**TABLE OF CONTENTS**

## Table of Authorities

### Federal Cases



### State Cases

**State Rules**



**State Statutes**



**Constitution**

**Other Authorities**

## I. Introduction

In October 1984, nineteen-year-old Bernard Baran was arrested and charged with unspeakable acts against children enrolled in the Pittsfield day care center where he worked as a teacher's aide. Four months later, Mr. Baran became the one of the first people to be convicted in what was to become a national wave of sex abuse prosecutions of day care workers in the 1980s.

In early 1984, American parents were pummeled with horrendous stories of child sex abuse.

> ... In January 1984, sixty million people watched *Something About Amelia*, an ABC-TV drama about a handsome, affluent father who sexually abuses his teenaged daughter. The McMartin case hit the nation's front pages and television sets the following month, and by the end of the year would become a household word. As tales of horrific abuse became a cultural staple and fear for young children became pandemic, ritual abuse scandals erupted like lesions across the country.
>
> In the spring, twenty-four people in Jordan, Minnesota, were arrested, including a deputy sheriff and a police officer, and charged with being part of a child-pornography and sex ring that included their own sons and daughters as victims. Eventually, the Jordan youngsters accused their parents of murdering babies, forcing them to drink the infants' blood, and throwing the corpses into a nearby river.
>
> In April, Delorartic Parks, a janitor at the Rogers Park Day Care Center in Chicago, was charged with sexual assault. After repeated interviews, children at the center then accused their teachers of abusing them in satanic rituals and making them eat boiled babies.
>
> In May, three workers at a Montesorri day school in Reno, Nevada, were charged with ritually abusing twenty-six children, some of whom talked about chanting, singing, and playing the Naked Movie Star game.
>
> In June, Frances Ballard, a middle-aged woman working as a teacher's aide at the Georgian Hills Early Childhood Center in Memphis, was charged with sexually assaulting nineteen of her charges. She was later joined in the dock by a Baptist minister and two other day-care employees after children began describing satanic rituals, the slaying of animals, and threats of murder.
>
> By the summer, investigators were looking at fourteen day-care centers in New York City's Bronx

borough and dozens more in Southern California. Cases in which ritualistic sex abuse, pornography production, and the sacrifice of animals and humans were implicated arose in Niles, Michigan; Spencer Township, Ohio; Sacramento, California; Malde

n, Massachusetts; West Point, New York; and Miami, Florida.

Debbie Nathan & Michael Snedeker, *Satan's Silence - Ritual Abuse and the Making of a Modern Witch Hunt* (New York, N.Y.: BasicBooks, a division of HarperCollins Publishers, 1993), pps. 107-108. (Endnotes omitted).

These stories quickly spawned more horror stories. By the end of the 1980's, the fears of parents had coalesced with the ambitions of well-intentioned investigators and prosecutors to destroy countless lives. The phenomenon played out time and again, following a virtually identical pattern.

> ... The prosecutors' propensity to believe in the guilt of anyone accused of the crime of child sex abuse was overwhelming. That belief was fueled by investigators who shared the same propensity and interrogated the children accordingly. The children had themselves come forth with their accusation, and had done so all on their own, so the investigators said: children would not make up such accusations out of nothing.
>
> This thinking, combined with the overweening hunger to win convictions, argues powerfully against the likelihood that prosecutors sat up nights during the ... trials ..., worrying about the truth of the charges. If any there were who actually harbored such concerns, they managed, quite successfully, to conceal them.
>
> ...
>
> How jurors could have believed child witnesses who had given clearly fantastic testimony – another question often asked – was easier to answer. The state's expert witnesses, the psychologists and the abuse specialists, were on hand precisely to provide the explanation for such testimony. Some ... traveled from trial to trial validating charges of abuse.
>
> Their explanation: the children had been traumatized and tortured and, as a result, had had to construct all sorts of fantasies to defend themselves. Jurors were little inclined

> to doubt the experts. And there was the fact that the children had given specific descriptions of their abuse. How such claims came to be made the jurors did not know.
>
> In the course of their pretrial interrogations, the children in the Kelly Michaels case were given knives and forks and anatomically correct dolls. They were then asked to show where their teacher had hurt them. Confused, but obedient, the preschooler poked at the doll's head, or neck, or arms, all locations obviously unsatisfactory to the interviewer, who kept asking, "Where else?"
>
> Finally the child would touch the doll's sex organs – the moment for which the interviewer had been waiting, for which the entire exercise had been designed. Here all urgings to say "where else" ended. The interviewer now wrote up notes attesting to the disclosure, and saying that the victim had described how he or she had been penetrated. This would be the testimony presented to the jurors.
>
> Defense lawyers could argue, and some did, vociferously, that the interviewers had spent months leading the children and putting accusations in their mouths. But these arguments could not prevail against the spectacle of four- and five-year-old witnesses who had come forward to say that they had been tortured. They could not prevail against the summations, in which prosecutors begged jurors not to betray the faith of the little ones who had come to tell their stories: they must not deliver a verdict that would declare these children liars.
>
> Once the first charge was made and investigations began, parents of children being questioned found their lives transformed. Those whose children were to become plaintiffs (not all parents were willing to allow their child to become involved) were now bound by a common passion to see the offenders convicted; they sought one another out; they shared with one another details of comments they had extracted from their children. Tortured as the parents were by the thought of the outrages committed against their children, they found, in the society of others they saw as victims like themselves, a powerful bond – and in the case itself, a drama that utterly absorbed them. They lived their lives with a focus and intensity previously unknown to them as they prepared for the trials and consulted with prosecutors and therapists. Of the principals in these cases, none were to believe the charges more immediately or more everlastingly than the parents.

Dorothy Rabinowitz, *No Crueler Tyrannies - Accusation, False Witness and Other Terrors of Our Times,* (New York, NY: Free Press, A Wall Street Journal Book; 2003), pps. 229-232.

Bernard Baran was a victim of this phenomenon. In the fall of 1984, his life was forever changed by fear, ambition, and good intentions.

Bernard Baran's prosecution played out in the shadow of several highly publicized cases, most particularly the notorious Fells Acres Day School case. On September 5, 1984, Gerald

Amirault was arrested in Malden, Massachusetts on charges that he had sexually abused children at his mother's day care center. The Fells Acres story instantly became the lead story in virtually every newspaper and newscast in New England.

On September 9, 1984, the *Berkshire Sampler* ran an article entitled, "What to look for in a day-care center," by Steve Lyon. The piece noted that several recent cases, including the McMartin case in California where several staff members were facing 115 counts of molesting children as young as two years old, the Praca Day Care Center in the Bronx where six employees had been arrested on child abuse charges, and day care centers in South Carolina and New Hampshire that had been shut down pending the outcomes of child abuse trials, had raised troubling questions about how these things could have happened and how they could have gone unnoticed for so long.

On September 12, 1984, the board of directors met to discuss whether Mr. Baran should be fired because a family had complained that he was a homosexual and that he should not be working with children.

On Friday, October 5, 1984, Bernard Baran's nightmare began when the troubled family, who had previously complained that he was gay, contacted the Pittsfield Police to report that their four-year-old son had "disclosed" that Bernie touched his penis. On Monday October 8, panicked parents met with child abuse experts who instructed them how to question their children about Mr. Baran. Within days children began attending "good touch, bad touch" puppet shows. The panic grew exponentially when parents were informed that one of the alleged victims had tested positive for gonorrhea of the throat. Within two weeks, more than a dozen children had "disclosed" and authorities suspected that at least eight to ten more children had

been abused.

On January 21, 1985, the first day of Mr. Baran's trial, the Fells Acres case once again dominated the news – Gerald Amirault, his mother, Violet Amirault, and his sister, Cheryl Amirault LeFave, were indicted on multiple charges of child sex abuse amid a media circus.

On January 30, 1985, after a farcical trial, Bernard Baran was convicted of sexually abusing five children. Then next day, he was sentenced to life in prison.

The case against Mr. Baran was far from overwhelming. None of the day care staff or parents ever saw him inappropriately touch a child. None of the children ever complained about him - to the contrary, all the children seemed to like him.

The first child who ostensibly "disclosed" came from the troubled family who had previously complained that Mr. Baran was a gay man and should therefore not be working with children. A few days after his disclosure, the child was diagnosed with gonorrhea of the throat. Mr. Baran tested negative for gonorrhea and there was no evidence that he ever had gonorrhea. The prosecutor overcame this obstacle by eliciting testimony from a medical expert that prostitutes and male homosexuals are more likely to be infected and reinfected by gonorrhea than the general population.

The second alleged victim, a three-year-old girl, had not been enrolled at the day care center since early summer. Nevertheless, after learning about the allegations made by the first family, this child's mother immediately questioned her daughter pointedly about whether Bernie had ever touched her. An inexperienced pediatrician testified that she examined the child and that she observed evidence of a ruptured hymen that would be consistent with full penetration. Although there would be bleeding from a ruptured hymen, there was no evidence that the child

ever bled from anything other than a cut on her foot. Moreover, it is now widely accepted that what the pediatrician observed was a normal anatomical variation. The jury never heard that, as the secretary of the board of directors of the day care center, the mother was aware that, just a few weeks earlier, the board had considered terminating Mr. Baran solely because of his homosexuality. In addition, the jury did not know that the mother had been emotionally scarred when her mother refused to believe that she had almost been raped at the age of fourteen by an uncle.

None of the other four alleged victims exhibited any physical symptoms of sexual abuse. All of the children were interviewed multiple times by investigators who used suggestive methods, including leading questions and anatomically correct dolls.

While there are many similarities between the prosecution of the Amiraults and the prosecution of Bernard Baran, there was one dramatic difference. The Amirault family was represented by aggressive, experienced trial counsel who put on a vigorous defense. In contrast, Mr. Baran was represented by an attorney of astounding incompetence. Leonard Conway did no pretrial investigation. Indeed, he did not even look at the videotaped interviews of the alleged victims until the third day of trial. He failed to request any discovery beyond the handful of reports that the prosecution voluntarily provided. He failed to oppose the filing of two additional counts involving a sixth alleged victim on the first day of trial. He failed to oppose closing the courtroom while the children were testifying. He failed to call, and apparently did not even consult with, experts to counter damaging testimony by prosecution experts. He failed to conduct meaningful cross-examination of nearly every witness. Most astonishingly, he failed to move for a mistrial as to the remaining counts of the indictment after the court dismissed the

counts involving the first child, which had involved all of the highly prejudicial testimony about gonorrhea. In his summation, he argued those counts that had already been dismissed and he failed to object to the extreme histrionics in the prosecutor's closing argument.

Mr. Baran's convictions were affirmed by the Appeals Court on March 27, 1986. Appellate counsel inexplicably failed to argue that Mr. Baran was deprived of his right to effective assistance of counsel. Instead of addressing Mr. Conway's gross incompetence, the appeal addressed a handful of issues that trial counsel managed to preserve: the denial of a motion to sever, the denial of a bill of particulars, an objection to the court's determination that the children were competent, an objection to excessive leading questions, and an objection to the fresh complaint testimony. The largely superficial arguments put forth in Mr. Baran's appeal were dismissed in an opinion rife with factual and legal errors.

Mr. Baran hereby submits this memorandum in support of his Motion for New Trial, for the purpose of illustrating the grave injustice that was done nearly twenty years ago.

## II. Statement of the Case

On November 7, 1984, a Berkshire County Grand Jury returned ten indictments against Bernard Baran. With respect to each of the five alleged victims, he was charged with one count of rape of a child without force (indictment nos. 18042, 18044, 18047, 18048, and 18050) and one count of indecent assault and battery on a child under the age of fourteen years (indictment nos. 18043, 18045, 18046, 18049, and 18051). On January 21, 1985, the first day of trial, the Commonwealth filed two complaints charging Mr. Baran with rape and indecent assault and battery of a sixth alleged victim (nos. 18100 and 18101).

On January 17, 1985, defense counsel filed three motions: a Motion to Sever Indictments for Trial, a Motion to Dismiss Indictments, and a Motion for a Bill of Particulars. A hearing on the motions was held on January 18, 1985, the last day before the trial. All three motions were denied.

A second hearing was held on January 18, 1985, for the purpose of determining the competency of the six child witnesses. At the conclusion of the hearing, the judge found five of the six children competent. On January 21, 1985, after viewing a videotape of the sixth child, the judge ruled that she, too, was competent.

The trial commenced on January 21, 1985. At the close of the Commonwealth's case, the judge entered Required Findings of Not Guilty with respect to two counts of rape (nos. 18042 and 18047) and one count of indecent assault and battery (no. 18046). The judge further ruled that, with respect to one of the alleged victims, the two counts would be submitted to the jury for an alternative finding, i.e. the jury could find Mr. Baran guilty of rape or indecent assault and battery, but not both.

On January 30, 1985, the jury returned verdicts of guilty on three counts of rape (18048, 18050, and 18100) and five counts of indecent assault and battery (18043, 18045, 18049, 18051, and 18101). The next day, Mr. Baran was sentenced to three concurrent life terms on the rape convictions and to 8-10 years on the indecent assault and battery convictions, also to be served concurrently.

Represented by different counsel, Mr. Baran appealed. On March 27, 1986, the Appeals Court affirmed his convictions. Commonwealth v. Baran, 21 Mass.App.Ct. 989 (1986). Further appellate review was denied on May 30, 1986. *Commonwealth v. Baran,* 397 Mass. 1103.

## III. Overview

The United States Constitution and the Massachusetts Declaration of Rights guarantee a criminal defendant the right to the effective assistance of counsel, the right to a fair trial, the right to a public trial, the right to present a defense, and the right to confront one's accusers. Bernard Baran's trial lawyer failed to protect and preserve these fundamental rights. Mr. Baran's appellate counsel failed to properly raise these issues and failed to raise the trial lawyer's incompetence. And finally, the prosecutor's tactics effectively robbed Mr. Baran of a fair trial.

### A. Mr. Baran's conviction was based on unreliable evidence.

Much of the Commonwealth's evidence was inherently unreliable. Due process is denied where a conviction is based on unreliable evidence. "[R]eliability [is] the linchpin in determining admissibility" of evidence. Manson v. Brathwaite, 432 U.S. 98, 114 (1977).

#### 1. The judge used an incorrect legal standard to determine that four of the children were competent to testify.

A witness is competent to testify in Massachusetts if he (1) possesses the ability or capacity to observe, remember, and give expression to that which he has seen, heard, or experienced, and (2) comprehends the difference between truth and falsehood, the wickedness of the latter and the obligation and duty to tell the truth, and in a general way, belief that failure to perform the obligation will result in punishment. Commonwealth v. Brusgulis, 398 Mass. 325, 329 (1986), citing Commonwealth v. Tatisos, 238 Mass. 322, 325 (1921). See also M.G.L. c. 233, § 20.[1] Judges must carefully craft questions posed to child witnesses to ensure that they are

[1] A person of "sufficient understanding" is competent to testify as a witness. M.G.L. c.

indeed competent. Commonwealth v. Monzon, 51 Mass. App. Ct. 245, 253 (2001).

Four of the children - Boy A, Girl B, Boy C, and Girl F - never demonstrated that they understood the difference between the truth and a lie and the consequences of telling a lie. Indeed, three of the children were never even asked and the fourth child who was asked demonstrated that she did not know the difference between the truth and a lie. In making his rulings on competency, the judge focused exclusively on the first prong of the competency test, while completely ignoring the second prong. Midway through the trial, the judge explicitly put his competency finding on the record.

> I believe I did earlier, for the record, but just so we're all clear on this, I have considered very carefully this issue of competency with regard to each one of these children separately. I am convinced that – I want the record to be unmistakably clear in this area – that I consider each of them to be competent, that is, I believe they have sufficient understanding to realize what it is that happened to them, to be able to recall and remember those events, and to, in ways, consistent with their age, to relate those events in front of the jury.
>
> It is clear that our system of courtroom procedure is not geared for witnesses of their ages. Each of these children came into a large formal courtroom in the presence of sixteen jurors and lawyers and court officers and to the extent that they showed this understanding and this ability, I think it was far more than adequate. I think it's met every reasonable test so I do state for the record.

Tr. 7/7-8 (Emphasis added). See also, *Competency Hearing*, 75-76, 81; Tr. 1/4. The judge's failure to focus on the second prong may well have been at least in part attributable to the prosecutor who, after the judge had already found five of the six children competent, suggested that the judge not ever mention the concept of truth to the children.

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233, § 20 (1984 ed.)

MR. FORD: ... The only suggestion I have is that I don't think asking a child the difference between the truth and a lie is something that they can really appreciate.

THE COURT: That is a philosophical concept.

MR. FORD: That is a language issue. I think right and wrong is something which they understand a lot better.

For example, if we were to bring Boy A in here the next time and say things like: "If I tell you this Scotch tape holder is red, would that be right or wrong?"

THE COURT: I think I tried basically to do that with Girl F.

MR. FORD: I think what you said was: "If I told that is red, would that be the truth or a lie?" And they say there with a look on their face that indicated they didn't know what you were talking about.

That is the only complaint I would make and the only suggestion.

*Competency Hearing*, p. 79.

While a trial judge is afforded wide discretion in ruling on a child witness's competency, *Commonwealth v. Brusgulis, supra* 398 Mass. at 330, as with other discretionary rulings, the judge's determination will be reversed where an incorrect legal standard is applied, *Commonwealth v. Mullins*, 2 Allen 295, 296 (1861), or where his determination is clearly erroneous. *Commonwealth v. LeFave*, 407 Mass. 927 (1990)*Commonwealth v. Tatisos, supra* 238 Mass. at 325. Here, the judge failed to properly apply the competency test and his determination was clearly in error.

The error might have been cured had the children been properly placed under oath. An oath administered to a child is adequate if the child affirms, with due solemnity, that he is prepared to tell the truth.[2] See Commonwealth v. Murphy, 57 Mass. App. Ct. 586, 591-592

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[2] The SJC has recognized that "asking [young children] to 'affirm to tell the truth' or to suffer 'the pains and penalties of perjury' measures inadequately their understanding of the duty to testify truthfully in the proceedings." *Commonwealth v. Bergstrom*, 402 Mass. 534, 540 n.7 (1988).

(2003)(Eight-year-old child, after a voir dire on competency that satisfied both prongs, "promise[d] to tell the truth as to all the questions that are going to be asked ... the entire truth, the whole truth."); *Commonwealth v. Amirault*, 424 Mass. 618, 649 n. 22 (1997)(Children made a promise of truthfulness that was within the their understanding). No such oath was administered to the children in this case. Over defense counsel's objection,[3] the judge decided that, "in view of their age and their ability to verbalize concepts," the oath would consist of nothing more than asking each child to "promise to tell what happened." Tr. 4/2.

Because none of these four witnesses understood the concept of truth, Mr. Baran was deprived of his right to confront these witnesses through the vehicle of meaningful and probing cross-examination. "The confrontation right is designed to make prosecution witnesses available for full cross-examination by the defendant and to ensure that the testimony of a witness is given under oath before the jury who will have an opportunity to observe the demeanor of the witness as he testifies." Commonwealth v. Whelton, 428 Mass. 24, 29 (1999).

A witness who does not know the difference between the truth and a lie has no credibility because she does not "possess 'the necessary understanding to comprehend the nature of the obligation imposed by the oath.'" *Commonwealth v. Brusgulis*, 398 Mass. at 330. The judge's

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"That is not to say that the traditional elements can or should be jettisoned without good reason or simply because a judge prefers a different approach. In use for centuries, those elements are by now a familiar part of a ceremony designed to remind witnesses and observers alike that testimony is a solemn process with serious consequences. The traditional elements, therefore, should remain a part of that ceremony unless, in a particular case, there is good reason to believe that a different formulation of the oath is more likely to achieve the ceremonial purposes." *Commonwealth v. Murphy*, 57 Mass. App. Ct. 586, 592 n.5 (2003).

[3] Attorney Conway correctly argued that the judge's formulation failed to show that "the children realize the difference between the truth or their ability to understand their swearing to

determination that the children were competent was error. The jury should not have been permitted to consider the children's testimony. *Commonwealth v. Tatisos,* 238 Mass. 325. Appellant's brief, pps. 64-65. "The record reflects that the children, by reason of age or intellect, did not have an adequate understanding of their obligation to testify truthfully ..." Appellant's brief, p. 19. The point was lost on the Appeals Court, however. The Court wrongly found no abuse of discretion in any of the trial judge's competency rulings.

It is now widely recognized that suggestive interview methods created a risk of distorting the children's recollection of actual events. The U.S. Supreme Court has recognized children are susceptible to suggestion and can be misled by leading questions. In Idaho v. Wright, 497 U.S. 805 (1990), the Court identified specific interview methods that are known to create a risk of obtaining unreliable statements from a child witness: the failure to videotape successive interviews, the use of blatantly leading questions, and an interviewer with a preconceived idea of what the child should be disclosing. Ceci, S.J. and Friedman, R.D., "The Suggestibility of Children: Scientific Research and Legal Implications," *Cornell Law Review,* 86, 33 (2000)Ceci,

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the truth." Tr. 4/2

[4] The following exchange regarding the oath to be administered to the children took place between the court and counsel:

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|---|---|
| THE COURT: | One of the things that we ought to talk about is the oath to be administered to the children. I think in view of their age and their ability to verbalize concepts, something along the lines of: Do you promise to tell what happened, is appropriate. If either of you have some other suggested language, I'll consider it. |
| MR. FORD: | That's exactly what I would ask the Court to do. That's fine with me. |
| THE COURT: | Do you want to say something? |
| MR. CONWAY: | I would officially object to that. I don't think it show the children realize the difference between the truth or their ability to understand their swearing to the truth. I would just object to it. |
| THE COURT: | Do you want to suggest another language? |
| MR. CONWAY: | No, your Honor. |
| THE COURT: | Okay. What else have we got? |

Tr. 4/2-3.

S.J. & Bruck, M., *Jeopardy in the Courtroom: A Scientific Analysis Children's Testimony,* American Psychological Association Press: Washington, DC (1995)*State v. Michaels,* 136 N.J. 299 (1994)*Id.,* at 311-312. The court identified a variety of factors that can create a substantial risk that a child's statements are unreliable – "the absence of spontaneous recall, interviewer bias, repeated leading questions, multiple interviews, incessant questioning, vilification of defendant, ongoing contact with peers and references to their statements, and the use of threats, bribes and cajoling, as well as the failure to videotape or otherwise document the initial interview sessions." *Commonwealth v. Allen*, 40 Mass. App. Ct. 458 (1996) Rosenthal, R., "Suggestibility, Reliability, and the Legal Process," *Developmental Review,* 22, 334-369 (2002)

Under the hearsay rule, out-of-court statements offered to prove the truth of the matter asserted are generally inadmissible. There are a number of firmly rooted exceptions to the hearsay rule, all of which allow the admission hearsay only if it bears sufficient indicia of reliability. Out-of-court statements that corroborate what a witness has already testified to in court, i.e., prior consistent statements, are also generally inadmissible except when offered to rebut an allegation of recent fabrication. However, a narrowly circumscribed subcategory of prior consistent statements is generally admissible in Massachusetts; a fresh complaint, an out-of-court statement seasonably made by the alleged victim of a sexual assault, is admissible as part of the prosecution's case-in-chief for the limited purpose of corroborating the alleged victim's testimony. Commonwealth v. Quincy Q., 434 Mass 859, 867 (2001), citing Commonwealth v. Licata,,412 Mass. 654, 657 (1992).

The fresh complaint doctrine has its "origins in outmoded, and invalid, sexual myths." *Commonwealth v. Montanino*, 409 Mass. 500 (1991)*Commonwealth v. Amirault,* 404 Mass. 221 (1989)*Commonwealth v. Snow*, 30 Mass. App. Ct. 443 (1991)*Commonwealth v. Scanlon,* 412 Mass. 664 (1992)*Commonwealth v. Quincy Q.*, 434 Mass. 859, 875 (2001). Statements that do not satisfy all of these criteria are inadmissible hearsay.

In 1992, the Supreme Judicial Court urged trial judges to exercise caution in the admission of fresh complaint evidence because of the risk that jurors will use the evidence substantively. *Commonwealth v. Licata, supra,* 412 Mass. at 660; Commonwealth v. Trowbridge, 419 Mass. 750, 761 (1995). More recently, the SJC has observed that fresh complaint evidence also "constitutes a potential threat to the accused's right of confrontation" under both the Federal and State Confrontation Clauses. To counter this threat, a defendant must have an adequate opportunity to cross-examine fresh complaint witnesses, not only about the

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[5] In *Licata*, the Supreme Judicial Court expressed reservations about the continuing viability of the Massachusetts fresh complaint doctrine. *Commonwealth v. Licata, supra*, 412 Mass. at 658.

More recently, it has been suggested that it is time to once again revisit the doctrine. *Commonwealth v. Montanez,* 439 Mass. 441, 458 (2003) (Sosman, J., concurring, joined by Cordy, J.) ("A reevaluation of our adherence to the doctrine of fresh complaint is, in my opinion, long overdue. Whatever remains of the doctrine ought to be tailored to a contemporary, not an archaic, understanding of the complex process by which victims overcome the many impediments to disclosing sexual assault.")

alleged victim's report of the present charge, but also about other allegations that tend to undermine the credibility of the present complaint. Commonwealth v. Peters, 429 Mass 22, 28 (1999), citing State v. Sullivan, 244 Conn. 640, 645 (1998).

Mr. Baran has a right to raise the fresh complaint doctrine in this Motion for New Trial. At the time of Mr. Baran's appeal, the fresh complaint doctrine was not fully developed. The rudimentary fresh complaint arguments that were made by both trial counsel and appellate counsel were appropriate given the state of the law. At the time, Commonwealth v. Bailey, 370 Mass. 388 (1976), was the SJC's most comprehensive decision on the fresh complaint doctrine. *Bailey* and the fresh complaint doctrine have since been considerably refined. Numerous issues regarding the timeliness of fresh complaints, details of complaints, repetition of complaints, and limiting instructions regarding fresh complaints, as well as the impact on a defendant's fundamental right to a fair trial, have been decided in dozens of opinions in the last fifteen years.

Where, as here, the law was not firmly established so that the defendant had no genuine opportunity to challenge the issue during prior proceedings, the "clairvoyance exception" applies and the claim must be reviewed as if it was properly preserved. Commonwealth v. Randolph, 438 Mass. 290, 295 (2002). "[T]he 'clairvoyance' exception ... applies to errors of a constitutional dimension 'when the constitutional theory on which the defendant has relied was not sufficiently developed at the time of trial or direct appeal to afford the defendant a genuine opportunity to raise his claim at those junctures of the case.'" *Commonwealth v. Rembiszewski*, 391 Mass 123 (1984**).**

A criminal defendant's right to effective assistance of counsel is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, Strickland v. Washington, 466 U.S. 688 (1984), and by Article XII of the Massachusetts Declaration of Rights, Commonwealth v. Saferian, 366 Mass. 89 (1974). Sixth Amendment. Commonwealth v. Rainwater, 425 Mass. 540, 553 (1997). A defendant has a constitutional right to effective assistance of both trial counsel and appellate counsel. Commonwealth v. Cardenuto, 406 Mass. 450, 453 (1990), citing Douglas v. California, 372 U.S. 353, 355-356 (1963).

Despite trial counsel's pathetic performance, appellate counsel failed to bring his deficiencies to the attention of the Appeals Court. The standard of review for unpreserved error depends on the state of the law at the time of the trial and the appeal and upon the nature of the deficiency of counsel's performance. A determination that a defendant was denied effective assistance of counsel requires "a discerning examination and appraisal of the specific circumstances of the given case to see whether there has been serious incompetency, inefficiency, or inattention of counsel – behavior falling measurably below that which might be expected from an ordinary, fallible lawyer – and, if that is found, then typically, whether it has likely deprived the defendant of an otherwise available, substantial ground of defence." *Commonwealth v. Rondeau,* 378 Mass. 408 (1979)Commonwealth v. Satterfield, 373 Mass. 109, 115 (1977).

By failing to raise the issue in the direct appeal, the claim of ineffective assistance of counsel was waived. "A finding of waiver does not end the analysis, however. All claims, waived or not, must be considered. The difference lies in the standard of review that we apply when we consider the merits of an unpreserved claim." *Commonwealth v. Amirault,* 424 Mass. 618, 637 (1999).

Where the issues were available to prior counsel and the alleged ineffectiveness amounts to nothing more than a failure to preserve claims for appeal, the standard of review is whether the errors produced a substantial risk of a miscarriage of justice. "In all cases where a defendant fails to preserve his claim for review we must still grant relief when 'we are left with uncertainty that the defendant's guilt has been fairly adjudicated.'" *Commonwealth v. Azar,* 435 Mass. 675 (2002)*Commonwealth v. Randolph*, *supra* at 297, citing *Commonwealth v. LeFave,* 430 Mass 169 (1999)*Commonwealth v. Azar, supra* at 687, and ask four questions: (1) Was there error? (2) Was the defendant prejudiced by the error? (3) Considering the error in the context of the entire trial, would it be reasonable to conclude that the error materially influenced the verdict? (4) Can it be inferred from the record that counsel's failure to object or raise a claim of error at an earlier date was not a reasonable tactical decision?

Mr. Conway was privately retained and paid a total of $500 for his work on this case. There is no evidence that he hired an investigator or that he interviewed a single witness before trial. He never filed a formal request for discovery, pursuant to *Rules 13 and* 14, Mass. R. Crim. P.[6] The only apparent pretrial effort made by Attorney Conway to obtain discovery beyond that which was provided pursuant to the Commonwealth's Certificate of Discovery was a Motion for a Bill of Particulars, A-81, that was heard, and denied, on Friday, January 18, 1985, the eve of trial.

Had Mr. Conway moved for discovery and/or conducted a meaningful investigation, he might have learned that parents were instructed at large meetings how to question their children about sexual abuse and what behaviors to look for. He might also have learned that within three weeks of the initial allegations, the Department of Social Services had already obtained "disclosures" about Mr. Baran from fifteen children and that the parents of eight to ten other children were concerned that something might have happened.[7] Presumably, each of these "disclosures" generated a 51A/B report, all of which should have been discoverable.[8] Clearer evidence supporting the defense theory that the allegations against Mr. Baran were the product of a wave of hysteria that swept through the day care community is hard to imagine. Additional crucial evidence that should have been discovered by defense counsel before the trial will be

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[6] The Rules of Criminal Procedure became effective in 1979, five years before the trial of this case, 378 Mass. 874 (1979).

[7] According to a report written by the Massachusetts Office for Children, dated October 24, 1984, A-652:

> Final reports from The Dept. of Social Services indicate that there have been 15 disclosures with 15 corresponding interviews of children, and the possibility of more interviews with children who's [sic] parent's have concerns. (8-10).

The report summarized the investigation that OFC did in the wake of the sex abuse allegations for the purpose of determining whether the day care center should remain open.

[8] As of this date, the Commonwealth has disclosed eleven DSS reports. A-457, A-474, A-488, A-500, A-512, A-524, A-540, A-552, A-566, A-578, and A-590.

discussed in the specific sections, *infra.*

Another facet of the defense theory was that the children's allegations were the product of improperly suggestive interview techniques. Videotapes were made of some of the interviews. These videotapes were made available to Mr. Conway[9] but, incredibly, he did not view this crucial evidence until the third day of trial had adjourned,[10] after he had already given his opening statement. On the fourth day of trial, Mr. Conway admitted that he was "looking at the tapes *last night for the first time*."(emphasis added) Tr. 4/10. As discussed at length *infra*, command of the videotapes was essential to preparing for meaningful cross-examination of both the child and the interviewer. Pretrial analysis of the evolution of the children's stories would have enabled counsel to illustrate for the jury the insidious influence of suggestion over time.

Several of the Commonwealth's witnesses gave expert testimony - a pathologist and a pediatrician testified about gonorrhea, a pediatrician testified about pediatric gynecology, a child psychiatrist and a rape counselor testified about a child's cognitive development and the behavioral characteristics of sexually abused children. Mr. Conway failed to call, and apparently did not even consult with, experts to counter damaging testimony by any of the prosecution experts. He made no attempt to determine whether the findings of the Commonwealth's experts were accurate or reliable. His cross-examination failed to challenge the expert testimony in any meaningful way. He accepted the opinions at face value and seemed to be asking questions for his own edification. He failed to call an expert to support his defense theory that the methods used to obtain "disclosures" from the children were flawed. The expert testimony will be discussed in detail in the following sections.

A defense attorney has a constitutional duty to conduct an independent investigation of the facts,[11] including an investigation of the forensic, medical, or scientific evidence on which

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[9] During the January 18th hearing on motions, Prosecutor Ford revealed that Mr. Conway had not yet seen the videotapes of the interviews of the alleged child victims. "The videotapes that he's made reference to have been in my office since October, and he asked me to see them. He's welcome to see them if he ever wants to ..." Hearing on Motions, January 18, 1985, p. 17

[10] The case was called for trial Monday, January 21, 1985. That day and half the next were occupied with jury selection, and then the jury were taken on a viewing of the scene of the alleged crime. Testimony commenced on Wednesday, January 23.

[11] According to the American Bar Association Defense Function Standard 4-4.1(a), entitled "Duty to Investigate:

> Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.

the Commonwealth will rely to prove guilt. Commonwealth v. Baker, 440 Mass. 519, 529 (2003).

In Commonwealth v. Haggerty, 400 Mass. 437 (1987), the Supreme Judicial Court reversed a first degree murder conviction because defense counsel failed to seek an expert opinion on the possibility that the death of the elderly victim seven to eight weeks after a brutal assault was not proximately caused by the defendant's criminal conduct. The Court noted that, rather than being a case where arguably reasoned tactical decisions were being questioned in hindsight, this was a case where defense counsel simply failed to investigate defendant's only realistic defense. *Id* at 442. See also, Commonwealth v. Farley, 432 Mass. 153, 156-157 (2000) (First degree murder conviction reversed where trial counsel put forth a defense that a drug dealer named Raphael killed the victim, then failed to interview Raphael before or after he became a witness for the Commonwealth, failed to conduct a meaningful cross-examination of Raphael, failed to investigate, test or develop at trial potentially exculpatory physical evidence, and failed to marshal evidence favorable to the defense in an effort to create a reasonable doubt.)

Here, Mr. Conway's performance fell below that of the defense attorney in

The Federal Constitution, Fifth Amendment*Levine v. U.S.*, 362 U.S. 610 (1960)Sixth Amendment right to a public trial, Commonwealth v. Marshall, 356 Mass 432, 434 (1969), our courts have recognized that the right to a public trial is applicable to the states under the *Commonwealth v. Stetson,* 384 Mass. 545 (1981)*Ottaway Newspapers Inc. v. Appeals Court,* 372 Mass 539 (1977)*Boston Herald v. Superior Court,* 421 Mass. 502 (1995)M.G.L. c. 278, §

16AM.G.L. c. 278, § 16A violates the First Amendment. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 603 (1982), rev'd 383 Mass. 838 (1981). The Court acknowledged that safeguarding the physical and psychological well-being of a child was a compelling interest, but ruled that it was a determination that should be made on a case-by-case basis, taking into consideration the child's age, psychological maturity and understanding, the nature of the crime, the desires of the victim, and the interests of the parents and relatives. § 16A, the measure of the State's interest lies not in the extent to which minor victims are injured by testifying, but rather in the incremental injury suffered by testifying in the presence of the press and the general public." *Globe Newspaper Co. v. Superior Court*, had been decided on Sixth Amendment:

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[12] *The Berkshire Eagle*, "Three of 12 charges brought against Baran are dismissed," Lynne A. Daley, 1/29/85. A-213.

> [T]here can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public. The central aim of a criminal proceeding must be to try the accused fairly, and "[our] cases have uniformly recognized the public-trial guarantee as one created for the benefit of the defendant."

Waller v. Georgia, 467 U.S. 39 (1984), quoting Gannett Co. v. DePasquale, 443 U.S. 368, 38 (1979). The Court acknowledged that the right to an open trial may give way to other rights and interests, such as a defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information, but cautioned that "such circumstances will be rare." M.G.L. c. 278, § 16A. A courtroom could be closed to the press and public only if the party seeking closure satisfied the requirements articulated in *Waller* requirements are satisfied. *Commonwealth v. Martin*, 417 Mass. 187, 194 (1994). No such analysis was undertaken.

The *Commonwealth v. Adamides,* 37 Mass.App.Ct. 339 (1994)*Martineau v. Perrin,* 601 F.2d 1196 (1st Cir., 1979)*Commonwealth v. Williams,* 379 Mass. 874 (1980)*Commonwealth v.*

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[13] At a hearing on motions earlier that same day, Mr. Conway waived Mr. Baran's presence at the competency hearing and acquiesced in the judge's decision to conduct the hearing in chambers.

> The Court: Now, it's now about eighteen past one; I have a bail review at two; then I'd like to proceed with the hearings in chambers on competency as far as the alleged victims are concerned. The defense counsel, of course, will be present, as will the prosecutor. I'm just wondering – we don't need to bring the Defendant back and forth.
>
> Mr. Conway: I think the prosecutor is, perhaps objecting to him being in those interviews anyway.
>
> Mr. Ford: I certainly would.
>
> The Court: All right. So he may be brought back and we don't require his presence for the balance of these proceedings today.

*Wells,* 360 Mass. 846 (1971)Sixth Amendment guaranty of a public trial], the importance of which cannot be overstated, exists primarily to prevent the courts from becoming instruments of persecution." [citations omitted] Under the public gaze, witnesses, counsel, and the judge are more strongly moved to a strict consciousness of their duty, thus improving the quality and fairness of our judicial system. [citations omitted].

*Commonwealth v. Marshall,* 356 Mass. 432, 435 (1969). "Generally, the appropriate relief for violations of the constitutional right to a public trial is a new trial." *Waller v. Georgia, supra* at 49. If appellate counsel had argued that the press and public were improperly excluded from his trial pursuant to the mandatory closure provision of *Globe* and **.**

The case against Mr. Baran was a credibility contest. The jurors could either believe the alleged victims' claims that Mr. Baran sexually abused them or they could believe Mr. Baran's denial that anything happened. Shored up by unfair and impermissible tactics, the

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Hearing on Motions, 1/18/85, pps. 21-22.

[14] Even if Mr. Conway was ignorant of the recently decided Supreme Court cases, he should have been aware that the SJC had clearly construed M.G.L. c. 278, § 16A as a statute of "very limited scope" that was to be strictly construed "in favor of the general principle of publicity." *Commonwealth v. Blondin*, 324 Mass. 564, 571 (1949)(statute does not exclude family or friends whose presence defendant desires; press apparently not excluded, although applicability of 16A to the press need not be decided). See also, *Commonwealth v. Leo,* 379 Mass. 34, 36-37 (1980)(although no caselaw on exclusion of press pursuant to 16A, no error where trial judge barred miscellaneous onlookers but ruled press was not part of the general public in the meaning of the statute and so allowed newspaper reporters to attend trial).

[15] For example, although Mr. Conway moved to sequester witnesses, he failed to object when five of the six children were accompanied to the stand by a parent, and then that same parent took the stand after the child was excused to give fresh complaint testimony.

Additional evidence of inattention to Mr. Baran's rights and interests will be discussed in subsequent sections.

Commonwealth prevailed. The result was a denial of Mr. Baran's right to a fair trial.

> [The prosecutor] is the representative not of an ordinary party to a controversy, but of an sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefor, in a criminal prosecution is not that it shall win a case, but that justice shall be done. ... He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935). See Smith v. Commonwealth, 331 Mass. 585, 591. The legal principles raised here will be discussed in detail in Section IX, *supra.*

The prosecution unabashedly constructed a case against Mr. Baran that was little more than a house of cards. At the risk of oversimplifying, there were essentially three facets of the prosecution case: (1) Mr. Baran had the opportunity to commit these crimes, (2) the children said it happened, and (3) there was medical evidence that two of the children had been molested.

The claim that Mr. Baran had the opportunity to sexually abuse children was virtually impossible for the defense to counter. After all, he was employed at a day care center and he was occasionally left alone to attend to the children for brief periods when another teacher went to the bathroom, the kitchen or the administrative offices. While other teachers and Mr. Baran himself testified that he was seldom left alone for more than five or ten minutes, the fact remained that he was alone with children in a classroom from time to time. Mr. Ford masterfully cast some of Mr. Baran's most basic job duties - story-telling, game-playing, bathroom assistance, classroom discipline, and rubbing a child's back at naptime - in a sinister light.

It was the second and third facets of the case - the children's allegations and the medical evidence - that was truly rife with impropriety. From his opening statement right through to his closing argument, Mr. Ford did whatever it took to elicit accusations from the children, to bolster their accusations with inadmissible hearsay, innuendo and speculation, and to evoke sympathy for the children and their families. Specifics will be discussed in the following sections.

Finally, in blatant disregard of its duty to disclose exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83, 87 (1963) and Commonwealth v. Ellison, 376 Mass. 1, 22 (1978), the Commonwealth suppressed crucial evidence. Before Mr. Baran's trial, DSS investigated (and, in at least one case, substantiated[16]) allegations that two of the six alleged victims were sexually abused by their mothers' boyfriends. Each of these children, a boy and a girl, provided more detail about what the boyfriend did to them than they did in their allegations against Mr. Baran. And the boy, who was the first child to make a "disclosure" about Mr. Baran, reported that his mother's boyfriend put his peepee in his mouth *before* Mr. Baran did.

**D. Newly discovered evidence.** Newly discovered evidence is evidence that was unavailable at the time of trial and could not have been discovered with reasonable diligence. *Commonwealth v. Moore*, 408 Mass. 117 (1990)

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[16] The outcome of the second DSS investigation is unknown. Despite repeated requests, the District Attorney has failed to produce the report.

[17] At the time of trial, the defense had information about a different mother who had been molested as a child.

4.

*Commonwealth v. Grace*, 397 Mass. 303 (1986)

**A. Facts the jury heard**.

The first allegation of sexual abuse against Bernie Baran was made by a child named Boy A. In early October 1984 when the allegation was made, Boy A was three years and eleven months old[18] and living with his mother, Mother A, an infant half-brother, and his mother's live-in boyfriend, David.[19] Tr. 4/167. At the time of the trial, Boy A was four years and two months old and living in foster care.

In connection with the A allegations, the jury heard testimony from the following witnesses: ECDC teachers and staff; Boy A; his mother, Mother A; pediatrician Dr. Jean Sheeley; Detective Joseph Collias; and, pathologist Dr. Jeffrey Ross. In addition, Mr. Baran testified in his own defense.

**1. ECDC teachers and staff.** Boy A started attending day care at ECDC in 1982, shortly after his second birthday. Tr. 4/67, 4/89, 4/160. His teachers described him as "a problem child," "a very troubled little boy," "a constant problem in school," and "nasty." He regularly used obscenities in the classroom. Tr. 3/77-78, 3/121-122, 4/32, 4/57. One time when Boy A was misbehaving in Room 1, the head teacher took him to another room to try to get him to settle down. After a short while, she asked Bernie to take over. She described the incident as follows:

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[18] Boy A's date of birth was November 6, 1980.

[19] David was the father of Boy A's half-brother and was the cousin of Boy A's natural

> Boy A was very – a very difficult child to deal with. From the beginning when he entered our room he would frequently have temper tantrums, hurt people physically. On this particular day, he could not be in the classroom, he was too aggressive towards other people. I took him in the room across the hall which was a former classroom. There was nobody in it. I had been in the room for fifteen or twenty minutes. I couldn't do anything with him. He was hurting me, he was very violent and I asked Bernie if he could come in and try to do something with him ... He was in the room for five minutes, maybe. He came out and Boy A was fine.

Tr. 3/72-73.

Because Boy A sometimes wet his pants, his mother was asked to send extra clothes with Boy A. Despite the requests for a change of clothes, Boy A did not always have extra clothes at school. If Boy A wet his pants on a day when his mother had not sent clothes for him, he would go home in extra clothes that the school kept on hand. Tr. 3/78-79.

**2. Boy A.** Boy A took the stand as a witness, but the child was largely unresponsive and recalcitrant. He was excused before he provided any substantive testimony.[20] Tr. 4/99-108.

**3. Mother A.** Mother A was Boy A's mother. One evening in early October 1984 while she was giving Boy A a bath, she noticed that Boy A "was pulling on his penis really hard." She observed what she described as "a bloody discharge." She asked Boy A "if anyone had ever touched him." He answered "yes." As to who, Boy A said "Bernie." Tr. 4/160-161. Bernie, she explained, was a teacher's aide at ECDC. At the prosecutor's request, she pointed to Mr. Baran in the courtroom. Tr. 4/162.

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father.

[20] In his opening statement, the prosecutor told the jury that Boy A would testify that Bernie touched his penis, that he touched Bernie's penis, and that Bernie put his penis into Boy A's mouth. Tr. 3/27.

The next day, Boy A was examined by Dr. Jean Sheeley. Tr. 4/162.

Mother A thought it was odd that Boy A occasionally came home from school wearing something different than what he had worn to school that morning. One time, he came home wearing the same jeans but different underwear.[21] Another time, his shorts were inside out. Yet another time he came home wearing the same pants, apparently unsoiled, but no underwear. Tr. 4/164-165, 169.

Mother A claimed that she noticed changes in Boy A's behavior in the summer of 1984. "Boy A had become violent. He started swearing, smashing his toys, wetting his pants." "He wouldn't sleep, he didn't want to be left alone. He wanted me all the time."[22] Tr. 4/166.

Mother A acknowledged that she'd had personal problems "of a psychiatric nature." Tr. 4/167. Regarding Boy A's foster care placement, Mother A admitted that Boy A had been removed from her home in October and that he was presently living with a foster family, but she denied that Boy A had been monitored by DSS during the past two years. As to why Boy A was designated as a "protected child," Mother A explained "There was no problem with Boy A. I needed some help. I sought help myself. They were helping me." Tr. 4/175.

