnesses concerning the interviews. He could have issued out-of-state subpoenas and cross-examined the few officers who interviewed victims in other jurisdictions. Further, a substantial majority of the interviews were videotaped and transcribed.

Moreover, there is substantial criticism of and disagreement with the research relied on by the defendant and the *Michaels* court for the proposition that suggestive questioning can alter memory. While some researchers have concluded that preschool children are more suggestible than the rest of the population, many psychological researchers have reached contradictory conclusions. *Myers*, *Saywitz*, *and* *Goodman*, at 27-28. In fact, children under ten are able to resist suggestion and do resist suggestions that they have been sexually abused. *Id*.; *Manshel*, *The Child Witness And The Presumption Of Authenticity After State v. Michaels*, 26 Seton Hall 685, 691 n. 44, & 694, n. 54 (1996) (hereinafter Manshel) (collecting and discussing studies); *Myers*, *Saywitz*, *and* *Goodman* at 28 (discussing study showing that five-year-old children “demonstrate considerable resistance to false suggestion [of abuse]”). Further, “even very young children have demonstrated a remarkable ability to provide both relevant and reliable information to decision makers.” *Myers*, *Saywitz*, *and* *Goodman* at 10.

The research the defendant cites to support his position that children are suggestible is criticized by contemporary professionals as inadequate. *Manshel* at 692. Other researchers state: “Recent studies, of which there are only a few, have failed to uncover any simple relationship between suggestibility and age.” *Id*. at 692 n. 45 (quoting *Zaragoza*, *Memory, Suggestibility, and Eyewitness Testimony in Children and Adults*, in *Children’s Eyewitness Memory* at 53 (Ceci et. al. eds. 1987)); “[There is] surprisingly little rigorous empirical evidence on the issue [of the relative suggestibility of adults and children]” *Id*. (quoting *Lindsay* and *Johnson*, *Reality Monitoring and Suggestibility: Children’s Ability To Discriminate Among Memories From Different Sources*, in *Children’s Eyewitness Memory* at 92, 110); “Numerous child memory studies fail to use comparison groups of adult subjects so that their usefulness in drawing conclusions about the relative suggestibility of children is doubtful.” Id.

Importantly, it has not been shown that suggestion in any form causes “a false implanted memory.” *Id.* at 693. Manshel writes: “It overstates the data to conclude that a preschool child can be led to make a false allegation of sexual abuse, let alone to be led to have a false memory that she has been assaulted.” *Id*. at 694 (footnotes omitted).[[7]](#footnote-7) Furthermore, the results of studies finding that children are suggestible are frequently preordained. Professor Myers, a highly respected expert who has written widely on this subject, states:

Ceci and his colleagues, for example, structure many of their experiments to demonstrate suggestibility. ... Other researchers, notably Gail Goodman, design experiments that focus on children’s ability to resist suggestive and leading questions. Studies of this latter type demonstrate that young children are often able to resist misleading questions.

*Myers*, *Taint Hearings For Child Witnesses? A Step In The Wrong Direction*; 46 Baylor L. Rev. 873, 919 (1994) (hereinafter Myers) (footnotes omitted).

Manshel and Myers agree that children’s memory is shown by research to be been especially resistant to suggestion regarding the “central details or main actions of events; personally significant events; and events in which the child is a participant instead of a bystander.” *Manshel*, *supra*, at 751. *See* *Myers* at 916; *Myers, Saywitz, and Goodman* at 24 (core features of stressful events are remembered especially well by children). Moreover,

[I]t is well settled that the psychological research purporting to confirm children’s disabilities has largely failed to achieve minimal ecological validity.[[8]](#footnote-8) These failures are so important because **they systematically understate the reliability of child witness statements in the very context in which their testimony may be especially reliable.**