A substantial portion of defense counsel's cross-examination of Mother A was devoted to questions about her relationship with David and his role in the allegations against Bernie Baran. Mother A denied that it was actually David, not her, who was bathing Boy A, but acknowledged

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[21] A defense objection was sustained when she testified that she "asked him if he had an accident and he said no," but the testimony was not stricken.

[22] The court recessed briefly midway through Mother A's description of her son's behaviors, apparently because of emotional distress. The transcript indicates only that there was

that David was present during Boy A's bath.[23] Mother A claimed that she made the initial report to the police department, but conceded that David participated in the contacts with the police and said that she believed that David had given a statement to the police. Tr. 4/168-169.

Mother A admitted that she and David sometimes had arguments that generated turmoil in the home, but she denied that it was a fairly regular situation. When asked whether the arguments had escalated to the point where she sought a criminal complaint against David, the judge sustained an objection and directed Conway to bring the line of questioning to a conclusion. When Conway asked if she knew where David currently resided, the judge again sustained an objection. Tr. 4/173-174.

**4. Dr. Jean Sheeley.** Dr. Sheeley testified that bleeding from the penis could have an internal cause, e.g., bleeding from the bladder or kidneys, or an external cause, e.g., irritation such as manipulation of the penis or infection. She ruled out an internal cause with a urinalysis. Tr. 6/119-120.

Dr. Sheeley took cultures from his throat and rectum. Boy A's throat culture tested positive for gonorrhea. Tr. 6/119-120. Forty to sixty percent of the sex partners of a person infected with gonorrhea will also get gonorrhea. Tr. 6/131.

**5. Detective Joseph Collias.** On October 10, 1984, Detective Collias picked Mr. Baran up and took him to Berkshire Medical Center to have him tested for gonorrhea. At

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a pause in the proceedings immediately after Ford asked her if she wanted a tissue. Tr. 4/166.

[23] When asked if she knew any reason why David would have reported that to the police, Ford objected on the ground that it was a fact not in evidence. The judge sustained the objection.

Berkshire Medical Center, a doctor took oral, rectal and penile swabs from Mr. Baran. Tr. 5/86-87. Before the swabs were taken, Detective Collias asked Mr. Baran if he ever had gonorrhea. Mr. Baran responded that "he never had it." While the swabs were being taken, Mr. Baran was told that he was being tested for gonorrhea. Mr. Baran offered no resistance to the testing. Tr. 5/91- 92.

All of the swabs taken from Mr. Baran tested negative for gonorrhea. The report of Mr. Baran's negative gonorrhea results was admitted as Exhibit 15. Tr. 5/88.

**6. Dr. Jeffrey Ross.** Dr. Ross, a pathologist and medical examiner, testified at length about what gonorrhea is, how it is transmitted and how it is treated. He explained that gonorrhea is a sexually transmitted bacterial infection that may or may not have symptoms. The most predominant symptom in an infected male is a urethral discharge which can be described as a cloudy fluid dripping intermittently but continuously from the end of the penis. In addition to the genitalia, gonococcal bacteria may also be found in the anus and in the mouth. Where the presence of gonococcal bacteria is detected, it is presumed there has been sexual contact with an infected partner. Tr. 5/94-95.

Gonorrhea is usually quite easily treated with penicillin, which kills the organism within eighteen to twenty-four hours after the start of normal antibiotic treatment. Once antibiotic treatment is started, the ability to prove the person was infected can be lost in a matter of just twelve to twenty-four hours. Tr. 5/97. Although penicillin is a prescription drug, it tends to be readily available. Samples are sometimes dispensed without a written prescription. Tr. 5/99-100. Tetracycline, an antibiotic that is commonly used for treating acne, is an alternative to penicillin. Penicillin was the drug of choice that was used for many years, but now tetracycline

would be used because it treats both gonorrhea and chlamydia, a venereal disease that is difficult to detect. In most cases, tetracycline should be as fast and effective as penicillin in curing gonorrhea. An allergy to penicillin would be one of the reasons to choose tetracycline.

"No gonococcal bacteria organisms [were] isolated" from Mr. Baran's throat, anus and penis. Tr. 5/98. As to whether Mr. Baran might have had gonorrhea at another time, Dr. Ross stated, "All that the tests state was that it was not possible to recover or culture the gonococcal bacteria at the time that the specimen was taken." Tr. 5/99.

It is possible for a infected person to have sexual contact with another person but not transmit the disease. Similarly, it is possible for an infected person to have sexual contact with two different people and give it to one person and not the other. Tr. 5/97. If a person with gonorrhea had oral sex with ten people, Dr. Ross predicted that "a significant percentage" of the ten people would get gonorrhea. It would be more than one but, in the absence of scientific studies, Dr. Ross guess at the likelihood of transmission. It would "probably [be] somewhere between, as low as perhaps three, and as many as perhaps eight would get it. A wide range. I wouldn't be able to predict that number very accurately." Tr. 5/105-106.

As to whether someone who had previously been diagnosed with gonorrhea would be likely to contract it a second time, Dr. Ross explained that persons who have had "sexual contact with any infected person tend to be more commonly reinfected by either the same person if that person does not obtain treatment or by other individuals who have this disease ... than someone who never had gonorrhea at all." As to whether gonorrhea is "especially prevalent among any particular subgroups of the population," Dr. Ross responded affirmatively, adding "Well, obviously it's described in greater frequency in prostitutes and in male homosexuals." Tr. 5/110-

111.

**7. Bernard Baran.** Mr. Baran denied that he had any sexual contact with Boy A. Tr. 7/109. He never touched Boy A. He never put his penis in Boy A's mouth. Tr. 7/168.

Mr. Baran was treated for venereal disease once. Four or five years prior to the trial, he went to the Health Clinic at Berkshire Medical Center where he got a shot. The lady at the clinic said it was a venereal disease, but she never gave it a name. Whatever it was, the condition cleared up in about two days and he never had it again. Tr. 7/127, 7/163-165. He denied that there was any penicillin at the house where he was when he was arrested. Besides, he was allergic to penicillin. Tr. 7/168.

Mr. Baran confirmed that Boy A had behavior problems. He gave everyone problems. Tr. 7/161. One time Boy A got angry when the teachers wanted him to try the food on his plate, so he threw the plate and fork, hitting Baran in the head with the fork. Tr. 7/107. On numerous occasions, when Boy A was kicking and biting, Bernie followed the classroom procedure of restraining him by holding his hands so he wouldn't hit or kick. Tr. 7/108. He acknowledged that one time he was alone with Boy A for about five minutes because he was asked to take him into a room to try to calm him down. Boy A calmed down after Mr. Baran told him he could have some stickers if he was a nice boy. Tr. 7/141-142. He conceded that he could not say with absolute certainty that he was alone with Boy A only once in the two and a half years that he worked at ECDC. Tr. 7/143.

Boy A wet his pants almost every nap time. Tr. 7/108. Most of the time he didn't have extra clothes, so Bernie would get clothes from a cabinet upstairs. The teachers in Room 1

alternated the responsibility of changing a child, which was done on a changing table in the smaller back room. Tr. 7/109.

When Boy A was in Room 1, there were times that Mr. Baran helped him zip up his pants, but there were other teachers in the room. He would not have helped Boy A with his zipper in Room 4 because the kids in Room 4 were older and did not need help with those kinds of things. Tr. 7/143, 7/154.

**B. Mr. Baran was denied his right to confront Boy A.** Mr. Baran was deprived of his right to confront Boy A because the jury heard the child's unreliable accusations through his mother's testimony even though Boy A was not competent to testify, was never properly placed under oath, and was never subjected to full cross-examination.

**1. Boy A was not a competent witness.** On January 18, 1985, the judge conducted a competency hearing. Boy A, accompanied by social worker Susan Eastland, appeared but the child was so distracted that he managed to answer only a few questions relevant to competency.

At the outset, the judge observed that Boy A seemed tired. Competency Hearing Tr. 47-48. After playing with the window shade cord and asking the judge questions about various items on his desk, *Id.,* at 48-50, Boy A answered that his name was "Boy A." *Id.,* at 50. As to where he lived, Boy A said, "I don't know," then added "I moved from my Mommy." *Id.* In an apparent attempt to deflect Boy A's attention from the stenographer, the judge tried to get him interested in a stapler and then asked him how old he was. *Id.,* at 50-51. After some prodding, he correctly answered he was "four." *Id.,* at 51-52. The judge next asked him when his birthday was. Boy A answered, "I just had my birthday." As to when, Boy A answered, "Last week.

Last night." *Id.,* at 52. The judge then pondered bringing him back at another time.

> THE COURT: I can see he seems to be very tired. I don't want to press him. I hate to bring him back again at another time, but I don't feel I can get a feel –
> MS. EASTLAND: The only thing is every once in a while on occasion when he has become – he gets frustrated, I think, whenever the subject is brought up. But there will be another social worker that will be working with him from Tuesday on – a D.S.S. worker, so it would have be arranged through them.
> THE COURT: I'm talking about Monday morning. I would do it at a specific time. I would cut into whatever else I'm doing, and just do it.

*Id.,* at 52-53. Victim Witness Advocate Elizabeth Keegan was then permitted to speak to the judge.

> MS. KEEGAN: Sometimes if you direct Boy A and tell him, then he answers the questions; and he has ways of getting distracted. I think if you tell him you're going to ask him questions and get it done.
> THE COURT: He seems quite tired.
> MS. KEEGAN: I've seen him like that before.
> MS. EASTLAND: That is the way he behaved the last time.

*Id.,* at 53.

Taking Ms. Keegan's advice, the judge directed Boy A to get down from the window sill and answer some questions. Boy A refused. *Id.* The social worker cajoled, "The sooner you come down and talk to the Judge, then we can leave." *Id.,* at 53-54. Boy A turned his attention to the judge, "You ain't a judge." *Id.,* at 54. The judge put his robe on to persuade Boy A otherwise. The social worker tried again, "... we'll be leaving soon. Before we go, he'd like to ask you some questions." *Id.,* at 54-55. ADA Ford stepped in.

> MR. FORD: Hey, Boy A. Boy A. Boy A. Listen to me. Judge Simons is going to ask you some questions. Okay? It's going to be real simple. Just listen to what Judge Simons asks you.
> Boy A: No.
> MR. FORD: Please. Are you going to help me?

*Id.,* at 55. Boy A, who was evidently still up on the window sill, did not respond. The judge was

ready to give up. "I don't think it's going to get us anywhere really, unless you feel a little recess will help and then we'll try again. But you'll have to guide me here." *Id.* After being granted permission to talk to Boy A for five minutes, the Victim Witness Advocate, Ms. Keegan, took Boy A out of the room. *Id.*

The prosecutor then requested permission to call "a professional witness ... who is going to testify with respect to Boy A's competency." *Id.* Rape crisis counselor Jane Satullo, who had previously spent about an hour-and-a-half alone with Boy A and had observed his behavior "in several of the gatherings of the children through this process," *Id.* at 59, opined that Boy A could differentiate between "fantasy and reality." She explained:

> My opinion is that he can differentiate between the two. I believe he's a developmentally-delayed child who is very distractable, but once one gains his attention he understands and is able to listen to what is being asked. I think he's very capable and differentiates between what in fact did happen and what did not happen.

*Id.* at 60. As to whether Boy A knew the difference between right and wrong, Ms. Satullo opined:

> I think he knows that difference between right and wrong. There were several occasions when things were asked and he had been told he cannot do that, and he knew it was wrong; and the day he stepped on something, he said, "I broke it; was that a bad thing to do?" So he certainly has some consciousness of what is right or wrong, or acceptable or not acceptable.

*Id.* at 61.

As Ms. Satullo's testimony drew to an end, the judge commented, "I don't doubt for a moment that he's able to understand what's going on around him." *Id.* at 64. The judge concluded, "Boy A, I don't have problems, I just haven't been able to finish my conversations with him, but from what Miss Satullo tells me, I don't have a lot of problem, for the threshold

issue." *Id.* at 66. At the conclusion of the hearing, the judge ruled that Boy A was competent. "I don't have any trouble with his competency. I have trouble with keeping him still long enough to get an answer out of him, which is not competency; that's another matter. Boy A is very able to relate things that affect him. I don't have any trouble with that." *Id.* at 81.

The judge's colloquy with Boy A was inadequate with respect to the first prong of the competency test,[24] and nonexistent with respect to the second prong. The judge asked just four questions related to the first prong of competency. While Boy A knew that his whole name was "Boy A" and that he was "four" years old, he was unable to give accurate, coherent answers when asked where he lived -"I don't know," "I moved from my Mommy" - and when his birthday was - "I just had my birthday" "Last week. Last night." Boy A's birthday was November 6th, two and half months earlier. Boy A did not demonstrate the ability to observe, remember and recount what he had seen, heard or experienced. See *Commonwealth v. Trowbridge, supra,* 419 Mass. at 755 (eight-year-old child satisfied first prong when she gave accurate, coherent answers when asked her name, her religion, her grade in school, and the subjects she studied). With respect to the second prong, the judge never asked a single question about Boy A's understanding of the difference between the truth and telling a lie and his obligation as a witness to tell the truth. Based upon the foregoing voir dire, the judge had no basis on which to conclude Boy A was competent.

Where the judge conducted an inadequate voir dire under the first prong, and no voir dire on the second prong, it was error for the judge to shift the responsibility of evaluating Boy A's

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[24] For a detailed discussion of the two prongs of the competency test, see Section III.A.1.

competence to Jane Satullo. Her testimony was problematic for several reasons. First, she was clearly biased. As a rape crisis counselor, it was her job to support and advocate for alleged victims of sexual assault,[25] not to give an impartial assessment of testimonial capacity. Second, she was not qualified. She was not a physician[26] qualified under G.L. c. 123, Sec. 19, to "supplement ... a judge's traditional method of assessing competency [of a minor ...], e.g., the voir dire." Commonwealth v. Widrick, 392 Mass. 884, 887-888 (1984). She had only recently completed a Master's program in Psychology and had been employed at the Rape Crisis Center for just a year. Competency Hearing Tr. 58. There is no evidence that she had any training or experience in assessing testimonial capacity. A timely, properly framed objection to her testimony should have been sustained. Cf. *Commonwealth v. Jiminez,* 10 Mass. App. Ct. 441, 443 (1980) (Where no objection interposed, special ed teacher's opinion regarding competence of fifteen-year-old student with disabilities allowed). Finally and most important, Ms. Satullo's opinions failed to satisfy the competency criteria. She provided no explanation of the basis of her opinions, i.e., the competency questions she asked and the answers Boy A gave. While an ability to differentiate between "fantasy and reality" and between "what in fact did happen and what did not happen" may be relevant to second prong of a competency evaluation, Commonwealth v. Ike I., 53 Mass. App. Ct. 907, 908 (2002) (Child witness must be able to

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[25] Girl B "was exhibiting some fear, a lot of clinging to her mother, so it took me a while to engage her friendship. Basically, it was a process just getting down to the child's level, asking them questions and talking with them. Just being friendly, letting them know that I'm there to help them. That I understand they may be scared but I'm there to help them." Tr. 5/139.

[26] Ms. Satullo testified that she approaches an interview with a potential child victim of sexual abuse by "letting them know that I'm there to help them. That I understand they may be

"differentiate fact from fiction"), it is certainly not conclusive. In addition to understanding the difference between the truth and a lie, a witness must understand that he has a duty to be truthful and that he could be punished if he tells a lie. That Boy A may have had "some consciousness of what is right and wrong" fails to address the central question of whether Boy A understood what lying is and that lying is wrong.

There was an inadequate evidentiary basis to support the judge's first prong ruling that Boy A had the ability to "relate things that affect him." Moreover, the ruling completely failed to address the second prong. The judge failed to properly apply the competency test, *Commonwealth v. Mullins*, 2 Allen 295, 296 (1861), and his determination was clearly in error, *Commonwealth v. LeFave*, 407 Mass. 927, 942 (1990) and *Commonwealth v. Monzon, supra* 51 Mass. App. Ct. at 252 (A jury should not be allowed to consider testimony of witness who was erroneously determined to be competent.)

**2. Mother A's testimony that Boy A said "Bernie did it" was**

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scared but I'm there to help them." Tr. 5/139.

[27] "Be a big boy, Boy A. Boy A, I want to ask you a question. Did Bernie ever touch you?" After a defense objection was overruled, Ford asked again "Did Bernie ever touch you, Boy A?" Tr. 4/103. Using one of the anatomically correct dolls, Ford asked Boy A, "Can you show us where Bernie touched you?" Tr. 4/104. Ford asked again, "Now, show us where Bernie touched you, Boy A?" Tr. 4/105.

The questions grew even more explicitly suggestive. "Boy A, remember the time you were bleeding from your P? What happened to your P, Boy A?" No response. "What happened to your P? Remember you had to go to the doctor?" No response. "Boy A, remember the time you were bleeding from your P? Remember the time you had to go to the doctor, Boy A?" Tr. 4/105- 106.

Ford moved on to yet another suggestive topic. "Boy A, did you ever see Bernie's P?" No response. "Did you ever see Bernie's P?" No response. Tr.

**inadmissible hearsay.**

When Boy A failed to testify that Bernie Baran sexually abused him, his mother took the stand and filled the void.

Before Mother A began her testimony, Attorney Conway properly objected to any testimony about what Boy A had said on the ground that it would be improper to allow the testimony under the fresh complaint doctrine where Boy A had not given any substantive testimony. "He would basically be getting called to testify through his mother when he has not testified at all. I would strongly object to that." Tr. 4/153. ADA Ford responded that Boy A made the statement "Bernie did it" when his mother saw blood coming out of his penis, so it was admissible as an excited utterance. Mr. Conway argued that "[i]n order to qualify for that there was something relatively near in time, I don't think the Commonwealth has established their – they basically refused to establish a date or anything." Tr. 4/155. After getting an assurance from the prosecutor that he would "ask some background questions: his age, the circumstances, what occurred," the judge allowed the statement because "I don't think time is the essential element here." Tr. 4/155.

After a few preliminary questions about Boy A's age and the dates that he attended ECDC, Mother A gave the following testimony on direct examination:

Q. Thinking back to one day earlier last October, do you remember being involved in giving Boy A a bath one night?
A. Yes.
Q. Do you remember seeing Boy A do something to himself during the course of the bath?
A. Yes, I did.
Q. Would you please tell the jurors what you saw Boy A do?

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4/107.

A. He was pulling on his penis really hard.
Q. Did you say anything to Boy A at that time?
A. No.
Q. Did you examine his penis more closely at that point?
A. Yes, I did.
Q. Did you observed something?
A. Yes, I did.
Q. Tell us what you observed?
A. A bloody discharge.
Q. Now, first of all, tell us how Boy A was acting at that time when you saw the blood?
A. Nervous. He wouldn't stand still, he was shifting back and forth.
Q. Did he seem scared?
A. Yes.
Q. I assume that you were scared?
A. Yes, I was.
Q. Tell us what questions you asked Boy A?
A. I asked him if anyone had ever touched him.
Q. What did Boy A say?
A. He told me yes.
Q. Did he say who?
A. Yes, he did.
Q. Who did he say?
A. Bernie.

Tr. 4/160-161.

The right of confrontation is guaranteed by the Article 12 of the Massachusetts Declaration of Rights. In limited circumstances, however, the right may yield. "The necessities of the case and the attainment of justice justify admission of hearsay against a defendant in some cases." Commonwealth v. Bohannon, 385 Mass. 733, 741-742 (1982).

> As a constitutional minimum, if the prosecution can demonstrate that a declarant whose statement it wishes to use against the defendant is unavailable to testify during the trial, that statement may be admissible if imbued with such trustworthiness and indicia of reliability that "there is no material departure from the reason of the general rule." Ohio

v. Roberts, 448 U.S. 56, 65 (1980), quoting Snyder v. Massachusetts,291 U.S. 97, 107 (1934).

*Commonwealth v. Colin C.*, 419 Mass 54 (1994)*Id.*

Boy A was not unavailable. He just refused to testify. "[A] child witness's refusal to testify does not reach that measure of necessity which justifies other hearsay exceptions." *Opinion of the Justices,* 406 Mass. 1201 (1989)*Commonwealth v. Kirouac,* 405 Mass. 557 (1989)*Commonwealth v. Brusgulis,* 398 Mass. 325, 332 (1986).

Boy A's statement was not reliable. It did not satisfy the criteria for the spontaneous utterance exception to the hearsay rule. A statement is admissible as a spontaneous utterance if "(1) there is an occurrence or event 'sufficiently startling to render inoperative the normal reflective thought processes of the observer,' and (2) if the declarant's statement was 'a spontaneous reaction to the occurrence or event and not the result of reflective thought.'" Commonwealth v. Santiago, 437 Mass. 620, 623 (2002), quoting 2 McCormick, Evidence § 272, at 204 (5th ed. 1999). The rationale behind this exception to the hearsay rule is that such statements "may be taken as particularly trustworthy." Commonwealth v. McLaughlin, 364 Mass. 211, 222 (1973), quoting J. Wigmore, Evidence § 1747 (3d ed. 1940)

First, there was no basis for the judge to conclude that the Boy A's bath was a particularly exciting event. Boy A was "pulling on his penis really hard" and then his mother, without saying a word, examined his penis. That Mother A ostensibly saw "a bloody discharge" was immaterial to the question of whether the event was sufficiently startling to render Boy A's normal reflective thought processes inoperative. There was no evidence that Boy A saw a bloody discharge from his penis. There was no exciting event from Boy A's point of view.

And second, there was no evidence that Boy A displayed a degree of excitement sufficient to conclude that his statement was a spontaneous reaction to an exciting event. According to his mother, "he was shifting back and forth" and "wouldn't stand still." She described him as "nervous." Finally, she agreed with the prosecutor that Boy A "seemed scared." There is no evidence that Boy A was shocked, surprised or particularly distressed by anything that happened while he was in the bathtub.

In most cases, a spontaneous utterance describes the exciting event. In this case, however, the bathtub events triggered a statement about something that happened at some point in the past, i.e., Bernie touched him. Where a startling event sparks a statement about a prior event, "a concern arises that the declarant might be speaking from conscious reflection, and hence the statement's reliability is in doubt." *Id.* The time between the two events and the statement is also relevant to this consideration. *Commonwealth v. Colin C., supra* 65 (Additional requirements imposed on M.G.L. c. 233, Sec 81 (1992), statute allowing a child's hearsay statement describing a sexual act in a criminal prosecution, to ensure hearsay has 'particularized guarantees of trustworthiness' include requirement that the judge make specific finding regarding reliability on the record.)

Boy A's statement was not imbued with such particularized guarantees of trustworthiness that would justify a departure from the reasoning behind the right of confrontation. "[A] statement given long after the incident and following many opportunities for possibly prejudicial conversations with, or solicitations by, other persons might be either an absolutely accurate and, therefore, reliable statement or one which has been so shaped by the passage of time and intervening conversations that it is not reliable." *Commonwealth v. McLaughlin,* 364 Mass 211,

222 (1973).

### C. Ineffective assistance of counsel.

Defense counsel put forth a two-pronged defense theory with respect to the A counts. First, Baran did nothing wrong. He never had any sort of sexual contact with Boy A, so there was no way Boy A could have gotten gonorrhea from him. Besides, Baran didn't have gonorrhea. And second, he asserted that the As singled Baran out and accused him of sexual abuse because they thought he was gay and should not be working with children.

#### 1. Defense counsel failed to try to exclude the gonorrhea evidence.

The evidence that Boy A tested positive for gonorrhea should not have been admitted. It was irrelevant and it was unfairly prejudicial. Defense counsel made no effort to exclude the evidence. Moreover, counsel made no effort to exclude or strike the speculative, prejudicial testimony of Dr. Jeffrey Ross regarding the likelihood that Mr. Baran had gonorrhea because he was a homosexual.

When Dr. Jean Sheeley examined Boy A on Friday, October 5, 1984, she saw no physical evidence of sexual abuse. Nevertheless, because of the nature of the allegations, she swabbed the child's throat and anus. Five days later, on Wednesday, October 10, the tests came back from the lab. The throat swab tested positive for neisseria gonorrhea. The police immediately obtained a warrant for Mr. Baran. He was taken into custody and transported to the Berkshire Medical Center so that he could also be tested for gonorrhea. Swabs were taken from his throat, penis and anus. All three tests came back negative for gonorrhea.

Had both Mr. Baran and the child tested positive for gonorrhea, such evidence would have been probative; the jurors could reasonably have inferred that Boy A was infected with

gonorrhea as a result of intimate sexual contact with Mr. Baran. Commonwealth v. Nylander, 26 Mass. App. Ct. 784, 786-787 (1989)(Jury could infer that defendant sexually abused five-year-old child based on the child's testimony and medical evidence that both the child and the defendant were diagnosed as having gonorrhea).

Mr. Baran, however, did not have gonorrhea. Indeed, the Commonwealth presented no evidence in its case in chief that Mr. Baran *ever* had gonorrhea.[28] In this circumstance, the evidence that Boy A tested positive for gonorrhea was of highly questionable relevance. Evidence is relevant only if it has a "rational tendency to prove an issue in the case." Commonwealth v. Fayerweather, 406 Mass. 78, 83 (1989). In the absence of evidence that Mr. Baran also had gonorrhea, the diagnosis of gonorrhea was not a link in a chain of evidence that pointed to Mr. Baran. See Commonwealth v. Burke, 339 Mass. 521, 533-534 (1959). Defense counsel should have objected and the judge should have excluded the gonorrhea evidence. No motion in limine was ever filed, nor did Mr Conway ever voice an objection to the admissibility of the gonorrhea evidence during trial.

Relying on speculation and innuendo, the Commonwealth created the illusion of a link to Mr. Baran through the testimony of Dr. Jeffrey Ross. Dr. Ross testified about what gonorrhea is, how it is transmitted, that it can be cured easily and quickly in a day or two, and that homosexuals are more likely to be infected with gonorrhea than the general population. The Commonwealth's house of cards was built on the following faulty inferences: (1) that Mr. Baran

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[28] The only evidence that Mr. Baran ever had a sexually transmitted disease came in during the defense case. When Mr. Baran took the stand in his own defense, he acknowledged that he was treated for a venereal disease when he was fifteen years old, but explained that the

had gonorrhea because homosexuals are more likely to have gonorrhea, (2) that Boy A was infected with gonorrhea by Mr. Baran, and (3) that Mr. Baran tested negative for gonorrhea because, before he was taken into custody and tested, he cured himself with a quick dose of antibiotics. Even though defense counsel knew that Dr. Ross was going to speculate about the possibility that Mr. Baran might have had gonorrhea and then treated it,[29] no motion in limine was ever filed, nor did counsel object while Dr. Ross was testifying. It is particularly shocking that Attorney Conway failed to object to speculation that Boy A was infected with gonorrhea in his throat by Mr. Baran when there was no evidence whatsoever that Boy A ever had oral sex with Mr. Baran - Boy A's mother testified only that Boy A said that Bernie touched his penis.[30]

In Commonwealth v. Kirkpatrick, 423 Mass. 436 (1996), the SJC dealt with the issue of conflicting gonorrhea test results in a child sex abuse case. In *Kirkpatrick*, the defense attempted

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clinician never told him what it was that he had. Tr. 7/127, 7/163-165.

[29] Attorney Conway's opening statement included the following:

> Then we have the evidence which will be introduced about the gonorrhea. I'm sure that when the doctor whom the Commonwealth intends to testify does testify he will tell you that gonorrhea is curable. You will notice evidence that at the time when Mr. Baran was being in a position where he might have been cured that he was actually under arrest and in the custody of the police for a portion of that time.
>
> You will find no evidence from the Commonwealth that Bernard Baran ever did cure gonorrhea, that he ever did have gonorrhea. You will hear evidence from the doctor about the likelihood of all these children catching gonorrhea, if in fact someone had it. You will hear evidence from the doctor – I'm certain that you can't catch gonorrhea from somebody that didn't have it.

Tr. 3/47-48.

[30] In his opening statement, ADA Ford told the jury he expected that Boy A would testify that "Bernard Baran touched his penis; that he touched Bernie's penis and that Bernard Baran put his penis into Boy A's mouth." Tr. 3/27. When Boy A took the stand, however, he provided no substantive testimony.

to offer conflicting gonorrhea tests (the defendant tested positive for gonorrhea, while the twelve-year-old alleged victim did not) to exculpate the defendant. The SJC ruled that, where the defense was offering just the bare medical records without any supporting medical testimony to help the jury understand the likelihood of transmitting gonorrhea, the medical records alone lacked probative value and were properly excluded because they would have left the jury to speculate about the likelihood of transmission.

In the instant case, rather than providing the supporting medical testimony necessary to get the jury beyond speculation as discussed in *United States v. Ham,* 998 F.2d 1247 (4th Cir. 1993)*Commonwealth v. Gillette*, 33 Mass. App. 427 (1992) The first police report filed in the

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[31] ADA Ford's opening statement included the following:

> ... Dr. Sheeley will also tell you that she took some cultures from Boy A's rectum and from Boy A's mouth and you'll hear that the culture taken from Boy A's throat was chemically analyzed and was found that little Boy A, four years of age, had gonorrhea in his throat.

Tr. 3/26.

> ... Finally, you will hear that as part of the investigation the Pittsfield Police Department obtained a warrant authorizing them to take Mr. Baran to the Berkshire Medical Center for purposes of determining if he had gonorrhea. That was done on October 10, 1984, six days after the first case came to light. You'll hear the test results were negative. On October 10th, 1984, Bernard Baran did not have gonorrhea, there's no dispute about that. But you'll hear something else, ladies and gentleman.
>
> You'll hear from a doctor named Jeffrey S. Ross that gonorrhea is the kind of disease that can be cured relatively easily and very quickly; that with proper medication it could be eradicated and cleared up in a matter of days, in some cases virtually overnight. You'll hear how gonorrhea is spread. It's possible for a person who has gonorrhea to give it to one sex partner and not to another depending on the type of contacts and a number of other factors.
>
> So, because Boy A had gonorrhea in his throat and because no other child, thank God, had gonorrhea, I ask you to listen carefully to that evidence because you might find it to be very important and that, in a nutshell, is what the Commonwealth will attempt to prove during the course of this trial.

Baran investigation stated that after receiving a report from a "David" alleging that his son, a student at ECDC day care center, may have been sexually abused by Bernard Baran, Detectives Collias and Beals went to the day care center where they talked with assistant director Janie Trumpy. The report continued, in relevant part:

> Ms. Trumby [sic] in checking checking [sic] her file, found that about the beginning of the school year a complaint was made through the ECDC Sue Eastland, from David complaining that Bernard Baran was a homosexual and objecting that he be allowed to work in child care. At that time we had not told the Trumby [sic] woman who the youth involved was.

PPD Report, "Possible Child Abuse," Collias/Danford/Beals, dated 10/5/84, A-94. This report

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Tr. 3/39-40.

[32] The Commonwealth's closing argument included the following:

> Mr. Conway says: "No, it can't be. It can't be. Boy A had gonorrhea in his mouth and Bernard Baran didn't have gonorrhea." Well, in the first place you heard Dr. Sheeley and Dr. Ross say that it is entirely possible for a person who has gonorrhea to give it to one sex partner and not to another. It depends upon the type of contact for one thing. A person who has gonorrhea on his penis is not going to give it to a child by putting his finger into the child's private area. It's not going to be spread that way.
>
> You heard the doctors say that gonorrhea is the kind of disease that can be cured very easily and quickly. With the proper treatment it takes twelve to twenty-four hours, sometimes forty-eight hours. Bernard Baran did not have gonorrhea on October 10th, but that doesn't mean he didn't have it when he raped these children. Remember he was bailed out on October 7th at 2:00 P.M. He was tested three days later on October 10th after 7:00 P.M. If he had it don't you think the first thing he would have done upon being bailed out is to have it treated to get rid of it and three days is adequate time. We know that from the medical testimony. But don't stop there. If he had it at any point before October 6th he would have gotten rid of it the next day. It's entirely consistent for him to have had it when he abused Boy A and the next time he had access to a child, for him to have gotten rid of it. It's perfectly consistent and perfectly logical to consider.
>
> Remember Dr. Ross told you that people who have had it once before have a greater chance of getting a second time by virtue of their life style. You recall Bernard Baran's own testimony that when he was fourteen or fifteen he had venereal disease. What does that tell you? That tells you why Boy A had gonorrhea in his throat. Poor little boy.

was the obvious genesis of the homophobia defense.

In his opening statement, Attorney Conway told the jury that they would hear evidence that David complained about Bernie Baran to ECDC, saying that "he did not want a nineteen-year-old homosexual teaching his son," months before the As ever accused Baran of sexual abuse.[33] Then, when there was something wrong with Boy A, David's tendency was "to blame it on someone who he already had prejudice against, who he had already expressed prejudice against, Bernard Baran, in his mind, a nineteen-year-old homosexual." Tr. 3/43. Conway failed, however, to develop the promised evidence. Undercutting the credibility of the defense, he never elicited evidence that the As did in fact make a homophobic complaint to ECDC about Baran.

During cross-examination of Mother A, Conway asked if, prior to the sexual abuse allegations, David brought up the subject of Bernie's homosexuality. The judge directed Mother A to answer yes or no. She answered "Yes." Conway then asked "Did he, to your knowledge, go to the school about this fact?" Ford objected again. Initially, the judge ruled that she could answer "[t]o her knowledge if she knows," but before the she could answer, the judge further narrowed the question, "Were you present? Not what anyone told you." Mother A answered

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Tr. 8/61-63.

[33] Specifically, Attorney Conway told the jury that he would show that Mother A's live-in boyfriend, David had "back sometime in September or late August ... gone to the Early Childhood Development Center and verbalized his feelings about Bernard Baran, telling the people at ECDC that in effect, he did not want a nineteen-year-old homosexual teaching his son. It will show his prejudice towards Bernard Baran. It will show that when he, not his mother, but David – that when he found something wrong with the children his tendency was naturally to blame it on someone who he already had prejudice against, who he had already expressed prejudice against, Bernard Baran, in his mind, a nineteen-year-old homosexual."

"No," indicating that she was not present. She denied that she personally "ever [went] to the school about the fact?" The inquiry ended there. Tr. 4/170.

Janie Trumpy, the executive director of ECDC, denied that she had ever seen or had knowledge of a complaint from one of the A parents about Bernie. She acknowledged that she told police investigating the A allegations that a complaint had been made about Bernie, but denied that she identified David as the source of a complaint because she did not know the name of the person who made the complaint. Ms. Trumpy stated that Lyn Witter, an ECDC administrative staff person, informed her that a complaint was made about Bernie Baran during the summer of 1984, but said that she did not know whether Ms. Witter had a written report of the complaint. Tr. 5/11-14.

The testimony by Janie Trumpy and Mother A was the only evidence the jury heard about a complaint that Baran was gay and should not have been allowed to work with children. Establishing that such a complaint was made by the As was essential to an understanding of how the first allegation of sexual abuse by Baran came to be made. After putting forth the defense theory that the As' allegations against Baran were the product of homosexual bias, Attorney Conway failed to competently develop the evidence supporting the theory.[34]

Detective Joseph Collias, who learned that the As had made a prior complaint about Mr.

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[34] Undaunted by, or perhaps oblivious to, his own failure to elicit testimony that the As had complained to the school that Baran was gay, Conway improperly claimed in his closing argument that school records indicated that in July David complained to the school that "Bernie Baran was a nineteen-year-old homosexual dropout and unfit to teach his child." "There was no complaint at that time that there was any molestation, but it does show someone with an ax to grind, someone for some reason had some problem with Bernie Baran." Tr. 8/21.

Baran because they thought he was gay when he went to ECDC to investigate the As' complaint, testified at Mr. Baran's trial. Tr. 5/86-92. On cross-examination, Attorney Conway failed to asked the detective a single question about what he knew about the As' complaint that Baran was gay. Conway's failure to pursue this legitimate line of inquiry is particularly curious in light of the fact that Mother A and Janie Trumpy had already testified, so Conway was acutely aware that he had not yet managed to elicit evidence in support of his defense.

That first police report identified Sue Eastland and/or David as the source of the complaint that Baran was gay. Both names were listed on the Commonwealth's Certificate of Discovery as potential witnesses. Conway could have called either or both. He did not. Trumpy testified that Lyn Witter, an administrative staff person at ECDC, took the complaint that Baran was gay. Ms. Witter, likewise, was listed as a potential witness. Conway did not call her either.

Apparently Mr. Conway did no investigation on this critical point. The file contains no request for discovery under 14, Mass. R. Crim. P., 378 Mass. 874 (1979). Had he fulfilled his duty to investigate,[35] he might have obtained from the Commonwealth an undisclosed[36] police

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[35] The American Bar Association Standards for representation of criminal defendants requires an attorney to investigate the case, which includes seeking information from the prosecution:

Defense Function Standard 4-4.1 Duty to Investigate

(a) Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. *The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities.* The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty. (Emphasis supplied).

report memorializing an interview with Susan Eastland. The untitled police report stated in relevant part:

> Interview with Susan E. Eastland ...
>
> Present Position: Social Worker for the Massachusetts Society for the Prevention of Cruelty to Children since July 1984.
>
> Ms. Eastland is the social worker for the A Family. On August 7, 1984, Mother A whose son Boy A age 3 was attending ECDC, made an accusation that she knew Bernie Baran was a queer by the was [sic] he talks and walks.
>
> On August 21, 1984, as the result of this disclosure by Mother A to Ms. Eastland, Ms. Eastland called ECDC by phone and spoke to Ms. Lynn Witter. She then informed Ms. Witter of Mother A's accusation in regard to Baran being a queer.

PPD Report, Untitled, Sgt. Frank P. Polidoro, 10/25/84. Had defense counsel been armed with information contained in the report of the Eastland interview, his cross-examination of Mother A presumably would have focused on Mother A's homophobia, not David's. Moreover, it would have been abundantly clear that Susan Eastland was a material witness for the defense.

Competent, aggressive cross-examination of Mother A would have yielded a homophobia goldmine. In a July 1988 deposition in her civil lawsuit against ECDC, Mother A testified that from she did not like Mr. Baran from the time Boy A started at ECDC in 1983 because he seemed gay, but she didn't know for sure until the end of September 1984 when a friend said that he heard Bernie was "queer." Deposition of Mother A, 7/6/88, pps. 75-79. When they heard this, Mother A and David were already "pretty fed up with the problems that were going on" (presumably Boy A's behavioral problems at ECDC). The next day, David phoned the school

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[36] The prosecution's failure to disclose will be discussed later in the section entitled "Prosecutorial misconduct."

and told someone (Mother A thought he talked to Pat but she wasn't sure) that they "didn't feel somebody with that kind of life style should be working with kids." The school politely responded that a person's life style was his own business and that the As could take Boy A out of school if they wished. Boy A did not go back to ECDC. A week later they "found out." Id., pps. 77-78. Mother A said that if she had known that Mr. Baran was gay prior to September 1984, "I probably would have taken him out because I had a very bad attitude about the gay community... Since then, I have learned that not all gay people rape kids... At that point, I felt that if they're gay, they shouldn't be with kids. They shouldn't get married. They shouldn't have kids. They shouldn't be allowed out in public. I was very prejudiced toward them." Id., pps. 81-82.

The obvious question in a case like this is - why would the As have singled out Bernard Baran and accused him of sexual abuse? With minimal diligence counsel could have obtained credible evidence to support the theory that the As' accusation may well have been the product of homophobia. His failure to investigate fell beneath the level of competency expected. *Commonwealth v. Saferian,* 366 Mass. 89, 96 (1974). Clearly, "better work might have accomplished something material for the defense." *Commonwealth v. Satterfield,* 373 Mass. 109, 115 (1977).

**3. Defense counsel prejudiced Mr. Baran by unnecessarily labeling him a homosexual.**

That the As thought that Mr. Baran was gay was central to the defense, but whether Mr. Baran was indeed a homosexual was both irrelevant and highly prejudicial. Attorney Conway poisoned his own defense by presenting his client to the jury as a homosexual.

Acceding to a request from Mr. Conway, Tr. 1/22, the judge informed potential jurors during individual voir dire that they would be hearing evidence that might tend to show that Baran was a homosexual or had homosexual tendencies, see e.g. Tr. 1/92, and asked if they would tend to believe a witness any more or less because his is a homosexual, see e.g. Tr. 1/94. In his opening statement, Conway referred to Mr. Baran as a "nineteen-year-old homosexual." Tr. 3/43.

"Because of its prejudicial character, evidence of homosexuality may be properly introduced only if it is relevant to the charged crime. [citations omitted] In this case, the evidence was improperly introduced because homosexuality is not relevant to the crime charged. The belief that homosexuals are attracted to prepubescent children is a baseless stereotype." *State v. Bates,* 507 N.W.2d 847, 852 (Minn. App. 1993)(irrelevant whether male gymnastics coach charged with sexual abuse of eight- and twelve-year-old male students is attracted to adult men). On some level, Mr. Conway apparently recognized that whether Mr. Baran was, or was not, a homosexual was not relevant because, despite his request for voir dire on homosexuality and his opening statement labeling his client as a homosexual, Conway never elicited any evidence of Mr. Baran's sexual preference, not even when Mr. Baran testified in his own defense. Unfortunately, the damage had already been done.

While evidence of homosexuality is extremely prejudicial,[37] "no evidence could be more

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[37] *State v. Woodard,* 146 N.H. 221, 225 (2001)(Reversible error to introduce evidence of adult lesbian relationship in trial of female middle school teacher charged with sexual assault of female student.), citing *United States v. Gillespie,* 852 F.2d 475, 479 (9th Cir. 1988)(reversible error to admit evidence that the defendant had a homosexual relationship; evidence did nothing help the trier of fact decide whether he was guilty of sexually abusing his three-year-old

inflammatory or more prejudicial than allegations of child molestation." When a jury hears evidence of a defendant's homosexuality and allegations of child molestation in the same case, the risk of unfair prejudice is compounded.*Guam v. Shymanovitz,* 157 F.3d 1154 (9th Cir. 1998)*Id.,* at 1161.

The prejudice was compounded when the Commonwealth elicited testimony that homosexuals are more likely to have gonorrhea**.** Gonorrhea, of course, was the linchpin of the A case. The Commonwealth had no evidence that Baran had gonorrhea in 1984, much less that he ever took a dose of penicillin to rid himself of the disease. Homosexuality provided the much-needed means of linking Baran to gonorrhea. Dr. Ross testified that homosexuals are more likely to be infected with, and to be reinfected with, gonorrhea than the general population. Asked whether gonorrhea is "especially prevalent among any particular subgroups of the population," Dr. Ross responded affirmatively, adding "Well, obviously it's described in greater frequency in prostitutes and in male homosexuals." Tr. 5/110-111. Mr. Conway failed to object.

Dr. Ross's statement was improper for two reasons. First, character evidence is not admissible to prove that a person acted in conformity therewith. *Commonwealth v. Wolcott,* 28 Mass. App. 200, 210-211 (1990)(testimony of police officer that defendant was a member of a street gang was irrelevant and prejudicial). "Evidence of a person's sexual preference or

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daughter.) "There was a clear potential that the jury may have been unfairly influenced by whatever biases and stereotypes they might hold with regard to homosexuals ..." *Cohn v. Papke,* 655 F.2d 191, 194 (9th Cir. 1981) (reversible error to introduce evidence concerning the plaintiff's prior sexual experiences and sexual preferences in a civil lawsuit filed against two Los Angeles police officers who arrested the plaintiff on the charge that he solicited a police officer to engage in a homosexual act); *United States v. Provoo,* 215 F.2d 531, 534 (2nd Cir. 1954)(evidence that a defendant on trial for committing treason while he was a prisoner of war had been suspected of being a homosexual was "utterly irrelevant," "highly inflammatory," and

propensities is generally considered character evidence." Utley v. State, 699 N.E.2d 723, 728 (Ind. App. 1998). See State v. Lambert, 528 A.2d 890, 893 (Me. 1987)(evidence of victim's character as a heterosexual not admissible as character evidence). And second, the prejudicial effect far outweighed any probative value the statement may have had. Any "ordinary fallible lawyer" would have sought to keep such a highly prejudicial statement out of the case.

At the conclusion of the Commonwealth's case, defense counsel moved for a required finding of not guilty on the charges relating to Boy A - one count of indecent assault and battery and one count of rape. Tr. 6/137. The prosecutor conceded that there had been no direct testimony from Boy A, but argued that the child's excited utterance that came in through the mother's testimony was substantive evidence and was therefore sufficient to let the case go to the jury. He asserted that the person who put his penis in Boy A's mouth was the person who gave him gonorrhea. The jury, he claimed, could infer from the diagnosis that Boy A had gonorrhea of the throat and the fact that Bernie was the only male teacher's aide at ECDC that Bernie was responsible for giving Boy A gonorrhea. Tr. 6/138-139. The judge granted the motion for the required finding of not guilty. Tr. 6/143.

Inexplicably, defense counsel did not move for a mistrial in the wake of the devastatingly prejudicial A evidence. (The error is magnified in light of the undisclosed evidence that Boy A reported someone other than Mr. Baran sexually assaulted him. See Section IV.F.1.) Conway had already moved to sever, albeit unsuccessfully. He had already argued that the evidence from one case would have a prejudicial impact on the next. Boy A was the only child who tested positive for gonorrhea. The gonorrhea evidence was among the most inflammatory evidence in

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"so prejudicial as to constitute reversible error.")

the entire case. It is virtually impossible to imagine a juror who would not have been revolted by evidence that a young child tested positive for gonorrhea of the throat. No reasonable strategy could have justified counsel's failure to move for a mistrial.

In what can only be characterized as the epitome of incompetence, Conway continued to present the defense case as if he were still defending against the A counts. Without the A counts, whether or not Mr. Baran ever had gonorrhea was no longer an issue. It is therefore hard to imagine why he elicited testimony from Mr. Baran about his history of treatment for venereal disease. Tr. 7/127. In a damaging cross-examination, the prosecutor established that the venereal disease that Mr. Baran was treated for at the age of fourteen or fifteen might well have been gonorrhea.

Q. Now, sir, you had gonorrhea; is that true?
A. I don't know if it was gonorrhea.
Q. Well, you had a venereal disease?
A. Uh-huh.
...
Q. You're telling us that you don't know what it was?
A. No. The lady told me it is – the way she described it she said it is a venereal disease. She never gave it a certain name.
Q. Yet you told your roommate, did you not, that you had gonorrhea?
A. No. I told him it was a venereal disease.

Tr. 7/163-164.

Q. You didn't have gonorrhea on October 10th?
A. No.
Q. And the first time and only time you had it was about four or five years ago?
A. Yes.

Tr. 7/167. The "ordinary fallible lawyer" would have tried mightily to keep the foregoing testimony out of the case.

The ineptitude continued. Even though the A counts had been dismissed, the A evidence

figured prominently in Conway's closing argument. Conway, who argued first, pointed out that on the single occasion that Bernie was alone in a room with Boy A for just five minutes, Boy A was calmer when he came out. Conway asked rhetorically, "Would a four or five-year-old child be calmed by the man who was molesting him? Would he have come out of that room calm, settled down, if Bernie was in there molesting him, having sex with him? I suggest to you the answer is, No." Tr. 8/19. As to how Boy A contracted gonorrhea, Conway pointed out that there was no evidence that Mr. Baran had gonorrhea between January and October 1984. Indeed, the only evidence was that Bernie Baran tested negative for gonorrhea. Tr. 8/20. He then made the bizarre argument that, even assuming that Bernie did have gonorrhea, the Commonwealth's two medical experts did not agree on the likelihood of transmission to other sexual partners. Dr. Ross, the pathologist, opined it would be a 30%-80% chance, while Dr. Sheeley, the pediatrician, stated that it would be a 40% - 60% chance. That was not consistent with the evidence that only one of the six child victims tested positive for gonorrhea. He reasoned:

> There's very little chance that only one person in six is going to come out with this so, therefore, if Bernie Baran had gonorrhea and if he did all the terrible things he supposedly did, why do we have only one case of gonorrhea? Why is it that all of these other people , all of us are so lucky that none of the other five contracted the same dread disease. I submit to you, no, that it's not the reason. The probability is that Bernie Baran didn't do it in the first place.

Tr. 8/37-38.

Not surprisingly, the prosecutor likewise argued the A evidence.

> Mr. Conway says: "No, it can't be. It can't be. Boy A had gonorrhea in his mouth and Bernard Baran didn't have gonorrhea." Well, in the first place you heard Dr. Sheeley and Dr. Ross say that it is entirely possible for a person who has gonorrhea to give it to one sex partner and not to another. It depends upon the type of contact for one thing. A person who has gonorrhea on his penis is not going to give it to a child by putting his finger into the child's private area. It's not going to be spread that way.

> You heard the doctors say that gonorrhea is the kind of disease that can be cured very easily and quickly. With the proper treatment it takes twelve to twenty-four hours, sometimes forty-eight hours. Bernard Baran did not have gonorrhea on October 10th, but that doesn't mean he didn't have it when he raped these children. Remember he was bailed out on October 7th at 2:00 p.m. He was tested three days later on October 10th after 7:00 p.m. If he had it don't you think the first thing he would have done upon being bailed out is to have it treated ... It's entirely consistent for him to have had it when he abused Boy A and the next time he had access to a child, for him to have gotten rid of it. ...

Tr. 8/61-62. Ford concluded his argument on gonorrhea by urging the jury to recall Dr. Ross's testimony that a person who has had gonorrhea is more likely to be reinfected than someone who never had gonorrhea at all and that it's more frequently seen in "prostitutes and in male homosexuals." Tr. 5/110-111.

> Remember Dr. Ross told you that people who have had it once before have a greater chance of getting it a second time by virtue of their life style. You recall Bernard Baran's own testimony that when he was fourteen or fifteen he had venereal disease. What does that tell you? That tells you why Boy A had gonorrhea in his throat. Poor little boy.

Tr. 8/62-63.

During final jury instructions, the judge informed the jury that he had withdrawn the A charges - one for indecent assault and battery and one for rape - from their consideration. He instructed that the "indictments are simply not for your consideration. Don't speculate or concern yourselves in any way as to those ... matters. They're simply not before you. You need not consider them and you should focus on the remaining nine indictments ... and confine yourselves to the evidence." Tr. 8/69. While the jury was instructed not to consider the A indictments, all of the A evidence remained before them as evidence. Conway failed to request, and the judge failed to give, an instruction that the jury was not to consider any of the A evidence.

There is simply no way that counsel's conduct can be seen as a valid trial strategy. Counsel's failure to move for a mistrial or to move to strike the A evidence (although even the strongest curative instruction to disregard the A evidence would have been inadequate with such highly inflammatory evidence) resulted in highly prejudicial evidence remaining in front of the jury as direct evidence of guilt. Counsel's performance fell well below that expected of the "ordinary fallible lawyer." Better work might have accomplished something material for the defense. Commonwealth v. Barrett 418 Mass. 788, 796 (1994)(defendant denied effective assistance of counsel where counsel failed to move to exclude evidence of indecent assault and battery charges barred by the statute of limitations in trial for rape of a child).

**5. Defense counsel failed to develop evidence that Mother A's bathtub story was a recent invention.**

The only account of Boy A's initial disclosure about Bernie Baran came from Mother A. Mother A testified that, while she was giving Boy A a bath in early October, she saw that he was pulling on his penis and observed "a bloody discharge." She asked Boy A "if anyone had ever touched him," to which he answered "yes." As to who, he said "Bernie." Tr. 4/160-162.

Because present counsel has only incomplete discovery at this time, it is impossible to determine when the bathtub story first materialized. It is clear, however, that the story appears nowhere in any of the police reports, DSS reports, or medical reports obtained to date.

On Friday morning, October 5, 1984, David called Sgt. Henault in the drug unit at the Pittsfield Police Department to report that "his son" came home from school "yesterday" (Thursday) and had "blood on or coming out of the end of his penis" and his son told him Bernie did it. Bernie, he explained, was Bernie Baran, a teacher at Boy A's day care center.

On Friday afternoon around 4:00 p.m., the As took Boy A to the Emergency Room at Berkshire Medical Center to be examined. There was no mention of the bathtub story. According to the nursing triage notes, David reported that he "noted bloody drainage from tip of penis yesterday. Child acting unusually difficult for past few weeks. Has come home from school with different undershorts on previous occasions." Hospital staff called Dr. Sheeley, who just happened to be in the hospital, to come down to the ER to do the child abuse evaluation. Sheeley depo, 35. Dr. Sheeley began her evaluation by talking to Mother A and David. She made the following notes:

> Acc. to father, clutching penis on + off x few mos. Asked if anyone touching him, said "Bernie" ~ 3 mo ago. Yest. c/o pain in penis, parents noted drop of blood at opening. Said "Bernie" touches it. Showed a rubbing motion, held up finger + said "Bernie makes it go away." Sometimes comes home [with] no underwear or [changed] underwear. Sometimes says "it's a secret" when asked if anyone at school touches him. Attends ECDC. According to father, Bernie is ECDC staff.

Berkshire Medical Center ER record, A-438, 440.

On Saturday morning, October 6, the A family went to the Pittsfield Police Station. Mother A and David were interviewed individually by DSS social worker Brian Cummings, while Boy A was interviewed by a detective. Notes of DSS interview of David and Mother A, A-450. David was interviewed first. There was no mention of the bathtub story. He told Mr. Cummings that in the last three to four months, Boy A had been acting out in school and ECDC wanted him out. Among other things, Boy A had thrown a fork at Bernie Baran. At that time, Boy A was wetting his pants and squeezing his penis. When David asked Boy A why he was doing that, Boy A said it was because he liked to do it. During this time, Boy A was coming home with different underpants or no underpants on. David and Mother A asked him if any one

touches him and he said "it's a secret." Mother A mentioned this to her MSPCC social worker, Sue Eastland. As to what became of this, David said, "Mother A sometimes gets excited and people don't take her seriously." As to when Boy A last went to ECDC, David replied "I think Wednesday." DSS Child Abuse and Neglect Report, Cummings, 10/7/84, pps. 8-8a, A-457.

Mr. Cummings then interviewed Mother A. She likewise made no mention of the bathtub story. She said that Boy A was an excellent student until he was put in a room with Bernie, when he began hitting other kids, swearing, etc. ECDC moved Boy A to another classroom. He was okay for a week and then Bernie was assigned to that room. She said that Bernie was alone with the children in the morning from 7:30 a.m. until 8:15 a.m. When Boy A was bad, Bernie put him in a room alone and talked to him. She claimed that about six months earlier, Boy A began to wet the bed at night and to wet his pants during the day. Mother A mentioned this to Dr. Sheeley but she was not concerned. DSS Child Abuse and Neglect Report, Cummings, 10/7/84, p. 8a, A-457. Mother A also spoke to the detectives while she was at the station. She told them that she began to see Boy A being different around the end of July. He began to openly fondle himself, he would cry for no reason, he became withdrawn, and talked about bleeding. PPD Report, "Indecent A&B," McGuire/Beals, 10/6/84, A-103.

On Sunday, October 7, at about 11:00 a.m. the Mother A and David took Boy A to the DA's office for a videotaped interview. No statements by Mother A or David were documented. PPD Report, "Video taping of interview of 'Boy A' age 4 yrs. old," McGuire, 10/7/84, A-104.

In contrast to the investigation of the allegations that other families made against Mr.

Baran,[38] it would appear that no written statements were ever obtained from Mother A or David about Boy A's "disclosure" or about anything else. In a report dated, 10/13, Detectives Beals and McGuire noted that they told Mother A that they would bring her in for a statement during the coming week. PPD, "Bernard Baran Jr. Case," Beals/McGuire, 10/13/84, A-123. No such statement was ever disclosed.

Within a week of making the allegations against Mr. Baran, David and Mother A gave a lengthy interview to a reporter from the *Berkshire Eagle*. "Parents of ECDC pupil say it should be closed," *Berkshire Eagle*, Lynne A. Daley, 10/13/84, A-179. Once again there was no mention of the bathtub story. According to the article, the As ostensibly called the *Eagle* because they wanted to share their thoughts on the case because they felt people were not taking the problem seriously enough. Mother A said that Boy A first complained that "teacher touched me" three months ago. Boy A refused to elaborate, saying that "it's a secret." In contrast to her testimony about the Thursday night bath, she told the reporter that Boy A did not mention it again "until last Friday." At that point, they immediately called the police. Mother A went on to say that she had been told several months earlier that Boy A had grown violent and antisocial. When the school asked her to take him out of the day care center, she suggested that he might do better in another room. He did well during the first week after the room assignment was changed, but the trouble began again when Bernie Baran was assigned to the same room. She explained that real awareness of the problem came a couple of weeks earlier, when she saw a

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[38] For example, Mother B gave police a four page written statement about her daughter's disclosure, and Mother E gave police a two-page written statement about her daughter's disclosure.

show about child sexual abuse narrated by Mike Farrell on public television. From that show, she learned that loss of appetite, bed wetting, a change in personality, or trouble sleeping could indicate sexual abuse. Boy A had all of those symptoms. Her first reaction was, "I'm scared. And how do I prove it?"

In cross-examination of Mother A, Attorney Conway never challenged the vintage of the Thursday night bath story. To the contrary, his lack of preparation and inept questioning implied that the only part of the story that he doubted was who was bathing Boy A. Even though none of the police reports ever mentioned the bathtub, he asked Mother A if she knew any reason why David would have reported to the police that he was the one who was actually bathing Boy A. The judge sustained a prosecution objection on the ground that it was a fact not in evidence. Tr. 4/168-169. Conway missed a golden opportunity. If the Thursday night bathtub story was true, that made the Friday morning story that she told the *Eagle* false. Moreover, if she really saw her son bleeding from his penis, it was strange that she did not take her son to a doctor until late the next day.

A probing interrogation of Mother A's bathtub story in Mr. Baran's trial would have poked holes in her story. By the time that A's civil case went to trial ten years later, the bathtub story had changed dramatically. In April 1995, Mother A testified that Boy A was sitting in the tub with his toys. He was pulling on his penis and complaining that it hurt. He said, "Mommy, my pee-pee is bleeding." She looked but she could not see anything because he was in the water. She asked him why it hurt. Boy A did not answer. She asked him if anyone had ever touched him there to make it hurt." He said, "yes." As to who, he said "Bernie." A Civil Trial, Tr. 103, 144.

### 6. Defense counsel never investigated the bathtub story and, as a result, never learned that David told a different, exculpatory version of the bathtub story.

Mother A testified that David was present during Boy A's Thursday night bath. Tr. 4/168-169. In a deposition that was taken on July 14, 1988, in connection with Mother A's lawsuit against ECDC, David gave a very different account of what was said in the bathroom. He testified that Bernie Baran was just one of the names that Boy A mentioned during the bath. According to David, "Boy A was standing there holding his penis very tightly, and he was bleeding so I asked him to stop doing it... And he goes why. Teacher does it... And he mentioned Bernie first and then two other teachers." David continued, "I tried to interrogate him real thoroughly... I tried to throw him off the track and get him to say different names ... And he come up with a few different names, but Bernie was the one he said the most often." As to what Bernie did to him, Boy A "said that he fondled him or, not, you know, didn't, kid can't say fondled, but that he touched him or something." David Deposition, 7/14/88, Tr. 31-32. After the bath, David "called the special investigating unit at the police department... They said that they would take care of it. That they were going to arrest Bernie Baran." As to what prompted him to call the police and make the allegation against Mr. Baran, David explained, "I used to get real high, and I'd get things in my head ..." David Deposition, 7/14/88, Tr. 32-33.

Defense counsel knew David was a key player in the case. Despite the fact that David was listed as a witness for the prosecution and a person who defense counsel had reason to believe figured prominently in the initial allegations, counsel failed to interview or otherwise

investigate David prior to the trial.

**7. Defense counsel failed to develop evidence that the As did not seem to be particularly eager to have Boy A examined by a doctor.**

Mother A claimed that she saw blood on her son's penis during a Thursday evening bath. Had she been alarmed, it would have been a simple proposition to call the pediatrician or to take him to the emergency room. She did neither on Thursday evening. She did nothing during the day on Friday. It was not until late Friday afternoon that Mother A and David took Boy A to the emergency room. Their choice of the emergency room was particularly odd since Boy A had seen his pediatrician, Dr. Sheeley, at her office the day before because he had been suffering from a cold and cough for a week. Dr. Sheeley's Notes, A-446. Attorney Conway failed to ask any questions at all about this.

**8. Defense counsel failed to develop evidence that Dr. Sheeley's physical examination of Boy A on October 5 was completely normal.**

In her examination of Boy A, Dr. Sheeley noted that his throat, abdomen, external genitalia and perirectal area were all normal, with no sign of trauma or blood.[39] This information seriously called into question Mother A's claim that she saw blood on her son's penis and that it was seeing the blood that prompted her to ask him if anyone had been touching him. But Mr. Conway did absolutely nothing to develop this information.

Years later in a civil deposition, Dr. Sheeley elaborated on her examination of Boy A on

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[39] When Dr. Sheeley examined Boy A's penis, she asked him if anyone touches him there. Boy A said "Bernie," but he refused to elaborate when she asked him what Bernie does. He denied that anyone had been putting anything in his mouth and he denied that he put anything in

October 5. She saw no signs of sexual abuse when she examined him. His physical examination was completely normal. The only reason she suspected sexual abuse was the history given by David and Mother A and the few things that Boy A said in Mother A and David's presence. It was because of the history that she made a referral to DSS. Sheeley deposition, 4/11/88, Tr. 47-51.

**9. Defense counsel failed to establish that the 51A report that alleged that Boy A was molested by Bernie Baran also alleged that Mother A and David had neglected Boy A.**

The jury never knew that, when Dr. Sheeley called the DSS hotline to report that she had reason to believe that Boy A had been abused, she actually alleged two types of abuse: sexual abuse by Bernie Baran (because of what the As had said) and neglect by Mother A and David because of their failure to do anything when Boy A supposedly told them three months earlier that "Bernie" had touched him. Mr. Conway failed to cross-examine Mother A and Dr. Sheeley on the As' claim that Boy A said Bernie touched him three months earlier. If that statement was not true or was an exaggeration, it would have raised questions about Mother A and David's credibility.

**10. Defense counsel failed to develop evidence that would support the suggestibility defense.**

Boy A was questioned about sexual abuse on numerous occasions, both before and after his "disclosure" on October 4.

5. After Mother A and David saw the television show narrated by Mike Farrell that

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Bernie's mouth. Berkshire Medical Center ER Record, 10/5/84, A-438, 440.

they described to the reporter for the *Eagle*, Mother A expressed concern that Boy A had all of the symptoms. The next day, David asked Boy A if anyone had ever touched his "pee?" Boy A responded with gibberish and ran out of the room. Mother A Deposition, 7/6/88, Tr. 83-84.

6. Boy A was questioned by Mother A and David in the bathtub on October 4.

7. Boy A was questioned by Dr. Sheeley in the Emergency Room of Berkshire Medical Center on October 5. Mother A and David were present.

8. Boy A was questioned by Detective Beals at the Pittsfield police station on Saturday, October 6. Boy A sat on David's lap during the interview. PPD, "Indecent A & B," McGuire Beals, 10/6/84, A-103.

9. Boy A was questioned by Jane Satullo at the District Attorney's Office on October 7. The interview was videotaped and observed on a monitor by Mother A and David, DSS social worker Brian Cummings, ADA Gerard Downing, Detective Peter McGuire, a victim witness advocate and the videographer. PPD, "Videotaping of interview of "Boy A" age 4 yrs. Old," McGuire, 10/7/84, A-104. Interview of Boy A, A-733.

10. Boy A was questioned by Dr Sheeley a second time on October 10, after she got the report that Boy A tested positive for gonorrhea of the throat.

> Re-questioned re whether Bernie put anything in his mouth. Very reluctant to answer, but after being told several time that there are no more secrets, replied "yes" –> when asked if Bernie "put his pee-pee in your mouth." "What happened then?" "He told me to lick it but I didn't wanna." "Then what?" "He said it would be allright." Asked to show me w/ his finger how far it put his pee-pee in, he put finger on back of tongue and said "it put it down my throat." Asked if Bernie ever hurt him, he said

"he put soap on my pee-pee and it hurt."

Dr. Sheeley's notes, 10/10/84, A-446.

11. On October 13, Detective McGuire showed Boy A a photo array that included Mr. Baran's picture and asked him if any of them had done bad things to him. After that, Detectives Beals and McGuire drove Boy A and Mother A to ECDC. On the way Boy A talked about where Bernie did bad things to him. Mother A revealed that Boy A had really begun to open up about what's been going on. PPD, "Bernard Baran Jr. Case," Beals/McGuire, 10/13/84, A-123.

12. Boy A was taken to "mock hearings" at the courthouse for about six weeks to prepare him to testify. Quarterly Summary of Psychotherapy Notes of Anna Pollack re Mother A," A-155A.

Even though defense counsel, in his opening statement, told the jury that the children were subjected to suggestive questioning by "the mothers, the fathers, the police department, Rape Crisis Center," he failed to develop this theory in his cross-examination of the A witnesses.

**11. Defense counsel failed to investigate or develop evidence of a history of violence in the A home.**

The jury heard just a few cryptic references to the toxic family to which Boy A was exposed. The dysfunctional environment in the A family was a key piece of the defense theory, Tr. 3/43-44, but the jury heard nothing of the extreme violence in the home.

On cross-examination, Mother A acknowledged that she had occasional arguments with David and admitted that the arguments generated turmoil in the home from time to time, Tr. 4/173-174, but the jury never heard that physical violence was a common occurrence in the A

home. In a sidebar, Attorney Conway explained that he needed to counter Mother A's testimony about Boy A's behavioral issues with evidence that Boy A was regularly exposed to fights in the home between Mother A and David - "the fighting, the carrying on where she goes to the police, through the court, and has this man charged and convicted of abuse." ADA Ford indicated that he was agreeable to the line of questioning about fighting in the home, but then he objected when Conway asked whether the arguments had escalated to the point where Mother A sought a criminal complaint against David. Tr. 4/172-173. The judge sustained the objection and directed Conway to bring the line of questioning to a conclusion. Mr. Conway knew that David was sitting in jail on domestic violence charges filed by Mother A, Berkshire Eagle, "David faces assault count," A-182, but when Conway asked if she knew where David currently resided, the judge sustained Ford's objection.

In the A civil case, it was later revealed that David was extremely violent, especially when he was not high. Civil trial Tr. 134-135 He assaulted Mother A more than twenty times. On one occasion, he hung her out of a second story window by the ankles, threatening to drop her on her head if she didn't say that she was sorry and that she loved him. Civil trial Tr. 135 Mother A was not the only one to get hurt. On March 29, 1983, David plunged a five-inch hunting knife into his own heart while Boy A was in the house. Civil trial Tr. 135-136. Mother A's relationship with David ended in October 1984, within 2 weeks of going to the police about Baran. After an argument, he left, but soon returned to the home to take all the pictures of them off the wall, cut the pictures and cut himself and put blood on all the pictures. After that, Mother A got a restraining order. Civil trial Tr. 147-148, 166. David was subsequently arrested for assault. Berkshire Eagle, "David faces assault count," A-182

Domestic violence in the A home was probative and material. A competent trial attorney would have found a way to get it in front of the jury.

**12. Defense counsel failed to investigate or develop evidence that Mother A and David were severe drug addicts.**

Mother A's testimony created the impression that she was just a young mother struggling to care for her children while dealing with "personal problems ... of a psychiatric nature." Tr. 4-167. This benign portrayal masked the sordid truth that Mother A and David were drug addicts of the worst kind.

Drugs were a way of life for Mother A and David. They abused virtually anything they could get their hands on - narcotics (heroin, cocaine, morphine and Dilaudid), barbiturates (Nembutal and Seconal), tranquilizers (Valium), painkillers (Percodan and Talwin), and amphetamines (Methadrine). David Deposition, 7/14/88, Tr. 14; A Civil Trial, 4/5/95, Tr. 132-133, 153, 177. Although Mother A supposedly quit injecting drugs in the spring of 1983, when she was seven months pregnant with her second child, the drug abuse did not stop. She just moved on to other methods of ingesting the drugs, e.g., she would snort cocaine rather than shooting it. A Civil Trial, Tr. 133. According to David, drugs were being used in October 1984. David Deposition, Tr. 15. Ten years after the Baran trial, Mother A admitted that she was still a drug addict. "I'm not going to say that I've remained totally drug free... I'm an addict." A Civil Trial, Tr. 153.

In addition to drugs like heroin and cocaine that could only be obtained on the street, prescription drugs were obtained through frequent visits to doctors' offices and emergency rooms. David Deposition, Tr. 17. Neither Mother A nor David were averse to using their

children to support their drug habit. Indeed, when confronted by Boy A's pediatrician, Dr. Sheeley, in April 1983 when Boy A was two-and-a half years old and she was seven months pregnant, Mother A admitted that she had previously stolen syringes from the exam room and that she had been injecting cocaine, Talwin, and Percodan while she was pregnant.[40] Sheeley Deposition, 7/11/88, Tr. 17-27. And later, after the second child was born, David stole paregoric that was prescribed for the baby's colic. A Civil Trial, Tr. 227. Meanwhile, Mother A was taking Valium to help her cope with her two children. A Civil Trial, Tr. 200.

Periodically, Mother A sought treatment in behavioral health programs. In April of 1981, shortly after she was involved in a drug bust and when Boy A was just an infant, she checked herself into a residential drug rehab/psychiatric program called the Jones program. Over the course of the next year, Mother A frequently visited the emergency room for drug overdoses. A Civil Trial, Tr. 174-176. At the end of July 1982, at the suggestion of a social worker, Mother A contacted a crisis intervention center and was re-admitted to the Jones program. She checked out

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[40] This information was also detailed in Boy A's medical chart. In what seems to be another failure by the Commonwealth to provide exculpatory evidence, the Commonwealth evidently obtained Boy A's chart, but it disclosed just one page of chart to the defense. One or two pages earlier under a date-stamp of April 6, 1983, Dr. Sheeley wrote:

> Confronted Mom re syringes missing from my exam room after a previous visit. She admitted taking 2, then none on further visits on friend's advice. Said she was injecting cocaine, Talwin + Percodan until 5 mos pregnant (she's due next month - Dr. Levison aware) Her boyfriend is heavier drug user who stabbed himself in heart last week - in BMC and "not returning to the home." Mother A attended Center on Alc. Abuse (counselor = Kate) until 2 mos ago + quit. Says Valerie Gill from MSPCC comes out weekly - [phone number] - will call

Dr. Sheeley's notes, A-448.

of the program after just two days.[41] A Civil Trial, Tr. 180-181, 184.

On August 1, 1984, a week before she complained to her social worker that Mr. Baran was a homosexual, Mother A returned to the crisis intervention center to seek treatment yet again. She was belligerent and argumentative with the staff and was denied admission to the program. A Civil Trial, Tr. 224-225

Both Mother A and David were known to the Pittsfield Police Department as drug abusers. David was an informant for the PPD drug unit and both he and Mother A appeared in a videotape produced by the PPD about how drug abusers act in the community. A Civil Trial, Tr. 170-172. Indeed, the Pittsfield Police Department first learned of the As' allegations about Bernie Baran when David contacted Sergeant Henault, an officer in the drug unit.

Attorney Conway knew that David called Sergeant Henault to make the complaint against Baran, but there is no indication that he ever understood the implication, i.e., David called an officer in the drug unit because he was a drug informant. Mother A and David were actively using drugs in October 1984. David Deposition, Tr. 15. A competent pretrial investigation would have highlighted this fact.

Evidence of a witness's use of illegal drugs or prescription drugs at the time of the events about which she is testifying or evidence of a pattern of addiction, if it would impair her ability to perceive and remember correctly, is admissible on cross-examination to attack the witness's credibility. Commonwealth v. Arce, 426 Mass. 601, 604 (1998); Commonwealth v. Carrion, 407

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[41] Mother A claimed that she did not remember that she overdosed on Compazine the day she checked out of the Jones program or that two days later she went to the emergency room because of the amount of cocaine that she had done the night before. A Civil Trial, Tr. 185.

Mass. 263, 273-274 (1990). Drug addiction would have explained Mother A's cryptic, yet evolving account of Boy A's "disclosure" in the bathtub.

Moreover, mental impairment may be the subject of proper impeachment if it affected the witness's capacity to perceive, remember, and articulate correctly. *Commonwealth v. Caine*, 366 Mass. 366, 369-370 (1974). On direct examination, Mother A revealed that she had personal problems "of a psychiatric nature." Mr. Conway did not ask a single question about her psychiatric issues.

This was not the work of an ordinary fallible lawyer. Mr. Conway was, quite simply, lazy. He did no meaningful pretrial investigation.

**13. Defense counsel failed to investigate or develop evidence of Mother A's motives to want Mr. Baran to be successfully prosecuted**

The jury heard that Mother A's children were in foster care at the time of the Mr. Baran's trial, but the jury did not know that Mother A believed that one of the reasons DSS took her children was because she told ADA Ford that she did not want her Boy A to have to testify in open court and that she did not care whether he had a case or not. She later testified under oath that "they wanted the investigation to go as smoothly as possible and I was making noise. That is why I was not allowed at the mock trials." Although she told the prosecution that she would not allow Boy A to testify, "I had no choice. I didn't have my kids. The state had my kids. They forced him to testify." Mother A Deposition, 7/6/88, Tr. 103-104.

As discussed, *supra*, the Woodger allegations were made while the children were still in foster care. In addition to not knowing that Boy A had alleged that someone else sexually abused him and that the matter had been referred to District Attorney's Office for prosecution,

the jurors did not know that when Mother A testified, she was despondent that all visitation with her children had been cancelled in the wake of the Woodger allegations and did not know when, or if, she would regain custody of her children. The pressure on Mother A to testify the way the District Attorney's Office wanted her to was enormous.

Finally, the jury did not know that Mother A saw the possibility of financial gain if Mr. Baran was convicted. Very soon after they complained about Mr. Baran and he was arrested, Mother A and David went to see an attorney on South Street in Pittsfield to discuss a lawsuit against ECDC. David Deposition, 7/14/88, Tr. 16.

All of these factors should have been disclosed to expose Mother A's bias and motive to lie.

**D. Prosecutorial misconduct - Suppression of evidence that Boy A claimed that his mother's boyfriend molested him.**

The jury heard a great deal about Boy A's diagnosis of gonorrhea even though Boy A never testified that Bernie Baran put his penis into Boy A's mouth (as the prosecutor said he would in his opening statement, Tr. 3/26-27). As a result of the testimony about gonorrhea, the jury knew that someone infected Boy A with gonorrhea. If not Bernie Baran, then who? Evidence that Boy A said that he was sexually abused by someone else would have been have been enormously helpful to the defense. The Commonwealth had such evidence, but it was never disclosed. Indeed, to this day, the Commonwealth has yet to provide this evidence to the defense. It might never have been found out had Mother A and Boy A not sued ECDC for monetary damages.

In October 1994, ten years after the As had first accused Bernie Baran of sexual abuse, the A's civil attorney filed a motion captioned "Plaintiff's Motion in Limine to Exclude 51B Allegation Dated January 17, 1985," A-155. Two exhibits were attached to the A's motion: Exhibit A, a thirteen-page packet which includes a transmittal memo, a referral to the District Attorney, and a Child Abuse and Neglect Report Form (otherwise known as a 51A report and a 51B investigation), A-138, and; Exhibit B, a quarterly summary of psychotherapy notes by Anna Pollack for treatment of Mother A in 1985, A-155A.

The 51A report was filed on Thursday, January 17, 1985. DSS Social Worker William Baughan began the 51B investigation on Friday, January 18 and concluded the investigation on Monday, January 21. According to Mr. Baughan's detailed narrative:

$ Mr. Baughan spent two hours interviewing Boy A and his foster mother on Friday, January 18 between 9:00 and 11:00 a.m. He introduced Boy A to three anatomically correct dolls, telling Boy A that the large male doll was John, the female doll was Mommie, and the small male doll was Boy A. Boy A hit the John doll and said he hates John. When asked why he hates John, Boy A said "John touches my peepee." Boy A said that when it happened, "Mommie hit John with soap." Boy A said that "John will get angry and break the house" if anybody knows. He said that Mommie told him to keep it a secret. At one point, the foster mother got a bowl of water so that Boy A could demonstrate how John washed his penis. While the foster mother held her hand over the bowl and stuck out her finger pointing down to represent Boy A's penis, Boy A rubbed the washcloth with soap and stroked her finger with a downward motion approximately a dozen times. The foster mother told Mr. Baughan that Boy A made copulating gestures

with a metal magazine rack within an hour of returning from visitation with his mother and John. Boy A did not want to demonstrate, but said "Yup" when asked if he did that. When the foster mother held the Boy A doll up so that the penis penetrated the hole in the rack, Boy A said "Yup." When the foster mother demonstrated by thrusting her lips back and forth, Boy A again said "Yup."

$ At 1:00 p.m., Mr. Baughan notified Mother A that her weekend visitation with the children had been cancelled.

$ At 2:00 p.m., Mr. Baughan met with Mother A and informed her that Boy A had said that John Woodger sexually abused him, that Mother A hit John and pledged Boy A to secrecy.

$ At 4:00 p.m., John Woodger and Mother A came in to meet with Mr. Baughan. Mr. Woodger denied all of the allegations and said, "If this ever makes the papers, there's going to be one sorry son of a bitch around here."

$ At 6:00 p.m. on Friday evening, Mr. Baughan called the foster mother to discuss the cancellation of visitation. She reported that Boy A had disclosed that John put his penis into Boy A's mouth and "went to the bathroom" in his mouth and that "it was yucky."

$ At 9:00 a.m. on Monday, January 21, 1985, Mr. Baughan returned to the foster home. The foster mother said that when Boy A was in the bathtub on previous Friday evening, he was amazed by the liquid soap that squirted out of the Ivory Soap dispenser. Boy A smeared the liquid soap on the end of his penis and said it was just like what came out of John's penis. The foster mother then placed the

Ivory Soap in front of Boy A and invited him to squirt the soap into his hand. When he squirted a white glob of soap into his hand, Mr. Baughan asked Boy A if John had soap like that. Boy A said "Yup." When asked where John keeps his soap, Boy A said "In his pee." Boy A answered "Yup" when asked if he saw John's pee and if John made him do anything. As to what John made Boy A do, Boy A said "kiss his pee." Boy A answered "Yup" when asked if that was when he saw the soap. In response to questions, Boy A said that the soap came "from John's pee" and went "in my mouth." Boy A said that he spit it out. Boy A said that Mommie knew what John did and that she hit John.

$ At 2:00 p.m. on Monday, January 21, Mr. Baughan substantiated the allegation of sexual abuse against John Woodger based on Boy A's disclosures.

There can be no doubt that Mr. Baughan was acutely aware that Boy A was one of the alleged victims in the Bernie Baran case. In the Friday morning interview after Boy A said "John touches my peepee," he added that "It was a bad touch." Mr. Baughan then asked if it was a "bad touch like Bernie," to which Boy A answered "Yup." Even more significantly, in the Monday morning interview after Boy A disclosed that John Woodger put his penis in Boy A's mouth and ejaculated, Mr. Baughan asked Boy A if John did the same thing to him that Bernie did to him. Boy A said "Yup," and then said that "John was one and Bernie was two."[42]

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[42] Mr. Baughan noted that Boy A did have a time reference and did not understand the words first and second, but did establish that Boy A understood "one" and "two" in finger counting. Boy A said his nineteen-month-old brother goes to bed "one" and Boy A goes to bed "two." Boy A was also able to accurately relate who in his foster family gets up "one" and who gets up "two" in the morning.

The judge in the Baran case conducted a hearing on the competency of the alleged child victims on Friday afternoon, January 18, the same day that Mr. Baughan spent two hours in the morning interviewing Boy A about the Woodger allegations. Mr. Baughan's report states that on Friday afternoon, DSS social worker Pat Palumbo told him that Boy A "was off the wall" during the competency hearing "for the children testifying about Bernie, the alleged E.C.D.C. sex abuse perpetrator" earlier that afternoon. She told him that she attributed Boy A's behavior to overload due to Mr. Baughan visit with Boy A earlier in the day.

Jury selection in Mr. Baran's case began on Monday, January 21, 1985, the same day that Mr. Baughan substantiated Boy A's allegations against John Woodger and recommended that the matter be referred to the District Attorney's Office for prosecution. By Tuesday, January 22, two supervisors and the director of the Pittsfield area office had signed off on Mr. Baughan's report, concurring in his recommendation. Mr. Baran's jury heard opening statements on Wednesday, January 23. On Thursday, January 24, Boy A appeared in court accompanied by his foster mother. Later that same day, Mother A testified. On Monday, January 28, two DSS social workers, including Pat Palumbo, testified for the Commonwealth in the Baran trial. On Tuesday, January 29, the DSS regional director signed off on Mr. Baughan's report. In a memorandum addressed to then-ADA Gerard Downing dated January 30, 1985 , the DSS regional director wrote, in relevant part:

> Attached ... please find a D.A. referral on behalf of Boy A, d.o.b. 11/6/80, whom we believe to have been sexually abused by John Woodger, mother's boyfriend.
>
> As you may recall, Boy A was one of the children involved in the E.C.D.C. series of referrals.

Guilty verdicts were returned against Mr. Baran on Wednesday, January 30. Mr. Baran was

sentenced on Thursday, January 31.

The Commonwealth's suppression of this evidence denied Mr. Baran his Federal and State rights to due process in violation of *Commonwealth v. Tucceri,* 412 Mass 401 (1992) *Brady* obligation. *Commonwealth v. St. Germain,* 381 Mass. 256 (1980)ABA Standards for Criminal Justice, Standards Relating to Discovery and Procedure Before Trial 2.1(d) (Approved Draft 1970)*Imbler v. Pachtman,* 424 U.S. 409 (1976)

Since Mr. Baran's conviction, David had grave doubts about Mr. Baran's culpability. On three separate occasions after Mr. Baran's conviction, David expressed misgivings and pangs of conscience. In the deposition, David testified that he had thought back about the incident "lots of times" and "It scares me. I don't know... My brother's in jail right now for rape on a child. And I know my brother didn't do it. I don't know if Bernie Baran did it. But I know I thought he did at the time. I think I might still think he did it. But I'm not quite sure. My conscience has bothered me a lot. Yeah, I thought about it a lot." David Deposition, 7/14/88, Tr. 23.

About six months later, David contacted Rick Anderson, Mr. Baran's former friend and roommate. In January 1989, after waiting in line to speak to Mr. Anderson at a walk-up service window at the Unemployment Office in Pittsfield, a man walked up to the window and identified himself as "David." He told Mr. Anderson that he wanted to take back the accusations that he had made about Bernie Baran. He said that he just said what someone else wanted him to say. Affidavit of Richard Anderson, A-313.

On January 31, 1989, Mr. Anderson contacted Bernard Baran's mother and told her that a man named "David" went to the Unemployment Office and told him that he wanted to retract what he had previously said about Bernie molesting Boy A. "David" said that someone put him

up to it. Affidavit of Bertha Shaw, A-312.

On February 1, 1989, a man who identified himself as David telephoned Mr. Baran's mother. He said that someone in his family had been wrongly accused of molesting a child. He said he knew how Mr. Baran's mother felt but he did not want to got to jail for perjury. He said he would call back the next day and he hung up. He did not call back. At 8:30 a.m. on February 2, 1989, someone who identified himself as David called Mr. Baran's mother on the phone again. He said he could not take the chance of going to jail. He said he was sorry and hung up. Affidavit of Bertha Shaw, A-312.

Finally, in a strange twist, Richard Anderson was teaching a special high school program at various schools in the Berkshires to help students classified as "youth at risk" transition into the workforce. One of the schools was Monument Mountain High School in Great Barrington. In the last year of the program in Great Barrington, a student by the name of Boy A was assigned to Mr. Anderson's class. Mr. Anderson did not realize that Boy A was Mr. Baran's accuser until one day when the students were doing projects about how to make a living. Boy A gave an oral presentation in front of the class about suing for money. Boy A bragged that his mom got money because he had a gay teacher in day care. He said all he had to do was say that the teacher did something to him to get the money even though nothing happened. He said the person who really abused him was his father. After hearing this, Mr. Anderson contacted both the District Attorney's Office and Mr. Baran's mother, but no one was interested in the information. Affidavit of Richard Anderson, A-313.

## V. Girl B

### A. Facts the jury heard.

The second allegation of sexual abuse against Bernie Baran came from a child named Girl B. The allegation was made in October 1984, when Girl B was three years and four months old.[43] When she testified at the trial, Girl B three years and seven months old.

In connection with the B allegations, the jury heard testimony from: ECDC teachers and staff; Girl B; her mother, Mother B; Detective Bruce Eaton; Rape Crisis Counselor Jane Satullo; Trooper Robert Scott; child psychiatrist Suzanne King; and, pediatrician Jean Sheeley. In addition, Mr. Baran testified in his own defense.

**1. ECDC teachers and staff.** Girl B began attending ECDC in January 1983 when she was nineteen months old. At the beginning of 1984, Girl B was in Room 2B. She was assigned to Room 1 from April 1984 until mid-July when her mother withdrew her from school shortly after she turned three. Tr. 4/68. From February 1984 until she left school in July, Girl B attended school three mornings a week, Mon, Wed, and Fri from 8:00 to 12:30. Tr. 5/18-19.

Girl B never said anything to Eileen Ferry, the assistant teacher in Room 1, about a problem with Bernie. Eileen never told Girl B not to tell anybody about anything or she wouldn't be able to come back to school. Tr. 3/116. Girl B's file contained an accident report dated 5/25/85 indicating that Girl B sustained a bruise while wrestling with another child. Nowhere in her file was there any indication that Girl B had ever been injured with scissors. Tr. 5/21.

**2. Girl B.** When asked if Bernie had ever touched her, Girl B pointed at the vaginal and anal openings of a female anatomically correct doll. She said that she was touched

"Right here" and "Right here and right here and –" and "He touched me like – on this with his fingers." Tr. 4/114-115, 4/128. As to what Bernie did to her with his "peniey," Girl B said "He stick it in my privies" and he put it "on my tongue." Pretend worms came out of Bernie's peniey and went on her leg. Tr. 4/116-117.

There was blood when Bernie touched her "down here," referring to the female doll. When the blood came out "[Bernie] scooped it out with scissors." Girl B told Eileen about Bernie and the scissors. Tr. 4/125. Bernie also cut her hair with the scissors. Tr. 4/126-127. Girl B went to the doctor "Because my privies hurt" and "I had to get checked." Tr. 4/120.

Girl B told her mother about what happened "a lot of times." Tr. 4/125.

The story that Bernie told Girl B about the bird's nest was that "the baby bird got killed." Tr. 4/119-120

**3. Mother B.** Mother B was Girl B's mother.[44] She was the secretary of the ECDC Board of Directors. Tr. 4/131.

On Friday, October 5, 1984, she got a phone call from a friend who worked at ECDC. She learned that another child's parents had alleged that Bernie Baran sexually abused their son and that the police were investigating. Mother B immediately questioned Girl B about Bernie. Eventually, Girl B said "He touched my privies a lot." Tr. 4/132-133, 4/144-145. Mother B called the police. Tr. 4/133.

That evening, two detectives and a social worker arrived at the B home. In their

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[43] Girl B's date of birth was June 4, 1981.

[44] The jury first heard a little personal information about Mr. and Mrs. B. Both were employed as resident faculty at Miss Hall's School, a private boarding and college preparatory school for girls. Mother B taught ceramics and was the Activity Director, while her husband, James, was the head of the Art Department. Tr. 4/129.

presence, Girl B said that Bernie had touched her and that they played the bird's nest game. Tr. 4/134-135. Girl B wanted to leave the room, so Mother B took her out into the hallway where they had a private conversation. Regarding the bird's nest game, Girl B said that "She and Bernie had found together a baby bird that was half in the shell and half out of the shell and Bernie told her the pretend police would come to take the baby bird away and that would upset the baby bird's mother very much." Tr. 4/135. When Girl B and her mother returned to the room, Detective Eaton asked Girl B some more questions, but "she was still not particularly free answering him." At that point, it was decided that a time would be set up for Girl B to go to the District Attorney's Office and make a videotape. Tr. 4/136.

The next day, Saturday, October 6th, Mother B took Girl B to the District Attorney's Office to be interviewed by Jane Satullo of the Rape Crisis Center. After getting acquainted, Girl B and Jane Satullo started the interview while Girl B's mother observed from another room. When "Girl B became upset," her mother went into the interview room. Tr. 4/137-138.

On Monday, October 8th, Mother B took Girl B to pediatrician Jean Sheeley, where Girl B was examined in her presence. Girl B "talked very openly to Dr. Sheeley." Tr. 4/141. A few nights after the allegations, Girl B had a nightmare about having her hand cut off. Eventually, said she was tied up and her hands were tied. In her sleep Girl B said, "Stop it. Stop it, I don't even go to ECDC any more." Tr. 4/152

Mother B continued to talk to her daughter about Bernie from time to time. Girl B said that Bernie put his penis in her privies and in her fanny. She also said the pretend worms squirted out of his penis onto her leg and her face and that Bernie washed them off with a wet paper towel. Tr. 4/141-142.

One time Girl B came home from ECDC with a cut on her foot. She said it had been cut with scissors." Tr. 4/142, 4/145, 4/147. Mother B reported the injury to someone at the school,

but she did not seek medical treatment for the cut. Tr. 4/147.

There were changes in Girl B's behavior. Girl B became very clingy and started bed-wetting again sometime in the spring and summer of 1984. She wanted to be carried. Tr. 4/142-143. Toward the end of her time at ECDC, Girl B exhibited reluctance to go to school, but she did not say why. Tr. 4/151-152.

**4. Detective Bruce Eaton.** On October 5th, 1984, Detective Bruce Eaton, accompanied by Detective Wimpenny and Brian Cummings of DSS, went to the B residence. They arrived at 10:50 p.m. Tr. 5/114-116, 5/119.

It was difficult to talk to Girl B. In an effort to break the ice and make friends, the detective gave her his badge to play with. Tr. 5/116. "Girl B was still nervous about talking to a stranger, still withdrawn, wanted to cling to her mother. I suggested to her mother that she talk to her while I listened." Tr. 5/116-117. Girl B responded to a few of Detective Eaton's questions:

> I asked Girl B what her age was. She said "three years old." I asked her if she ever went to ECDC for school. She said "yes" and I asked her if anything happened there. She said "yes" and she told me that Bernie had touched her privies, patted her and then she also mentioned a bird's nest game that Bernie would play with her.

Tr. 5-117. "When I asked her about the bird's nest game and also asked her if Bernie had ever touched her behind, she again became withdrawn and didn't want to talk to me any further. She wanted to just talk to her mother." Tr. 5/117.

Girl B and her mother left the room and went into a hallway where they talked. They returned after about five minutes. Mrs. Mother B explained a couple of things, but Girl B did not seem any more able to tell him things about Bernie. She continued to tell things to her mother. Regarding a touch game, she said that Bernie would touch her eyes and nose and ears and neck, but she was only allowed to touch Bernie's neck. Tr. 5/118, 5/120-121.

**5. Jane Satullo.** Ms. Satullo was a psychotherapist for the Rape Crisis Center.[45] She estimated that she had interviewed "well over 100 children." She claimed to be familiar with the current literature in the field of child sexual abuse. Tr. 5/136-137. In addition to her counseling work, she said that she had been involved in training on interview techniques for children. Tr. 5/138.