*Manshel* at 752 (footnote omitted) (emphasis supplied); *accord*, *Warren and McGough*, *Research on Children’s Suggestibility*, 23 Criminal Justice and Behavior 269 (1996) (reprinted in Bottoms and Goodman, eds., *International Perspectives on Child Abuse and Children’s Testimony*, 12, 15 (Sage Publications)). Indeed, according to Myers, Saywitz, and Goodman, a Ceci study frequently cited for the proposition that children’s memory can be affected by suggestion is faulty because the children may have thought they were playing a game; caution therefore is required in “generalizing Ceci’s results to real-world investigative interviews about serious matters.” *Myers, Saywitz, and Goodman* at 18. Other researchers have obtained results inconsistent with Ceci’s findings by telling the children in the studies that they were being questioned about a serious matter. *Id*. “Abusive genital contact is often very salient, and a child questioned about such an event is likely to be **less suggestible than a child questioned about an innocuous or poorly remembered event**.” *Id*. at 33 (footnote omitted) (emphasis supplied). *Myers, Saywitz, and Goodman* also point out:

Since the bulk of the research to date has been conducted on nontraumatized children dealing with benign or mildly stressing events, the degree to which conclusions from research generalize to genuinely abused children is no doubt limited. *Id*., at 8 n. 13.

Further, it is commonly accepted that persons have accurate recollections of “central events” in their lives. *See, e.g. Neil v. Biggers*, 409 U.S. 188, 200, 93 S.Ct. 375, 382, 34 L.Ed.2d 401 (1972) (victim “was no casual observer, but rather the victim of [rape]”) (footnote omitted).

Significantly, the amicus brief submitted to the *Michaels* court “by a ‘Committee of Concerned Social Scientists’ has come under attack as having **misrepresented** the state of the research.” *Manshel* at 750 & n. 285 (emphasis supplied). Significant limitations on the application of the research were not disclosed to the court. *See* *Lyons* at 429.  A recent publication issued by the authors of the amicus brief in *Michaels* -- who also wrote the review of the literature attached to the defendant’s brief -- has “sparked an outcry due to alleged factual distortions, omissions, and mischaracterizations.” *Id*. at 750-51 & n. 285 & 286. Professor Myers believes that the authoritativeness of Ceci and Bruck’s research on child suggestibility “is marred by lack of objectivity, insufficient work for its conclusions, and factual distortions of the material.” *Myers*, *New Era of Skepticism Regarding Children’s Credibility*, 1 Psychol., Pub. Pol’y & Law 387, 392-96 (1995), quoted in Manshel at 750-51 n. 285.

In short, both the defendant and the *Michaels* court have ignored “the controversy within the professional literature over whether suggestion does in fact induce memory distortions.” *Manshel* at 695. Since psychologists are no more able than lay persons to assess the testimony of children who are the victims of sexual abuse, this court should not hold pretrial taint hearings. *See State v. Swan*, 790 P.2d 610, 631-32 (Wash 1990) (trial court’s refusal to permit R.C.U.’s testimony about child memory and suggestibility was sustained; there was no showing R.C.U.’s work was accepted in the scientific community).

The foundation of the *Michaels* decision and the premise of psychologists like R.C.U. -- the assumption that pretrial suggestion irremediably changes the memory of a child -- is unsound. The *Michaels* opinion and R.C.U.’s opinion reflect “a computer virus understanding of suggestion.” Manshel at 717-18 (footnote omitted). The research into children’s suggestibility has not reached the stage that views expressed by R.C.U. concerning the effect of suggestive interviewing are shared by an sufficient portion of relevant scientific community to justify judicial acceptance of his testimony, much less taint hearings.

Moreover, taint hearings would be inconsistent with Alaska provisions governing the competency of witnesses to testify. Alaska Evidence Rule 601 presumes that all witnesses are competent to testify unless (1) the person is incapable of expressing himself so as to be understood, or (2) the witness is incapable of understanding the duty to tell the truth. Alaska Evidence Rule 601 provides:

A person is competent to be a witness unless the court finds that (1) the proposed witness is incapable of communicating concerning the matter so as to be understood by the court and jury either directly or through interpretation by one who can understand the proposed witness, or (2) the proposed witness is incapable of understanding the duty of a witness to tell the truth.

*See Blume v. State*, 797 P.2d 664, 668 (Alaska App. 1990) (finding that five-year-old child was competent to testify affirmed despite psychological studies questioning cognitive ability of young children to give reliable testimony). This court should not override Rule 601 by providing for special taint hearings in cases of sexual abuse of children.

1. **Due Process Does Not Require Pretrial Taint Hearings Assess the Reliability of Children Who Are the Victims of Sexual Abuse**

The defendant, like the *Michaels* court, cites the pretrial identification cases *-- Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977) and *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1966) -- and argues that pretrial reliability hearings are the norm and should be permitted in cases of child sexual abuse so that the trial court can evaluate the reliability of the child victims. But the defendant’s reliance on identification case law is wrong. In *Watkins v. Sowders*, 449 U.S. 341, 350, 101 S.Ct. 654, 659, 66 L.Ed.2d 549 (1981), the Court said the Due Process Clause of the Fourteenth Amendment *does not* always require a pretrial hearing when a defendant alleges that an identification was made under suggestive circumstances. The court pointed out that it is normally the function of the jury to evaluate the reliability of testimony and held that due process did not require “abandonment of the time-honored process of cross-examination as the device best suited to determine the trustworthiness of testimonial evidence.” *Id*. Indeed, even a showing that an eyewitness identification may well be unreliable does not mandate a hearing out of the presence of a jury. *See United States v. Mills*, 704 F.2d 1553, 1563-64 (11th Cir. 1983) (evidence that defendant’s picture was included in photographic array prior to one-on-one show up did not require *in camera* hearing); *United States v. Davenport*, 753 F.2d 1460, 1462 (9th Cir. 1985) (same).

Moreover, the identification cases do not preclude “event” testimony -- testimony, for example, that a person threatened the victim with a weapon and took the victim’s money. *Wade* and similar cases merely exclude eyewitness identifications. Exclusion of central event testimony, for example, the claim of a child that she has been raped, is a vastly more drastic step than precluding an eyewitness from making an in-court identification. Because psychologists do not agree that suggestive interviews implant false memories about serious matters such as sexual abuse, and in fact many are strongly critical of research purporting to confirm such an effect, it cannot be said that due process is violated when the jury is permitted to evaluate the credibility of a child’s claim. This view is reflected in the many decisions of this court which preclude opinion testimony concerning the credibility of child witnesses. *See, e.g. Reece v. State*, 881 P.2d 1135, 1137 (Alaska App. 1994); *Colgan v. State*, 711 P.2d 533, 534 (Alaska App. 1985); *Rodriquez v. State*, 741 P.2d 1200, 1204 (Alaska App. 1987).

The defendant also cites *Rock v. Arkansas*, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987), where the court held that a *per se* exclusion of a defendant’s post-hypnotic testimony violated the right to testify under the Due Process Clause of the Fourteenth Amendment, the Compulsory Process Clause of the Sixth Amendment, and the Fifth Amendment’s privilege against self-incrimination. The Court required the trial court, on remand, to consider the expert’s corroboration of the petitioner’s hypnotically enhanced memories and the absence of suggestion during the hypnotic session in determining the admissibility of the defendant’s testimony.

The defendant’s reliance on *Rock* is misplaced. The *Rock* Court found error because the defendant’s own testimony was not presented to the jury on account of an arbitrary evidentiary rule. *See Shepard v. State*, 847 P.2d 75, 83 (Alaska App. 1993) (*Rock* cited for proposition that defendant has due process and compulsory process right *to present* evidence). Here, the defendant is not seeking to have evidence admitted for evaluation by the jury; rather, he is seeking a *de facto* acquittal by preventing the jury from hearing any direct testimony from the victims about the offenses.

Moreover, there is no parallel between posthypnotic testimony and the testimony of young children who are the victims of sexual abuse. The potential perils of suggestive interview technique do not raise the special concerns that are raised when a witness has been hypnotized in order to recover repressed memory. *See* *Manshel* at 720-27. Police routinely question reluctant, withholding, and “non-conversational” witnesses in a suggestive manner. Id.