On October 6th, 1984, Ms. Satullo interviewed Girl B. Tr. 5/138-139. The process of getting to know Girl B went on for "probably over an hour."[46] Tr. 5/139. Eventually Girl B began to talk about Bernie. At one point, Girl B said "I forget the bad stuff that Bernie did to me." Her mother was brought into the interviewing room to calm her down and then she was able to describe what Bernie did.. Using a female anatomically correct doll, Girl B "very clearly indicated on the two places on the body where Bernie had touched her." "First, she showed with the doll's pants on. She said 'Bernie touched me here.'" pointing to the vaginal area. "And then she removed the doll's pants. 'Bernie touched me here. It hurt me very much.' She spontaneously turned over the doll and she said 'Bernie touched me here,'" pointing to the vagina and to the anus. Tr. 5/140, 6/6, 6/8. Girl B talked about Bernie for "maybe about twenty minutes of the interview," but it was not a continuous process where she just talked about Bernie. Girl B was able to say what Bernie had done to her by using the doll. A significant amount of time was spent reassuring her. Tr. 5/141. "The interview ended with me reassuring once again that she had been a very good girl in telling me what happened and we would all make sure what

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[45] Ms. Satullo began working at the Rape Crisis Center after receiving a masters degree from Antioch in 1983. She was full-time for "about a year" and part-time for a year. In addition, Ms. Satullo did "part-time clinician work for Berkshire Mental Health" and had "a small private practice for children." Tr. 5/136.

[46] Girl B "was exhibiting some fear, a lot of clinging to her mother, so it took me a while to engage her friendship. Basically, it was a process just getting down to the child's level, asking them questions and talking with them. Just being friendly, letting them know that I'm there to

happened to her would never happen again." Tr. 5/142.

Girl B said nothing about scissors during the videotaped interview. Scissors were not mentioned until several weeks later. Tr. 6/7.

As to whether it is possible to plant an idea concerning sexual abuse in a child's mind, Ms. Satullo said, "I think it's possible to present an idea which the child has not consciously thought about before and – but it's also my experience that any child who is able to tell a story and repeat its details over a period of time then there is validity to that story." Tr. 5/145.

Ms. Satullo described the behavioral symptoms of a child who has been sexually abused. They included a child who is overly curious about his or her genital area, masturbates continuously, inserts things in either the anus or vagina, has inappropriate sexual knowledge, exhibits regressive behavior like bed-wetting or soiling, exhibits fear of the dark, has nightmares, or has a sleeping disorder or an eating disorder. They also include any massive behavioral change. For example, a child who is suddenly aggressive, withdrawn, or fearful about a particular person.

Tr. 5-146. The prosecutor then propounded a series of hypothetical behaviors and asked Ms. Satullo to assess their significance:

> Q. If a child were to repeatedly take off all his clothes when he went to the bathroom, would that be a sign of some significance to you?
> A. Yes, it would be significant. Of course, children do some general experimenting but repeated and repeated activity of a sexual nature, removal of clothes or touching of the genitals, indicate that a child has had some inappropriate sexual activity.
> Q. If a 4 year old male child was repeatedly touching his penis would that be of some significance?
> A. Yes. ... It would be in any child where it is constant and repeated and inappropriate. I would take a look at what kind of sexual activity the child had been exposed to.
> Q. If a child were to report the fact that he or she had been sexually abused in some way and then repeated the story continually, would that fact be of some

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help them. That I understand they may be scared but I'm there to help them." Tr. 5/139.

significance to you?

A. That would be of extreme significance. Children at the age of which we're talking about in order to repeat a story and to tell the details again, the same it needs to be a true story. That's one of the things we look for often with children is a story that holds up over time with the same facts. It's hard enough for adults to repeat a story with details. It really is impossible for a child to do that.

Tr. 5/147-148.

When asked by defense counsel if it was significant that Girl B's story evolved from Bernie touching her with his finger to scooping out blood with scisssors, Ms. Satullo testified, "Well, my sense is that often children can't tell the whole story the first time and as she got more relaxed – the information is not scaring the adult – more details may come out." Tr. 6/10.

Ms. Satullo acknowledged that it was possible that a child who has been threatened might be afraid of naming the offender, but she said that with reassurance over time the child would eventually be able to tell. She went on to say, "children have withheld the name of the person out of fear but there haven't been any cases of young children falsely accusing somebody." Tr. 6-11. As to whether children are susceptible to suggestion about sexual abuse, Ms. Satullo stated that children are no more susceptible "than the rest of us." Tr. 6/12.

**6. Trooper Robert G. Scott.** "At some point prior to the trial," Trooper Scott showed a photo array to Girl B.

> When asked if she could point out the picture of Bernie she went to the cardboard and she first – she couldn't. I asked her to count the number of pictures on the board and she went one to ten. I asked her if she saw Bernie's picture there and she pointed to the picture of Bernie and I asked her to say the name of that person. She wouldn't say it out loud but she came over and whispered in my ear that name Bernie.

Tr. 6/83. Trooper Scott then asked her if the person who had done bad things to her was on that board. Girl B responded by pointing to the picture of Bernie. Defense counsel did not cross-examine Trooper Scott. Tr. 6/84.

**7. Dr. Suzanne King.** Dr. King, a child psychiatrist,[47] saw Girl B for the first time on October 16, 1984 and continued to see her on a weekly basis, for a total of approximately fifteen play therapy sessions, prior to the trial. Tr. 6/107-108.

In play therapy, a child can play with toys or the child can make up something to play. A child communicates thoughts and feelings through play. "The themes of the play are very important. In that regard she is telling me what is important to her and it's also a way of working out and mastering feelings she has that are upsetting to her." The child plays and thereby communicates what is of concern to the child. Tr. 6/108-109. When a child "does something in her play I really have to take the whole context into consideration and everything else that I know about a child in interpreting and making an impression about that play." She continued, "I would never make an interpretation without some sort of history. I think that's – with a three-year-old that's impossible." Tr. 6/116-117.

Dr. King opined that Girl B had been emotionally traumatized, "based on the history that I received from the child, from the mother, behavior that I observed, what she showed me in her play, what she tells me about her nightmares." Tr. 6/109-110. Dr. King testified that "... the major themes of Girl B's play have had to do with fear from bad men, with being injured, and with the need for safety and protection." These themes were significant because one would not normally see them in a child of this age unless the child experienced some kind of injurious trauma. Tr. 6/111-112. The emotional trauma that Dr. King observed in Girl B could not be the product of suggestion "[b]ecause of the anxiety that she showed, the emotional overlay is not something that she could make up." Tr. 6/112.

A normal three-and-a-half year old child should be past the stage of clinging to her

[47] Dr. King began practicing as a physician in July of 1981. She had only been in

mother; the child should be able to separate fairly readily from her mother. Girl B was not able to separate from her mother. Since she had reportedly been able to at some previous time, Dr. King felt that she had regressed. In addition, Dr. King noted that Girl B had started bed-wetting after having been dry for a while. "It's something that I have seen in children who have been sexually abused." Tr. 6/112-113.

Girl B had a recurrent nightmare in which a witch cut off her hands. This suggested that "she is preoccupied with injury, with having been injured, and I wouldn't expect a child of her age to be preoccupied with that unless she had, indeed, suffered some sort of injury." Tr. 6/113.

During one session, Girl B "was playing ... that her legs were a tunnel and that cars went through that tunnel. And at one point there was a crash in the tunnel and a lot of blood in the tunnel and she wanted to tell her mother to come wipe up the blood." Dr. King continued, "It seems to me that is really an enactment in her play of what she says has actually occurred. What she says actually occurred in terms of being sexually abused." Tr. 6/113-114. Dr. King had never seen any other children play that cars were driving between their legs.

A three-and-a-half year old child, like Girl B, would not have the cognitive ability to make up a story of sexual abuse. "I think a child of her age – and many people have said this, this in not just my opinion – that a child of her age is not cognitively able to describe in graphic detail some sexual event unless she actually experienced it." Tr. 6/114. "One might be able to suggest something to a child," but "one couldn't suggest ... the feeling that goes along with it and the anxiety that a child shows connected with it." As to whether an anxious parent could make a child anxious, she said, "No, I don't think the anxiety would necessarily be transferred to the child and certainly not anxiety where the child shows the amount of anxiety that Girl B, for example, has shown along with all the other symptoms that suggest that a child has been hurt in

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Pittsfield for about a year prior to the trial. Tr. 6/107

some way." Tr. 6/115.

Girl B repeatedly said that "she is afraid of a man named Bernie," but she "neither expressed nor exhibited a fear of men in general." Tr. 6/115, 6/117.

**8. Dr. Jean Sheeley.** Dr. Sheeley began her examination of Girl B with a general physical examination to put the child at ease "so she wouldn't be too uncomfortable with having her genitalia examined." Dr. Sheeley then performed a pediatric gynecologic exam.[48] She observed that the "hymen was ruptured in several sites consistent with full rupture of the hymenal ring." Specifically, "there were two small posterior tears in the hymenal ring and there was a large anterior tear toward the urinary opening." Tr. 6/121-122. "The hymen is a tissue ring which is at the opening of the vagina and is, in fact, in most prepubital children and is the structure which is ruptured at the time of sexual intercourse." Tr. 6/122. The doctor made a drawing on the blackboard and gave the following testimony:

> This would be normal anatomy with the urethra being the opening of the urinary tract. In other words, if the child were laying face down with the buttocks here and pubic area here, we will be looking at the labia surrounding all of this. The "U" is the urinary opening and this would represent the position of a normal hymen and this the rectum.
>
> Now, in Girl B's hymenal opening – it was shaped as such, so there were two tears in the back region and then there was a full rupture to the front so that the opening was widened much more than usual.

Tr. 6/122-124.

The injuries to Girl B's hymen were "consistent with what we call a full penetration

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[48] Dr. Sheeley explained that in a pediatric gynecologic examination, a child is placed with her knees and shoulders on the table and with her buttocks up in the air to get a full view of the opening of the vagina. The child needs to cooperate in maintaining the position so the doctor can get a good internal look. Tr. 6/121.

At Prosecutor Ford's request, Dr. Sheeley exhibited a drawing in a "teaching manual for how to do a pediatric gynecologic exam and demonstrating the knee-chest or lithotomy position with the child's buttocks up in the air with an instrument with a light to shine into the vagina to show the opening in the structure." She apparently directed the jury's attention to a photo or drawing, indicating, "This is the general opening and this is what the doctor sees." Tr. 6/124.

which would occur by insertion of a penis or an object as large as perhaps several adult fingers. I feel that a smaller object such as inserting one finger probably would not produce a tear to this extent." Tr. 6/124. These injuries would not be consistent with Girl B inserting her own finger. "The finger isn't large enough to produce this kind of trauma nor do I feel that a child could inflict that much pain on themselves if they were a normal child." The result of such an injury "would be bleeding from the tearing of the hymen." Tr. 6/125. Penetration of a child of this age with either an adult male penis or several adult male fingers "would be somewhat painful." Tr. 6/127.

It was "a possibility" that a child could have inserted a foreign object in her vagina large enough to cause this kind of damage, but said "it's unlikely for a child to do this to themselves because the extent of the trauma is more than most people will inflict upon themselves." Many three-year-old children go through an exploratory period with their own genitals. As to whether she had read that a female child may occasionally insert a foreign object as part of her exploration of her own body, she responded, "Children will put a piece of toilet paper or small object painlessly, which can cause irritation." Tr.6/132-133.

Dr. Sheeley's original report on her examination of Girl B (A-252) did not contain the words "full rupture of the hymen." It stated that there were "two posterior tears" and "looseness of the two flaps that are left in the front from the anterior tear." Tr. 6/125. At this point, Dr. Sheeley revealed that she had done a second examination. The first examination was done on October 8th "and then because of further information from the family regarding the internal penetration by various objects, we brought her back in to do a careful internal inspection on January 16th, to look for vaginal or rectal tears." Tr. 6/126. During both examinations, she observed the anterior tear and small posterior tears. Although the report of the October 8th examination did not say "full rupture of the hymen," "[t]hat is what I mean by looseness of

mucosa bilaterally at sides of entroitis. Those are the two loose flaps that are left in the front where the hymen has torn toward the urethra." The small well-healed posterior tears were one to two millimeters which, according to Dr. Sheeley means "a quarter of an inch." Tr. 6/126 -127.

Dr. Sheeley took cultures from the child's throat, vagina and rectum to test for gonorrhea. The results of all three tests were negative. Tr. 6/127-128.

On cross-examination, Dr. Sheeley testified that Girl B "said that Bernie had put his fingers in my privies." Dr. Sheeley continued, "And I asked where else he touched her, what else he touched her with. She said his peniey and her mouth. I asked her if she had seen his peniey and she said "yes" and where else he touched her. She said "he put his hand on my fanny." Tr. 6/128. Girl B said that Eileen saw Bernie do these things to her.[49] Tr. 6/129.

**9. Bernard Baran.** Mr. Baran denied that he ever had any sexual contact with Girl B. Tr. 7/110. He denied that he ever touched Girl B on the vagina or the fanny or that he ever put his penis in her mouth. He denied that pretend worms ever came out of his penis on Girl B's leg. Tr. 7/168. He acknowledged that there probably was a time that he took Girl B to the bathroom. Tr. 7/110, 7/153. He never had that much to do with Girl B, because Girl B was only there from 9:00 to 12:30, the busy part of the day. Tr. 7/112, 7/159-160.

Mr. Baran denied that he told Girl B a story about a bird's nest game or that he told her that the pretend police would come and take the baby bird away and the mommy bird would be hurt. Tr. 7/158. He recalled that there was a Dr. Seuss book that was read at circle time quite

[49] Mr. Ford objected when Conway asked whether Girl B told her what Eileen said would happen if Girl B told about it. The objection was initially overruled, then sustained. Tr. 6/129.

frequently about a little yellow bird that falls out of its nest and then goes around asking "Are you my mother?" Sometimes he would read the book to the children. Tr. 7/111, 7/176. There was a policeman in the story who he could have referred to as a pretend policeman. Tr. 7/177, 7/185.

### B. Mr. Baran did not get a fair trial because his conviction was based on unreliable testimony.

Girl B was an inherently unreliable witness. She was not competent to testify because there was no evidence that she understood her obligation to tell only the truth. In addition, her testimony was tainted by suggestive interview techniques. See lengthy discussion of suggestive methods used in Section V.C.3, *infra* at 142. The error was compounded when her credibility was improperly bolstered by fresh complaint witnesses and by experts who improperly vouched for her credibility.

#### 1. The judge used an incorrect legal standard to determine that Girl B was competent to testify.

Girl B never demonstrated that she understood the difference between the truth and a lie and the consequences of telling a lie. The judge focused exclusively on the first prong of the competency test,[50] while completely ignoring the second prong. See analysis of the legal requirement of competency at Section III.A.1, *supra* at 10.

Dr. Suzanne King, a board certified pediatrician who had been practicing in the field of child psychiatry for four years, was the first witness at the pretrial competency hearing. She had

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[50] A witness is competent to testify in Massachusetts if he (1) possesses the ability or capacity to observe, remember, and give expression to that which he has seen, heard, or experienced, and (2) comprehends the difference between truth and falsehood, the wickedness of the latter and the obligation and duty to tell the truth, and in a general way, belief that failure to perform the obligation will result in punishment. *Commonwealth v. Brusgulis*, 398 Mass. 325,

seen three-and-a-half year old Girl B for weekly psychotherapy "about fourteen times." *Competency Hearing,* Tr. 5-6. Dr. King opined that Girl B could differentiate between "what is external ... and what comes from within, like dreams or fantasies." *Id.,* at 7. Girl B knew the difference between right and wrong because she said the police were going to get her doll when her doll did something bad. *Id.,* at 8-9. Dr. King testified that Girl B knew it was wrong to say things that are not truthful. The basis of this opinion was that she was not aware that Girl B had ever told her something that was not true. *Id.,* at 8. Cross-examination further revealed that the basis of this opinion was seriously deficient:

> Q. Have you asked her if she knows the difference between the truth and a lie?
> A. No. That hasn't come up. There's been no reason to because she hasn't said anything that I thought was a lie.
> Q. So you've never covered what she considers truth and lying or if she knows the difference between telling the truth and lying; is that correct?
> A. Not something I specifically asked her, no.

*Id.,* at 10. The judge turned the focus back onto whether Girl B had sufficient capacity to understand and to relate what she understands. Dr. King opined that Girl B had reached the stage where she was able to understand. The judge then asked Dr. King if there was a certain age when children develop the ability to distinguish between "right and wrong and between reality and fantasy, and between what is happening to them or someone that they can see and be able to relate it." Dr. King responded that she did not think that there was a definite age, but said that around the age of two when a child's language becomes better developed, a child also begins to understand "the difference between right and wrong in terms of what he should do and what he should not do." *Id.,* at 10-11.

Girl B appeared at the competency hearing accompanied by her mother, Mother B. The judge began by asking Girl B who picked out her dress - "I got it for Christmas." Asked if the

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329 (1986), citing *Commonwealth v. Tatisos,* 238 Mass. 322, 325 (1921).

doll she was holding was a special doll, Girl B answered, "No. It's a Barbie doll." "Her name is Amy." She knew her name was "Girl B," that she lived at "Miss Hall's" "with my mother and Daddy," and that she was "three" years old. She did not know when her birthday was, even when her mother hinted, "It's the 4th of something. Do you know what it's the 4th of?" As to whether she remembered getting anything else for Christmas besides the dress she was wearing, Girl B said she got a raincoat but she did not remember getting anything else. *Competency Hearing,* Tr. 23-24. The judge then moved on to the concept of telling the truth:

Q. Now, Girl B can you tell me, if someone asks you a question and you know what the answer is, what you should do?
A. [Shaking her head from side to side.]
Q. Well, do you know that if someone asks you a question whether it's a good thing or a bad thing to tell them the truth; you want to tell me what that is?
A. Bernie touched me.
Mother B: You don't have to talk about that today. You just have to tell if it's a good thing or a bad thing to tell the truth.
Q. What do you think, Girl B? What do you think happens if you say something that isn't true?
A. I don't know.
Q. Okay. Well do you think that would make the Judge happy or unhappy?
A. I don't know.
Q. What do you think? Do you think that it's something you should do or shouldn't do?
A. Shouldn't do.
Q. That is right. You shouldn't tell something that isn't true. All right. And if you do that, that is if you say something that isn't true, could you tell us what would happen to you?
A. I don't know.
Q. What would you do if someone asked you a question; would you tell the truth if you knew the answer?
A. [Shaking her head from side to side.]
Q. You're shaking your head no. What do you mean by that? You have to tell me. Can you tell me?
A. It's not.
Q. It's not what, sweetheart?
A. It's not true.
Q. If it is not true, what should you say? I don't know if you should say or –
A. You shouldn't say.
Q. You shouldn't say anything that's not true. That is right. I agree with that. I think that's absolutely good. Do you think that a good girl would say something that isn't true?
A. [Shaking her head from side to side.]

Q. No, a good girl wouldn't do that.

*Id.,* at 25-27. Later in the hearing, the judge found Girl B competent. *Id.,* at 65-66. The judge's inquiry regarding the second prong of the competency test was inadequate. It is indeed surprising that, in the wake of Dr. King's candid admission that she never asked Girl B if she understood the difference between the truth and a lie, the judge never asked Girl B that very question. Commonly, the concept of truth is dealt with by asking a child generic questions like - would it be true if someone said that a judge's black robe is white? No such questions were asked. On this record, there was no factual basis to support a conclusion that Girl B understood the difference between the truth and a lie.

Girl B's performance on the witness stand at trial failed to fill the gaps left by the judge's inadequate inquiry. She did not take an oath to tell the truth. She simply nodded when asked to promise to tell what happened. Tr. 4/112. For discussion of the adequacy of the oath that was administered, see Section III.A.1, *supra* at p. 12.

The word "truth" was uttered only once during Girl B's testimony. When she failed to give expected answers to leading questions, ADA Ford turned to Girl B's mother and asked, "Mommy, could you just tell Girl B it's okay to tell the truth." Ironically, she was being asked to tell "the truth" about "pretend worms." Tr. 4/117. Girl B's testimony about "pretend worms,"[51] a

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[51] During direct examination of Girl B, ADA Ford asked the following questions about "pretend worms."

Mr. Ford. Remember something coming out of Bernie's peniey when he touched you with it?

Girl B. Uh-huh.

Q. What?

A. Nothing

Q. I thought something came out?

"pretend bird,"[52] and fresh complaint testimony about "pretend police," Tr. 4/135, should have prompted a *sua sponte* competency examination.

The Commonwealth elicited out-of-court statements made by Girl B from five witnesses: Mother B, Detective Eaton, Trooper Scott, Jane Satullo, and Dr. King. Defense counsel elicited

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A. Nothing came out.
Q. Mommy, could you just tell Girl B it's okay to tell the truth.
Mother B. What do you think came out?
A. I don't want to.
Q. Remember some pretend worms coming out?
A. (Child nods head up and down.)
Mother B. What color were they?
Q. Mother you can't do that. Where did the pretend worms go?
A. On my leg.
Q. On your leg. Anywhere else?
A. (Child shakes head from side to side.)

Tr. 4/116-117.

[52] Girl B gave the following testimony about a "pretend bird":

Mr. Conway. Did you tell Mr. Ford about the bird and the bird's nest?
Girl B. Uh-huh.
Q. Did somebody bring a bird to your class? To your school?
A. It was a pretend one.
Q. It was what honey?
A. It was a pretend bird.
Q. It wasn't a real bird?
A. Uh-uh.
Q. Who did that? Was it Bernie or Richard? Who did that?
A. Bernie.
Q. Did Bernie have a bird?
A. No, uh-uh.

out-of-court statements made by Girl B from a sixth witness, Dr. Jean Sheeley.

The testimony was flawed in a multitude of ways. Perhaps the most troublesome aspect of the fresh complaint testimony was that it was admitted to corroborate Girl B's testimony, which was almost entirely the product of leading questions. Leading questions, which suggest the desired answer, are permissible to elicit testimony from a witness of limited understanding due to age. *Commonwealth v. Peters,* 429 Mass at 28, citing Mother B testified to numerous

statements made by her

daughter. The only statement that even came close to satisfying the requirements of the fresh complaint doctrine was Girl B's first statement that "[Bernie] touched my privies a lot" in response to her mother's questioning on the afternoon of October 5. The complaint was not reasonably prompt; Girl B had not been at ECDC or had any contact with Bernie Baran for at least three months. Moreover, it was a response to suggestive questioning from her panicked mother. Mother B asked Girl B questions about Bernie Baran and no one else. Tr. 4/145.

Mother B's testimony that she was "terrified" when Girl B disclosed and that she was "afraid to question her any further because [she] didn't know the right questions to ask" was inadmissible. The mother's emotional response to her daughter's disclosure was irrelevant; it had no "rational tendency to prove an issue in the case." *Commonwealth v. Bailey,* 370 Mass. at 396. The prosecutor took a nonsensical story and gave it a sinister spin to explain why it took Girl B so long to disclose. In his summation, ADA Ford argued that this was one of the stories that Mr. Baran told the children to frighten them into not telling what he had done to them. Tr. 8/52. Regardless of its relevance to the Commonwealth's theory of the case, the testimony about the bird's nest game was inadmissible hearsay.

Mother B related two distinct sets of statements that her daughter made about Bernie

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Tr. 4/123.

Baran on October 5th. When she was also asked to describe what Girl B said to Jane Satullo on October 6th, defense counsel properly objected on the ground that the testimony would be repetitive. The judge sustained the objection, but made it clear that he was going to allow the jury to hear all of the statements that Girl B made to her mother except where another witness would be describing the same conversation. The judge explained, "Every one is a fragment. ... one supplements the other rather than repeating the other, but this might be a repeat." Tr. 4/139. The judge missed the point. Defense counsel properly argued, albeit inarticulately, that it would be unduly repetitive to allow the jury to hear all the numerous statements that Girl B made to her mother.[53] In contravention of the admonition of the SJC that a "trial judge should be cautious in

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[53] The following exchange took place at sidebar after defense counsel made his objection:

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|---|---|
| Court. | Is Miss Satullo going to testify? |
| Mr. Ford. | Yes, she is. |
| Court. | Is this going to be a repeat? |
| Mr. Ford. | Yes, it is. |
| Court. | I'll sustain it for that reason. Why double it, is that your objection? |
| Mr. Conway. | My objection – you've had the first fresh complaint to the mother. You had no - a confirmation of Capt. Dermody which is a step down. Now, you've gone on to Eaton which is step 3. |
| Court. | Everyone is a fragment. I think there's a rational reason. It's – one supplements the other rather than repeating the other, but this might be a repeat. |
| Mr. Conway. | It's cumulative if you say it enough times, that the kid said it enough times. |
| Court. | I'll give an instruction at this point or as soon as this witness is finished, whatever you want to do. But as far as her saying something and then have Satullo come in and say the same thing, I'm going to sustain it. One or the other ought to say – |
| Mr. Ford. | In that case, I'll wait for Jane Satullo or the video tape as the case may be. |

Tr. 4/139-140.

admitting evidence of a fresh complaint," *Commonwealth v. Licata,* 412 Mass. at 659-660*;* Commonwealth v. Swain, 36 Mass.App.Ct. 433, 442 (1994). The implication of the ruling was not lost on the prosecutor, who quickly seized the opportunity to introduce additional conversations that Mother B had with her daughter.

> Q. ... did you continue to talk about this with Girl B from time to time?
> A. We only talk about it with Girl B when she seems to want to.
> Q. Can you tell us what she says?
> A. All of it?
> Q. Yes.
> A. She says that he put his penis in her privies, that he put his penis in her fanny. In the beginning he played a touch game where he put his fingers all over her including in her ear. That seemed to bother her very much when he put his finger in her ear.
> Q. Did she ever say anything –
> A. She said that pretend worms came out and we didn't understand what at first she meant. She said it squirted out of his peniey and it went all over her leg. Apparently it was pretend worms squirted on her face, down her face. Then he took a wet paper towel and washed them off.

Tr. 4/141-142. This testimony was improper for several reasons. First, it lacked foundation as fresh complaint. In the absence of a time frame, it is impossible to classify these statements as fresh. Second, the testimony exceeded the scope of what Girl B herself said on the stand. Girl B never testified that Bernie put his penis in her fanny, nor did she mention anything about "pretend worms" on her face. It was error to allow a fresh complaint witness testify about acts that were not testified to by the alleged child victim. Commonwealth v. Flebotte, 417 Mass. 348, 351 (1994). And last, the testimony improperly enhanced the child's credibility.

Next, the prosecutor elicited testimony that one day Girl B came home from ECDC with "a fairly serious cut on her foot" and Girl B said that her foot had been cut with scissors. Tr. 4/142. This line of testimony was inadmissible and should have been stricken. Girl B never

testified about her foot being cut with scissors.[54] Nothing about the foot incident, except for the word "scissors," corroborated Girl B's bizarre claim that Bernie scooped out blood with scissors. Because it exceeded the scope of Girl B's testimony, it was inadmissible. Moreover, it did not involve an allegation of sexual assault. If defense counsel had objected, it should have been excluded. An ordinary fallible lawyer would have sought to exclude the testimony as hearsay. Instead, defense counsel pursued the subject in cross-examination with disastrous results:

> Q. And, this incident where she told you she was cut with scissors at school, what was it? On her foot?
> A. Yes, it was.
> Q. When did she tell you that Mother B?
> A. She came home from school at one point last spring with a cut on her foot. About two weeks ago she was terribly upset. I said, "What's the matter?" She said, "I have to tell you something about Bernie." I said, "What?" She said, "When I started bleeding he scraped the blood out with scissors" and I said, you know, I don't understand or something. And she said, then – no, then he called Stephanie in and told Stephanie to clean up the blood, and I said to her that makes no sense. Why would – Stephanie would notice. She said he stabbed her in the foot with the scissors so Stephanie cleaned the blood off her foot.
> Q. Your understanding from all that Girl B told you was that the bleeding was from her foot?
> A. No, I believe Bernie scraped the blood from her vagina and then to cover it up stabbed her foot so there would be justifiable blood.

Tr. 4/145-146. Upon learning that Girl B's statement had been made just two weeks before trial, the testimony should have been immediately stricken because it was not a "fresh" complaint and was therefore inadmissible hearsay. Instead, Mr. Conway persisted, opening the door to Mother B's theory of the stabbed foot. At this point, defense counsel moved, albeit unsuccessfully, to strike the last statement. Tr. 4/146. It was error to allow the statement to stand. It was a "purely subjective opinion ... based on nothing more than conjecture, surmise and speculation,"

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[54] During direct questioning, the prosecutor repeatedly asked Girl B if she bled when Bernie touched her "down here," pointing to the doll's vaginal opening. When he finally got her to acknowledged that she saw blood, he asked her what Bernie did when blood came out. Girl B responded, "He scooped it out with scissors." Tr. 4/117-118.

Ducharme v. Hyundai Motor America, 45 Mass App.Ct. 401, 407 (1998), and was completely lacking in probative value. Moreover, the statement was highly prejudicial because it materially strengthened the case against Mr. Baran. Without evidence of blood, Girl B's claim that she bled when Bernie hurt her was uncorroborated. Fresh complaint evidence may not be used as hearsay to fill gaps in the prosecution's case. *Commonwealth v. Lennon,* 399 Mass. 443 (1987) *Commonwealth v. Almeida,* 433 Mass. 717 (2001)*Id.*, at 720. A scary nightmare "would evoke strong sympathy for the child, while offering nothing of genuine probative value." Detective Eaton testified that when he asked Girl B about the bird's nest game, "she again became withdrawn and didn't want to talk to me any further. She want to just talk to her mother." Tr. 5/117. The testimony was improper fresh complaint testimony because it interpreted the child's words and emotions as opposed to providing a factual description of what she said. "The witness ... may not interpret the complainant's words." In his opening statement, ADA Ford told the jury that, when the police learned that Richard Herdman, a janitor at ECDC, had shown a dead bird to some children, the police followed up on this because of Girl B's bird's nest story. The janitor readily agreed to have his picture taken and that picture was put into an array of nine other photos. The array also included a photo Mr. Baran. Tr. 3/34. The photo array, which was ten photos mounted on a piece of cardboard, was shown to some children and the children were asked if "anyone here did bad things to you?" All of the children picked out Mr. Baran. None of the children picked out the janitor. Tr. 3/37-38. At sidebar, Mr. Conway objected to the photo array. He pointed out that the photo array was pointless because all of the children already knew Mr. Baran well. The testimony would not be fresh complaint. It was nothing more than hearsay.

When Mr. Ford assured the judge that the photo array was being offered as identification,[55] and not as fresh complaint, the judge allowed the evidence. Tr. 3/35-37.

Trooper Scott testified that he asked Girl B to point out Bernie's picture. When she could not identify him, he asked her to count the pictures so that she would look at each one. After she pointed to Bernie's picture, Trooper Scott asked her to say Bernie's name. She would not say it out loud; she whispered the name "Bernie" in the trooper's ear. Tr. 6/83. The following exchange then took place:

> Q. Did someone ask her a question at that point?
> A. Yes.
> Q. Who?
> A. I did.
> Q. What was the question?
> Mr. Conway. Objection, your Honor.
> The Court. This is the same area you're covering?
> Mr. Ford. Fresh complaint, yes.
> The Court. You may have it.
> .....
> A. I asked her if the person who had done bad thing to her was on that board.
> Q. What did she do?
> A. She pointed to a picture of Bernie.

Tr. 6/83-84.

When defense counsel objected during opening statement on that ground that the evidence was improper fresh complaint testimony, the judge allowed the photo array testimony as identification evidence. When defense counsel objected during the trooper's testimony, the judge allowed the photo array testimony as fresh complaint. It was error to admit the testimony on either ground. It was an unduly suggestive identification. Moreover, it did not remotely satisfy the requirements of the fresh complaint doctrine. It was not an allegation of a sexual

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[55] Mr. Ford pointed out that the photo array evidence had been discussed with defense counsel before trial and, even though counsel indicated he would object to the evidence, he never filed a motion to suppress the photo array as an unduly suggestive identification. The judge agreed that this issue should have been raised in a motion to suppress.

assault. There was no hint of the circumstances or the time frame of this conversation.[56] The child's statement was not fresh and spontaneous; it was instead clearly the product of improperly suggestive questioning.

In his closing argument, Mr. Ford drove home the real reason that he wanted the jury to consider the photo array evidence - Girl B's emotional reaction to identification procedure.

> Remember how [Trooper Scott] testified he showed those ten photographs to ... Girl B? No reaction whatsoever when [she] looked at [the janitor's] photograph but a reaction of absolute terror when [she] looked at Bernie Baran's photograph.
>
> ... Girl B wouldn't even say his name out loud, she whispered it "Bernie," in Trooper Scott's ear and Trooper Scott told you that Girl B was asked "Who in this group of people did bad things to you?" and she responded ... [to] a photograph of that man, Mr. Bernard Baran.

Tr. 8/54. Even if this evidence had met the criteria for a fresh complaint, it was improper to use it in this manner. Fresh complaint testimony may not interpret the complainant's words.

Defense counsel improperly elicited fresh complaint testimony from Dr. Sheeley on cross-examination. On direct examination, Dr. Sheeley said only that she had a conversation with Girl B about things that happened at ECDC. On cross-examination, defense counsel asked about what Girl B actually said in that conversation.

Q. You talked to Girl B about this as well, did you not?
A. Yes.
Q. Did she tell you at some point in time that Eileen had seen Bernie do this?
A. Yes, she did.
Q. What did she tell you happened?
A. She said that Bernie had put his fingers in my privies.
Q. She said one finger?
A. Fingers.
Q. Fingers.

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[56] No police report memorializing the date of the conversation was ever disclosed.

A. And I asked where else he touched her, what else he touched her with. She said his penie and her mouth. I asked her if she had seen his peniey and she said, "Yes," and where else he touched her. She said, "He put his hand on my fanny."
Q. Did she tell you in response to your question if anybody had seen Bernie do these thing that Eileen did?
A. Yes, she did.
Q. Did she tell you that Eileen – what Eileen said, if Girl B told about this?
A. Yes.
Mr. Ford. I object.
The Court. He may have it.
Q. Did she tell you what Eileen supposedly said?
Mr. Ford. I object.
The Court. I'm going to sustain it.
A. I ask –
The Court. No. No, there is no question.

Tr. 6/128-129. This inept cross-examination introduced improper fresh complaint evidence and further bolstered Girl B's credibility.

Perhaps most damaging was the doctor's testimony that Bernie touched her with "his penie and her mouth." Dr. Sheeley's notes clearly indicate that Girl B said he touched her with his penie and "his mouth." A-452. This testimony corroborated not only Girl B's testimony, but also supported the Commonwealth's larger theory that Mr. Baran forced the children to submit to oral sex and thereby infected Boy A. The error was further compounded when no contemporaneous limiting instruction was given**.** An ordinary fallible lawyer would have assiduously avoided eliciting testimony that bolstered the child's credibility. See Jane Satullo

testified in a dual role, as a

fresh complaint witness and also as an expert on sexually abused children.

Ms. Satullo first recounted what Girl B told her during the interview that was videotaped at the District Attorney's Office on October 6. After the hour-long getting acquainted process, Girl B talked about the things that Bernie did to her.

The way she told it in the room, she took the doll and she held it. "Bernie touched me here" and she pointed very clearly between the doll's legs and the vaginal area. Then she removed the pants from the doll. "Bernie touched me here and Bernie touched me

here" turning the doll over to the anal area, "and it scared me very much." That was the general interview.

Tr. 5/140. Ms. Satullo repeatedly described the anxiety and fear that Girl B exhibited during the interview.

$ ... she was exhibiting some fear, a lot of clinging to her mother so it took me a while to engage her friendship. Tr. 5/139.

$ She began to talk about games she played with Bernie. At that point she began to be afraid. Tr. 5/140.

$ It took quite a long while of my reassuring her it was okay, she was a very good girl and she needed to tell me. It took a long while. Her mother was brought into the interviewing room to calm her down and then she was able to tell me some of the bad stuff. Tr. 5/140.

$ The rest of the time was spent with her saying she was frightened. She thought Bernie was a bad boy and she wasn't sure she was a bad girl. There was a lot of psychologically reassuring the child not so much going over the details of the incident, but just psychologically reassuring the child that she had done nothing wrong. Tr. 5/141.

$ Some of that time she needed to go to the bathroom which is really a very normal response of children who are frightened. Tr. 5/141.

With respect to these statements, Ms. Satullo impermissibly went beyond rendering a factual account of what was said. "The witness ... may not interpret the complainant's words." *Commonwealth v. Triplett*, 398 Mass. 561 (1986)*Commonwealth v. Dickinson*, 394 Mass. 702 (1985)*Commonwealth v. Trowbridge, supra*, and "could substantially influence the jury's decision about whom to believe." *Commonwealth v. Quincy Q.*, 434 Mass. 859, 872 (2001), quoting Commonwealth v. Richardson, 423 Mass. 180, 186 (1996).

Despite the lack of an objection from defense counsel, the judge recognized that there was a problem with Ms. Satullo's testimony. "That last statement could be misunderstood by the jurors." Tr. 5-148. The judge proposed giving a curative instruction "to point out what this witness is entitled to say as an expert is of a general nature as opposed to any opinions as to

whether or not anyone of the particular witnesses in this case is speaking the truth." The instruction was given at the conclusion of Ms. Satullo's direct testimony.[57] Tr. 5/149. Ms. Satullo impermissibly vouched for the Girl B's credibility. She specifically indicated believed Girl B had been sexually abused by defendant. The curative instruction was inadequate - the testimony should have been stricken and the jury should have been explicitly instructed to disregard Ms. Satullo's testimony that a child who repeats a story is telling a true story and her assertion that there have never been any cases of young children falsely accusing somebody.

**f. Child psychiatrist Dr. Suzanne King.** Dr. King also testified in a dual role, as Girl B's psychotherapist and as an expert in child psychiatry.

In her capacity as Girl B's therapist, Dr. King opined that Girl B had been emotionally

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[57] After giving a brief fresh complaint instruction, the judge gave the following instruction:

> I'd like to make a comment about the testimony of the last witness. Experts are permitted to testify as to many things and this witness did, in fact testify as to certain things. I want to suggest to you that you understand that her testimony was of a general nature when she talked about certain persons saying certain things that has a ring of accuracy or truth. She would not have been permitted and did not refer to the specific testimony of certain witnesses in this case.
>
> First of all, she wasn't in the courtroom when they testified and didn't hear them. In other words, what I'm saying to you is that deciding as to whether anyone is telling you the truth in a trial on the witness stand is exclusively the province of the jurors. Only jurors can make that decision. No one can interfere with that.
>
> So that, if I as the judge were going to try to give an impression as to who you should believe or who you shouldn't believe that would be improper. Lawyers can't do it, neither can the expert witness. Someone can't come in – witness X who is standing on a street corner when these two cars collided is telling the truth when he was telling you that. No witness can tell you that. Experts can tell you about things in general and hypothetical cases and so on. So I wanted to make sure you understand that distinction as well since we are ending at a point where the last witness would be cross-examined.

Tr. 5/150-151.

traumatized, "based on the history that I received from the child, from the mother, behavior that I observed, what she showed me in her play, what she tells me about her nightmares." Tr. 6/109-110.

When ADA Ford asked Dr. King to describe what she had observed in Girl B's play, defense counsel properly objected, arguing that what Girl B said week after week in her therapy sessions would not be fresh complaint. The statements would be nothing more than hearsay. The judge erroneously overruled the objection, reasoning that a psychiatrist should be able to testify about the basis of her opinion that a patient had suffered emotional trauma in the same way a physician is able to testify about the basis of an opinion that a patient had suffered physical trauma.[58] Tr. 6/110-111.

Dr. King was then permitted to testify that "the major themes of Girl B's play have had to do with fear from bad men, with being injured, and with the need for safety and protection." These themes were significant, she explained, because one would not normally see them in a child of this age unless the child experienced some kind of injurious trauma. Tr. 6/111-112. Dr. King cited the following specifics:

$ Girl B repeatedly said that "she is afraid of a man named Bernie." Tr. 6/115.

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[58] At side bar, Conway objected, arguing that what Girl B said or did during ongoing weekly therapy sessions would not be Fresh Complaint. Her statements would be hearsay.

In response, Ford argued that Conway had repeatedly insinuated that the child's testimony might be the product of suggestion by the parents or other adults. Dr. King was going to give an opinion that the defense's suggestion theory was nonsense. In order to express her opinion, Ford contended, the doctor needed to describe the types of things Girl B did.

The judge agreed with the prosecutor. He reasoned that, if the victim had been physically traumatized, a physician would have been able to testify about what he found as the basis for his opinion. "... I think someone who has been psychologically traumatized ought to have the same opportunity, insofar as having a qualified expert say what he found. It doesn't have to be tangible to qualify a result. So I think this witness is qualified. Therefore, I'm going to permit it." Tr. 6/110-111.

$ Girl B had a recurrent nightmare in which a witch cut off her hands. Tr. 6/113.

$ On one occasion, Girl B "was playing ... that her legs were a tunnel and that cars went through that tunnel. And at one point there was a crash in the tunnel and a lot of blood in the tunnel and she wanted to tell her mother to come wipe up the blood." Tr. 6/113-114.

These statements, made in the context of ongoing play therapy, were not fresh complaints. They were undeniably hearsay. They bore no indicia of reliability and should not have been admitted. The error was compounded by the fact that the statements were repeated by an expert who, by noting their significance, gave the statements an undeserved aura of reliability.

Dr. King impermissibly compared Girl B's behaviors to the behaviors typically exhibited by sexually abused children. She testified that Girl B exhibited signs of regression. Unlike a normal three-and-a-half year old, she was not able to separate from her mother. In addition, Girl B had started bed-wetting after having been dry for a while. "It's something that I have seen in children who have been sexually abused." Tr. 6/112-113. While the courts in this Commonwealth have uniformly allowed expert testimony relating generally to behavioral characteristics of sexually abused children, see Commonwealth v. Hudson, 417 Mass. 536, 540 (1994) and cases cited, such testimony must be confined to general behavioral characteristics and may not refer or compare the child complainant to those general characteristics. *CCommonwealth v. Richardson*, 423 Mass. at 186. Experts are prohibited from comparing those general characteristics to the behavioral characteristics of a specific child. Commonwealth v. Spear, 43 Mass.App.Ct. 583, 594 (1997). "Where the witness explicitly links the opinion to the experience of the witness child, the opinion is clearly impermissible vouching." *Commonwealth v. Federico*, 425 Mass. 844 (1997)

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[59] On cross-examination, Dr. King agreed that "[o]ne might be able to suggest something

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*Commonwealth v. Montanino*, 409 Mass. at 504. When Jane Satullo improperly crossed the line into vouching, the judge gave a prompt, albeit inadequate, curative instruction. No such instruction was given in connection with Dr. King's testimony. Neither did the final instruction on expert testimony cure the error.[60] At no time was the jury explicitly instructed to disregard Dr. King's opinions regarding Girl B's credibility. The error was magnified when, in his closing argument, Mr. Ford urged the jury to recall the impermissible vouching:

> ... you heard the child psychiatrist, Dr. King, tell you that a child of such tender years simply does not have the cognitive ability to make up or fabricate a story about sexual abuse. Tr. 8/48.
>
> I'm sure you recall the testimony of Dr. Suzanne King. She told us that Girl B's emotional trauma was real, that the trauma, the fear from which Girl B was and is still suffering, could not be the result of some fabrication. Tr. 8/49.

In light of the fact that Girl B's credibility was a crucial issue, the improper use of Dr. King's testimony to bolster Girl B's credibility was error requiring reversal. Six witnesses

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to a child" but she stated that "one couldn't suggest ... the feeling that goes along with it and the anxiety that a child shows connected with it." As to whether an anxious parent could make a child anxious, she said, "No, I don't think the anxiety would necessarily be transferred to the child and certainly not anxiety where the child shows the amount of anxiety that Girl B, for example, has shown along with all the other symptoms that suggest that a child has been hurt in some way." Tr. 6/115.

[60] The judge gave the following final instruction on expert testimony:

> Now, in the course of this trial you've heard testimony from certain expert witnesses. Ordinarily a witness can only testify to that which he or she saw or heard. But where matters are brought out that are technical or beyond the knowledge of the average person then an expert may give his or her opinion to assist the jurors in understanding the evidence. That expert opinion does not extend to an opinion as to whether a particular a particular witness who appeared before you is telling the truth or not. It extends only to the areas that the expert testified to. Such expert opinion is subject to the same rule as that of any other witness. That is, you can accept everything the witness says, or reject all of what the witness says, or accept anything in between those two extremes. Tr. 8/82.

repeated out-of-court statements made by Girl B: Mother B, Detective Bruce Eaton, Trooper Robert Scott, Dr. Jean Sheeley, Jane Satullo, and Dr. Suzanne King. Although there is no *per se* rule of how many fresh complaint witnesses may testify, *Commonwealth v. Licata,* 412 Mass. at 660. "[R]epetitive testimony from several witnesses regarding the details of the complaint may lend undue credibility to the complainant's testimony." *Commonwealth v. Lavalley,* 410 Mass. 641 (1991)*Commonwealth v. Licata,* 412 Mass. at 660; *Commonwealth v. Dion,* 30 Mass.App.Ct. 406 (1991)*Commonwealth v. Sherry,* 386 Mass. 682 (1982)*Commonwealth v.*

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[61] The judge gave the following limiting instruction after Mother B was excused from the courtroom:

> Now, before we proceed with this witness, if you will just allow me, I want to give a preliminary instruction to the jurors. That is not concerning the testimony of this witness but concerning the testimony of the last witness who testified in regard to what the law calls Fresh Complaint. ... I expect that there will be other such testimony, Fresh Complaint testimony. ...
>
> It is a rule of evidence that one witness cannot testify as to what someone else said. It's called hearsay. However, there's an exception to that rule just as there is probably to almost every other rule. And there is an exception in cases like that, that is, cases involving sexual assault, rape, indecent assault and battery, any kind of sexual assault case. A person who alleges that a sexual assault took place and who reports it or complains of it or tells of it to someone else, if it is made during a certain period of time, under all circumstances may be considered Fresh Complaint. And the person to whom that is related to may therefore testify as to what it was in detail that the person claiming to have been assaulted says to them. You heard some of that testimony from the previous witness, Mother B. And as I indicated, you will probably hear additional testimony in the course of this trial form other persons, police officers who took statements, physicians, counselors – I'm not sure who else – perhaps other parties. But in any event, the law permits such persons to tell you what it is that they were told concerning an alleged sexual assault upon the person who related the matter.
>
> Here's the important thing to remember about Fresh Complaint. There are two points I want to make. Fresh Complaint is not positive evidence that the assault took place because repeating a story or telling a story more than once doesn't make it more so that not. It simply is offered to corroborate for your use in whether you believe, whether you accept the testimony of the person who actually says they experienced the sexual assault. So, it's for that purpose. If you accept the testimony of Fresh Complaint then you may consider such testimony for whatever light you feel it provides on the alleged victim's truthfulness on the witness stand here, or in the area of the witness stand. But, again, you may not take it as direct proof of the event that occurred as – or described in

*Snow,* 30 Mass.App.Ct. at 446.

The second fresh complaint instruction had some of the same flaws as the previous instruction. It was given late, after Ms. Satullo had completed her testimony for the Commonwealth. Although the judge properly instructed the jury that the fresh complaint testimony could be considered "if you make the finding that it was, in fact, a Fresh Complaint," the judge once again failed to explain that the jury could disregard the testimony if the jury found that the complaint was not reasonably prompt.

At no time before, during, or after the testimony of the other four fresh complaint witnesses - Detective Eaton, Trooper Scott, Dr. Sheeley, and Dr. King - were contemporaneous limiting instructions requested or given. It was not enough that the judge informed the jury during his first fresh complaint limiting instruction that "you will probably hear additional

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> the Fresh Complaint.
>
> Now, obviously, it follows then that if the person relating the Fresh Complaint states in detail that which wasn't stated by the alleged victim in the direct testimony then of course, that's not evidence of anything and you can't accept that detail which you find and you recall was not stated by the alleged victim in direct testimony.
>
> So that instruction on Fresh Complaint is something I'll repeat to you at the close of all of the evidence after arguments but you can keep it in mind during the course of this trial when you hear other examples of such Fresh Complaint.

Tr. 4/156-158.

[62] At the conclusion of Ms. Satullo's direct examination and immediately before recessing the trial for the weekend, the judge gave the following fresh complaint instruction:

> ... I'd like to remind you that on an earlier occasion I gave you an instruction concerning fresh complaint which is the relating of a series of alleged events by the alleged victim of those events to another person and that person's testimony as to what was said to the witness. That of course, as you know since I told you earlier is not positive evidence of the act. It is available for you to use if you make the finding that it was, in fact, a Fresh Complaint as corroboration, and for that purpose only. So, I remind you of that.

testimony in the course of this trial from other persons, police officers who took statements, physicians, counselors." The purpose of contemporaneous limiting instructions is to alert the jury that the testimony they are hearing may be used for corroboration only. Had defense counsel requested prompt limiting instructions, it would have been reversible error for the judge to refuse to give it. *Commonwealth v. Goss*, 41 Mass.App.Ct. 929 (1996)

**1. Trial counsel failed to investigate, to seek discovery, or to properly prepare for trial.**

Mr. Conway was ill-prepared to cross-examine the three experts who testified for the Commonwealth regarding their contacts and opinions about Girl B.

**a. Jane Satullo.** In addition to the videotaped interview on October 6th, Girl B

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Tr. 5/150.

[63] The judge's final instruction on fresh complaint was as follows:

> As I instructed you during the course of this trial concerning Fresh Complaint, I'm going to now reinstruct you on that point as I indicated I would.
>
> As you recall witnesses were permitted to testify that the alleged victim – some of them or all of the cases – it's your memory – told either the mother or the police officer or the social worker or whatever your recollection is, that they were molested in a sexual way and they gave certain details of that.
>
> When the victim of an alleged sexual assault recounts what happened to another person after the event, that is called Fresh Complaint. If you believe the testimony you've heard that Fresh Complaint was made in this case then in deciding how much credibility to give the alleged victim's testimony in this trial as to what happened, you may consider that the Complaint was made and also all the details of the Fresh Complaint that were related to you. But I instruct you that you may not consider the fact of the Fresh Complaint as positive evidence that a sexual assault did, in fact, occur since the likelihood that any story is true is not increased just because it is repeated on occasion by the alleged victim.
>
> So, it's for you to say. If you accept the testimony of Fresh Complaint you may consider such testimony for whatever light you feel it provides on the victim's truthfulness on the witness stand in the courtroom in this trial. But again, you may not take it as direct proof that the events occurred as described.

evidently had multiple "visits" with Rape Crisis Counselor Jane Satullo. The only discovery that was provided in connection Mr. Satullo was the videotape itself. See *Commonwealth's Certificate of Discovery*, A-70.

There is no evidence that Mr. Conway ever sought, obtained, or viewed the unedited videotape of Jane Satullo's interview of Girl B. To date, the Commonwealth has provided current counsel with two edited versions of the B interview: the grand jury version, 5 minutes and 27 seconds in length, and a second edited version, 13 minutes and 16 seconds in length.

$ Edited out of the version shown to the grand jury were Girl B's denial that she ever played a touching game at ECDC, Girl B's denial that Bernie touched her with anything other than his finger, Girl B's denial that he ever touched her anyplace else on her body, and her complete inability to talk about the bird's nest game.

$ Edited out of both versions were Girl B's efforts to call Bernie on the telephone, her inability to accurately say whether her father had a beard, and her curious statement to Jane Satullo that she was going to have a dream and she would tell Ms. Satullo about it.

There is no conceivable reason for failing to request, view and analyze the unedited tape in advance of trial. It is clear from the record that Mr. Conway did not watch the videotape until the night before Girl B testified. Even though it is not clear what version of the videotape he saw - short edited, edited, or unedited - there is no doubt that he failed to utilize the videotape to Mr. Baran's advantage. He failed to use the tape to impeach Ms. Satullo's simplified account of the interview and failed to showcase the suggestive techniques that she used to get disclosures from Girl B. Finally, he failed to use prior inconsistent statements made by Girl B on the tape to

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Tr. 8/83-84.

illustrate the evolution of her story.

Mr. Conway scored a minor point when Ms. Satullo acknowledged that Girl B said nothing about scissors during the videotape, but dropped the ball when she added that Girl B mentioned scissors "during one of the visits" several weeks later. Mr. Conway never asked how many visits there were and , more importantly, never bothered to ask if Mr. Satullo had records of the visits, nor did he ask for the records. Tr. 6/7.

Mr. Conway was not prepared to challenge Ms. Satullo's credentials and expertise in the field of child sexual abuse. By all indications, Ms. Satullo was a relative novice in the field of child sexual abuse. In 1983, she received a masters degree from Antioch "with special emphasis on child and adolescent psychotherapy." She had worked for the Rape Crisis Center full-time for about a year and part-time for a year. Tr. 5/136-137. She was by no means an authority on child sexual abuse. Nevertheless, she was permitted to testify, without objection or foundation, about the behavioral symptoms of a sexually abused child. Finally, she testified without objection that "there haven't been any cases of young children falsely accusing somebody" and that children are no more susceptible to suggestion to "than the rest of us." Tr. 6/11-12. Not only did Mr. Conway fail to directly challenge her expert credentials and the basis of her opinions on cross-examination, but he failed to call his own expert witness to rebut her testimony.

**b. Dr. Jean Sheeley.** Pediatrician Jean Sheeley did a pediatric gynecological exam on Girl B on October 8, 1984. The only discovery that was provided in connection Dr. Sheeley's examination were two pages of notes from Girl B's office visit with Dr. Sheeley on October 8, 1984. See *Commonwealth's Certificate of Discovery*, A-70.

Among the six alleged victims, Girl B was the only child who showed any evidence of physical trauma. It is therefore shocking that Mr. Conway made no effort to obtain Girl B's medical records from Dr. Sheeley. Had he done so (and had the prosecution complied with its

continuing duty of disclosure), Mr. Conway would have learned before he was cross-examining Dr. Sheeley that she did not characterize her findings as a ruptured hymen until she re-examined Girl B on January 16, 1985.

Dr. Sheeley was a general pediatrician just a few years out of her residency. Had Mr. Conway consulted with a specialist in pediatric gynecology, he would have been prepared to challenge her credentials and expertise in the field of pediatric gynecology.

**c. Dr. Suzanne King.** Child psychiatrist Suzanne King began seeing Girl B for weekly play therapy sessions on October 16, 1984. By the time she testified, Girl B had already had fifteen sessions with Dr. King.

Dr. King was not listed as a witness on the *Commonwealth's Certificate of Discovery*, A-70. Nevertheless, she testified as an expert witness at the competency hearing and again at Mr. Baran's trial. She testified both as Girl B's psychiatrist and as an expert in cognitive development.

There is no evidence that Mr. Conway objected to the Commonwealth's failure to disclose her as a witness. There is no evidence that Mr. Conway made any effort to find out about Dr. King's credentials, prior testimony, and opinions, nor is there any evidence that he attempted to obtain Girl B's therapy records. Her opinion that Girl B had been emotionally traumatized was "based on the history that I received from the child, from the mother, behavior that I observed, what she showed me in her play, what she tells me about her nightmares." Tr. 6/109-110. The records would therefore have been discoverable. See Commonwealth v. Oliveira, 431 Mass. 609, 614-616 (2000). Mr. Conway's failure to request the records that documented the basis for an expert witness's opinion can only be characterized as serious incompetency falling measurably below that which might be expected from an ordinary fallible lawyer. Mr. Conway's failure to mount any sort of meaningful challenge to Dr. King's

testimony is all the more egregious when one considers that she was "interpreting" Girl B's play and Girl B's nightmares, in the context of the "history" that she got from Girl B and her mother.

**2. Defense counsel failed to investigate or to develop the hysteria defense.**

Mother B testified that, until she got the phone call from her friend Carol Bixby about Bernie Baran, she had not so much as an inkling that her daughter might have been sexually abused by Bernie Baran. Nevertheless, as soon as Mother B hung up, she immediately went into her daughter's room and began asking questions about what Bernie Baran had done to her. Tr. 4/131-132, 4/144-145. Why was she suddenly so concerned when Girl B had not even been at ECDC for several months and was now enrolled in a new school? Was this ordinary parental concern, or was something more fueling the instantaneous interrogation about whether Bernie had ever touched Girl B?

Minutes of the September 12, 1984, meeting of the Executive Committee of the ECDC Board, A-401, stated cryptically: "Jane will handle Bernie issue (whether or not he will be fired)." The "Bernie issue" was that there had been a complaint that a gay man was permitted to work with children. In an interview with the Pittsfield police about Mr. Baran, ECDC Director Jane Trumpy explained the "Bernie issue":

> That Baran was a homosexual was brought to her attendtion [sic] as well as to the attention of the Board of Directors. All were concerned but afraid of violating his rights if anything done to terminate him because of his choice of lifestyle.

*PPD, "Interview with Ms. Jane Trumpy,"* 10/25/84, Polidoro, p. 1, A-431. As the secretary of the Board of Directors, Tr. 4/132, Mother B presumably was aware of the "Bernie issue."

This information was crucial. Not only did it support the hysteria theory, it would have lent credence to the claim that homophobia fueled the hysteria. This report on the Trumpy interview was not disclosed on the *Commonwealth's Certificate of Discovery*, A-70, so Mr.

Conway evidently never saw it. A formal discovery request pursuant to *Rule 14, Mass. R. Crim. P.*, might well have pried the police report loose. Alternatively, investigative interviews of Jane Trumpy and/or Carol Bixby might have been fruitful. Mr. Conway, however, did nothing.

There was a second reason that Mother B may have been ready to believe that her daughter had been molested. Mother B, herself, was almost raped by an uncle as a child, but when she told her mother, her mother did not believe her. It is hard to imaging that this was not in the forefront of her mind when she began questioning her daughter. Indeed, it was so significant that she related the story to the two detectives and the social worker who came to her home to question Girl B on October 5th. "Mother was very upset and related experience of [being] 'attacked, almost raped' at age 14, by an uncle and telling her mother [who] didn't believe her." *DSS Child Abuse and Neglect Report*, Cummings, 10/6/84, p. 8, A-474. Mr. Conway had this information, but his ineptitude precluded using it to explain Mother B's state of mind. Rather than cross-examining Mother B about her state of mind when she was questioning her daughter, Mr. Conway asked Detective Eaton about what she said. He came up empty-handed. Was Mother B upset? Yes. Did she say why she was upset? Yes. Did she attribute part of her emotional distress to her own past experiences? ADA Ford objected. The judge sustained the objection. Mr. Conway dropped the subject. Tr. 5/121-122.

Better work by a competent attorney would have accomplished something material for the defense.

**3. Defense counsel failed to investigate and develop the suggestibility defense.**

Girl B acknowledged that she told mommy about Bernie "a lot of times," Tr. 4/125, but she had also talked to many other people on many occasions about what Bernie had done to her. A total of six witnesses testified about contacts with Girl B around the subject of Bernie Baran.

Even though Mr. Conway had more discovery about Girl B than about any of the other children, Mr. Conway failed to marshal the facts in a cohesive fashion to illustrate how dramatically Girl B's story changed over time. Moreover, he failed to develop evidence of prior inconsistent statements which, not surprisingly, the prosecution chose to ignore.

Mother B never had so much as an inkling that her daughter might have been sexually abused by Bernie Baran until she learned that another family at the day care center had made an allegation of sexual abuse and that he was being investigation. When Mother B first questioned her daughter about sexual abuse on the afternoon of October 5th, her questions focused exclusively on Bernie Baran and no one else. Tr. 4/144-145. When she got a nonsensical answer (when she asked Girl B "if Bernie ever touched her at school – touched her funny," Girl B responded by saying "something about her hair and said something about a bird's nest ..."), she got more explicit. Mother B said, "No, that not what I mean. Did he ever maybe touch you on the fanny?" Girl B replied, "He touched my privies a lot." "Privies" was Girl B's word for vagina. Tr. 4/132-133.

That evening three investigators - two detectives and a social worker - went to the B home. Girl B was very reluctant to talk to the three men. Asked about Bernie Baran, she said little more than to repeat that he touched her privies and they played a bird's nest game. In a private conversation with her mother, however, she explained the details of the Bird's Nest Game. When they returned to the room after five or ten minutes, the investigators heard about the bird's nest game, Tr. 4/135, and the Touch Game, both of which Girl B evidently said that she had played with Bernie. Girl B's mother did most of the talking.

The next day, October 6th, Girl B was interviewed on videotape by Jane Satullo. When Girl B and her mother left to go to the interview they talked about Bernie Baran again. Tr. 4/137. That conversation was not documented. Ms. Satullo spent "over an hour" getting

acquainted with Girl B, asking general questions and listening to whatever the child had to say. Tr. 5/139. The pre-videotape conversation was not documented. The videotape of interview was heavily edited. Girl B talked about Bernie for "maybe about twenty minutes of the interview," Tr. 5/141, but Defendant has been provided with just thirteen minutes of videotape of that interview. See *Interview of Girl B,* A-731. Girl B made no allegations about what Bernie did to her until her mother came into the room and until she was given an anatomically correct doll.

On Monday, October 8th, Girl B was interviewed and examined by Dr. Jean Sheeley. Girl B's mother was present the entire time and actively participated in the conversation. Dr. Sheeley took notes on the interview and Mother B briefly described it in a written statement to the police a few days later, but the interview was not otherwise memorialized. Dr. Sheeley's notes stated:

> 10/8/84 Evaluation for sexual abuse - Has been videotaped at rape crisis + interviewed by detectives after charges brought against ECDC staff member Bernie. Girl B attended ECDC until 5/84. Questioned here [with] family present.
>
> Asked if anyone touched genitals, says "Bernie put his fingers in my privies." Asked what else he touched her with, says "his peenie" and "his mouth." Asked what he did w/ his mouth, won't elaborate. Asked if she saw his peenie, says "yes." Asked where else he put his hands, says "on my fanny." Asked if anyone else has touched her like this, says "no."
>
> Asked if she was ever hurt by Bernie, says yes. Where? "In my privies" and puts hand on genitals. By what? "His stick." What else? "His snake" "his pretend worm." Asked if anything came out of the worm, says "no."
>
> Asked if there was ever blood when she was hurt, says "yes." Where? Puts fingers on labia. Mother asked "what happened to the blood - did Bernie clean it up? Says "yes."
>
> Asked if anyone else ever saw Bernie do these things, says "Eileen did." Were her pants up or down? "Down." What did Eileen do? "She got mad at Bernie." Did Eileen say anything could happen if Girl B told? "She say I could not come back there."
>
> Several times Girl B reluctant to [answer] questions and said "it's a secret."
>
> Asked what Bernie says will happen if she tells, says "the baby bird will be hurt and the baby bird's mother will be hurt. The pretend police will come and take the baby bird

away." Asked where the baby bird is, points to genitalia.

*Dr. Sheeley's notes on Girl B,* A-452.

On October 11th, before Mother B went to the police department to give her statement, she asked some additional pointed questions.

> Today, Oct. 11, 1984, before coming into the Pittsfield Police Dept., I told Girl B that I was going to go and see Det. Eaton and tell him what I remember about what Girl B told me. Girl B was asked by me at this time a couple questions because I wanted to be sure of what she had told me. I asked Girl B about the blood that she had on her and asked how that got cleaned up. Girl B at this time told me that Bernie took toilet paper with water on it and washed it up. Girl B also said that Bernie said "Oh my God." Girl B then said that she was sorry that she said that because Girl B is not allowed to say that. Girl B did say that that was what Bernie said about the blood. I recalled that at the doctors that there was mention by Girl B about something on her legs that came from Bernie, this was evaculation [sic] as far as we could understand. I asked Girl B tonight about if Bernie put his penie in her mouth and Girl B told me at this time that, "Bernie put his penie in my mouth and it squirted pretend worms in my mouth." Girl B stated that that made her sick when Bernie did this. But that Bernie showed her the mother and daddy worm coming down her face and Girl B laughed and felt better. I checked with her again on the person who saw her and Bernie. Girl B told me that Stephanie was the teacher, not Eileen. I asked her if she was sure it was Stephanie and Girl B stated that she was sure.

*PPD, Statement of Mother B*, 10/11/84, p. 4, A-119.

Girl B had additional sessions with Jane Satullo that apparently began on October 11th. There were multiple "visits," Tr. 6/7, although the number of visits and substance was never disclosed. Girl B began weekly play therapy with Dr. Suzanne King on October 16th. Girl B had approximately fifteen sessions with Dr. King prior to the trial. Tr. 6/107-108. No documentation of the sessions with Ms. Satullo or Dr. King has ever been provided.

Girl B's mother continued to talk to Girl B about Bernie, but only "when [Girl B] seems to want to." Tr. 4/141. About two weeks before the trial, Girl B disclosed that Bernie stabbed her in the foot and scooped out blood with scissors. "[B]ecause of further information from the family regarding the internal penetration by various objects, [Girl B was reexamined by Dr. Sheeley for the purpose of doing] a careful internal inspection on January 16th, to look for vaginal or rectal tears." Tr. 6/126.

Presumably, Girl B participated in the same six weeks of mock trials that Boy A participated in. There is, however, no documentation of this. She was clearly primed for her testimony, as evidenced by a her testimony at the pretrial competency hearing. The judge, after a series of preliminary questions, had the following exchange with Girl B:

> Q. ... if someone asks you a question and you know what answer is, what should you do?
> A. [Shaking her head from side to side.]
> Q. Well, do you know if someone asks you a question whether it's a good thing or a bad thing to tell them the truth; you want to tell me what that is?
> A. Bernie touched me.

*Competency Hearing*, p. 25.

Despite her pretrial preparation, Girl B had considerable difficulty testifying. The bulk of the incriminatory evidence from Girl B was elicited through the use of anatomically correct dolls and grossly leading questions. After a few preliminary questions, Mr. Ford then asked "... did Bernie ever touch you?" Girl B replied "Uh-huh." Girl B then took a female anatomically correct doll[64] and complied with Mr. Ford's request that she show where and how Bernie touched her. Pointing at the doll, she said, "Right here" and "Right here and right here and –" and "He touched me like – on this with his fingers." Tr. 4/114-115.

A male anatomically correct doll was used to elicit the next set of answers. When Girl B said "I don't know" in response to being asked what else Bernie had touched her with, Ford restated the question: "Did he touch you with some part of him?" Girl B answered with an affirmative "Uh-huh." Ford then handed her a male doll and the following exchange took place

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[64] At the conclusion of Girl B's testimony, the prosecutor put on the record that "when the last witness was testifying she was using these anatomically correct dolls. I want the record where Bernie touched her as she pointed to the female doll's vaginal and anal opening. And that when I asked what Bernie touched her with she pointed to the penis on the male doll and she identified as his peniey." Tr. 4/128. The court then directed that the two dolls be marked for identification as Exhibits B and C.

as he labored to get her to identify Bernie's penis as the part of his body that had touched her:

Q. ... Show us on this dolly what Bernie touched you with.
A. Right here.
Q. Right down here?
A. Uh-huh.
Q. With his pants up or down when he touched you?
A. Down.
Q. Could you see something on Bernie when his pants were down?
A. Uh-huh.
Q. What could you see?
A. (Child examining the doll.)
Q. What do you call this?
A. Peniey.

Tr. 4/115. Once Girl B identified the doll's penis, Mr. Ford asked about Bernie's penis and where Bernie had touched Girl B with his penis.

Q. Did you see Bernie's peniey?[65]
A. Uh-huh.
Q. What did Bernie do to you with his peniey?
A. He stick it in my privies.
Q. He stuck it in your privies?
A. Uh-huh.
Q. How did that make you feel, Girl B?
A. Pretty bad.

Tr. 4/116. In an effort to get the child to say that Bernie touched her mouth with his penis, Ford asked a sequence of progressively more leading questions until he simply gave her the answer that he wanted the jury to hear.

Q. Did he put he peniey anywhere else, Girl B?
A. Back there.
(Child pointing on the doll.)
Q. Any where else?
A. No.
Q. No? I thought he put it somewhere else.
A. No.
Q. How about up here?
A. On my tongue.[66]

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[65] Later in her direct testimony, she said she saw Bernie's peniey a total of three times. Tr. 4-120

Tr. 4/116. Later in the examination, Mr. Ford revisited this repulsive allegation.

Q. Girl B, remember when Bernie put his peniey on your tongue? You told us about that?
A. (Nods head up and down.)
Q. How did that make you feel?
A. Bad.
Q. Did it make you feel sick?
A. (Nods head up and down.)

Tr. 4/121.

Mr. Ford tried to get Girl B to say that something had come out of Bernie's penis. When his efforts failed, he enlisted the child's mother. When that also failed, he resorted to blatantly leading the child to recall "pretend worms."

Q. Remember something coming out of Bernie's peniey when he touched you with it?
A. Uh-huh.
Q. What?
A. Nothing
Q. I thought something came out?
A. Nothing came out.
Q. Mommy, could you just tell Girl B it's okay to tell the truth.
Mother B. What do you think came out?
A. I don't want to.
Q. Remember some pretend worms coming out?
A. (Nods head up and down.)
Mother B. What color were they?
Q. Mother you can't do that. Where did the pretend worms go?
A. On my leg.
Q. On your leg. Anywhere else?
A. (Shakes head from side to side.)

Tr. 4/116-117.

At this point, Mr. Ford focused on trying to get Girl B to say that she bled from her vagina as a result of having been sexually abused by Bernie. Ultimately, her testimony, which

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[66] Defense counsel objected at this point, presumably to the blatantly leading nature of the question. The transcript contains no record of a ruling by the judge, and the prosecutor continued with his questions.

was the product of more leading questions, was both confusing and fantastic.

Q. Now, Girl B, when Bernie touched you down here – For the record, your Honor, I'm referring to the vaginal opening of the female doll that the witness has already pointed to. When Bernie touched you down here, did something happen to you?
A. (Shakes head from side to side.)
Q. Remember something coming out?
A. (No response.)
Q. Did you bleed?
A. I forget it
Q. You forgot that?
A. (Nods head up and down.)
Q. You remember seeing some blood?
A. Uh-huh.
Q. You did?
A. Uh-huh.
Q. What did Bernie do when the blood came out?
A. He scooped it out with scissors.
Q. With scissors? How did that make you feel, Girl B?
A. Bad.

Tr. 4/117-118. Ford next asked a few questions to establish when and where it was that Bernie scooped blood out with scissors. When he got the wrong answer with an open-ended question, he gave her the answer he wanted to hear.

Q. Girl B, what room were you in when this happened?
A. In my classroom.
Q. In your classroom?
A. Uh-huh.
Q. How about in the bathroom? Anything ever happen in the bathroom?
A. (Nods head up and down.)

Tr. 4/118.

Ford then moved into questions about the "Bird's Nest." He had already told the jury in his opening statement that he would offer evidence that Bernie Baran had concocted a bird's nest story with a sexual overtone concerning a baby bird partially in the egg. When he was unable to elicit any significant testimony about the bird's nest, he suggested that maybe it was too scary to talk about.

Q. Did Bernie ever tell you a story about the bird's nest?
A. Uh-huh.

Q. Tell us what the story was.
A. The baby bird got killed.
Q. Girl B, these people can't hear you so can you speak up good and loud so they can hear what you're saying?
A. I don't want to.
Q. Do you want to talk about the bird's nest?
Court. Do you want to use the microphone?
Q. Can you tell us about the bird's nest, now? Girl B, take a deep breath, think hard. It's okay to tell.
A. I don't want to.
Q. You don't want to talk about that?
A. I just don't want to.
Q. Is it scary?
A. Uh-huh.

Tr. 4/119-120.

Mr. Conway failed to develop the following specific points and prior inconsistent statements through cross-examination of Girl B and the other fresh complaint witnesses:

**a. Where did Bernie touch Girl B?** When asked about Bernie Baran on October 5th, Girl B said "he touched my privies." By the time the case went to trial, Girl B was saying that Mr. Baran touched every orifice.

At trial, Girl B pointed to a female doll's vaginal and anal openings to show where Mr. Baran touched her, Tr. 4/128, and she said he put his penis on her tongue. Jane Satullo corroborated this testimony.

> ... she took the doll and she held it. "Bernie touched me here" and she pointed very clearly between the doll's legs and the vaginal area. Then she removed the pants from the doll. "Bernie touched me her and Bernie touched me here" turning the doll over to the anal area, "and it scared me very much."

Tr. 5/140.

Mr. Conway failed to establish that on Friday October 5th, Girl B specifically denied that Bernie touched her fanny. In his written description of his initial interview of Girl B, Detective Eaton wrote, in relevant part: "Asked at this time if Bernie touched her fanny, Girl B said No." *PPD,"Indecent A&B of Child under 14 yrs.,"* 10/5/84, A-96. In her formal statement to the

police, Mother B said the same thing. "I asked Girl B at this time in front of the officers and DSS worker if Bernie had ever touched her 'fanny,' Girl B at this time said that Bernie did not." *PPD, Statement of Mother B,* 10/11/84, p. 2, A-119. Mr. Conway had both of these documents, but failed to elicit this information during cross-examination of these witneses.

Back on October 5th, Girl B said that Bernie touched her only one time. In her written statement to the police, Mother B wrote, in relevant part: "Girl B at that time did say in front of the detectives and DSS worker that she had been touched in the privites [sic] by Bernie and that it happened one time." PPD, *Statement of Mother B,* 10/11/84, p. 2, A-119. (Emphasis added.) Detective Eaton's report corroborated this statement. "Girl B while talking with her mother explained that when she was going to the ECDC school, she was touched by Bernie one time in the privites [sic] ..." PPD, *"Indecent A&B of Child under 14 yrs.,"* 10/5/84, A-96. At the trial, however, Mother B testified that on October 5th Girl B said, "He touched my privies a lot." Tr. 4/132. She reiterated her claim on cross-examination:

> Q. Now, at sometime Girl B has told you that Bernie did this once and at times three times; is that correct?
> A. She has never used the expression "three times" to me. She has always used the expression "a lot of times" to me.
> Q. A lot of times?
> A. Yes.

Tr. 4/148. Mr. Conway had a signed statement that contradicted this testimony, yet he failed to challenge Mother B on this important point.

By failing to establish that Girl B's statements about what Bernie did and how many times he did it evolved over, Mr. Conway effectively eviscerated the suggestibility defense. **b. How did Bernie touch Girl B?** Girl B's story about how Bernie touched her evolved from touching her with his finger to penetration with his penis.

At trial, Girl B testified that Bernie touched her with "his fingers" and that he also

touched her with his "peniey." As to what Bernie did with his penis, Girl B said that "He stick it in my privies," he put it "back there," and "on my tongue." Tr. 4/115-116. Pretend worms came out of Bernie's peniey and they went on her leg. Tr. 4/116-117. Mother B corroborated Girl B's testimony. She testified that Girl B told her that Bernie put his penis "in her privies" and "in her fanny." Tr. 4/141. She continued:

> She said that pretend worms came out and we didn't understand what at first she meant. She said it squirted out of his peniey and it went all over her leg. Apparently it was pretend worms squirted on her face, down her face. Then he took a wet paper towel and washed them off.

Tr. 4/142.

Mr. Conway failed to establish that Girl B said none of these things on October 5th when she was questioned by her mother and the investigators. Even more important, Mr. Conway failed to develop inconsistent statements that Girl B made to Jane Satullo on videotape on October 6th and in Dr. Sheeley's office on October 8th.

Jane Satullo testified that Girl B said Bernie touched her with "His hand and finger, I believe." Tr. 6/10. That was not what Girl B said. On videotape, Girl B said only that Bernie touched her with "his finger."[67] Rather than challenging Ms. Satullo's "hand" comment, he gave her an open-ended opportunity to bolster the Commonwealth's case. He asked Ms. Satullo if it was significant that at one point Girl B said that Bernie touched her with his finger and that at

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[67] The following exchange took place between Jane Satullo and Girl B on the videotape:

Jane ... Did - when Bernie touched you there, in the hole you go pee, and then this hole - what did he touch you with?

Girl B He poke me in my eye.

Jane And he poked in your eye too? When he touched you here, can you show me - did he use his finger? Did he use his hands? Did he use something else?

Girl B He used his finger.

Jane He used his finger. Okay.

another point she said he used scissors. Ms. Satullo responded, "Well, my sense is that often children can't tell the whole story the first time and as she got more relaxed – the information is not scaring the adult – more details may come out." Tr. 6/10.

That Girl B originally said that Bernie touched her with his "finger," not his fingers or his hand was critical. Dr. Sheeley opined that the injuries to Girl B's hymen were consistent with "a full penetration which would occur by insertion of a penis or an object as large as perhaps several adult fingers. I feel that a smaller object such as inserting one finger probably would not produce a tear to this extent." Tr. 6/124. Rather than establishing in his cross-examination of Jane Satullo that Girl B said that Bernie touched her with his "finger," he ineptly assisted Dr. Sheeley in emphasizing that Girl B said "fingers."

Q. What did she tell you happened?
A. She said that Bernie had put his fingers in my privies.
Q. She said one finger?
A. Fingers.
Q. Fingers.

Tr. 6/128.

The incompetence continued. Mr. Conway failed to establish that Girl B denied on videotape that Bernie touched her any place else or with anything else.[68] Quite the contrary. Mr. Conway's inept cross-examination of Dr. Sheeley enabled the pediatrician to corroborate Girl B's testimony: "I asked her where else he touched her, what else he touched her with. She said his peniey and her mouth." Tr. 6/128. The clear implication of Dr. Sheeley's testimony was that

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[68] The following exchange took place between Jane Satullo and Girl B on the videotape:

Jane Anything else that he used?
Girl B [Shakes head]
...
Jane [Inaudible] Did he touch you any place else?

Girl B told her that Bernie touched his penis to her mouth. That was not, however, what Girl B said to Dr. Sheeley. According to Dr. Sheeley's notes, which were provided to Mr. Conway pursuant to the Certificate of Discovery, Dr. Sheeley wrote: "Asked what else he touched her with, says 'his peenie' and 'his mouth.' Asked what he did w/ his mouth, won't elaborate." (Emphasis added.) Mr. Conway allowed the misstatement to stand.

Mr. Conway also failed to establish that Girl B told Dr. Sheeley a story that was dramatically different than Girl B's testimony. The doctor's notes state, in relevant part:

> Asked if anyone touched her genitals, says "Bernie put his fingers in my privies." Asked what else he touched her with, says "his peenie" and "his mouth." Asked what he did w/ his mouth, won't elaborate. Asked if she saw his peenie, says "yes." Asked where else he put his hands, says "on my fanny." Asked if anyone else has touched her like this, says "no."
>
> Asked if she was ever hurt by Bernie, says yes. Where? "In my privies" and puts hand on genitals. By what? "His stick." What else? "His snake" "his pretend worm."
>
> Asked if anything came out of the worm, says "no."

The clear implication of this Dr. Sheeley's contemporaneous account was that Girl B knew what a penis was and that, contrary to her trial testimony, Bernie did not put his penis in her privies. Because Mr. Conway failed to cross-examine Dr. Sheeley about this crucial information, the jury never got this information.

Mr. Conway failed to establish that Girl B's mother was the link between what Girl B told Dr. Sheeley on October 8th about Bernie's "pretend worm" and her trial testimony that "pretend worms" came out of Bernie's penis. Before Mother B left to go to the Pittsfield Police Department to give a statement on October 11th, she asked Girl B if Bernie ever put his penis in her mouth.

I recalled that at the doctors that there was mention by Girl B about something on her

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Girl B [Shakes head]

> legs that came from Bernie, this was evaculation [sic] as far as we could understand. I asked Girl B tonight about if Bernie put his penie in her mouth and Girl B told me at this time that, "Bernie put his penie in my mouth and it squirted pretend worms in my mouth." Girl B stated that that made her sick when Bernie did this. But that Bernie showed her the mother and daddy worm coming down her face and Girl B laughed and felt better.

Statement of Mother B, 10/11/84, p. 4. The timing of this conversation is significant; it took place the day after Dr. Sheeley got the results of Boy A's gonorrhea test. The jury, however, never knew the genesis of Girl B's story about the pretend worms.

**c. Did Girl B bleed as a result of being sexually abused by Bernie?** With expert testimony that Girl B had a ruptured hymen, one would reasonably expect to have evidence of vaginal bleeding. No one ever observed anything such thing. Fortunately for the prosecution, two weeks before the trial Girl B disclosed to her mother that Bernie stabbed her in the foot with scissors and that, when she started to bleed, he scooped the blood out with scissors. While, on it's face, this statement about a foot bleeding would not seem to be particularly helpful to the prosecution, by the time Girl B testified at the trial the story had morphed into vaginal bleeding.

Through a series of leading questions, Mr. Ford managed to elicit testimony from Girl B, both ambiguous and fantastic, that she saw blood and that, when the blood came out, Bernie "scooped it out with scissors."

| | |
|---|---|
| Mr. Ford. | Now, Girl B, when Bernie touched you down here – For the record, your Honor, I'm referring to the vaginal opening of the female doll that the witness has already pointed to.<br>When Bernie touched you down here, did something happen to you? |
| A. | (Shakes head from side to side.) |
| Mr. Ford. | Remember something coming out? |
| A. | (No response.) |
| Mr. Ford. | Did you bleed? |

A. I forget it
Mr. Ford. You forgot that?
A. (Nods head up and down.)
Mr. Ford. You remember seeing some blood?
A. Uh-huh.
Mr. Ford. You did?
A. Uh-huh.
Mr. Ford. What did Bernie do when the blood came out?
A. He scooped it out with scissors.
Mr. Ford. With scissors? How did that make you feel, Girl B?
A. Bad.

Tr. 4/117-118. On redirect, Girl B added that Bernie also cut her hair with the scissors. Tr. 4/126-127. Girl B also testified that she went to the doctor "because my privies hurt." Tr. 4/120.

Dr. Sheeley testified, in dry, clinical terms, that Girl B had a ruptured hymen, Tr. 6/122, and that "There would be bleeding from the tearing of the hymen." Tr. 6/125. When Girl B was first examined on October 8th, Dr. Sheeley specifically asked her about blood. In her notes, Dr. Sheeley wrote:

> Asked if there was ever blood when she was hurt, says "yes." Where? Puts fingers on labia. Mother asked "what happened to the blood - did Bernie clean it up? Says "yes."

Clearly, Girl B talked to Dr. Sheeley about blood but said nothing about being cut with scissors. Mr. Conway failed to develop this in his cross-examination of Dr. Sheeley.

The most damaging testimony about blood came from Mother B - on cross-examination. On direct, Mother B testified that one time Girl B came home from ECDC "with what appeared to be a fairly serious cut on her foot and she said it had been cut with scissors." Tr. 4/142. Beyond that, she said nothing else about Girl B bleeding. A competent lawyer would have established that Girl B talked about blood within days of her original "disclosure," but that the

claim that Bernie scooped out blood with scissors was never part of those conversations.[69] Instead, defense counsel pursued the subject of Girl B's foot being cut by scissors on cross-examination, opening a virtual Pandora's box:

> Q. And, this incident where she told you she was cut with scissors at school, what was it? On her foot?
> A. Yes, it was.
> Q. When did she tell you that Mother B?
> A. She came home from school at one point last spring with a cut on her foot. About two weeks ago she was terribly upset. I said, "What's the matter?" She said, "I have to tell you something about Bernie." I said, "What?" She said, "When I started bleeding he scraped the blood out with scissors" and I said, you know, I don't understand or something. And she said, then – no, then he called Stephanie in and told Stephanie to clean up the blood, and I said to her that makes no sense. Why would – Stephanie would notice. She said he stabbed her in the foot with the scissors so Stephanie cleaned the blood off her foot.
> Q. Your understanding from all that Girl B told you was that the bleeding was from her foot?
> A. No, I believe Bernie scraped the blood from her vagina and then to cover it up stabbed her foot so there would be justifiable blood.

Tr. 4/145-146. At this point, Mr. Conway moved, albeit unsuccessfully, to strike the last statement - but immense damage had already been done. Tr. 4/146.

**d. The Bird's Nest Game.** The Bird's Nest Game was a mainstay of the Commonwealth's case. In his opening statement, Mr. Ford cast the Bird's Nest Game in an ominous light. He said he would offer evidence that Bernie Baran had concocted a bird's nest

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[69] Mother B described what Girl B had to say to Dr. Sheeley on October 8, 1984:

> Girl B also said that there was blood on her privies, meaning her vagina and pointing to her vagina. I asked if Bernie had cleaned up the blood and Girl B said that he had.

Statement of Mother B, 10/11/84, p. 3-4, A-119.

A few days later, Mother B asked more questions about the blood:

> I asked Girl B about the blood that she had on her and asked how that got cleaned up. Girl B at this time told me that Bernie took toilet paper with water on it and washed it up. Girl B also said that Bernie said "Oh my God." Girl B then said that she was sorry that she said that because Girl B is not allowed to say that. Girl B did say that that was what Bernie said about the blood.

story with a sexual overtone concerning a baby bird partially in the egg. Mr. Ford was unable, however, to elicit a description of the bird's nest from Girl B. When the only thing Girl B would say about it was that "the baby bird got killed," he suggested that maybe it was too scary to talk about. Tr. 4/119-120, 126-127. In his summation, he argued that the bird's nest game was one of the stories that Mr. Baran told the children to frighten them into not telling anyone about the sexual abuse. He pointed out that the story frightened Girl B so much that she could not talk about it in court. Tr. 8/52-53.

In addition to Girl B's testimony, the jury also heard from Mother B that on Friday afternoon, Girl B said "something about her hair and said something about a bird's nest ..." Tr. 4/132-133, 4/144-145. On Friday evening, Girl B did not want to talk about when Detective Eaton asked her about it. She wanted to just talk to her mother. Tr. 5/117, 119. After a private conversation with her daughter, Mother B explained to the investigators that Girl B told her that "[s]he and Bernie had found together a baby bird that was half in the shell and half out of the shell and Bernie told her the pretend police would come to take the baby bird away and that would upset the baby bird's mother very much." She added that Girl B was frightened as she related the story to her mother. Tr. 4/135.

The jury heard Girl B's testimony and select details of two other conversations in which she mentioned the bird's nest game. But there was documentation that, on at least four prior occasions, Girl B mentioned and/or was asked about the Bird's nest game: on the afternoon of October 5th, on the evening of October 5th, in her videotaped interview on October 6th, and when she was examined by Dr. Sheeley on October 8th. Moreover, on each successive occasion the story grew.

There was no indication that the bird's nest game was anything other than innocuous

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Statement of Mother B, 10/11/84, p. 4, A-119.

when Girl B initially mentioned it on Friday. When Mother B first asked Girl B "if Bernie had ever touched her in a funny way," Girl B said that "Bernie and Girl B would play the 'Birds Nest' game, Girl B said sometimes in Girl B's hair and sometimes in Bernie's hair." *Statement of Mother B,* 10/11/84, p. 1, A-119.

That evening, when asked about Bernie, Girl B said only that Bernie patted her and that they played the Birds Nest Game. Tr. 5/117; PPD, *"Indecent A&B of Child under 14 yrs.,"* 10/5/84, A-96; *Statement of Mother B*, 10/11/84, p. 2, A-119. It was not until Girl B and her mother returned after a ten-minute private conversation that details were disclosed. Mother B, not Girl B, was visibly upset when they returned and it was Mother B, not Girl B, who did most of the talking when they returned. Indeed, "[Girl B] could not tell the story without help from [her] mother." *DSS Child Abuse and Neglect Report - B,* Cummings, 10/6/84, p. 7, A-474. According to Detective Eaton, Mother B told the investigators a more innocuous version of the Bird's Nest Game, in which there was no mention of a baby bird being taken away or of a mother bird being upset.

> Mother B stated that Girl B and Bernie one day had played the "Bird Nest Game." This game was as follows, Bernie found a birds nest with a dead bird in it still in part of its egg and told Girl B that if the "make beleave" [sic] Policemen found out about the bird and nest that Bernie would be in trouble.

PPD, *"Indecent A&B of Child under 14 yrs.,"* 10/5/84, pps. 1-2, A-96.

The next day, when Girl B was interviewed by Jane Satullo on videotape, Girl B said nothing about the bird's nest game, despite the combined best efforts of Ms. Satullo and Girl B's mother, both of whom repeatedly reassured her that they knew it was a scary story:

> Jane Do you know what the birds nest game is? It's scary to talk about the game. Do you think you could maybe tell me something about the birds nest game? Do you think you could tell me something about that now? I can tell that you're really scared and that you're very afraid.
>
> Mother [Inaudible] - about that game. Honey, I'd like it if you'd tell her and then we could leave.
>
> Jane I'm just gonna let you know that I think you're really scared and you don't understand [inaudible] wrong. It might feel like it's not safe to talk about the birds nest.

Girl B [Inaudible]
Jane It's not safe to talk about it? My guess is somebody told you if you talk about it you'll get in trouble. Did somebody tell you that?
Girl B No.
Jane [Inaudible] Your mom asked you if you could talk about the birds nest. I heard her ask you. And I know that there's something very, very scary. And no one's going to hurt you or hurt your mom - or hurt your dad either.
Mother And no one's going to hurt the baby bird. No one's going to hurt the baby bird.
Girl B [Inaudible]

*Interview of Girl B,* A-731. The videotape ended at this point.

By the time Girl B got to Dr. Sheeley's office on Monday October 8th, she had adopted the suggestions of her mother and Jane Satullo that Bernie told her that the baby bird and the mother bird would get hurt if she told anyone what Bernie did to her. Dr. Sheeley wrote in her notes:

> Several times Girl B reluctant to [answer] questions and said "it's a secret." Asked what Bernie says will happen if she tells, says "the baby bird will be hurt and the baby bird's mother will be hurt. The pretend police will come and take the baby bird away." Asked where the baby bird is, points to genitalia.

*Dr. Sheeley's notes on Girl B,* A-452. The degree to which Mother B contributed to this portion of the conversation is unknown.[70]

Mr. Conway failed to impeach Girl B's trial testimony that "the baby bird got killed" with all of her prior inconsistent statements. In addition, he failed to marshal the evidence to illustrate the evolution of the bird's nest story. In the beginning the story was innocuous but it

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[70] It is clear that Mother B actively participated in the conversation between Girl B and Dr. Sheeley. She freely acknowledged that she suggested answers to Girl B at other points in the conversation. "There was also a time that Girl B was asked if anyone had seen this happen with Bernie and Girl B and Girl B after asking me what girl and me answering you mean Eileen, not thinking that I was putting a name in her head, Girl B said yes Eileen." *Statement of Mother B,* 10/11/84, p. 3-4. Mother B's contribution was not, however, documented in Dr. Sheeley's notes. "Asked if anyone else ever saw Bernie do these things, says 'Eileen did.'" *Notes of Dr. Jean*

grew, over time, into something very sinister-sounding.

**e. Was Girl B afraid of Bernie?** Fear was a theme of the prosecution. At several points during his examination of Girl B, Mr. Ford asked her if it was scary to talk about these things. Each time she answered affirmatively. Tr. 4/119, 120, 127. Mr. Conway played into this theme when he tried to get Girl B to make an in-court identification of Mr. Baran at the conclusion of his cross-examination. "Who is that right there?" Girl B responded, "I don't want to." She evidently exhibited some distress because both attorneys comforted her, assuring her that "It's all right." Tr. 4/127

Other witnesses followed suit. Mother B testified that Girl B was "terrified" while she was answering the investigators' questions, Tr. 4/134, that Girl B was frightened as she told her mother the bird's nest story, Tr. 4/135, and that she became upset during the Satullo interview, Tr. 4/138. Jane Satullo testified that when Girl B began to be afraid when she started to talk about Bernie, that her mother was brought in to calm her down, and that Girl B said it scared her when Bernie touched her. Tr. 5/140. Dr. King testified that Girl B "repeatedly said that she is afraid of a man named Bernie," Tr. 6/115, but denied that she expressed or exhibited a general fear of men, Tr. 6/117.