In contrast to the situation involving suggestive questioning, it is known that hypnosis profoundly affects recollection. A person who is hypnotized becomes increasingly susceptible to suggestions consciously or unconsciously advanced by the hypnotist, is likely to confabulate, and experiences increased confidence in the subsequent recollection of the incident in question. *See Contreras v. State*, 718 P.2d 129, 131-32 (Alaska 1986). For example, hypnotized subjects “are able to describe the year 2000 -- an indication of the ease with which fantasy is induced.” *Id*. at 132. In addition, it is “virtually impossible for the subject or even the trained, professional hypnotist to distinguish between true memory and pseudo memory.” *Id*. at 132 (quoting *State v.* *Peoples*, 319 S.E. 2d 177, 181-82 (N.C. 1984)). Finally, it should be pointed out that a person who is hypnotized is not fully conscious while, to the contrary, children being questioned by police are conscious and fully aware of their surroundings.

In *Pennsylvania v. Ritchie,* 480 U.S. 39, 60, 107 S.Ct. 989, 1003, 94 L.Ed.2d 40 (1987), the Court observed that sexual abuse of a child “is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim.” Since there is no relevant consensus of opinion among psychologists that real world questioning of children about sexual abuse leads to false memories, since the child is frequently the sole event witness in cases of sexual abuse, and since a defendant is permitted to cross-examine witnesses at trial, it is clear that due process does not require a taint hearing -- especially in a case such as the one at bar where the evidence is strong and corroborated. *Lee v. State*, 511 P.2d 1076, 1078 (Alaska 1973) (apart from trial conducted in violation of express constitutional mandate, due process is violated “only where barriers and safeguards are so relaxed or forgotten ... that the proceeding is more a spectacle or trial by ordeal ... than a disciplined contest”) (quoting *United States v. Augenblick,* 393 U.S. 348, 356, 89 S.Ct. 528, 534, 21 L.Ed.2d 537, 545 (1969)); *cf., e.g., Miller v. Purvis*, 921 P.2d 610, 617-18 (Alaska 1996) (rules limiting right of attorney to appeal fee arbitration award do not violate due process; arbitration hearing provided necessary opportunity to be heard; review on merits would cause delay, judicial involvement, and expense and was therefore unjustified); *Keyes v. Humana Hosp. Alaska, Inc*, 750 P.2d 343, 352-54 (Alaska 1988) (due process requires opportunity to be heard at meaningful time in meaningful manner; requirement that malpractice claims be submitted to medical review panel did not violate due process).

As Professor Wigmore put it, “[cross-examination] is beyond any doubt the greatest legal engine ever invented for the discovery of truth.” 5 J. Wigmore, Evidence § 1367 (Chadbourn rev. 1974) Lyon states:

Ceci and Bruck (1993) have elsewhere made several points that highlight the potential significance of the defendant’s opportunity to challenge the child’s story through cross-examination. First, they acknowledge that “acquiescence to a leading question provided at the time of testing does not in itself imply that the misinformation contained in the leading question has been incorporated into memory.” (Ceci and Bruck, 1993, p. 428). Therefore taint hearings are not justified by high rates of false assenting alone; it is necessary to demonstrate that children actually believe what they endorse.

[Ceci and Bruck also] acknowledged that researchers currently disagree over whether suggestibility effects lead to erasure of the child’s original memory....*Lyon* at 435.

A rule mandating taint hearings would represent “a radical departure from the evidentiary norm of admitting at trial all relevant nonhearsay testimony.” *Manshel* at 689 (footnote omitted). Judge T.’s refusal to hold a pretrial taint hearing did not violate due process.

In addition, there are important public policy reasons that this court should not require taint hearings. Such hearings “will undermine society’s ability to protect abused children.” *Myers* at 889-93. Further, it is likely that such hearings will be over-utilized and will create new and unnecessary appeals.  *Id*. at 945

Finally, it should be noted that the defendant presented extensive testimony to the jury by Dr. D.R. concerning his views of the reliability of the testimony of the victims. This testimony was very favorable to the defendant. The defendant’s presentation of this testimony to the jury and his opportunity to cross-examine both the victims and the interviewers gave him a fair opportunity to challenge the reliability of the victim’s testimony and statements to the police. Due process requires no more.

**CONCLUSION**

The convictions and sentences should be affirmed.

DATED: September \_\_\_\_\_\_\_\_\_\_, at\_\_\_\_\_\_\_\_\_\_\_, Alaska.