The fact was, however, that early on Girl B exhibited no fear of Bernie Baran - just affection. She was afraid of the three male strangers who questioned her that first evening and, rather than being fearful of Bernie, her mother believed that Girl B was protective of him because she thought he would be hurt by the pretend Police.[71] Even more significantly, the next

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*Sheeley,* 10/8/84.

[71] "At the time, it was very uncomfortable for Girl B to say anything with the detectives or the DSS worker because of them being strangers. Girl B also was still trying to protect Bernie because it was in Girl Bs head that Bernie would be hurt by what she call the 'pretend Police.'" ... "I could see that Girl B was upset talking in front of these people at this time." *Statement of Mother B,* 10/11/84, p. 2.

day she wanted to talk to Bernie on the telephone during her interview with Jane Satullo. This information evidently did not serve the Commonwealth's purpose because it was edited out of the videotape. There were, however, written accounts of Girl B's wish to talk to Bernie.

> Girl B at one point picked up the telephone in the room, questioned where the dial tone was and wanted to call Bernie. She even told her mother that when she got home she had to call Bernie.

*DSS Child Abuse and Neglect Report*, Cummings, 10/6/84, p. 8(a), A-474.

> There was an attempt by Jane to talk more about the Birds Nest Game with Girl B but Girl B wanted to call Bernie on the phone to make sure that it was alright to tell about this. When Jane and I would only let Girl B make pretend phone calls to Bernie, Girl B got very nervous and had to go to the bathroom two times.

*Statement of Mother B*, 10/11/84, p. 3, A-119. Had Mr. Conway developed this important information, he could have effectively countered the claim that Girl B was afraid of Bernie from the beginning and could have bolstered the suggestibility defense. The evidence supported an argument that Girl B progressively became fearful as well-intentioned, solicitous people suggested to her that it was hard to talk about what Bernie did to her because she was scared.

**f. Girl B's nightmare.** Mother B testified that Girl B had a nightmare "about having her hand cut off" a night or two after this thing first broke. Tr. 4/152. Picking up that thread, Dr. Suzanne King testified that Girl B's recurrent nightmare in which a witch cut off her hand was significant because it suggested that "she is preoccupied with injury, with having been injured, and I wouldn't expect a child of her age to be preoccupied with that unless she had, indeed, suffered some sort of injury." Tr. 6/113.

Mr. Conway failed to establish that Girl B had her first nightmare the night after she was interviewed by Jane Satullo. *Statement of Mother B*, 10/11/84, p. 3, A-119. More to the point, he failed to establish that at the conclusion of the interview, "Jane wrapped up the session and Girl B said that she would 'have dreams tonight' and would tell Jane about them." *DSS Child*

*Abuse and Neglect Report*, Cummings, 10/6/84, p. 8(a), A-474.

**g. The videotaped interview.** The videotape of Jane Satullo's interview of Girl B presented a golden opportunity to show the jury that the interview technique was far more suggestive than Ms. Satullo would admit. Even though he had the valuable videotape, Mr. Conway failed to impeach Jane Satullo's account of what was said and what was done during the videotaped interview of Girl B on October 6th. Regarding the type of questions she asked Girl B concerning the allegations of sexual abuse, Ms. Satullo testified:

> Well, the main question was: Can you show me what was done and she showed me what was done. Can you tell me who did it? She told me it was Bernie. Did it hurt? I think I asked some questions about whether her clothes were on or off. Where she was when this happened, how many times it did happen. I think those were all the questions on sexual abuse.

Tr. 5/142. She testified that, after the hour-long getting acquainted process, Girl B began to talk about things that occurred at ECDC.

> She was telling me about some games she played at ECDC. She began to talk about games she played with Bernie. At that point she began to be afraid. She said, "I cannot tell you about those game because it was very bad stuff." It took quite a while of my reassuring her it was okay, she was a very good girl and she needed to tell me. It took a long while. Her mother was brought into the interviewing room to calm her down and then she was able to tell me some of the bad stuff.
>
> The way she told it in the room, she took the doll and she held it. "Bernie touched me here" and she pointed very clearly between the doll's legs and the vaginal area. Then she removed the pants from the doll. "Bernie touched me her and Bernie touched me here" turning the doll over to the anal area, "and it scared me very much." That was the general interview.

Tr. 5/140. Ms. Satullo acknowledged on cross-examination that, at the very beginning of the interview, Girl B said she forgot the things that Bernie did. Tr. 6/6. On redirect she explained that, when Girl B said that she forgot the bad stuff that Bernie, she gave Girl B the female anatomically correct doll. Girl B then "very clearly indicated on the two places on the body where Bernie had touched her." According to Ms. Satullo, "First, she showed with the doll's pants on. She said 'Bernie touched me here,'" pointing to the vaginal area. "And then she removed the doll's pants. 'Bernie touched me here. It hurt me very much.' She spontaneously

turned over the doll and she said 'Bernie touched me here,'" pointing to the vagina and to the anus. Tr. 6/8.

The clear implication of this testimony was that Girl B clearly, confidently, and spontaneously demonstrated on the doll what Bernie did to her. Very little of what Girl B said and did during that interview can be properly characterized as clear, confident or spontaneous. When asked to tell about some of the games she played with Bernie, Girl B said, "I can't cause there was a lot of bad stuff." Ms. Satullo told Girl B that she knew there was some bad stuff, but assured her that it was okay to tell because she was "a very, very good girl." The interview continued in this vein until Girl B's mother came into the room.[72] When Mother B entered the

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[72] According to the videotape, the following conversation took place:

J You know what, I know there's some bad stuff that maybe happened, but it's okay to tell me bad stuff. You're not a bad girl. You're a very good girl.

G Well, Bernie is a bad boy cause he did a lot of bad stuff to me.

J Yeah. Can you tell me the bad stuff Bernie did cause you're not a bad girl, you're a good girl. Can you tell me the stuff that Bernie did?

G Well, it's scary to tell you.

J It is scary. It's real scary, isn't it?

G Umhmm

J You know what Girl B? Maybe you could show me on this dolly - what Bernie did to you.

G Well - Bernie - on my own dolly I can show.

J Can you do it on your own dolly? Well, here's your own dolly.

G That's my dolly that I suck my fingers with.

J That's the dolly you such your fingers with, huh?

G Yeah -

J You know, I know it's scary to tell me about the things Bernie did, but it's okay to tell me cause -

G Well, I - it's very scary stuff that I can't tell you.

J You know, I know it's real scary stuff and it's so scary it's hard for you to say it. But it's okay to say it. I know it's scary. It's very scary stuff.

room, Girl B looked up and said "Mommy, mommy, I forgot the stuff that, that, um, that Bernie did, did the bad stuff to me." Her mother reassured her. Jane Satullo reminded Girl B that she said she would tell what happened if her mother was there. When Girl B still could not remember the bad stuff Bernie did to her, Ms. Satullo handed her an "anatomically correct" doll.[73] Not until she had the "anatomically correct" doll was Girl B able to make any sort of

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G Well, I only can tell it to my own mom.

J You can only tell it to your own mom?

G To my own mom.

J Uh huh. If your mom came in and she sat down next to me, could you tell her out loud? Could I listen - cause I know it's scary but I'd like to hear.

G Well, I want my mom to come in her cause I'm a little scared.

J You're a little scared. Okay, maybe mom could come in and sit next to us. Okay?

G He's gonna go get your mom. She's gonna come sit next to us. Okay? There's mom.

[73] According to the videotape, the following conversation took place.

Girl B Mommy -

Mom What hon?

Girl B Uh - I forgot the bad stuff that Bernie did to me.

Jane Can you show me on the dolly with the dolly?

Girl B Yeah.
Jane Yeah, why don't you show me? She's funny. Yeah. What do you want to do first?
Girl B I touch - He touched me right in here.
Jane Bernie touched you right in there. Yeah.
Girl B When I was having - no, no, no, no, uh, no, no -
Jane It's okay, it's scary. You can say it. Having no what?
Mom It's okay, don't forget. Detective Eaton's gone out now.
Jane Having - having - He touched you there. You showed me and that was good.
Mom Gwynnie, the dolly has pants on. If you want to take the dolly's pants, you can.
Jane Did Bernie take your pants? Can you show me what Bernie did to you?
Girl B I, I (inaudible)
Jane Yeah.
Girl B [Pulls doll's pants down partway.] He touched me right here. [Points between doll's legs]
Jane He touched you right in there.
Girl B [Turns doll over] And right, right here. [Points at buttocks]
Jane He touched you right in there too. Umhmm. See the dolly's got a little hole in there? Did Bernie touch you in that hole? [Points at anus]

allegation about what Bernie had done to her. When Girl B began to falter after this first allegation, her mother urged her not to forget. Jane Satullo praised her - "You showed me and that was good." Girl B did not spontaneously take the doll's pants off; her mother suggested that she do that. Complying with her mother's suggestion, Girl B pulled the doll's pants partway down and again pointed between the doll's legs - "He touched me right in here." Girl B then turned the doll over - "And right, right here" pointing at the doll's buttocks. Jane Satullo directed Girl B's attention to the doll's anus - "See the dolly's got a little hole in there? Did Bernie touch you in that hole?" Girl B answered affirmatively and added that "it hurted very badly." Girl B failed to respond to a question about whether Bernie touched her in her "peepee hole."

Girl B's inability to say what Bernie had done to her until she had a doll to point to was never properly highlighted for the jury. The jury did not know how much effort actually preceded Girl B's act of pointing between the doll's legs. Girl B knew that Bernie was supposed to have done something bad to her; she just did not know what it was. Mr. Conway never asked whether Girl B had been introduced to the anatomically correct dolls, or to the procedure of demonstrating on a doll what Bernie ostensibly did to her, at any time prior to the videotape

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Girl B Yeah.
Jane Yeah?
Girl B And it hurted very badly.
Jane And it hurted very badly. It would hurt. Yeah. And did it - and you showed me before - did Bernie touch you in this hole here [Points at vagina] - is your peepee hole - is that what you call it? What do you call it?
Girl B I call it my, my, just hole that I peep with.
Jane Your hole that you peep with - and he touched you in there. Did it hurt you when he touched you there too?
Girl B [No response]
Jane Umhmm. You know, you have to know something - that you're a very good little girl. You're a very, very good little girl.

being turned on.

Moreover, the jury never knew that her allegations during the interview failed to correspond to the allegations that she made the day before. Girl B never once repeated the accusation, "He touched my privies." Indeed, it was as if she did not remember what she had said the day before. Now, instead of using the word "privies" for her vagina, she called it "the hole that I peep with." On Friday, she told her mother and the investigators about a "Touch Game" that she played with Bernie at ECDC, but now she denied that she ever played any such game at ECDC.[74] Girl B was apparently telling the truth when she said she could not remember

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[74] J - called the Touching Game at ECDC?

G No.

J You don't remember that game?

G [Inaudible]

J Should we park the bus over here?

G [Inaudible]

J Yeah, he's a little scary.

G What is his name?

J I think his name is The Hulk.

We can sit, stay with the doll. [Inaudible]

I was remembering, I know a game that I used to play call the Touching Game. I wonder if you ever played it at school?

G I didn't.

J You don't remember that game?

G [Inaudible]

J Did you do it at home ever?

G [Inaudible]

J You can touch your ears. Can you touch your ears? Umhmm. You can touch your nose.

G I can't touch my eyes - cause that would poke my eyes.

J That's right. You can't touch your eyes. There are some places it hurts when you touch. And your eyes are one place. Is there anywhere else that hurts when you touch?

G You can poke her eyes because they're not real.

J Let's see if she's going to cry. But if somebody poked your eyes, it would hurt.

what bad things Bernie did to her.

**D. Newly discovered evidence - Girl B had a normal genital exam.**

In the years since Mr. Baran's trial, medical research has established that certain genital features, particularly hymenal characteristics, that were previously believed to be abnormal and evidence of prior genital trauma are in fact normal anatomical variations. *Affidavit of James E. Crawford, M.D.,* A-305.

In light of what is now known, Dr. Sheeley's conclusion that Girl B had a ruptured hymen was groundless. Specifically, after reviewing Dr. Sheeley's testimony and her

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G [Inaudible]

J Is there someplace else if somebody touches you it would hurt?

G [Inaudible]

J Yeah, and eyes would, that would hurt a lot too. Does it hurt if somebody touches your elbow? Does that hurt?

G No.

J No. Does it hurt if somebody touches your foot?

G Nope.

J Is there some place else on your body that would hurt if somebody touched?

G If you touch my bellybutton, it wouldn't hurt.

J [Inaudible] - bellybutton hurts. Do you remember playing a game at school where you touched your ears and touched your toes?

G Yep.

J Do you remember that game?

G Yep. We do some exercises, and the exercises you, um -

J At Bonnie Prudence you do lots of exercise.

G Yeah.

J Do you remember at ECDC if you did the game where you touched your nose and touched your ears?

G No.

J You don't remember that game?

G I don't do it. And I don't got to ECDC anymore.

handwritten notes of her examination of Girl B, Dr. Crawford found:

1. The first area of hymenal "pathology" that Dr. Sheeley describes is symmetrical, bilateral "small, 1-2 mm tears" in the posterior portion of the hymen. This objective description suggests that there was slightly more hymenal tissue in the central portion of the posterior aspect of the hymen, flanked by areas where the width of the hymen was "1-2 mm" less. This is a very good description of what would presently be identified as a hymenal mound. A hymenal mound is a normal structure. It is not evidence of prior genital injury. Alternately, one might argue these findings represent two "superficial notches". These too, are physical findings identified in normal, non-abused children, and do not offer a trier of fact any insight as to whether or not injury occurred in the past.

2. Another area where hymenal "pathology" is identified is "looseness of mucosa bilaterally at sides of introitus. * two loose flaps that are left in the front where the hyman [sic] has torn toward the urethra". This is a description of an examination where no anterior hymenal tissue is present. Rather than evidence of pathology, this is a description of a normal appearing, crescentic hymen. A crescentic hymen is one of the most common anatomic forms, where the hymen is "U-shaped", and has lateral and posterior tissue, but little or no anterior tissue. The hymenal finding of "two loose flaps * toward the urethra" is a very good description of what would currently be referred to as "anterior hymenal wings". Anterior hymenal wings are normal structures. They are not evidence of prior genital injury.

3. Today's literature is clear that very few "non-acute" hymenal findings would allow an examiner to testify with certainty that a child's exam showed "clear evidence of prior penetration". None of the findings that would allow an examiner to testify today with certainty that a child's exam showed "clear evidence of prior penetration" is described in Girl B's genital exam.

4. The description of Girl B's genital exam appears to objectively describe physical findings that, if interpreted with the information available in 2004, would be characterized as normal.

This information, which was unavailable at the time of trial, surely casts grave doubt on the justice of Mr. Baran’s conviction.

**A. Facts the jury heard.** The third and fourth children who testified against Mr. Baran were Boy C and Boy D. Both Boy C and Boy D attended a puppet show on October 11 and both talked to the same social worker after the puppet show. After several interviews, a story evolved that each of them saw Bernie touch the other. The prosecutor presented their stories in tandem.

Both boys were four years and three months old[75] in October 1984 and they were four and a half years old when they testified at the trial. In connection with the boys' allegations, the jury heard testimony from: ECDC teachers and staff; Boy C; his mother, Mother C; Boy D; his father, Father D; DSS social worker Patricia Palumbo, and rape crisis counselor Jane Satullo. In addition, Mr. Baran testified in his own defense. **1. ECDC teachers and staff.** Boy C attended ECDC for a year, from September 1983 through September 1984. His last day at ECDC was September 25, 1984. Mr. Baran was an aide in two of the four classrooms to which Boy C was assigned. Boy C was assigned to Classroom 1 with Stephanie, Eileen and Bernie during his first two months of attendance in the fall of 1983. Tr. 4/70-71, 5/31. From June 18 through August 30, 1984, Boy C was in classroom 4. Tr. 4/55, 4/70-71, 5/31.

Boy D attended ECDC from November 1983 until October 1984. Boy D was assigned to Room 4 from June 18, 1984 until October, when he withdrew in the wake of the sex abuse allegations. Tr. 4/70, 5/28. One time, Boy D told Mary Morin that his mother was dead. Boy D later said that it was a joke. Tr. 4/56-57.

Mr. Baran began working in Room 4 on July 2, 1984. He was in the room from 8:30 a.m. to 10:15 a.m[76]. and again from 12:00 p.m. to 1:30 p.m.[77] He helped assistant teacher Mary

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[75] Boy C's date of birth was June 30, 1980. Boy D's birth date was July 6, 1980.

[76] In the morning, Bernie helped Mary Morin with breakfast and he helped supervise the children during free play. Tr. 4/26. When Pat arrived to take over at 9:30, they would be finishing up breakfast. Circle time was next during which the children would sit together and hear poems and stories. Tr. 3/137-138. Mr. Baran would leave at 10:15.

[77] At noon, Bernie returned to Room 4 to help with lunch and to get the children settled for their naps. Tr. 3/142. From 12:00 to 12:30, Mary and Bernie would eat lunch with the children. Tr. 3/138, 4/34. After Pat left at 12:30, Mary and Bernie spent ten or fifteen minutes cleaning up. Tr. 3/143, 3/156, 4/46. Next, the children would brush their teeth and use the bathroom. Bernie and Mary stood outside the bathroom two or three feet apart; Bernie kept an eye on the kids using the bathroom while Mary supervised the children while they brushed their

Morin because head teacher Pat Coulter did not come in until 9:30 and went out for lunch from 12:30 to 1:30. Tr. 3/135-137, 3/139, 3/150-151 , 4/26, 4/34, 4/37. During the time that Bernie Baran was assigned to the Room 4, Boy C and Boy D were in the class all day. Tr. 4/55. Mr. Baran never went on a field trip with Room 4. Tr. 4/54.

**2. Boy C.** Boy C pointed to the zipper area of his pants when asked to "show these people where Bernie touched you." When the judge suggested that perhaps he could stand on his chair, Mr. Ford asked Boy C to "show us one more time." Boy C again pointed to the zipper area of his pants. Tr. 5/38-39. As to where he was when Bernie touched him down there, Boy C answered "Woods." Tr. 5/39. He went on a bus with Stepanie, Eileen and Bernie when he went to the woods. Tr. 5/46-47.

Boy C denied, by shaking his head in the negative, that he ever saw "Bernie's P." He pointed a finger up when asked if Bernie's pants were up or down when Bernie touched him "down there." Boy C again denied, by shaking his head from side to side, that he touched Bernie

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teeth. Tr. 3/142, 4/42, 4/47-48.

Around 1:00, the children would lay down on their cots. Tr. 3/142. There was not enough room in the main room for all of the cots, so three or four children would usually be in the back room. Boy C and Boy D usually slept in the back room. Bernie and Mary took turns monitoring the back room, sitting in the back room or in the doorway between the two rooms. Sometimes Mary and Bernie would sit together, right next to each other, talking. There were probably times when Bernie was in the back room with Boy C because Bernie and Mary took turns monitoring different parts of the room. Tr. 3/145, 4/27-28 4/43, 4/50-51.

The children usually settled down by about 1:15. Fairly regularly, once the kids were settled, Mary would ask Bernie to go to the corner store to get her cheese crackers and a can of soda. He would be gone for about five minutes. When he came back, they would sit and have a can of soda together. Tr. 4/53. Bernie returned to Room 1 at 1:30 when Pat came back from her lunch hour. Tr. 4/26, 4/41-42, 4/52.

Other people were often in the room with Bernie and Mary at nap time. Two or three times a week, another teacher's aide named Donna Sumner would drop in unannounced on her lunch breaks during nap time. Neither Mary nor Bernie knew when Donna was coming. Tr. 4/37-38. A college student named Katie Donohue frequently helped out in the classroom when she was home from school. Tr.3/157-158, 4/38-39. And a young woman named Shelly Saunders helped in Room 4 sometimes. Tr. 4/39.

anywhere or that Bernie touched him anywhere. Tr. 5/39-40. Mr. Ford then gave Boy C a doll and asked him to "show us on the dolly where Bernie touched you." Boy C pointed to the doll's genital area. Tr. 5/40.

Asked where he used to hide when he played hide and seek with Bernie, Boy C answered, "Shed." He nodded when asked if Bernie ever found him in the shed but denied, by shaking his head from side to side, that Bernie ever touched him in the shed.

Boy C nodded affirmatively when asked if Boy D was there when Bernie touched him down there. As to whether he saw Bernie touch Boy D, Boy C nodded and pointed to the zipper area on his pants when asked where Bernie touched Boy D. Tr. 5/42. Boy C pointed a finger up when asked whether Boy D's pants were up or down, and he pointed a finger down when asked about Bernie's pants. Tr. 5/43.

Boy C shook his head in the negative when asked if anything came out of "Bernie's do." He nodded affirmatively when asked if Bernie ever put his do somewhere on him, and pointed to the zipper area of his pants when asked where Bernie put it. Pointing to his own mouth, ADA Ford asked, "Did he ever put it up here?" Boy C nodded affirmatively.

**3. Mother C.** Mother C was Boy C's mother. She was married and had two children: Boy C, age four, and Sister C, age eight.

Mother C learned that Mr. Baran had been charged with some crimes from the news. She subsequently talked to Boy C about things that happened at ECDC. Tr. 5/73-74. Boy C started talking at the puppet show.

> He went in and talked to Pat[78] and sitting there – and she was just talking to him. He was talking mad. She asked him if he wanted to draw any pictures. He said "yes." He had a big smile on his fact, daddy, and then started drawing another picture and the

[78] "Pat," she explained, was social worker Pat Palumbo of the Department of Social Services. Tr. 5/74.

picture was like sad. Pat said, "who's that?" "That's Bernie" and then he got mad and scribbled it all out.

She said "what are you doing, Boy C?" "I'm covering him up." She didn't push him much that day. Then she had another session and then he started talking.

Tr. 5/74. Boy C does not talk about ECDC around the house. Tr. 5/75.

Mother C noticed behavior changes in Boy C during the time Boy C attended ECDC:

He was ... clinging to me all the time. He cried at night that he didn't want to go back to the school, he didn't want to take a nap, he was like a little more hyper, he just didn't know what to do with himself. I can't describe it. He was more – he stuck to me like glue. If I went to the bathroom, anywhere, he wanted to be right with me.

Tr. 5/73. One day Boy C came home from ECDC with the wrong underwear on and a couple of other times his underwear were inside out. Tr. 5/75.

Defense counsel did not to cross-examine Mother C.

**4. Boy D.** Boy D nodded and pointed to the zipper area of his pants when asked if Bernie ever touched him when he was at ECDC,. As to where he was when Bernie touched him down there, Boy D said he was "In the woods." Tr. 5/55. The woods were "Way, far away." It was wintertime. To get to the woods, he walked "down the hill" in "the snow." When he went on the walk, Mary and Pat and lots of kids went. Boy C went, too. Tr. 5/63-65.

Boy D said that, when this happened, his own pants were down and that Bernie's pants were up. He nodded when Mr. Ford asked him if Bernie's pants fell off. Boy D nodded and pointed to his fanny area when asked if Bernie touched him anywhere else. Bernie poked him "with his finger." He didn't put his finger inside, he put his finger on his behind. Tr. 5/55-56.

Boy D gave almost entirely nonverbal answers when he was asked a series of questions about Boy C.

Q. Was Boy C with you?

A. (Child nods head up and down)
Q. Your friend Boy C?
A. (Child nods head up and down)
Q. Did Bernie touch Boy C somewhere?
A. (Child nods head up and down)
Q. Where did he touch him?
A. (No response)
...
Q. Where did Bernie touch Boy C?
A. I don't know.
Q. Did you see it?
A. (Child nods head up and down)
Q. Think hard. Tell us where Bernie touched Boy C.
A. (Child point to the area of the zipper on his pants)
...
Q. Was Boy C in the woods with you?
A. (Child nods head up and down)

Tr. 5/56-57.

As to whether he ever played hide and seek with Bernie, Boy D answered "Yes ... In the shed." Tr. 5/57-58. He also did finger painting with Bernie and played ring around the rosie. Tr. 5/65.

After stating that he called a penis "a dinky," Boy D nodded when asked if he ever saw something come out of Bernie's dinky. When asked what, he said "Nothing."

Q. Nothing came out?
A. Uh-uh.
Q. Did something white come out?
A. Uh-uh.
Q. Something yellow come out?
A. No.
Q. Nothing at all? Did something from Bernie's dinky ever go on your face?
A. Uh-uh.
Q. Did it go somewhere else?
A. Uh-uh.

Tr. 5/58.

Mr. Ford then asked Boy D if Bernie ever told him scary stories. Boy D nodded. When he said he didn't know what kind of scary stories Bernie had told him, Mr. Ford asked if Bernie

told him about devils. Boy D nodded. Did Bernie tell him about fire? Boy D nodded. Did Bernie tell him about wolves that ate little boys. Boy D nodded. Tr. 5/59. On cross-examination, Boy D nodded when asked if Bernie told him a story about the big bad wolf and about the three pigs. Boy D nodded when asked whether the story Bernie told him was about the Big Bad Wolf trying to get the pigs and eat them up. He nodded again when asked if the wolf came down the chimney and went in the fire. That story scared him. Tr. 5/62.

Mr. Ford concluded by asking Boy D if Bernie did something to Boy C when he touched Boy C. Boy D nodded.

Q. Tell these nice people what Bernie did to Boy C. Did he put his dinky somewhere?
A. Yup.
Q. Where?
A. (Child points to area of zipper on his pants)
Q. He put his dinky down there?
A. (Child nods head up and down)
Q. Did he put his dinky up here? Did he put it up here? Look at me. Did Bernie put his dinky up here on Boy C?
A. Yup.
Q. He did?
A. No.
Q. Which is it, yes or no?
A. Yes.

Tr. 5/60.

On cross-examination, Boy D nodded when asked if he knew Mr. Ford and held up five fingers when asked how many times he had seen Mr. Ford. He talked to Mr. Ford and to his mother and father about the things that happened. Tr. 5/66.

Boy D remembered going to see a puppet show, but he didn't know where he went to see it. When asked what the puppet show was about, Boy D asked, "Where's mommy?" After locating his mother, he answered "Yup" when asked if his mother and father went to the puppet show with him. He shook his head in the negative when asked if he talked to his mother about the puppet show after it was over. He shook his head when asked if he talked to Mr. Ford about

it, and denied that he talked to anyone about the puppet show. Tr. 5/67.

Boy D nodded when asked if he sometimes made up stories. Tr. 5/67. Sometimes he would tell scary stories, "real scary ones," about creatures. Tr. 5/68. When asked if he knew any scary stories about Bernie, Boy D said he told Mr. Ford a story. Tr. 5/69. He nodded when asked if he had told the story to Mr. Ford lots of times and if Mr. Ford asked lots of questions. Tr. 5/70. He denied that he ever talked to a policeman. Tr. 5/70.

**5. Father D.** Father D, an unemployed auto body worker, was Boy D's father. He testified that Boy D attended ECDC for a year, until the previous October. Tr. 5/76-77.

Mr. Ford asked him if he noticed any behavior changes in Boy D during the time Boy D attended ECDC. Father D testified that Boy D was fine in the beginning. He was happy and liked going to ECDC, but that his behavior changed when he moved to the classroom downstairs.

> ... he would come home, he wouldn't want to talk about anything. We'd ask him what he'd done, you know, in school and nothing. He wouldn't say nothing. When he goes to the bathroom he takes off all his clothes, goes to the bathroom and then come in – he doesn't put his clothes back on – sits down on the couch and watches TV with no clothes on.
> ...
> He'd sit there on the couch watching cartoons and he'd play with [his penis] a little bit.

Tr. 5/78. In addition, Father D testified that Boy D exhibited sleep problems.

> He wouldn't go to bed. He'd stay up and stay with us until he fell asleep on the couch.
> ...
> He'd wake up every night and come in and lay in bed with us and wouldn't want to go in his bed. He'd wake up two or three in the morning and come with us. We would try to put him back in bed but he was scared and he wouldn't want to go back to be so he'd stay with us.

Tr. 5/78-79.

After Father D heard the news that Mr. Baran had been charged with some crimes, Boy D

told him about some things that happened to him while he was ECDC.

Q. Please tell the jurors what Boy D told you.
A. He'd come out and say – this is out of the blue – we weren't talking about nothing, he come out and say that Bernie had pepeed in somebody's face.
Q. Anything else?
A. And that he was touched by Bernie.
Q. Did he tell you where he was touched by Bernie?
A. He kept saying the woods and the shed.
Q. How about the parts of his body that he was touched?
A. On the weeney.
Q. Is that what he calls his penis?
A. Yes.

Tr. 5/79-80. On cross-examination, defense counsel asked if Boy D ever said anything about Bernie, good or bad, before the news broke about the charges against Mr. Baran. Father D replied, "[H]e used to come home and say that he didn't want to go back to that school. He would come home crying sometimes. Sometimes he'd be happy." Tr. 5/84-85.

When Father D denied that Boy D ever said anything about stories that Bernie told him, Mr. Ford showed him a document to refresh his memory.[79] Father D then testified, "He would say the devil would get him a lot." He added, over defendant's objection, that Boy D used to come home from school and would say, "Do you love me? Do you love mommy and does mommy love you?" Tr. 5/80-81.

**6. Patricia Palumbo.** Ms. Palumbo was a protective investigative social worker with the Department of Social Services. Tr. 6/13. She began working for DSS on May 21, 1984. Tr. 6/13. She estimated that she had interviewed between forty and fifty children "in the course of her career." Tr. 6/19.

Ms. Palumbo first described her interactions with the D family. She spoke to Boy D and his family after the "sexual assault puppet show" at St. Mark's Community Center. She

[79] Defense counsel objected on the ground that the document evidently did not contain a statement from Father D, but the judge ruled that the document could be used to refresh his

subsequently "made a number of home visits." Tr. 6/19-20. Boy D was very agitated during Ms. Palumbo's first home visit. "[H]e was running around and when I got him settled down in a chair he was obviously very upset about talking to me about this." He was calmer on a later home visit. Tr. 6/23. She testified that she never mentioned Bernie's name to Boy D. She asked him about teachers that he liked and didn't like. He said he liked Bernie and that Bernie was his friend. Tr. 6/26.

Ms. Palumbo testified that Boy D said that Bernie touched him on his penis and his behind. It happened "in a shed in the back of the school and on another occasion in the woods." He also said that Bernie "peed on his friend's face and that his friend did not like this." Tr. 6/20-21. Boy D said that Bernie told him scary stories about wolves eating him up in the woods and about devils coming up from the ground and burning him. Tr.6/21.

Regarding Boy C, Ms. Palumbo testified that Mother C approached her after a puppet show at St. Mark's Church. Tr. 6/21. Mother C "said she thought he was sexually assaulted by Bernie because he was complaining about his penis being red and sore, having numerous urinary – " An objection was sustained and the jury was directed to "disregard anything coming from the mother, anything other than [Boy C]." Tr. 6/21-22.

Ms. Palumbo then related what Boy C told her. "Boy C told me and illustrated on his cabbage patch doll and touched himself on his behind and made him touch his behind and touched his penis." Boy C said that they were playing hide and seek with Boy D in the shed behind the school. Tr. 6/22. Regarding Boy C's demeanor, Ms. Palumbo testified that "Boy C was obviously very embarrassed talking to me." He would not demonstrate what Bernie did to him on his own doll. "He said, 'I won't do that to my doll.' I said, 'Get another doll and tell me what Bernie did, with the doll.' He got another doll and showed me. He was very embarrassed."

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memory for whatever purpose. Tr. 5/81.

Tr. 6/23.

As to her method of getting acquainted with Boy C and his friend, Boy D, she explained:

> I just met them at the puppet show and talked very generally with them telling them what I do. It was – it may be something that's very difficult and embarrassing to talk about. It was really forming a lot of rapport with either child individually in the safety of their own home without any other people around spending a considerable amount of time, possibly and hour, an hour and a half, before I actually asked them any questions.
>
> ...
>
> [During that hour and a half] I was talking about mommy keeping them safe in their own home. If anything happened to them it wasn't their fault. They weren't a bad boy. That and those – with those two children they weren't going to return to the Day Care Center and I think that had a bearing on being able to make them feel more secure; that they weren't going to have to go back to the Day Care Center so it wasn't going to happen again.

Tr. 6/24.

**7. Jane Satullo.** Ms. Satullo testified about the behavioral characteristics of sexually abused children and about the puppet show. See Section V.A.5.

**8. Bernard Baran.** Mr. Baran denied that he ever touched Boy C on the penis. Tr. 7/168. He denied that he ever put his penis in Boy C's mouth. Tr. 7/169. He never had any trouble with Boy C. Tr. 7/160. He did not recall that Boy C ever was disciplined by putting him in the blue chair. Tr. 161.

Mr. Baran denied that he went into the storage shed while playing hide and seek with Boy C. As far as he knew, the storage sheds were always locked. Until his trial, he never knew that the keys were hanging on a hook in the janitor's room. Tr. 7/169, 7/190.

Mr. Baran recalled that he went with Room 4 to Dorothy Amos Park a couple of times . Tr. 7/114. It had a basketball court and playground equipment. There were bushes behind the

fence going down to the river, but there was no woods inside the park fence. Tr. 7/115. The classroom stayed together as a group. They would either be in the play area or they might go out on the field to play kickball. Tr. 7/116.

The children in Room 4, who were older three year olds and younger four year olds, generally did not need help zipping or buttoning up after going to the bathroom, because they could do it themselves. Boy C would not have needed help. Tr. 7/117, 7/154.

Mr. Baran acknowledged that he was in Room 1 when Boy C was assigned to that class. He further acknowledged that he went on trips with Room 1. Tr. 7/118. Mr. Baran testified that when Boy C was in Room 1, the class went to Ward's Nursery, where they had Christmas trees and animals that the children could feed. Another time, Room 1 went to an apple orchard. On these trips, the children were kept together in one group. Tr. 7/119.

**B. Mr. Baran did not get a fair trial because his conviction was based on unreliable testimony - The judge used an incorrect legal standard to determine that Boy C was competent to testify.**

Boy C never demonstrated that he understood the difference between the truth and a lie and the consequences of telling a lie. The judge focused exclusively on the first prong of the competency test, while completely ignoring the second prong. The judge failed to properly apply the competency test and his determination was clearly in error.

Boy C was accompanied by his mother, Mother C, at the pretrial competency hearing. He was able to tell the judge his first and last name and his age. He said that he lived on "Memorial Drive" with "my Mommy and my Daddy and my sister." His sister's name was Sister C and she was older because she was a "big girl." He knew the date of his birthday, "June 30th," how old he would be on his next birthday, "five," and where he wanted to go on his birthday, "Showbiz" pizza parlor. He remembered a couple of his Christmas gifts.

The judge's colloquy with Boy C with respect to the second prong of the competency test consisted of the following:

Q. If somebody asks you a question, what should you do?
A. [Shrugging his shoulders]
Q. Should you answer the question? If you can?
Mother C. If somebody asks you a question, what do you do?
Boy C. Nothing.
THE COURT. Okay. Now, mother –
Mother C. Sorry.
Q. Let me ask you this: Do you know if it's a good thing or a bad thing to tell the truth?
A. Good thing.
Q. It's a good thing. Sure it is. And what about if you don't tell the truth; is that a good thing or a bad thing?
A. [Shaking his head from side to side.]
Q. Shaking your head, that means what? It's a bad thing?
A. [Nodding his head up and down.]
Q. That is a bad thing. Okay. If someone asks you a question you don't know the answer, what should you do, say I don't know?
A. [Nodding his head up and down.]
Q. Right?
A. [Nodding his head up and down.]
Q. No one can expect you to do more than that, right?
A. [Nodding his head up and down.]

Competency Hearing, pps. 31-32. This exchange failed to satisfy the second prong of the competency test. As with Girl B, the judge failed to establish as a preliminary matter that Boy C even understood the meaning of the word "truth" or "lie" and the difference between them. The child's affirmation of the judge's leading question, agreeing that it is a good thing to tell the truth and it is not a good thing not to tell the truth, is not sufficient evidence that he possessed an "understanding of the difference between the truth and telling a lie and [his] obligation as a witness to tell the truth." *Id.,* quoting *Commonwealth v. Monzon, supra*, the judge's questions on the second part of the competency test were "sparse," *Id*. at 250, but Boy D demonstrated that he understood the difference between the truth and a lie and his obligation to tell the truth.

In contrast, Boy C failed to adequately demonstrate that he knew the difference between the truth and a lie or that he understood the consequences of telling a lie. The judge's colloquy

consisted of nothing more than a couple of leading questions resulting in Boy C's affirmation that it was a good thing to tell the truth and it was not a good thing to not tell the truth. The judge did not have a sufficient factual basis to support a conclusion that Boy C possessed the requisite understanding necessary to satisfy the second prong of the competency test.

Boy C's performance on the witness stand at trial failed to fill the gaps left by the judge's inadequate inquiry. He did not take an oath to tell the truth; he was merely asked to "promise to tell what happened." When he failed to give a verbal response to the question, ADA Ford interjected, "I think the witness nodded in the affirmative." Tr. 5/37.

At no time during direct examination was the subject of what was, and was not, true ever touched upon. On cross-examination, Boy C testified that he told the police "fake stories." Unbelievably, Mr. Ford objected when defense counsel asked Boy C to explain the difference between a fake story and a real story. Boy C was unable to explain the difference.

Q. Do you know what it's like to tell a story? Sometimes they're real, and sometimes they're make believe stories?
A. [Child nods head up and down]
Q. Now, did you tell Jane and the police any stories? Were they real stories or make believe stories?
A. Fake stories.
Q. Fake stories. Why would you tell these fake stories?
A. [No response]
Q. They kept asking you about it, Hon, didn't they? And you told them a fake story?
A. Yes.
Q. Can you tell us what the difference between a fake story and a real story is?
A. [Nods head up and down]
MR. FORD. I object.
THE COURT. He can answer if he can.
MR. CONWAY. What's the difference between a fake story and a real story, Boy C?
A. [No response]
Q. Are you tired? It's getting to be nap time?
A. [Child nods head up and down]
Q. If real happens to you that's a real story, isn't it?
A. [Child nods head up and down]
Q. If something doesn't happen to you then it's a fake story? Isn't it a make believe story?

A. [No response]

Tr. 5/50-51. At this point, the child's inability to explain the difference between a fake story and a real story should have triggered an immediate voir dire on his competence.

**1. Defense counsel failed to request discovery and failed to object to the substitution of an undisclosed witness.**

According to the Commonwealth's Certificate of Discovery, filed 11/28/84, the District Attorney provided just two documents concerning Boy D: (1) a brief statement given by his mother co-signed by the father, *PPD, "Statement of Mother D,"* 10/25/84, A-133, and (2) the DSS Referral to the District Attorney (the 51A/B Report), A-488. The record is devoid of any indication that Mr. Conway did any independent investigation. He never made a formal request for discovery pursuant to

Evidence that on Monday, October 8, fearful parents flocked to a meeting with ECDC staff, law enforcement and sex abuse specialists would have given credence to the defense theory that hysteria swept through the Pittsfield day care community. Father D and Mother D attended this meeting. They summarized what happened at that meeting in the witness statement they gave two weeks later:

> My son Boy D has been going to ECDC for about 10 months. During that time I didn't notice any problems. He was in Stephanie's and Eileen and Burnie's [sic] class. When we went to a meeting at ECDC about the children being abused, they told us of certain signs to be looking for. I then realized that Boy D had some of these signs already. He was touching himself in his private areas and was overly active.
>
> I started asking Boy D questions but was not hurrying them. Some times Boy D would talk and sometimes he wouldn't. He did say that Burnie [sic] had touched him on his penis and on his bottom. This is when we talked to Pat Plumbo [sic] about putting Boy D on tape.

*PPD, Statement of Mother D,*10/25/84, A-133.

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[80] This substitution of one witness for another is particularly odd in light of the fact that Mother D was evidently in court. During his testimony, Boy D asked, "Where's mommy?" He

Newspaper articles that appeared in the wake of the allegations provided a little more information about the October 8 meeting with ECDC parents. According to an article that appeared in the *Berkshire Eagle* on Wednesday, October 10:

> [District Attorney Anthony J. Ruberto, Jr.] said a meeting between ECDC officials, social workers and law enforcement officials Monday night was called to explain details of the investigation to parents of children who attend ECDC. Rape Crisis Center employees, he said, told parents to watch out for possible indications that their children have been abused. They also told parents to broach the subject delicately, he said.
>
> "We do not want parents interrogating the child," Ruberto said. "We're dealing with children that are 3, 4 and 5 years old. Our primary concern is to elicit the information from them without causing any more stress or trauma than is necessary."
>
> He said the investigation would begin the screening-out process, to determine which of the center's 160 children are potential victims.

*Berkshire Eagle, "Suspect in day-care abuse case faces additional charge of rape,"* Lynne A. Daley, 10/10/84, A-165. Additional information was contained in an article that appeared the same day in Springfield in *The Morning Union.*

> Ruberto said he met with parents of pupils at the center Monday night and urged them to watch their children for signs they were molested, such as nightmares, and report any suspicions to police.
>
> If any children were suspected of being molested, a special team of rape counselors and police will question them. We don't want parents interrogating the children.

*The Morning Union, "Day care aide denies child abuse,"* 10/10/84, A-169.

That same day, *The Boston Globe* ran an extensive article on the case highlighting parents' fears and the belief that more victims would be identified.

> A teacher's aide at a Pittsfield day care center pleaded innocent yesterday to charges he sexually assaulted two children, the latest court case amid what the state Office for Children spokesman said is a "significant" increase in complaints of sexual abuse at day care centers statewide.
>
> ...
>
> The charges against Baran ... come one month after a staffer at a Malden day care center was charged with raping a young boy. That case is believed to have triggered greater awareness among parents of possible abuse.

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continued only after locating his mother in the courtroom. Tr. 5/67.

> "We have had an increase in complaints about sexual abuse in day care centers since the Malden case broke, said Michael Coughlin, a spokesman for the Office for Children. "It is a significant increase."
>
> At Pittsfield's Early Childhood Development Center ... members of the state Department of Social Services arrived at 6:30 a.m. yesterday to begin talking with parents. They plan to remain all week.
>
> The center enrolls 140 children, and Baran ... was in regular contact with about 52 of them in two classes. A hotline was set up for concerned parents who wanted to call in and talk to the center's staff.
>
> Carolyn Burns, area director of the Pittsfield office of the Department of Social Services, said she was "planning" for further cases. "It's probably too early in the game to have a lot of other stories coming out," she said. "With young children, you get bits and pieces of information. The stuff will come out over a period of time."
>
> ...
>
> "It's frightening to all of us," said Barbara Gardner, a nurse at the Berkshire Medical Center, as she picked her daughter up from the center yesterday afternoon. "I knew the man, he had taken care of my daughter," said Gardner of Baran. "We always thought he was terrific with the kids."
>
> ...
>
> Authorities said there had been no complaints about Baran until last week, when the mother of the girl allegedly assaulted called Capt. Dermody at home. At about the same time, the family of the young boy called the station with a similar complaint, he said.
>
> ...
>
> A Monday meeting was called for parents, police, the district attorney's office and center staff members to discuss the case. Parents were advised on how to discuss the matter with children, said Fred Lantz, a spokesman for the Berkshire County district attorney's office. Asked whether there are more alleged victims, Lantz said, "We don't have any evidence to indicate that at this time, but we are not assuming anything."
>
> Detective Gary Danford, who is investigating, said his office is interviewing other staff members at the center. "At this point, there are not other suspects, other than [Baran]," said Danford, who lamented the increase in charges of abuse at day care centers.
>
> Referring to the well-publicized arrest earlier this year of seven staff members at a Manhattan Beach, Calif., center on sexual abuse charges, Danford added, "I just hope this doesn't turn into another California."

*The Boston Globe, "Day care sex charge in Pittsfield,"* Jonathan Kaufman and Chris Chinlund, 10/10/84, A-167.

On Thursday, October 11, *The Morning Union* in Springfield reported that police were investigating new allegations against Mr. Baran made by a third victim. Police Captain William Dermody was quoted as saying "I think this is just the tip and we will find more cases. ... I think there may be more cases, I'm not sure how many." The mayor of Pittsfield got involved,

ordering the Police Department to "work right straight through" in the investigation. "The mayor said approximately 90 children were attending the day care center all are being interviewed along with parents, by the police." The mayor added, "Unfortunately, Captain Dermody could be right about the tip of the iceberg ..." *The Morning Union, "Sexual abuse probe expands,"* John Hitchcock, 11/11/84, A-171.

Perhaps the most inflammatory article appeared in the *Berkshire Eagle* on Friday, October 12. The article reported that another rape charge had been added the previous day and said that officials had revealed that one of the alleged victims was suffering from gonorrhea. In light of the additional charge, Mr. Baran's bail was increased from $5,000 to $15,000. Assistant District Attorney Michael McCarthy requested that bail be set at $25,000 because there was a "continuing investigation and likelihood of new charges." "Parents are outraged," McCarthy said.

> Parents of children at the center yesterday received letters about the case that were hand-delivered, according to interim director Janie Trumpy. Trumpy, who called the letter "a personal communication," refused to reveal its contents.
>
> According to one parent, who read the letter to a reporter, it said that as a result of a recent investigation, a child from ECDC has been treated for gonorrhea. The letter stressed that there is "no immediate danger to any child," but urged parents who are worried about their children to take them to a pediatrician immediately.
>
> The letter also informed parents of a medical hotline that ECDC [set up] to answer parents' questions, as well as a hotline staffed by state Department of Social Services.
>
> A second letter, from Charlene O'Brien of the Department of Public Health, told parents, "Don't panic," and went on to say that gonorrhea cannot be transmitted through such casual contact as kissing, sharing a glass, holding hands, using a public toilet or sharing a bed.
>
> ...
>
> Ruberto refused to confirm or deny that the girl has the disease, as did Police Captain William M. Dermody. But, Dermody said when asked about it, "The plot sickens, and the plot thickens."
>
> Police said tests have not yet revealed whether or not Baran has any venereal disease.
>
> ...
>
> [A spokesman for the District Attorney] said the investigators will begin screening other children. Baran, according to Ruberto, worked with about 50 of the

> center's 85 children.
>
> One mother of a child who attends ECDC praised both the center and the investigatory tactics, which, she said, include a puppet show about sexual abuse. Any child who has an unusual reaction to the presentation, which he or she see with parents, is questioned afterward.
>
> ...
>
> "A lot of parents are angry and scared to death,"[said Mayor Charles L. Smith]. "I'd certainly be angry if I was one of the parents."