ATTORNEY GENERAL

By:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Assistant Attorney General

1. Appellant uses “C.S.(m)” to distinguish him from C.S., a female. To avoid confusion, the state will follow suit. [↑](#footnote-ref-1)
2. Ceci, S.J., & Bruck, M., *Suggestibility of the Child Witness: A Historical Review and Synthesis*, 113 Psychol Bull. (1993). Nelson has attached a copy of this article to his brief. [↑](#footnote-ref-2)
3. Underwager’s book has been universally condemned by his fellow professionals. Among the critics is Anna Salter, a psychologist who views Underwager himself as “a hired gun who makes a living by deceiving judges about the state of medical knowledge.” *Underwager v. Salter*, 22 F.3d 730, 736 (7th Cir. 1994). Salter read all of the original works Underwager and his co-author discussed in *Accusations of Child Sexual Abuse*. Salter then wrote, in a monograph “packed with detail,” that Underwager’s book “misrepresents the studies, rips quotations from their context (and misleadingly redacts them), attributes to scholars positions they once held but have repudiated in light of more recent research, and ignores evidence contradicting its thesis.” *Id*. at 732. Four other reviewers agreed with Salter. *Id*. at 731 & 735. One of the reviewers wrote: “. . . When a given reference Fails to support their viewpoint they simply misstate the conclusion. When they cannont use a quotation out of context from an article, they make unsupported statements, some of which are palpably untrue and others simply unprovable.” *Id.* (quoting David L. Chadwick, Book Review, 261 JAMA 3035 (May 26, 1989)). [↑](#footnote-ref-3)
4. Although the defendant did not appropriately raise the issue of the police questioning before trial, it is appropriate to point out that Professor Myers has said: “In certain situations it is necessary to ask children focused and specific questions. Moreover, it may be necessary to ask suggestive and even mildly leading questions in order to make decisions of risk assessment.” *Myers, Saywitz, and Goodman*, *Psychological Research on Children As Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony*, 28 Pac. L. J. 3, 42 (hereinafter Myers, Saywitz, and Goodman). Lyon states “Abused children are unlikely to reveal their abuse readily, and specific (”leading”) questions may be necessary when the interviewer has good reason to believe that an abused child is having difficulty disclosing. *Lyon*, *False Allegations and False Denials in child Sexual Abuse*, 1 Psychology, Public Policy, and Law 429, 430 (1995) (hereinafter *Lyon*). Lyon explains that sexual abuse is embarrassing and that children frequently desire to protect the offender. *Id*. at 430-31. [↑](#footnote-ref-4)
5. The children described the picture, shown in Appendix A, as a rat or a mouse. The defendant’s attorney said during argument that the rodent “was classically phallic.” [↑](#footnote-ref-5)
6. At trial, C.P. testified that the defendant had touched her vagina once with his finger. C.P. said the touching occurred at night while her mother and father were sleeping in the same room with her and Nelson in the state of Washington. C.P. claimed that she woke up her mother and told her what had happened. D.P. testified that C.P. had not done so. [Tr. 1343-44] [↑](#footnote-ref-6)
7. In one study both adults and children were shown a picture of a man holding a weapon. Adults often said the man was black while no child said that the man was black. In fact, the man was white. *Id*. at 696 (citing *Johnson and Foley*, *Differentiating Fact From Fantasy: The Reliability of Children’s Memory*, 40 J. Soc. Issues 33, 46 (1984)). [↑](#footnote-ref-7)
8. Manshel states that ecological validity “refers to the *salience of research conditions to the applied legal context* and the multiplicity of contextual factors which can improve accuracy and generate resistance to suggestion.” *Id*. at 751. The so-called “mousetrap” study (discussed by the defendant at page 40 n. 21 of his brief) is a good example of a study that lacks ecological validity. The persons conducting the study purported to create a false memory in a child of having a finger caught in a mousetrap. But the mousetrap study hardly demonstrates that police officers can create false memories of a rape. Id. at 752. The Sam Stone study, described extensively by the defendant is subject to the same criticism. *See* *Lyon* at 431. The conclusion of the Sam Stone study that young children are suggestible is also criticized because the children were not simply asked what had happened, but were “given a forced-choice question regarding how the acts were performed by Mr. Stone.” *Lyon* at 434. [↑](#footnote-ref-8)