*Berkshire Eagle, "Day-care worker faces a new rape charge,"* Lynne A. Daley, 10/12/84, A-173..

Meanwhile, on Thursday, October 11, in the midst of this media frenzy, Boy D went to one of puppet shows with his mother and father. After the puppet show, the family met with DSS social worker Pat Palumbo. Mother D suspected her son might have been abused by Bernie Baran because he was exhibiting some of the behaviors they'd been told to watch for at the October 8th parents meeting. Boy D had been in Bernie's class from June 1984 through October 1984. She reported to Ms. Palumbo that, in the last few months, Boy D fussed about going to school. He often took his clothes off and masturbated on the couch after getting home from day care. Lately he had started talking about devils and how he will burn in a fire and about wolves and how they bite and eat kids up. He had become really insecure and clingy, asking his parents, "Do you love me? I love you, Mom and Dad." Ms. Palumbo was "unsuccessful in gaining disclosure from Boy D." Ms. Palumbo suggested a home visit and asked the parents not to question Boy D before the next meeting. *DSS Child Abuse and Neglect Report - D,* Palumbo, 10/17/84, p. 6, A-488.

Nevertheless, Boy D's parents did talk to him about Bernie. When Pat Palumbo arrived for the home visit on October 17, Mother D revealed that, the previous night, Boy D told her that Bernie peed (urinated) all over Scott's face. *Child Abuse and Neglect Report - D,* Palumbo, 10/17/84, p.7, A-488.

Defense counsel failed to develop any of the foregoing information, all of which was in

his possession (discovery) or readily available to him (in the newspapers). Mr. Conway failed to ask Father C a single question about the October 8th parents meeting. Although he told the jury in his opening statement that "they had a meeting of all the parents of the school and told all of these parents basically, that Bernie Baran was the perpetrator of some terrible sex crimes, at ECDC, and asked these people to check into it," Tr. 3/46, he completely failed to develop this theory. The jury did not hear that neither parent had any concerns about Boy D's behavior until they went to the meeting. On direct examination, Father D acknowledged that it was only after he heard that Mr. Baran had been arrested that he spoke to Boy D about things that happened to him while he was at ECDC, Tr. 5/79, but his testimony left the impression that there had been concerns about Boy D's behavior for some time. Mr. Conway failed to seize this opportunity to establish that the parents' suspicions and fears were a direct result of the information they obtained from ECDC staff, law enforcement, social workers and the media. This evidence, if developed, might have raised a reasonable doubt about how and why the case snowballed so quickly against Mr. Baran. Instead, the theory collapsed. Mr. Conway did not even mention it in his summation. He could not marshal the evidence favorable to the hysteria theory in an effort to create a reasonable doubt because he failed to develop the evidence. Mr. Ford ridiculed the theory in his closing:

> The defense would have you believe that these charges are the result of some kind of prejudice against Mr. Baran or some sort of mass hysteria on the part of the parents.
> ...
> ... Did those parents strike you as a hysterical mob out for a pound of flesh at any price?
> ... Did they strike you that way or did they impress you as a group of deeply concerned parent frightened and worried to be sure, but a far cry from hysterical.

Tr. 8/47.

"Trial counsel put forth a defense and then failed to develop this defense through evidence, cross-examination, or in summation. He there by effectively left the defendant

'denuded of a defense.'" *Id.,* at 157.

**3. Defense counsel failed to develop the suggestibility defense theory.**

Evidence of repeated conversations with the children about what Bernie did was critical to the defense. In his cross-examination of Boy D, Boy D held up five fingers when asked how many times he had seen Mr. Ford and acknowledged that he talked to Mr. Ford and to his parents about the things that happened. Tr. 5/66. Defense counsel failed to ask Boy D about his multiple conversations with Pat Palumbo and, even worse, failed to ask Pat Palumbo how many times she talked to Boy D. She testified that she "made a number of home visits." The 51A/B reveals only one visit on October 17. Evidently she went back after she completed her 51B investigation. Counsel failed to cross-examine her about those additional visits.

It was essential to the defense that the jury understand how Boy D's story evolved. The jury heard that he went to a puppet show and that Pat Palumbo went to his home. The jury also heard about statements that Boy D made. There was a great deal of crucial information that the jury never heard because defense counsel failed to develop it on cross-examination.

The jury never heard that, when she first met Boy D at the puppet show on October 11, Ms. Palumbo "was unsuccessful in gaining disclosure from Boy D" *DSS Child Abuse and Neglect Report - D,* Palumbo, 10/17/84, p. 6, A-488.

The jury also did not know that, before she visited Boy D at home on October 17, she had already had two conversations with Boy C and both times Boy C mentioned Boy D.

$ On October 11, right after the puppet show, Boy C said that he and Boy D played hide and seek in the shed with Bernie. Boy C denied that anyone touched his "dupee," but said that "Bernie touched Boy D's dupee and Boy D touched Bernie's dupee. At the time, Ms. Palumbo wrote that she suspected that maybe "Boy C was able to speak more freely because he was saying Boy D was

assaulted, when in fact it may have been him." *DSS Child Abuse and Neglect Report - C,* Palumbo, 10/16/84, p. 7, A-524.

$ During a home visit on October 16, Boy C said that he played hide and seek in the shed with Boy D and Bernie. With continual reassurance from Ms. Palumbo, Boy C disclosed that Bernie touched his dupee and put his finger in his behind and that it hurt. He also said that Bernie made him touch his behind. *DSS Child Abuse and Neglect Report - C,* Palumbo, 10/16/84, p. 8, A-524.

The jury never heard that on October 17, Boy D made a nearly identical disclosure to the one Boy C made the day before.

> Boy D then disclosed to worker that Bernie touched his dinky (penis) and put his finger in his behind. Boy D said he was in the woods. He also talked about a game of hide and seek, where he hid in the shed with Bernie. Boy D said Bernie made him touch his behind, too.

*DSS Child Abuse and Neglect Report - D,* Palumbo, 10/17/84, p. 7, A-488. During his disclosure Boy D became very silly. He said he was going to zip up Bernie's behind.

Most important, the jury did not know that during his videotaped interview with Pat Palumbo on October 19, Boy D denied that Bernie ever touched him.

> Q. Boy D, did, uh, did Bernie ever touch Boy D?
> A. [shakes head no]
> Q. Can you show me what Bernie did to Boy D (inaudible, sounds like - if we make believe)?
> A. [shakes head no]
> Q. No. It's kinda embarrassing sometimes. Yeah. But, you know, remember what mommy said.
> A. I want to play now.

*Interview of Boy D,* p. 3, A-738.

"Trial counsel put forth a defense and then failed to develop this defense through evidence, cross-examination, or in summation. He there by effectively left the defendant 'denuded of a defense.'"

When Mr. Ford asked Father D to tell the jury what Boy D had said in conversations about things that happened to him while at ECDC, defense counsel failed to react. Even if he had reason to believe that an objection would be fruitless because the impending testimony would be allowed under the Fresh Complaint doctrine, he should have requested a contemporaneous limiting instruction to lessen the substantial risk that the jury would rely on the testimony substantively. When fresh complaint evidence is admitted, the accused "is entitled to have it impressed on the jury that the [fresh complaint] testimony may be used for corroborative purposes only." *Commonwealth v. Trowbridge,* 419 Mass. at 762 (substantial risk of miscarriage of just where the jury was not properly instructed not to use fresh complaint evidence as substantive evidence of the crime); *Commonwealth v. Scullin,* 44 Mass. App.Ct. 9 (1997)*Commonwealth v. Licata,* 412 Mass. 654, 660 (1992). Counsel's failure to object to the flawed instruction fell below what would be expected of reasonably competent counsel.

Father D and Pat Palumbo testified, without objection, to nearly identical fresh complaints that exceeded the scope of Boy D's testimony.

$ Father D testified that Boy D said that Bernie touched his "weeney" in the woods and the shed.

$ Ms. Palumbo testified that Boy D said that Bernie touched him on his penis and his behind, "[f]irst in a shed in the back of the school and on another occasion in the woods." Tr. 6/21.

Nothing in Boy D's testimony suggested that Bernie touched him on more than one occasion. Boy D testified that Bernie touched him in the woods. The only thing that he did in the shed was to play a game of hide and seek. Both statements were clearly outside the permissible bounds of corroborative fresh complaint evidence. There was no strategic reason not to object to this prejudicial testimony. Not only did counsel fail to object, but he highlighted the prejudicial point

in his cross-examination of Ms. Palumbo.

> Q. When you talked to him did you talk to him in terms of this incident that he told you about in the shed? Was this incident the same incident he was talking about in the woods or was this a different incident or were you able to determine from what he was telling you?
> A. No, I wasn't. Basically, he was saying the same two things happened to him, that Bernie touched his penis.

Tr. 6/26. Trial counsel's performance fell measurably below that which might be expected from an ordinary fallible lawyer. Commonwealth v. Sugrue, 34 Mass.App.Ct. 172, 173 (1993)(child sex abuse conviction reversed where counsel failed to object to prejudicial fresh complaint testimony that child said it happened more than once, where child testified about one occasion,).

**6. Defense counsel failed to object to hearsay improperly admitted as fresh complaint.**

Father D and Pat Palumbo testified, without objection, gave strikingly similar testimony with respect to other statements made by Boy D. These statements were all inadmissible hearsay.

The first pair of statements involved an allegation that Mr. Baran urinated on another child.

- Father D testified that Boy D said that Bernie had pepeed in somebody's face. Tr. 5/79.
- Ms. Palumbo testified that Boy D said that Bernie "peed on his friend's face and that his friend did not like this." Tr.6/21.

These statements were not fresh complaints. First, the statements are not complaints of sexual assault. Second, Boy D was not the alleged "victim" - "his friend" was. This statement was highly inflammatory because, when viewed in context, it implied that the friend to whom this happened was Boy C. This was not true and Ms. Palumbo knew it. In her 51B report, she wrote

that Boy D "said Bernie peed on Scott's face and in his mouth. He said Scott was mad. Worker asked if Bernie did this to Boy D. He said, 'No.'" *DSS Child Abuse and Neglect Report* - D, Palumbo, 10/17/84, p. 7, A-488. These statements were inadmissible hearsay.

The second pair of statements involved Boy D's claim that Bernie told him scary stories.

$ Father D testified that Boy D said "the devil would get him a lot"[81] Tr. 5/81.

$ Ms. Palumbo testified that Boy D said that Bernie told him scary stories about wolves eating him up in the woods and about devils coming up from the ground and burning him. Tr.6/21.

Once again, these were not fresh complaints. Both statements were rank hearsay and should have been excluded, but Mr. Conway failed to object. In the absence of evidence that Boy D was afraid of Bernie and was afraid to tell what Bernie did because of scary stories that Bernie told him, these statements were both irrelevant and prejudicial. To the contrary, the only evidence was that Boy D liked Bernie.

Finally, Father D testified that Boy D asked, "Do you love me? Do you love mommy and does mommy love you?" Tr. 5/81. Yet again, this was inadmissible hearsay.

A diligent lawyer would have challenged the admissibility of all of these statements. At a minimum, competent counsel should have objected to the testimony. Counsel could also have requested voir dire "so that the judge may prune out extraneous matter before the jury hears it." Commonwealth v. McCaffrey, Mass.App.Ct. , 584, n. 1 (1994). Better yet, he could have filed a motion in limine. Mr. Conway did none of these things.

Any ordinary fallible lawyer would have sought to exclude inadmissible prejudicial

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[81] Initially, Father D denied that Boy D ever said anything about stories that Bernie told him. Mr. Ford showed him a document to refresh his memory. Defense counsel objected on the ground that the document evidently did not contain a statement from Father D, but the judge ruled that the document could be used to refresh his memory for whatever purpose. Tr. 5/81.

hearsay. *Commonwealth v. Sugrue,* 34 Mass.App.Ct. at 173-174 (ineffective assistance of counsel where lawyer failed to object to improper fresh complaint testimony).

**E. Ineffective assistance of counsel regarding the C allegations.**

**1. Defense counsel failed to assert Mr. Baran's right to a probable cause hearing or to seek meaningful discovery.**

Mr. Baran was not formally charged in the C matter until the first day of trial. On January 21, 1985, Mr. Ford filed complaints charging Mr. Baran with rape (#18100), A-66, and indecent assault and battery (#18101), A-68, of Boy C. He explained that the C case had not been presented to the grand jury because "his mother was ill and had not decided whether or not she would permit Boy C to come," but that she was now willing to let him testify. He stated that Mr. Conway was agreeable to proceeding on the complaint and that he would obtain a written waiver from Mr. Baran. Tr. 1/17-18. Mr. Conway then explained, "We had decided that this was the practical thing to do since you had not severed the trial." Tr. 1/18. A written waiver of indictment was filed on Mr. Baran's behalf.[82]

A defendant in Superior Court has a right to be proceeded against by indictment.[83] *Mass.*

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[82] The first entry on the docket sheets of cases #18100 and #18101 is "Defendant's waiver of indictment." Neither the docket sheet nor the transcript indicate that the court engaged in any sort of colloquy with Mr. Baran to determine that his waiver of indictment was knowing and intelligent and that he would not be harmed by proceeding by complaint. See *DeGolyer v. Commonwealth,* 314 Mass. 626, 632 (1943).

[83] Before an individual can be formally charged with a felony, there must be a finding of probable cause to believe that a crime was committed and that the accused committed it. In Massachusetts, indictment by a grand jury has historically been favored as the means of establishing probable cause. The right of a defendant not to be publicly accused of a serious crime until probable cause determination has been made by a grand jury "is justly regarded as one of the securities to the innocent against hasty, malicious and oppressive public prosecutions." *DeGolyer v. Commonwealth,* 314 Mass. at 629, quoting Chief Justice Shaw in *Jones v. Robbins, 74 Mass. (*8 Gray) 329, 344 (1957).

*R. Crim. P., 3(b)(1)*; *M.G.L. ch. 263, Sec. 4.* This right may, however, be waived. A defendant who waives the right to indictment is entitled to a proceed with a probable cause hearing. Mass. R. Crim. P., 3(b)(2); *M.G.L. ch. 263, Sec. 4A.* The primary function of a preliminary hearing is to screen out those cases that should not go to trial, sparing individuals from being unjustifiably prosecuted. Commonwealth v. Myers, 363 Mass. 843, 847 (1973). The Supreme Judicial Court has noted that a defendant's election to waive indictment and proceed by preliminary hearing has certain collateral benefits. Not only does the hearing present the defendant with an opportunity to discover the case against the defendant and thereby prepare a proper defense, but the opportunity to cross-examine sworn witnesses yields an important tool for impeachment. Commonwealth v. Lataille, 366 Mass. 525, 529-530 (1974); *Commonwealth v. Myers*, 363 Mass at 847-848.

At the time the indictment was waived, the Commonwealth had provided just two pages[84] of discovery on the C charges. After telling the court that waiving indictment was "the practical thing to do,"Mr. Conway touched on the issue of discovery:

> The only thing I would request of the District Attorney – I had very little

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[84] The "two brief things" that Mr. Conway referred to were evidently two one-page police reports that were provided by Mr. Ford by a letter dated January 14, 1985.

The first report stated that a man named Father C phoned the Detective Bureau to report that his son, who had been in a classroom at ECDC with Bernie Baran, "had been acting strange in the past and one time mentioned that Bernie touched him in his 'poo-poo.'" The report indicated that the matter was referred to DSS for an interview. *PPD, "Possible ECDC Victim Boy C age 4,"* 10/9/84, McGuire/Danford, A-109.

The second police report stated that Boy C and his mother went to the DA's office on October 18, 1984 to do a videotaped interview. It continued:

> During the interview Boy C told Pat [Palumbo of DSS] that Burnie [sic] touched a little girls nipples. He also touched the little girls vagina and but [sic]. Boy C also said that Boy D touched Burnie's [sic] penis and that Burnie [sic] put his mouth on Boy C's penis.

*PPD, "Video of Boy C,"* 10/19/84, Collias, A-129.

information on Boy C. I don't know if there's more information available. Those two brief things –

Tr. 1/18. Mr. Ford responded to this feeble request by offering to show Mr. Conway a videotape.

Mr. Conway's failure to assert Mr. Baran's right to a probable cause hearing deprived Mr. Baran of a crucial opportunity to discover the Commonwealth's case. Because the rules of evidence at a probable cause hearing are the same rules applicable at a criminal trial, *Commonwealth v. Lataille,* 366 Mass. at 529-530.

This blunder could have been mitigated by a formal request for discovery pursuant to

When the Baran story hit, Boy C was no longer enrolled at ECDC. His last day at ECDC had been September 25, 1984.

On Tuesday, October 9, Boy C's father, Father C, phoned the Pittsfield Police to report that Boy C had been acting strange in the past and at one time mentioned that Bernie touched him in his "poo-poo." *PPD, Possible ECDC Victim Boy C age 4,* 10/9/84, McGuire/Danford, A-109. Earlier that same day, an article had appeared in the *Berkshire Eagle* under the headline "Day-care employee faces abuse charge."

> A 19-year-old male employee of the Early Childhood Development Center will be arraigned today in Central Berkshire District Court on charges that he sexually assaulted two 3-year-old children in his care.
>
> Bernard Baran ..., an employee for the past 2½ years at the day-care center, was arrested Saturday morning at 11 ... by Pittsfield Detectives Robert Beals and Peter T. McGuire.
>
> He was suspended from his post over the weekend, according to ECDC interim director Janie Trumpy.
>
> Capt. William M. Dermody, who is heading the investigation, said the arrest capped a week long inquiry that began when one of the parents of a purported victim called him. Soon after, he said, the parents of another child called police detectives to say they thought their child also had been molested.
>
> The alleged victims are a boy and a girl, both of Pittsfield.
>
> ...
>
> Although police have not determined yet exactly when the children may have

> been molested, Dermody, initial reports indicate the allegations do not stem from recent incidents.
>
> He said police, the Department of Social Service and the district attorney's office are collaborating on the investigation, which he termed "thorough." Detective Joseph Collias also has been involved in the case, he added.
>
> ...
>
> Trumpy ... urged parents with concerns or questions to call ECDC ...

*Berkshire Eagle, "Day-care employee faces abuse charge,"* Lynne A. Daley, 10/9/84, A-164.

Media coverage went beyond the print media. On Tuesday, October 9, the District Attorney called a television press conference to accommodate the widespread interest the case had generated.

> ...
>
> The local case attracted widespread attention because it comes in the wake of a number of news stories about sexual abuse in day-care centers across the nation.
>
> [District Attorney] Ruberto's press liaison, Frederick A. Lantz, said the district attorney called a press conference after several television stations from Hartford, Conn., Albany and Schenectady, N.Y. and Springfield expressed an interest in the case.
>
> Facing the lights of the television cameras, Ruberto began by reading from a prepared statement. He said that "the exact extent of the situation is unknown to us at this point."
>
> ...
>
> Asked to elaborate on the charges, Ruberto said, "There were touchings, there were fondlings and there was penetration in one case, which resulted in the rape charge."
>
> ...

*Berkshire Eagle, "Suspect in day-care abuse case faces additional charge of rape,"* Lynne A. Daley, 10/10/84, A-165.

In her direct testimony, Mother C acknowledged that she learned from the news that Mr. Baran had been charged with some crimes and that she subsequently talked to Boy C about things that happened at ECDC. Tr. 5/73-74. This statement played directly into the defense theory that the children's "disclosures" were fueled by parental panic. It is, therefore, incomprehensible that Mr. Conway elected not to cross-examine Mother C. Tr. 5/75.

Had Mr. Conway obtained the 51A/B report, he would have seen evidence that Mother C was highly emotional. According to Ms. Palumbo's report, "Mother C was noticeably upset"

when she started talking to Ms. Palumbo after the puppet show on October 11 and Ms. Palumbo "called to reassure mother" on October 12, the day that a particularly inflammatory story hit the papers. *DSS Child Abuse and Neglect Report - C,* Palumbo, 10/16/84, pps. 6-7, A-524. Diligent investigation and skilled questioning might have revealed that Mother C was afflicted with a debilitating psychosomatic illness - an on-the-job hand injury had been severely exacerbated by psychosomatic condition known as "clenched fist syndrome." *Treatment Summary,* A-746.

Competent investigation and questioning might also have revealed that Mother C had already laid the groundwork for a lawsuit against ECDC. In a letter dated October 23, 1984, Attorney Cynthia Spinola advised ECDC that she represented "... Mother C and Father C in connection with the sexual abuse suffered by their son, Boy C, by Bernard Baran ..." Letter from Attorney Cynthia Spinola to ECDC, A-658. Mother C therefore had a financial interest in the outcome of the trial.

Mr. Conway was under a duty imposed by both State, *Strickland v. Washington,* 466 U.S. at 690, constitutional law to conduct an independent investigation of the facts. *Commonwealth v. Haggerty,* 400 Mass. at 442-443.

**3. Defense counsel failed to develop the suggestibility defense.**

Mr. Conway managed to establish, in his cross-examination of Boy C, that Boy C had numerous contacts with investigators. Boy C nodded when asked if he had talked to a lot of people and answered a lot of questions about this. Tr. 5/47. He held up five fingers in response to being asked how many times he talked to Dan (Mr. Ford). Tr. 5/47. He held up four fingers when asked how many times he talked to the policemen. Tr. 5/48. He saw the puppet show once (one finger). Tr. 5/48. He played with the little boy doll twice (two fingers). Tr. 5/49. Boy C held up four fingers when asked how many times he talked to "Jane." (Mr. Conway was evidently confused about who conducted the videotaped interview of Boy C. He asked Boy C

about Jane, presumably Jane Satullo who interviewed Boy A and Girl B. The interviewer was actually Pat Palumbo. Boy C did not pick up on the mistake.) He held up five fingers when asked how many times he played with the dolls. Tr. 5/49. Boy C nodded when asked if he told Jane that it was him who touched Boy D's thing and that Boy D touched Bernie with a stick. Tr. 5/49-50. Having apparently confused Jane Satullo with Pat Palumbo, Mr. Conway failed to ask Boy C a single question about how many conversations with Pat Palumbo. He also failed to ask Pat Palumbo how many times she talked to Boy C.

As in the D case, it was essential to the defense that the jury understand how Boy C's story evolved. The jury heard that Boy C talked to Pat Palumbo at the puppet show and at another session. Tr. 5/74. Mother C briefly described the interaction between Boy C and Pat after the puppet show, Tr. 5/73-74, and Pat Palumbo related what Boy C told her without providing any time frame. Mr. Conway waived cross-examination of Mother C and, although he did cross-examine Pat Palumbo, he failed to ask her a single question about Boy C. As a consequence, Mr. Conway completely failed to develop, and the jury never heard, the following crucial information about the evolution of Boy C's story.

The jury never heard what Boy C said, or did not say, to Ms. Palumbo after the puppet show on October 11.

- Boy C "shook his head, no" when asked if anyone touched his dupee.
- Boy C said that he hid in the dark shed with Boy D and Bernie while playing hide and seek, but he said nothing when asked what they did in the shed.
- When asked if he saw anything he didn't like, he said that "Bernie touched Boy D's dupee and Boy D touched Bernie's dupee."
- Ms. Palumbo suspected that maybe "Boy C was able to speak more freely because he was saying Boy D was assaulted, when in fact it may have been him."

*DSS Child Abuse and Neglect Report - C*, Palumbo, 10/16/84, p. 7, A-524.

Neither did the jury hear that, during a home visit on October 16, "Boy C needed continuous reassurance that he was a good boy and that his Mom and Dad would not be mad at him for talking."

$ When initially asked if anyone had touched him on the dupee, Boy C responded by touching his head.

$ When asked if he could use his doll as an example, he responded by shaking the doll's head no. Instead he went to get one of his sister's doll.

$ When asked about his teachers at ECDC, Boy C said he had a boy teacher named Bernie. In response to a series of pointed questions about Bernie, Boy C said:

$ He liked Bernie; he was his buddy.

$ They played hide and seek. Boy C hid in the shed with Boy D and Bernie.

$ Bernie touched Boy C's dupee and put his finger in his behind. It hurt.

$ Bernie touched his dupee five times.

$ Bernie made him touch his behind, too.

Ms. Palumbo reiterated that Boy C needed continual reassurance to give these answers. *DSS Child Abuse and Neglect Report- C*, Palumbo, 10/16/84, p. 7-8, A-524.

The jury did not know that during his videotaped interview with Pat Palumbo on October 19, Bernie Baran was the last of several people Boy C accused of having touched his dupy. First, Boy C said that Boy D touched his dupy, but shook his head in the negative when asked if Boy D was a friend of his. *Interview of Boy C*, pps. 6-7, A-690. Next, he said that Jared touched his dupy. It required a great deal of effort to get this answer.[85] Finally, Boy C gave her the

[85] A large portion of the interview was omitted from the edited version of the tape.

answer she was looking for - Bernie touched Boy C's dupy.[86] When Ms. Palumbo asked Boy C

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Those passages that were deleted from the edited version are indicated in italics.

> *Ms. Palumbo began by asking about a shed. Boy C nodded when asked if he remembered telling her about a shed. He elaborated, "It was a green shed" and it was "in the back." Interview of Boy C, p. 14.*
>
> *"Well, were you playing that game of hide and seek one time in the shed?" Boy C answered, "Uh-huh." When Boy C offered nothing more, she suggested that it was hard to talk about (Boy C nodded) and that it was embarrassing to talk about things that were a little scary (Boy C nodded). She continued:*
>
> > *But remember that Mom loves you; right? And nobody's going to be mad at you if you tell us what happened because we think that maybe something happened. In the shed. And we kind of, I kind of want you to tell me so that I can help you understand why that happened.*
>
> *Interview of Boy C, p. 15.*
>
> *Boy C added that he bumped his head and his hand in the shed. Interview of Boy C, pps. 15-16. Ms. Palumbo persisted:*
>
> > *Let's talk about that game of hide and seek that you were playing that you were telling me about. Okay? You going to tell me about that in the shed. You remember? You were playing – did you want to show me what happened? This, these two dolls ... these two dolls right here, this is a big boy doll. And they have their special parts underneath their clothes. Okay? And that doll does, too. That doll has his special parts, too. Do you want to look and see? That was one of the dolls that Jane used, remember, in the puppet show?*
> >
> > ...
> >
> > *... So what we were talking about was a game you were playing, hide and seek when you were in the shed; right? Can you show me* where a person touched Boy C when he was in the shed?
>
> *Interview of Boy C*, pps. 16-17, A-690.
>
> When asked to show where some one touched him when he was playing hide and seek in the shed, Boy C gave an inaudible response. Ms. Palumbo filled in the gap. "On the dupy?," she asked. Boy C nodded. She asked him to point to the dupy on the doll. Boy C obliged. When asked who it was that touched him, Boy C said it was "Jared." *Interview of Boy C*, pps. 17-18, A-690.
>
> Ms. Palumbo directed Boy C's attention to the big boy doll and asked, "Was there another person, a bigger person?" *Interview of Boy C*, p. 18, A-690.
>
> *Boy C did not answer Ms. Palumbo when she later asked, "Can you tell me again about that hide and seek game where you were? Tell me you were outside by the shed?" Interview of Boy C, p.30,* A-690.

[86] *"What's this?," Boy C asked, evidently pointing to the large male doll's pubic hair. She asked if his daddy had hair there. Boy C nodded. Had he ever seen other adults who had hair there? Boy C nodded. "What other adults did you see? You can tell me. It's okay.*

if he did anything to Bernie, Boy C said Boy D did. Boy D touched Bernie on his dupy with a stick. *Interview of Boy C*, p. 31, A-690. Boy C saw Bernie's dupy; Bernie's pants were down but not his underpants. *Id.*, at p. 30, 33, A-690. This happened at nap time in the classroom. *Id.*, at pps. 33-34. As to whether Bernie touched any of the other children at school, Boy C said that Bernie touched Shondra[87] and other little boys.[88]

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*Remember I told you you're safe." Boy C did not answer.* Interview of Boy C, p. 18-19, A-690.

*The social worker showed Boy C how the doll had a little hole in his mouth. Boy C asked, "does the little boy drink water?" Ms. Palumbo said that she did not think so "because they're only dolls so they don't drink water." Boy C asked if he could take the doll's clothes off.* Interview of Boy C, p. 20, A-690.

Ms. Palumbo focused Boy C's attention specifically on Bernie.

Pat. What we were talking about was ECDC and adults; right? And you had an adult teacher, a boy teacher. Did the boy teacher do anything to any of the little children that you might want to show me? You can show me on this, on the little boy doll. Want to show me?

Boy C. (Indicates) Touch on there.

Pat. ... Who touched you on there?

Boy C. Bernie.

Pat. Bernie? Did Bernie touch, if we made believe this was Boy C, if we made believe that this little boy was Boy C, can you show me what this person did to this little boy? Can you just show me?

Boy C. (Indicates)

Pat. Did he touch you any place else?

Boy C did not answer. His attention evidently drifted to another doll. Interview of Boy C, pps. 20-21.

[87] *Ms. Palumbo encouraged Boy C to examine the special parts on the girl doll. "That's a girl doll. You want to check her out, too? ... They have special parts, too; don't they?"* Interview of Boy C, p. 21, A-690. Ms. Palumbo then asked Boy C about other children that Bernie touched.

Pat. Boy C, do you remember Bernie touching any of the other children at school? Do you remember some of their names?

Boy C. (Shaking head).

Pat. No? Do you remember did he touch any of the little girls? Can you show me? Show me on that little girl. If we make believe that this is Bernie, can you show me on the little girl what Bernie did?

Some very interesting statements were deleted from the edited interview. When Boy C described the game of hide and seek, he said that they played hide and seek "inside. " Bernie and Boy D and Jared and Boy C were hiding inside "under the table" while the other children were hiding outside. *Interview of Boy C*, pps. 10-12, A-690. When asked whether another teacher

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Boy C. (Indicates).

Pat. Do you remember what the little girl's name was?

Boy C. Shondra.

Pat. Shondra. And when Bernie *did this to Shondra, where were you? Do you remember?*

*Boy C. (Shaking head).*

*Pat. Do you remember what room you were in? Were you inside the classroom or –*

Interview of Boy C, p. 22, A-690. Boy C did not answer.

[88] *Using one of the dolls, Ms. Palumbo steered Boy C back to the subject of Bernie touching a little boy's dupy.*

*Boy C. ... He's a little person.*

*Pat. Yeah, he's a little boy and he's got a little dupy; right? Do you remember any little boys being* touched by Bernie?

Boy C. (Nodding).

Pat. Where did Bernie touch the little boys?

Boy C. (Indicates).

Pat. On the dupy?

Boy C. (Nodding).

Pat. Did he touch Boy C on the dupy?

Boy C. (Nodding).

Pat. It's okay to talk about it. Sometimes it's kind of embarrassing. But it's okay to talk about it.

Boy C. (Inaudible)

Pat. Can you show me on this little boy what, what Bernie did, everything that Bernie did to the little boy?

Boy C. (Indicates).

Pat. How did that little boy feel?

Boy C. Sad?

Interview of Boy C, pps. 23-24, A-690.

was outside with the other children, Boy C said that Bernie "was outside counting and Boy C was all alone." *Id.*, at pps. 12-13, A-690.

Another deleted statement was Boy C's claim that he yelled at Bernie when Bernie was touching him and Bernie made funny noises - "oo, oo, oo." *Interview of Boy C*, pps. 32-33, A-690. Boy C also said the Mrs. Coulter yelled at Bernie when she saw him touch Boy C on the dupy. She said, "Don't do that to Boy C." *Id.*, at p. 29, A-690. Boy C later seemed to contradict himself on this point when he said that he did not remember if any teachers saw what Bernie did to Shondra, Boy D and Boy C. *Id.*, at pps. 37-38, A-690. And finally, Boy C said that he did not remember taking walks in the woods when he went on field trips.[89] This, of course, would have been important to know because, by the time he testified at the trial, Boy C was saying that Bernie touched him in the woods. Tr. 5/39.

In his opening statement, Mr. Conway told the jurors that they would hear evidence that the children's accusations were the product of suggestion.

> You'll hear testimony that some of these children were shown puppet show, were shown an anatomically correct doll, and even after that they said: No, Bernie didn't hurt us,

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[89] *Ms. Palumbo began this line of questioning by alluding to what other children had told her. "Remember I that told you that I talked to a lot of children? I've got other children, too." "Here?," Boy C asked. "Yeah, sure, lot of your friends come here and talk to me."* Interview of Boy C, p. 39, A-690.

*Ms. Palumbo then asked Boy C if he remembered taking walks in the woods. Boy C shook his head. She persisted, "Sometimes when you go on the field trips?" Boy C said, "No."* Interview of Boy C, pps. 39-40, A-690.

> Bernie was our friend. But finally, after the mothers, the fathers, the police department, Rape Crisis Center questioning – when you see and hear the evidence of the questioning suggesting to these children that, in fact, Bernie was a bad boy, that after all this questioning and after all this suggestion they then said: Bernie was a bad boy, Bernie did this, Bernie did that.

Tr. 3/47. Had Mr. Conway cross-examined Pat Palumbo about her contacts with Boy C and had he competently developed the foregoing information that was, or should have been, readily available to him, it is difficult to imagine that the jury would not have seen the case against Mr. Baran in a very different light.

"Trial counsel put forth a defense and then failed to develop this defense through evidence, cross-examination, or in summation. He there by effectively left the defendant 'denuded of a defense.'"

Mr. Conway not only failed to object, but apparently did not even notice, that when Boy C testified under cross-examination that the trip to the "woods" was on the bus with Stephanie, Eileen and Bernie, Tr. 5/46-47, it created a variance between the complaint and the proof. See MGL ch. 277, Sec. 35. Stephanie and Eileen taught in Classroom 1. Boy C was assigned to Classroom 1 for just two months in the fall of 1983. The complaint charged conduct from January through October of 1984. The variance went to the heart of the Commonwealth's theory that Boy C and Boy D were together when they were molested by Mr. Baran. Boy C and Boy D were together in a classroom with for approximately two months in July and August 1984. That was Classroom 4. Classroom 4 never went on a field trip to the "woods." Only Classroom 1 went on a field trip to the woods, but Boy D was never in Classroom 1.

When Mr. Conway unsuccessfully moved for a bill of particulars the day before the trial started, he seemed to be acutely aware that knowing when and where the alleged incidents

happened was crucial to putting forth a defense to the charges against Mr. Baran.[90] Rather than

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[90] Mr. Conway made the following argument:

> I think we need to know basically now – I hear the prosecutor say, for the first time mention "field trips." I have no knowledge from any of the discovery that I have that any of these things occurred on a field trip. If they did, I would certainly like to know. I may have a defense that Mr. Baran wasn't on a field trip, but I don't know whether I have the information in a bill of particulars. ... – I'd like a little clearer time and dates given a span of nine months or eight months over which it may have happened. I'd like them to be required to at least tell me if it happened in the building, if it's out of the building, if it happened on a bus; where did it happen, as closely as possible when did it happen. Because I know we have absences from school by Mr. Baran, and I know we have absences from school from these children. I don't know the dates. But I can find out from the school records.
>
> ... Mr. Ford mentioned some things to me this morning that I did not see in discovery as to the manner. My understanding of some of the manner, from what I've read in the Grand Jury minutes or from other discovery is different from things mentioned to me today.

*Hearing on Motions*, 1/18/85, pps 15-16. Mr. Ford argued that he could not possibly give an

moving to strike all evidence of the time Boy C spent in Classroom 1 in 1983 as irrelevant because it predated the time frame of the complaint, he ineptly elicited prejudicial testimony from Mr. Baran about 1983 field trips that he went on with Classroom 1 (to the Pittsfield State Forest, a Christmas tree nursery, and an apple orchard). Tr. 7/118-119. Counsel's failure was not the product of reasonable tactical decision. It was another example of inattention to his client's interest. Compare Commonwealth v. Bynoe, 49 Mass.App.Ct. 687, 693-694 (2000).

**5. Defense counsel failed to request proper fresh complaint limiting instructions.**

When Mr. Ford asked Pat Palumbo if she had spoken to Boy C, Mr. Conway should have made a request for fresh complaint limiting instructions. A few moments earlier, the judge had given a flawed limiting instruction in connection with Ms. Palumbo's testimony about what Boy D had told her. Mr. Conway did nothing to correct the earlier inadequate instruction and did not request another contemporaneous instruction as the C testimony came in.

**6. Defense counsel failed to object to fresh complaint testimony that exceeded the scope of Boy C's testimony.**

Pat Palumbo testified, without objection, that "Boy C told me and illustrated on his cabbage patch doll and touched himself on his behind and made him touch his behind and touched his penis." Tr. 6/22. This exceeded the scope of Boy C's Testimony. There is no evidence that Boy C indicated, either verbally or by gesturing, that Bernie touched his behind or

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exact time and place. He said the time frame of January 1, 1984 through October 5, 1984 was the best he could do. Children, he claimed, don't remember that type of information. *Id.,* at 17,19.

that he touched Bernie's behind. To the contrary, Boy C pointed to the zipper of his pants when asked where Bernie touched him, but he shook his head from side to side when asked if he touched Bernie anywhere else and if Bernie touched him anywhere else. Tr. 5/39-40. This portion of the statement was clearly outside the permissible bounds of corroborative fresh complaint evidence. The references to touching Boy C's behind and Bernie's behind were not just details added to a summary of the testimony Boy C gave. This was new information. An ordinary fallible lawyer would have objected. *Commonwealth v. Quincy Q., supra,* 434 Mass. at 874-875. (Testimony that child witness "just clammed up. You could see in her eye - that she was – she had said something at that point that she didn't really want to talk about.") This testimony was rank hearsay. Had defense counsel objected, it should have been excluded.

**7. Defense counsel failed to object to inadmissible hearsay.**

Mother C was permitted to testify, without objection, about the conversation that Boy C had with Pat Palumbo after the puppet show.

> He went in and talked to Pat and sitting there – and she was just talking to him. He was talking mad. She asked him if he wanted to draw any pictures. He said "yes." He had a big smile on his face, daddy, and then started drawing another picture and the picture was like sad. Pat said, "who's that?" "That's Bernie" and then he got mad and scribbled it all out.
>
> She said "what are you doing, Boy C?" "I'm covering him up."

Tr. 5/74. Not only was this conversation inadmissible hearsay, but the prejudice of her account of Boy C's anger when he scribbled over a picture of Bernie far outweighed the probative value. A timely objection would have prevented the jury from considering this irrelevant, prejudicial evidence. Any ordinary fallible lawyer would have sought to exclude inadmissible prejudicial hearsay.

**1. Boy C.** In the fall of 1985, some eight months after Mr. Baran was convicted, Boy C told his therapist a Berkshire Mental Health that he "made it up" when asked

about Bernie Baran. According to his therapist's progress notes:

> 10/29/85 -
> Boy C - vigorous play in sandbox. Attacks from monster? Played w witch mommy some but not as much affect. Talked a little abt Bernie. R said he "made it up." Interpreted as wishing it hadn't happened. "Yeah."

*Progress Notes by Douglas MacDonald,* A-787. (Emphasis added). The therapist reiterated Boy C's recantation in a *Termination Summary,* dated 3/3/87, A-782. "Denied sex abuse at first, then talked about it briefly."

Some time later, Boy C recanted again. Jane Satullo contacted Dr. MacDonald in connection with her role as an expert in the family's lawsuit against ECDC. Ms. Satullo made the following notes about a telephone conversation with Dr. MacDonald:

> Phone consultation w/ Doug McDonald Jan 22
>
> Boy C and Mother C met w/ Doug for the 1st time in about 1 month.
> Boy C tried to retract the s.a. stuff - saying it never happened. When he was pressed a little more, he asked where Bernie was now (in prison). Can he get out? Can he come and get me? When reassured that he was safe from Bernie, Boy C retracted his retraction and began to talk about many of the details of own abuse as well as what he witnessed Bernie do to other children.

*Satullo handwritten notes of conversation with MacDonald*, A-689 (Emphasis added)

That Boy C recanted on more than one occasion clearly casts grave doubt on the legitimacy of Boy C's allegations and on the justice of Mr. Baran's conviction.

**2. Mother C.** Mother C had some serious psychological problems for which she did not begin regular psychotherapy with Doug MacDonald until April 1985, a few months after Mr. Baran's trial. Although her presenting problem was anxiety over Boy C's sexual abuse and anxiety over her injured hand (bandages were visible on her hand during the videotaped interview of Boy C in October 1984), a clearer picture emerged after two years of

therapy. In a *Termination Summary*, dated 3/3/87, A-781, her final diagnosis was listed as:

> I. Conversion disorder
> II. Dependent personality disorder with mixed features
> III Clenched fist syndrome

Under a section entitled "Course of Treatment/Major Themes," Dr. MacDonald wrote:

> Fears of what can happen in life, sense of helplessness, victimization, being "doomed." Anger at how world has treated her and her family, particularly issue of injury to her hand and its subsequent turning into a "clenched fist." Fears that Boy C will be permanently scarred by the sexual abuse. Fears that husband Steve will leave her, or will suffer from Huntington's chorea, a family disease. <u>Overidentified and overly protective of Boy C</u>. Dependent upon others for emotional support.

(Emphasis added) Indeed, according to the *Termination Summary,* dated 3/3/87, A-782, that Dr. MacDonald wrote for Boy C, Mother C was so overprotective that Boy C slept with her every night while her husband slept in Boy C's bed and during the first six months of therapy she would not let Boy C meet with Dr. MacDonald alone.

A year or so later, Mother C was still in therapy with Dr. MacDonald. According to progress notes:

> 2/19/88 Mother C had taken Boy C to psychiatrist in NH. Psychiatrist got her to admit to having been <u>molested by uncle</u> at 14 ½ [years old]. Mostly relief but some sadness the secret is out. Seems to have freed her to let Boy C out of her bed. Was able to tell Steve too.

*Progress Notes by Douglas MacDonald,* A-803. (Emphasis added).

This information, all of which was unavailable at the time of trial, casts a very different light on the legitimacy of the C allegations and the justice of Mr. Baran's conviction.

## VII. Girl E

**A. Facts the jury heard.** The fifth child who testified against Mr. Baran was Girl E. Girl E was five years and five months old[91] in October 1984. In connection with Girl E's allegations, the jury heard testimony from: ECDC teachers and staff; Girl E; her mother, Mother E; Detective Peter McGuire; Trooper Robert Scott; and, Dr. Jean Sheeley. In addition, Mr. Baran testified in his own defense.

**1. ECDC teachers and staff.** Girl E attended ECDC from 1/10/83 through 10/5/84. Tr. 4/68. At no time was she ever assigned to a classroom where Mr. Baran was an aide. Tr. 4/71. Girl E was assigned to Room 5 from the time she enrolled in January 1983 through June 1984. She attended day care five days a week from 9:00 a.m. to 3:00 p.m. Tr. 5/24-25.

In June 1984, Girl E was assigned to a classroom in another building known as the Apple Tree Center. Tr. 5/22-23. ECDC staff did not have a record of her schedule at Apple Tree. Tr. 5/24. Girl E was apparently one of the children who, when classes ended at Apple Tree, were taken back to the main building where they stayed until it was time to go home. Tr. 4/69-70.

**2. Girl E.** Girl E testified, incorrectly, that Bernie was a helper in her classroom with her teachers Laura and Kathy. Tr. 6/30, 6/32.

Girl E's incriminatory testimony was largely nonverbal. When she failed to respond when asked if Bernie ever touched her when she was at ECDC, she was given an anatomically correct doll and asked to point out on the doll where Bernie her touched her. Girl E pointed at the doll's genital area. Tr. 6/30.

When asked where Bernie put his dinky, Girl E answered, "In my mouth." This

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[91] Girl E's date of birth was May 13, 1979.

happened, she said, “In the bathroom” Tr. 6/30-31. She shook her head from side to side when asked if anything came out of Bernie’s dinky when he touched her. Tr. 6/31. As to where the other kids were when she was in the bathroom with Bernie, she said, “They were in the school.” Tr. 6/34.

On re-direct, when asked what Bernie said he would do to her mother if she ever told anybody what he did to her, Girl E responded, “Kill her.” Tr. 6/36.

**3. Mother E.** The jury learned very little about Mother E other than her name, address, and that she was the mother of three children - Girl E, Brother E and Sister E. Tr. 6/37. Girl E, who was five years old, attended ECDC from the time she was three years old. She stopped attending ECDC in September or October 1984, and then went to the Apple Tree. Tr. 6/38.

The first time Mother E asked her daughter if Bernie had ever touched her, Girl E said ‘No’ walked out of the room. Tr. 6/39, 6/43. A couple of days later, Mother E was lying down with Girl E to take a nap. “I said ‘Girl E, did anybody ever touch you?’ I didn’t say who or nothing. She said ‘Yes.’ She said that Bernie had touched her.” According to Mother E, Girl E pointed to her private area and made a rubbing motion to show what Bernie did and she said that, after he finished doing that, he pulled down his pants and stuck his penis in her mouth. Girl E said these things happened in the bathroom. Tr. 6/39.

**4. Detective Peter McGuire.** Detective Peter McGuire, a fourteen year veteran of the Pittsfield Police Department, testified that, in October 1984, he received a telephone call from Mother E. As a result of that phone call, he spoke with Girl E - first in his cruiser, and then later at the Detective Bureau of the Pittsfield Police Department. Tr. 6/55-56. Girl E told him that “Bernie put his dinky in her mouth.” Tr. 6/57.

Defense counsel objected when ADA Ford asked the detective if he showed any

photographs to Girl E. After a somewhat lengthy sidebar, 6/58-61, Ford was permitted to continue asking about the photo array. McGuire stated Exhibit 16, an array of ten photographs, was what he showed Girl E. Referring to the photo array, McGuire said that Photo #7 was a picture of Mr. Baran, that Photo #9 was a picture of Mr. Herdman, the janitor at ECDC, and that Photo #4 was a picture of Detective Beals of the Pittsfield Police Department. As to what happened when he showed the photo array to Girl E, he said "I brought the photo array out and asked her if she could point to Bernie and she looked and pointed to #7 and said, 'That's Bernie.'" Tr. 6/62.

McGuire went on to testify about the arrest of Mr. Baran.

**5. Trooper Robert Scott.** Trooper Robert Scott interviewed Girl E on October 15, 1985 at the District Attorney's Office. There was a video camera in the room.[92] Tr. 6/78. He spent "about an hour all together before the interview actually began establishing a rapport with her." Tr. 6/79. Girl E knew that she was there to talk to him about Bernie, and she said that Bernie was a bad boy over and over again, but she became "very irritated and fidgety, [and] unresponsive" when asked what Bernie did to her. At this point, the trooper showed Girl E a male and a female anatomically correct doll. Tr. 6/79-81. After both dolls were undressed, he asked her if Bernie if had ever touched her any place. Girl E pointed to the vaginal area of the female doll. When asked what he touched her with, she pointed to the hands of the male doll. Asked if Bernie ever touched her anywhere else, Girl E pointed to the mouth of the female doll and said "He put his dinky in my mouth." When asked why she never told anyone about this and she said Bernie told her that he would kill her mother if she ever told anyone. Tr. 6/81-82.

Trooper Scott also showed Girl E a photo array, "... at some time thereafter before this

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[92] The District Attorney has not, as of this date, produced the videotape of this interview.

trial started..." Girl E started crying before he showed it to her. When he asked her why she said, "You're going to show me a picture of Bernie." When he turned the card over and asked her if she saw Bernie, she pointed to a picture of Mr. Baran. Tr. 6/82.

When he asked her to draw a picture of a dinky on the blackboard that was in the room, "she drew an outline that was phallic shaped." Tr. 6/82-83.

Mr. Conway had no questions for Officer Scott. Tr. 6/84.

**6. Dr. Jean Sheeley.** Dr. Sheeley examined Girl E; the physical exam was normal and she tested negative for gonorrhea. Tr. 6/129-130, 6/132. In response to a question about the history she was given, Dr. Sheeley testified that Girl E said "that Bernie put his dinky back in her throat." Girl E also said that "he had put his hands on her genitalia." Tr. 6/130.

**7. Bernard Baran.** Mr. Baran denied that he ever had any sexual contact with Girl E. He said that he never had an opportunity to be alone with her. Tr. 7/120. He denied that he ever put his penis in her mouth. Tr. 7/170.

Girl E was never assigned to the same classroom as Mr. Baran. He could have gone into the classroom she was in because he used to go to every classroom. He saw her on the playground a few times and sometimes he was the bus monitor on the bus Girl E took home from school, but he did not recall ever taking her to the bathroom. Tr. 7/119A, 7/153. **B. Mr. Baran did not get a fair trial because his conviction was based on unreliable testimony.**

Girl E's testimony was tainted by suggestive interview techniques and was the product of grossly leading questions. See lengthy discussion of suggestive methods used in Section VII.C.3, *infra* at 230. Her credibility was improperly bolstered when several witnesses testified about out-of-court statements made by Girl E.

The Commonwealth elicited out-of-court statements made by Girl E from three witnesses: Mother E, Detective Peter McGuire, and Trooper Robert Scott. In addition, defense counsel elicited out-of-court statements made by Girl E from a fourth witness, Dr. Jean Sheeley. All four witnesses repeated Girl E's claims that Mr. Baran touched her between her legs and he put his penis in her mouth.

$ Mother E testified, "She pointed down to her private area and then she made a rubbing motion – that's what he was doing – and that later on after he finished that he pulled down his pants and stuck his penis in her mouth." Tr. 6/39.

$ Detective McGuire testified, "She told me that Bernie put his dinky in her mouth." Tr. 6/57.

$ Trooper Scott testified, "I asked her what he used to touch her with there, and she pointed to the hands of the male doll. I asked her what that area of her body was, if she had a name for that particular area of her body. She said 'Yes, pussy.' I asked her if Bernie ever touched her anywhere else. She pointed to the mouth of the female doll. She said 'He put his dinky in my mouth.'" Tr. 6/81-82.

$ On cross-examination, Dr. Sheeley testified that Girl E said "that Bernie put his dinky back in her throat." Girl E also said that "he had put his hands on her genitalia." Tr. 6/130.

"The overuse or 'piling on' of evidence regarding the details of several fresh complaints may create the risk that the jury will use the details of the fresh complaints as substantive evidence that the crime actually occurred." *Commonwealth v. Trowbridge*, 419 Mass at 761; Commonwealth v. Lamontagne, 42 Mass.App.Ct. 213, 220 (1997).

At no time during Mother E's testimony was a limiting instruction given. When fresh complaint evidence is admitted, the accused "is entitled to have it impressed on the jury that the

[fresh complaint] testimony may be used for corroborative purposes only." *Commonwealth v. Trowbridge,* 419 Mass. at 762 (substantial risk of miscarriage of justice where the jury was not properly instructed not to use fresh complaint evidence as substantive evidence of the crime); *Commonwealth v. Licata,* 412 Mass. at 660, the language that the testimony "is available for you to use as you see fit" could easily be interpreted as permitting substantive use.

Before Trooper Scott's fresh complaint testimony, the judge cursorily responded to a defense objection, "Same ruling and the jurors, again, are reminded of the Fresh Complaint instruction." Tr. 6-79. This instruction, coming on the heels of the McGuire instruction, only reinforced any misunderstanding the jurors may have had.

There is no per se rule as to how many fresh complaint witnesses may testify, but the courts have warned against the overuse of such evidence. *Commonwealth v. Quincy Q.*, 434 Mass. at 875. This testimony exceeded the permissible scope of fresh complaint evidence. Instead of recounting what Girl E said, Mother E interpreted her emotions.

Trooper Scott's testimony about the Girl E's statements on the day that she was shown the photo array was similarly improper. When Mr. Conway objected during Trooper Scott's testimony, the judge allowed it as fresh complaint.[93] Tr. 6/83-84. The testimony that Girl E cried before she saw the photo array did not even remotely satisfy the requirements of the fresh complaint doctrine. The statement was not an allegation of sexual abuse and there was no hint of the circumstances or the time frame (freshness) of this conversation. In his closing argument, Mr. Ford exhorted the jury to consider Girl E's emotional reaction to identification procedure.

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[93] When Mr. Conway objected to the photo array during the Commonwealth's opening statement on the ground that it was improper fresh complaint testimony, the judge allowed it as evidence of identification. Tr. 3/35-37.

> Remember how [Trooper Scott] testified he showed those ten photographs to ... Girl E ...? No reaction whatsoever when [she] looked at [the janitor's] photograph but a reaction of absolute terror when [she] looked at Bernie Baran's photograph.
>
> Trooper Scott told you that before he even turned the board over Girl E started to cry. When he said, "Why?" she said, "your going to show me a picture of Bernie."

Tr. 8/54. This was improper use of fresh complaint. See *Id.*, at 874. "I'm sorry for not telling you the truth" was not a fact of the assault. It was instead an improper affirmation that Girl E was truthful. A fresh complaint witness cannot comment directly or indirectly on the credibility of the complainant. *Id.,* at 873, n. 19. Mr. Conway did neither.

**C. Ineffective assistance of trial counsel.**

**1. Counsel failed to investigate and develop exculpatory evidence that Girl E was sexually abused by her mother's boyfriend.**

The children who attended Jane Satullo's good touch bad touch puppet show came away with newfound knowledge about body parts and bad touches. Girl E apparently did not ever see a puppet show. One could reasonably infer that, since she did not have the educational benefit of the puppet show, she must have had acquired her knowledge of oral sex elsewhere. How could Girl E have learned enough about oral sex to accuse Bernie Baran of making her do it?

Dr. Sheeley's notes of Girl E's October 13th office visit reveal the answer. After asking Girl E some questions about what Bernie had done to her, the doctor asked Girl E if anyone else had done these things to her. Girl E answered, "Chino did the same thing." As to what Chino did, Girl E said "this and this," putting her hand on her genitals and her finger in her mouth. Chino's pants were off. This happened "in the bathroom - at the motel." Brother E[94] was also there. *Notes of Dr. Jean Sheeley re: Girl E,* 10/13/84, p. 2, A-454. Girl E's mother, Mother E, was present for this conversation.

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[94] Girl E had a younger brother named Brother E.

According to the *Certificate of Discovery*, A-90, Dr. Sheeley's notes were provided to Mr. Conway in early November 1984. Nothing else about Girl E's allegation about Chino was ever disclosed. Nevertheless, this modicum of information gave Mr. Conway a good faith basis for an investigation and a probing cross-examination of Girl E, her mother, and Dr. Sheeley. Who is Chino? Where is Chino? Why was Girl E in a motel with him? Where was this motel? Did Girl E say anything else about what Chino did to her? Was this allegation reported to DSS and the police? Was this investigated? Was Chino prosecuted? No such inquiry was ever made by Mr. Conway. Competent counsel would presumably have followed up on this information. See Commonwealth v. Healy, 38 Mass. 672, 679 n. 8 (2003).

Mr. Baran was seriously prejudiced by Mr. Conway's failure to develop the Chino evidence. Girl E was never assigned to a classroom where Mr. Baran worked, and was attending school in an entirely different building at the time of her "disclosure" about Mr. Baran. When Mother E, who had just learned from her good friend Mother A that Boy A tested positive for gonorrhea of the throat, first asked Girl E about Bernie, Girl E denied that he did anything to her. When Girl E finally "disclosed," she disclosed that Chino and Bernie did the same thing to her. The verdict might well have been different if Mr. Conway had competently developed this evidence. In Mr. Baran's direct appeal, appellate counsel was constrained by the trial record. Dr. Sheeley's note about Chino was never made a part of the trial record. Mr. Conway's failure to develop this crucial evidence can only be characterized as gross incompetence.

**2. Defense counsel failed to develop the hysteria defense theory.**

The jury never heard the circumstances surrounding Girl E's ultimate disclosure on Saturday, October 13. In direct examination, Mother E briefly mentioned that Mother A was a friend of hers in the course of relating a conversation the two had, but defense counsel objected to the conversation and the judge directed the jury to disregard the testimony about the

conversation.[95]

In his cross-examination of Mother E, Mr. Conway failed to develop the fact that Mother E and Mother A were close friends and that Mother A influenced her reaction to the Baran allegations.

$ Mother E evidently stopped sending Girl E to school at Mother A's urging. Girl E's last day at school was October 5th, the same day that the As called the police and a full week before Girl E "disclosed." In an article that appeared in the *Berkshire Eagle*, David and Mother A openly acknowledged that they had persuaded their friends to take their kids out of ECDC.[96]

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[95] Mother E testified, "Well, I found out through my girlfriend, Mother A, that her son was molested. Then I went home – " Defense counsel objected. The judge promptly advised the jury that "someone else's conversation is stricken and the jury will disregard it." Tr. 6/38-39.

[96] The article stated, in relevant part:

> The parents of the 3-year-old boy who allegedly was molested by an Early Childhood Development Center employee said yesterday they thought the center should be closed down pending a further investigation of its employees.
>
> David and Mother A ..., whose son Boy A was diagnosed this week as having gonorrhea of the throat, called *The Eagle* because, they said, they wanted to share their thoughts on the case. They said they felt people weren't taking the problem seriously enough.
>
> ....
>
> Both said they decided to go public with their identities and experiences to try to

$ Mother E was at Mother A's apartment on Wednesday, October 10, when Mother A got a phone call from Dr. Sheeley informing her that Boy A tested positive for gonorrhea of the throat.[97] She went home and questioned Girl E about whether

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wake up other parents.

...

Real awareness of the problem came a couple of weeks ago, when Mother A watched a series about child abuse, narrated by Mike Farrell on public television. The series said a loss of appetite, bed wetting, a change in personality, or trouble sleeping could indicate sexual abuse.

"Everything it showed on there, Boy A had," Mother A said. "These people [the center staff] are trained to work with children. I'm a parent who watched something on TV and I picked up on it like that."

Her first reaction was, she said, "I'm scared. And how do I prove it?"

Now that the case is out of their hands, the As have talked friends into taking their children out of the center. ....

*Berkshire Eagle,* "Parents of ECDC pupil say it should be closed," Lynne A. Daley, 10/13/84, 179.

[97] I was aware about Bernie Baran being arrested for molesting kids at ECDC. I also knew one of the victims was Boy A. I know Boy A because his mother is a friend of mine. I go to school with her also. I was at her home ( Mother A) when Mother A received the call from Dr. Sheeley that Boy A has gonorrhea.

Bernie had ever touched her.

$ Mother E questioned her daughter again on Saturday, October 13th, the same day that the article that prominently featured the As' allegations appeared in *The Berkshire Eagle.* When Girl E "disclosed" what Bernie had done to her that afternoon, Mother E was very upset and called Mother A who instructed her to call Detective McGuire.[98]

All of the foregoing information was known to Mr. Conway, yet he failed to develop evidence that Mother E withdrew Girl E from school because of information she got from her good friend, Mother A, before the story even hit the papers and a full week before Girl E "disclosed."

Had this evidence, all of which was known to defense counsel, been properly developed, it would certainly have bolstered the hysteria theory. Yet again, counsel's lack of preparation and his failure to investigate and develop the evidence effectively left Mr. Baran "denuded of a defense" and deprived him of a fair trial.

Girl E had multiple conversations with various people about what Bernie did to her.[99]

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[98] After hearing this I called Mother A and told her what was just told to me. I was very upset and didn't know where to turn. Mother A told me I should call Det. McGuire.

[99] Girl E held up five fingers when asked how many times she talked to her mother about what Bernie did. Tr. 6/33, 6/35. She held up seven fingers when asked if she talked about it a lot with Dan Ford. When Conway commented, "Seven times. That's a lot of times, " Girl E corrected him, "Eight times." Tr. 6/35. In his cross-examination of Mother E, Conway asked if Girl E had indeed talked to Mr. Ford eight times. Mother E denied that it was that many times, suggesting that it was really about four times. Mother E also revealed that Girl E was interviewed by Michael Harrigan of DSS. Tr. 6-/43-44.

Only a handful of the conversations were documented and, as of this date, no videotape of Girl E "disclosing" what Bernie did to her has materialized. Even with this limited information, Mr. Conway could have traced the evolution of Girl E's story. The jury knew that Girl E initially denied that Bernie did anything and that she eventually disclosed, but there was a great deal of crucial information that the jury never heard because defense counsel failed to develop.

Despite the fact that Girl E was never assigned to a classroom where Mr. Baran was an aide, Tr. 4/71, and the fact that she had been assigned to an entirely different building since June 1984, Tr. 5/22-23, Mother E questioned her daughter about Bernie Baran. The questioning started on October 10, 1984, the same day that Mother E learned from her good friend Mother A that Boy A tested positive for gonorrhea of the throat and the questions focused exclusively on Bernie Baran. Tr. 6/40. All of the questions she asked her daughter were about Bernie Baran. Tr. 6/40. Mother E testified about only two conversations but she was never asked how many times she actually questioned Girl E about Bernie before Girl E finally "disclosed." Moreover, he failed to highlight, in his opening statement, cross-examination, or in his summation, that Girl E's allegation of oral sex was made only after her mother learned that Boy A tested positive for gonorrhea of the throat.

Mr. Conway failed to develop evidence that on October 13th alone, Girl E was questioned by six different people: by her mother and her grandmother,[100] twice by Detective McGuire (first in his cruiser, and then later at the Detective Bureau of the Pittsfield Police Department, Tr.

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[100] "After I talked to my daughter today and she told me about what Bernie did to her my mother talked with Girl E also." *PPD, Statement of Mother E,* 10/13/84, p. 1, A-126.

6/55-56), by Dr. Sheeley,[101] by DSS worker Michael Harrigan,[102] and by then-ADA Gerard Downing.[103]

Girl E was formally interviewed two days later, on October 15, by Trooper Scott.[104] Before the formal interview, he spent "about an hour ... establishing a rapport with her." Tr. 6/79. Girl E knew that she was there to talk about Bernie. Trooper Scott testified:

> I asked her if – I told her that her mother had talked with me – that I had been talking with her mother earlier and that her mother told me some things that happened to her while she was at ECDC. And I asked her if she wanted to talk about that. She became very fidgety and very irritated. She moved around a lot, finally she began to say things like: Bernie would play games with the kids, play puzzles and things like that. I said "Oh, did you like Bernie?" And she said "No, Bernie was a bad boy." I asked her how

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[101] "Questioned by me w/ mother present." *Notes of Dr. Sheeley re Girl E,* 10/13/84, p.1, A-454.

[102] "During my conversation with Detetective McGuire, the mother and child were at the police station with us. It was decided that the child would not again be interviewed by McGuire or me." *DSS Child Abuse and Neglect Report - Girl E,* Harrigan, 10/13//84, p. 4, A-500.

[103] "We then brought the girl and mother to the DA's office were [sic] we met Atty. Downing. We showed her the room that an interview would be taking place this coming week. The girl seemed to be able to talk about what happened without any probelms. [sic]" *PPD, Girl E age 5 yrs. old,* McGuire, 10/13/84, A-124.

[104] *PPD, Interview of Girl E,* McGuire, 10/15/84, A-128.

> Bernie was a bad boy and again she became very irritated and fidgety, unresponsive. I sat with her a while longer and talked about some more nonthreatening kinds of things and I asked her if anyone at ECDC ever made her do anything that she didn't want to do. She said, "Yes, Bernie" and again she began to say "Bernie was a bad boy" over and over again. When I began to press and ask her how Bernie was a bad boy she just wouldn't respond. So finally, I introduced a pair of anatomically correct dolls.

Tr. 6/79-81. He continued:

> I did some role playing with Girl E and I asked her to take the female doll and I took the male doll and I said "Girl E, let's pretend that this doll is going to be Bernie and let's pretend that this doll is going to be you, Girl E. Tell me what did Bernie say to Girl E?" She said in a very deep voice "Take off your clothes." So I began removing the clothes on the doll. I took the pants down and she began undressing the female doll and I asked her if Bernie ever touched her any place and if so, where. And she pointed to the vaginal area of the female doll. I asked her what he used to touch her with there, and she pointed to the hands of the male doll. I asked her what that area of her body was, if she had a name for that particular area of her body. She said "Yes, pussy." I asked her if Bernie ever touched her anywhere else. She pointed to the mouth of the female doll. She said "He put his dinky in my mouth." I asked her why she had never told anyone about this and she said she was afraid. And I said why, and she said Bernie had told her that he would kill her mother if she said anything about this.

Tr. 6/81-82. After Girl E said that Bernie put his dinky in her mouth, Trooper Scott pointed to the genital area of the male doll and asked her what that was. Girl E identified it as a "Dinky." Tr. 6/82. When he asked Girl E to draw a picture of a dinky on the blackboard, "she drew an outline that was phallic shaped." Tr. 6/82-83.

On two separate occasions, Girl E was shown a photo array that included Mr. Baran's picture. On October 13th, Detective McGuire asked Girl E to point to Bernie's picture. She did. Tr. 6/62. At some unspecified later date Trooper Scott met with Girl E a second time to show her the same photo array.

> I brought the cardboard into the room. The back of it was facing Girl E and before I even turned it around she began crying. I asked her what was the matter and she said "You're going to show me a picture of Bernie." I turned the card around and said "Do you see Bernie on here," and she pointed to the picture of Bernie.

Tr. 6/82.

Presumably, Girl E participated in the same six weeks of mock trials that Boy A participated in, but there is no documentation of this. Despite her pretrial preparation, Girl E had considerable difficulty testifying. Girl E barely spoke. Her testimony consisted almost entirely of nodding or shaking her head in response to grossly leading questions and pointing at anatomically correct dolls.

Despite assurances from both Ford and her mother that "It's okay," Girl E failed to respond when asked if Bernie ever touched her when she was at ECDC. Mr. Ford then gave her an anatomically correct doll and three times asked her to point out on the doll where Bernie her touched her. Girl E pointed to the doll. Ford requested that the record reflect that the Girl E pointed to the doll's genital area. Tr. 6/30.

Girl E again failed to respond when if Bernie ever did anything else to her. Ford got more specific - "Did he put his peniey somewhere, his dinky?" Girl E nodded, but failed to respond when Ford asked her where he had put his dinky. Ford reassured her, "It's okay. Can you show us?" Still no response. Ford tried again, "It's okay, sweetheart. Tell us where Bernie put his dinky?" Girl E answered, "In my mouth." She said this happened "In the bathroom" Tr.

6/30-31. When asked if anything came out of Bernie's dinky when he touched her, she shook her head from side to side. Tr. 6/31.

Girl E failed to respond when Ford asked her how it made her feel when Bernie did these things to her. Ford suggested an answer - "Did it make you feel kind of scared?" Girl E nodded. Tr. 6/31.

On re-direct, Ford got no response from Girl E when he asked if Bernie ever told her that something bad would happen if she told anybody what he did to her. Ford pressed her - "Do you remember that? Did he tell you something bad would happen to your mommy? Remember that?" Girl E just shook her head. Ford tried again - "Think hard. Did Bernie ever say something about what he would do to your mommy?" Girl E nodded. Ford then asked what Bernie said. After her mother told her that "It's okay," Girl E said "Kill her." Ford restated her answer in his final question - Bernie said "that he would kill your mommy?" Girl E nodded. Tr. 6/36.

The death threat was a key piece of the Commonwealth's case. Tr. 6/36. Trooper Scott also testified about the threat. Tr. 6/82. Not only did Mr. Conway failed to cross-examine either Girl E and Trooper Scott about the threat, Tr. 6/37, 6/84, but he failed to establish that the death threat did not materialize until October 15th, two days after Girl E's initial "disclosure." Even more important, the jury did not know that Girl E told a very different story on the 13th. When Girl E's grandmother asked her why she did not tell her mother about Bernie sooner, "Girl E said something about Bernie threaten [sic] her, hitting her or something." *PPD, Statement of Mother E,* 10/13/84, p.1, A-126. At the doctor's office later that same afternoon, Girl E told Dr. Sheeley a dramatically different story. Girl E said, "I tried to tell the teacher, but he wouldn't let me." The conversation continued:

Q. How did he stop you?

A. He said not to.
Q. Did he say what would happen?
A. He would tell my parents. Then I told Laura, and she said to tell my parents.
Q. Did you?
A. No - because I wasn't home.

*Notes of Dr. Sheeley re Girl E,* 10/13/84, p.1, A-454. These prior inconsistent statements could have been established by competent cross-examination of Mother E or Dr. Sheeley, or by calling Girl E's grandmother as a witness. Defense counsel did none of these things. Because the jurors had no knowledge of these prior inconsistent statements, they had no reason to doubt the constancy of Girl E's story. Mr. Conway's lack of preparation and his failure to investigate and develop the evidence deprived Mr. Baran of a fair trial.

In a type-written letter to Sergeant Sgt. Pacitti of the West Springfield Police Department, Detective McGuire wrote:

> This department is investigating a sexual child abuse case involving a day care center in Pittsfield. One of the children involved is a Girl E, a 5 yr. old girl.
>
> After making a disclosure to her mother Mother E about being sexual [sic] abused at the day care center her in Pittsfield, she made another disclosure.
>
> She told her mother that Chino did the same thing to her. Mother says she was visiting a boyfriend Carlos "Chino" Cassillias in a motel in West Springfield and this is the person her daughter is talking about. The incident at the day care center is unrelated to incident in motel in West Springfield.
>
> Attached is a copy of a disclosure the girl made to her doctor.
>
> The date this disclosure was made to me by the mother was 10/13/84. This was reported by myself to DSS on the same date.
>
> A copy of statement from mother attached. Nothing in this statement about incident in your city. Sending you this for information on addresses and phone number to get mother etc.
>
> If there is anything else we can assist you in please contact me.
>
> Det. Peter T. McGuire

*Letter from Det. McGuire to West Springfield Police Dept.,* A-409. Clearly, Girl E told her mother about what Chino did to her, and Mother E reported it to Detective McGuire on the same day that Girl E made the allegation against Mr. Baran - 10/13/84. Mother E confirmed that there was indeed a visit to a motel in West Springfield. Detective McGuire made a separate report to DSS about Chino on the same day he reported Mr. Baran to DSS - 10/13/84. Mother E's written

statement about Girl E's disclosure about Mr. Baran, dated 10/13/84, which was witnessed by Detective McGuire, omits any mention of the Chino disclosure.

As of this date, the Commonwealth has failed to disclose anything that mentions the Chino disclosure beyond Dr. Sheeley's handwritten notes. Those notes should have prompted a formal discovery request by the defense. By the same token, the Commonwealth should have recognized the exculpatory value of the information and complied with it's constitutional duty to disclose exculpatory evidence pursuant to *Commonwealth v. Ellison*, 376 Mass. at 20-22. "The prosecuting attorney's obligations . . . extend to material information in the possession or control of members of his staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report or with reference to the particular case have reported to his office."

In the fall of 1985, some eight months after Mr. Baran was convicted, Girl E told a therapist a Berkshire Mental Health that Bernie Baran never raped her and that her mother wanted her to say that it happened so they could sue the day care center. According to an entry in her social worker's progress notes:

> 10/1/85 -
>
> Spoke with Audrey Ringer, B.M.H. re Girl E. Audrey stated that it came out in the session that Bernie Baran did not rape Girl E at E.C.D.C. last year. Girl E indicated that her mother led her to believe that if she didn't say the right words that they wouldn't get a lot of money. (Mother E is in the process of suing E.C.D.C.) Audrey feels at this time that Girl E could have been coaxed by her mother to say the necessary things at the trial to indicate the sexual abuse or it may [be] that it actually did take place and Girl E is confused about it. Audrey will not have an exact answer until she meets with Girl E a few more sessions. John Whalen was informed of this.
>
> M. L. Hamilton, S.W.

At the time of Mr. Baran's trial, Girl E, although a reluctant witness, was unwavering in her claim that Mr. Baran sexually abused her. It was not until many months later that she admitted that her mother told her what to say. This evidence clearly casts grave doubt on the legitimacy

of Girl E's allegations and on the justice of Mr. Baran's conviction.

**VIII.** **Girl F**

**A. Facts the jury heard.** The last child who testified against Mr. Baran was Girl F. Girl F was the youngest of the six alleged victims. She was three years and two months old[105] in October 1984. In connection with Girl F's allegations, the jury heard testimony from: ECDC teachers and staff; Girl F; her mother, Mother F; Detective Peter McGuire; and DSS social worker Michael Harrigan. In addition, Mr. Baran testified in his own defense.

**1. ECDC teachers and staff.** Girl F was enrolled at ECDC from 6/25/84 through 10/84. She attended five days a week from 9:00 a.m. to 4:00 p.m. She was in Room 1 with Stephanie Adornetto and Eileen Ferry the entire time. Tr. 4/70, 5/26.

According to Eileen Ferry, Girl F was a very cute little girl who never gave anybody any trouble and Bernie liked her. Tr. 3/129. At times, she was tearful. In particular, when her mother dropped her off and left, Girl F cried and screamed that she didn't want to be there. Either Eileen or Stephanie would calm her down when this happened. Tr. 3/122. Eileen recalled one time when Girl F was awake at naptime and was moved to the back room with Bernie. Tr. 3/129.

**2. Girl F.** Girl F testified that her teachers at ECDC were "Bernie and Stephanie and Eileen." She nodded when asked if she liked it at ECDC. Tr. 6/86.

When asked of Bernie ever touched her when she went to school at ECDC, Girl F said, "No" She explained, "I didn't see him touch me," and then she added, "He was just pretending." Undaunted by Girl F's denial, Mr. Ford gave her an anatomically correct doll and asked her to "show us where Bernie pretended to touch you." Girl F put her finger in the doll's opening and said, "Right in here, all the way in." She said her pants were up and he did it by putting his hand

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[105] Girl F's date of birth was August 14, 1981.

inside her pants. Tr. 6/86-87.

When asked on cross-examination if Bernie played a lot of pretend games, Girl F responded, "No, he touched my tookoo." Tr. 6/88. Girl F said that when Bernie touched her, Stephanie and Eileen "were gone," but the other kids "were there too." Tr. 6/89-90. Mr. Conway tried to get Girl F to explain her earlier testimony; "What do you mean 'pretend?' How do you mean pretend to touch you?" She answered, "He just pretended if I did talk." Girl F responded affirmatively when asked if she liked Bernie and agreed that Bernie is "a good boy." Tr. 6/89. Mr. Conway concluded by confirming that Girl F liked Bernie. She responded, "No, I don't." He rephrased the question, "Now you don't like him?" Girl F shook her head from side to side. "Are you sure?" Girl F shook her head from side to side. Tr. 6/90

**3. Mother F.** Mother F testified that she was Girl F's mother and that Girl F was her only child. Girl F, who was three years old, started going to ECDC in June 1984 and remained there until October 1984. Tr. 6/91-92.

About two weeks after she learned that Mr. Baran had been charged with some offenses, Girl F disclosed that Bernie touched her "in her tookoo." Mother F explained that tookoo was the word that Girl F used for her vagina. Tr. 6/93. Girl F said that other kids were there when Bernie did this, but she did not mention any names and she did not say where it happened. Tr. 6/94. The first time they talked Girl F said her pants were down, but later she said her pants were up when it happened. Half of the time Girl F said her pants were up, and the other half she said her pants were down. Tr. 6/95-96.

**4. Michael Harrigan.** Mr. Harrigan was a protective investigator for the Department of Social Services. In just over two years of doing that job, he estimated that he had interviewed at least a hundred children. Tr. 6/97.

On October 15, 1984, he interviewed Girl F in his office. He focused on ECDC. When

asked who her teachers were, she mentioned Bernie. She said, "yes," when asked if she played games with her teachers. As to what kind of games, she said "stickers," but could not explain exactly what that was.

> I asked her if she had ever been touched by any of the teachers? She told me that Bernie touched her and I asked her where did he touch her. She told me her tookoo. I asked: Could you point to me where is your tookoo? The child spread her legs and pointed to her vagina and that was the extent of my questioning.

Tr. 6/98. Mr. Harrigan described Girl F as "open and willing to talk" and "cooperative," but acknowledged that she got distracted by the toys in the room and that he needed to refocus her attention back to what they were talking about. Tr. 6/99.

On cross-examination, Mr. Harrigan acknowledged that he asked only if Bernie had ever touched her; he did not ask if any of the other teachers touched her. As to where this happened, Girl F just said the school, but Mr. Harrigan did not ask her more specifically. She did not say whether her pants were up or down when this happened. Tr. 6/99-100.

**5. Detective Peter McGuire.** Detective McGuire testified that on October 16, 1984, he received a telephone call from Michael Harrigan. As a result of that phone call, he made an appointment to see Mother F and Girl F at their home. Tr. 6/101-102.

Detective McGuire asked Girl F who her teachers were at ECDC. She said Stephanie and Eileen. When asked if there were any others, she added Bernie. He then asked Girl F if anybody at ECDC touched her with a bad touch, to which she replied, "Bernie touched my tookoo" while pointing to her vaginal area. She said he touched her "with his finger." As to whether anybody saw him do this to her, she answered, "Ashanti." Tr. 6/102.

The detective then asked Girl F to show him on the doll that she was holding how Bernie touched her. She pointed to the vaginal area of the doll. She said that he did not pull her pants down. She demonstrated what happened by putting her hand in the doll's pants. She kept

pointing to the doll's vaginal area. Tr. 6/103-104.

On cross-examination, Detective McGuire acknowledged that when asked where this happened Girl F first said, "upstairs with the toys," and then right after that she said downstairs. Asked if there was a room upstairs with toys, he testified that there were rooms with toys both upstairs and downstairs. Tr. 6/104-105.

**6. Bernard Baran.** Mr. Baran testified that Girl F began attending ECDC around June 1984, when Girl B left the class. In essence, Girl F filled Girl B's slot in the classroom. He described her as a clinging, crying child who did not want her mother to leave her when she was dropped off. Tr. 7/112-113. He acknowledged that she was in his classroom so he might have taken her to the bathroom. Tr. 7/153. He had more to do with Girl F than he did with Girl B. The only trouble Girl F ever had was crying. Tr. 7/159-160. There were times the children were disciplined by having them sit in a chair, but this did not happen very often with Girl F. Tr. 7/161.

Mr. Baran denied that he ever had any sexual contact with Girl F. He said that he never had an opportunity to be alone with her. Tr. 7/113. Mr. Baran denied that he ever touched Girl F on the vagina or that he ever put his finger into her vagina. Tr. 7/170.

## B. Mr. Baran did not get a fair trial because his conviction was based on unreliable testimony.

Girl F was an inherently unreliable witness. Not only was she an incompetent witness because there was no evidence that she understood her obligation to tell only the truth, but her testimony was tainted by suggestive interviews and the product of grossly leading questions. The error was compounded when her credibility was improperly bolstered by fresh complaint witnesses.

**1. The judge used an incorrect legal standard to determine that Girl F was competent to testify.**

Girl F never demonstrated that she understood the difference between the truth and a lie and the consequences of telling a lie. The judge focused exclusively on the first prong of the competency test,[106] while completely ignoring the second prong.

Girl F appeared at the competency hearing accompanied by her parents, Mother F and Father F. The judge began by asking Girl F for her name - "Girl F" - and then introduced her to, or reacquainted her with, the people in the room. Girl F held up three fingers when asked how old she was. When first asked, she did not know when her birthday was but then answered August. She said she was going to be "Five" on her next birthday. As to what she got for Christmas, Girl F said she got a yellow Big Bird, a Rainbow Brite doll, and a Sit and Spin. Competency Hearing Tr. 40-43.

The judge moved on to questions about the second prong of the competency test:

Q. Okay. And would you tell me, what about if someone asked you a question; do you think it would be a good thing or a bad thing to tell the truth?
A. Good thing.
Q. Good thing to tell the truth. What about if you don't tell the truth; is that a good thing or a bad thing?
A. Good thing.
Q. What?

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[106] A witness is competent to testify in Massachusetts if he (1) possesses the ability or capacity to observe, remember, and give expression to that which he has seen, heard, or experienced, and (2) comprehends the difference between truth and falsehood, the wickedness of the latter and the obligation and duty to tell the truth, and in a general way, belief that failure to perform the obligation will result in punishment. *Commonwealth v. Brusgulis*, 398 Mass. at 329 (1986), citing *Commonwealth v. Tatisos*, 238 Mass. at 325.

A. Good thing.
Q. It's a good — What about to tell a lie; do you know what that means?

*Id.,* at 44. At this point, Girl F's father told her to "sit down," to which Girl F replied "I want to sit over here." After a brief digression about a panda, a horsey, and a bear, the judge resumed questioning on competency and it quickly became obvious that Girl F had no concept of what was true and what was not, let alone that she had a obligation to tell the truth:

Q. ... What do you think this is?
A. A pipe.
Q. That is what it is. What color is this?
A. Brown.
Q. Okay. Now if I told you that this pipe was yellow, would that be true?
A. [Nodding her head up and down.]
Q. You say it would be. Okay. What if I told you it was brown, would that be a true thing?
A. Yeh.
Q. Well, what color is this pipe, this part of it?
A. White.
Q. That is right. That's a white pipe. If I told you that this white part of the pipe – I said that that is really black?
A. On that side, it's yellow.
Q. That is right. This pipe has two colors. One is white and one is yellow. But what if I told you that the whole pipe was one color and it was black, would that be true?
A. Yeh.
Q. Okay.

*Id.,* at 45-46.

After the judge had spoken with each of the six children, he expressed his reservation regarding Girl F's competency and invited the Commonwealth to call another witness who might shed light on her ability to testify. *Id.,* at 65-66. The Commonwealth called Michael Harrigan. *Id.,* at 66. Mr. Harrigan had been employed as a social worker by the Massachusetts Department of Social Services for four-and-a- half years. For the previous two years, he had been a Protective Investigator; "my job primarily is to go out and interview children that have been reported for being sexually abused, physically or negligently as well." He claimed to have

interviewed "hundreds" of children who might have been sexually abused.[107] *Id.*, at 67-68.

Mr. Harrigan testified that he met Girl F and her mother at his office on October 15th, 1984. *Id.,* at 69. Their conversation about "things ... that allegedly involved Bernie Baran" started with questions about her name, age, if she went to school, and the names of her teachers. She gave the names of three teachers, one of which was "Bernie." *Id.*, at 70. Mr. Harrigan denied that he had any difficulty talking to Girl F; "She was a little shy, but she talked with me." She responded to direct questions like, "Did Bernie touch ...?" *Id.,* at 71. Despite the limited scope of his interview of the child ("I can't recall anything besides, you know, her giving me her name and her age, and answering directly regarding the allegations"), Mr. Harrigan opined that Girl F was able to differentiate between fantasy and reality. *Id.,* at 73. This opinion was based on the fact that Girl F repeated the allegations on three separate occasions.[108] He concluded that

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[107] Defense counsel objected to Mr. Harrigan's qualifications to evaluate whether Girl F was competent to testify. He argued that neither Mr. Harrigan's education nor his job experience qualified him "to say whether or not this child is telling – is able to distinguish the truth or reality ..." *Id.,* at 68-69. The judge overruled the objection but indicated that Mr. Conway would be free to renew his objection after hearing the testimony. *Id.,* at 69. Mr. Conway did not renew his objection.

[108] Specifically, Mr. Harrigan testified:

> Well, that goes along with the investigation itself, the allegations came in on the 12th. The child made a statement at that time. I interviewed her on the 15th – I believe it was the 15th – it could have been the 16th – she reitterated [sic] the statement that she

where a three-year-old child is able to consistently repeat allegations of sexual abuse over the course of a month, "that tells me that the child is telling the truth and she knows exactly what she was saying." *Id.,* at 73-74.

When the judge indicated that he was still unpersuaded that Girl F was competent to testify (*Id.,* at 75, 78), Mr. Ford asked the judge to view a videotape of Girl F that had been made some three months earlier "when she was in a more informal environment in a room with toys and was able to sit on a blanket and play." He claimed that the tape showed Girl F's "spontaneity ... and the affect with which she spoke" and argued that "if the child appeared to be competent three months ago, she's three months older, and you can draw an inference ... if she's competent then, she's competent now." *Id.,* at 78. The judge indicated his willingness to view the videotape and stated that he would also talk with her again.

> I will, and I'll speak to her again. I'm not going to in the space of a five minute or ten minute interview, because it's a big problem in a serious case like this. I don't know how helpful that will be, but if it's helpful, I'll be glad to do it.

*Id.* It was agreed that the judge would view the unedited videotape, estimated to be about forty-five minutes in length, the following Monday morning before starting jury selection. *Id.,* at 82.

Before the Competency Hearing adjourned, the judge commented on the difficulty of assessing the competence of such young children. Mr. Ford responded by praising the judge's

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> made on the 12th. She was again interviewed on the 7th of November, and the child again made the same statement. There was consistency there. If it was fantasy there would not be consistency especially with a child that age. The child is not – again with my experience and the training that I've received, tells me that a child that age does not know about the things that she was stating in each of those three statements. That was over a course of a month. The child was consistent with her story, and that tells me that the child is telling the truth and she knows exactly what she was saying.

efforts, but urged him to substitute the concepts of right and wrong for the concept of truth because "the difference between the truth and a lie is [not] something that they can really appreciate."

The Court. I have to tell you in all humility I don't know whether I'm making things better or worse, by the method I have asked questions; I think I can relate to young children, but I'm relating to normal young children, so-called, and this is –

Mr. Ford. Your Honor, I have to say I think what you did was terrific. The only suggestion I have is that I don't think asking a child the difference between the truth and a lie is something that they can really appreciate.

The Court. That is a philosophical concept.

Mr. Ford. That is a language issue. I think right and wrong is something which they understand a lot better.

For example, if we were to bring Boy A in here the next time and say things like: "If I tell you this Scotch tape hold is red, would that be right or wrong?"

The Court. I think I tried basically to do that with Girl F.

Mr. Ford. I think that what you said was: "If I told you that is red, would that be the truth or a lie?" and they sat there with a look on their face that indicated they didn't know what you were talking about.

That is the only complaint I would make and the only suggestion.

The Court. I'm open to suggestion, because I don't know how to cope with them.

I must say for the record that counsel's task ahead of him in both examining and cross-examination is a frightfully difficult one, for which I extend my sympathy. I don't know what else I could extend. If I could, I would. It is a most difficult case. We have a serious

problem, each of us, and we'll have to do the best we can. You know we have to extend whatever measures we can do.

*Id.*, at 78-80. The judge evidently took Mr. Ford's suggestion to heart. He would make the determination of Girl F's competence without regard to her understanding of the truth.

The judge and both counsel convened on Monday morning to view the videotape.[109] Immediately after viewing the videotape, the judge was still not persuaded that Girl F was competent.

> After viewing the tape I note that in the context of being in a room with small furniture – children-sized furniture – the relaxed atmosphere not present in the courtroom, the child spoke somewhat more freely. However, while she demonstrated a capacity to understand what she was relating and appears to have a memory of what occurred and was able to relate it to the police officer in that context as opposed to the formality of a witness answering questions in the courtroom, she is as her age – you would expect because of her age very easily distracted.
>
> Frankly, I'm concerned.

Tr. I/2-3. The judge indicated that he would not make his decision, however, until they reconvened for argument on the issue. Before adjourning, Mr. Ford got a jump on the argument. He suggested that perhaps the judge might want to view the videotapes of all of the children because:

> I've had the benefit of viewing not only this particular videotape, but the other videotapes of the other children, and it's

[109] This was the first time Mr. Conway saw any of the videotapes.

> my opinion that in comparison, Girl F is one of the best. It seems to me that if the other children have been found competent I would suggest that Girl F is just as competent, if not more so, than the others.

Tr. I/3. The judge declined to view the videotapes of the other children because he had already found them competent. Regarding Girl F, he said "I've got to make that decision based on a very brief conversation with her. I feel inadequate based on that, that's why I have viewed the tape." Tr. I/4. The judge had evidently decided that he was not going to speak with Girl F again, despite his prior statement to the contrary. *Supra*, Competency Hearing Tr. 78.

The Commonwealth's argument focused exclusively on the first prong of the competency test. Based on Girl F's performance at the competency hearing and her performance on the videotape, Mr. Ford argued that "we can conclude that she is competent, that she is aware of things around her, that she is able to respond to questions." While any three-year-old is going to be distracted to some degree, he again claimed that "[s]he was as responsive, if not more so, than other children who I had the opportunity to see and tape." Tr. I/5. Girl F was just "handicapped by a lack of verbal skills" and "[a] handicap is no reason to prevent someone from being able to testify." *Id.* He also recalled the testimony of DSS social worker Michael Harrigan, who opined that "Girl F knows the difference between fantasy and reality." *Id.*, at I/6. Finally, he urged the judge to "infer that if Girl F was competent when she was so taped last fall, she is that much older now and able to answer questions more responsibly and more competently." *Id.*

Defense counsel properly pointed out that nothing on the tape showed that Girl F knew "[t]he difference between what is true and what is untrue, what has been told to her and what she knows for fact." *Id*., at I/7. Regarding her ability to respond to questions, he observed that the videotaped interview was rife with leading questions. Accordingly, he argued that the tape added nothing to Girl F's performance at the competency hearing and there was no basis to find her competent.

The judge expressed misgivings about whether Girl F satisfied the first prong of the competency test, i.e., whether she possessed the ability or capacity to observe, remember, and give expression to that which she had seen, heard, or experienced. Nevertheless, he found her competent.

> ... I have no doubt as to her capacity to understand what went on and to remember it. I have some doubt about her ability to relate it, but that I have to tell you I can't pinpoint whether that difficulty she has is because she doesn't have the capacity to relate it or because she – because of her age, can't relate it in the context of a formal hearing or even what the law calls an informal hearing, which I imagine to a two or three-year old is awesome as anything can be.
>
> Our system was simply never designed to cope with this kind of witness. ... [T]hat videotape indicates to me she does have a capacity to relate it but I'm wondering if she can do so other than that kind of environment, that is a small room with someone in an informal way, sitting down in a low chair, child's chair at her level, using dolls and to some extent leading questions.
>
> ...
>
> My problem with Girl F was when we had those brief meetings in this room I was not able to get any kind of realistic response from her and I make no bones about the fact that it is really impossible to treat this properly in the context of a five-minute or ten-minute, whatever it was, meeting with a young child in a roomful of adults with a judge whose skills don't run to dealing with children that age, in this context asking a whole series of questions.
>
> So, I'm prepared because she was able to obviously understand and communicate in that context to permit her to testify in this case

*Id*., at I/8-10. The judge's determination was clearly wrong. Not only was there serious doubt about whether Girl F could give expression to that which she had seen, heard, or experienced, there was literally no evidence that she understood the difference between the truth and a lie, that she had a duty to tell the truth, and that she would be punished if she did not. Indeed, the only

evidence that the judge had with respect to the second prong was that Girl F did not know what the truth was.

Girl F's performance on the witness stand at trial failed to fill the gaps left by the judge's inadequate inquiry. Girl F was called to the witness stand twice.

When Girl F was first called, she could not or would not take the modified "oath," despite the prosecutor's best efforts to get her to promise to tell what happened.. Initially, the child was unresponsive.

The Clerk. Girl F, do you promise to tell what happened?
Mr. Ford. Do you promise to tell what happened?
The Mother. It's all right, Girl F.
Mr. Ford. Girl F, listen to Mrs. Capeless.
The Clerk. Do you promise to tell what happened, Girl F?
The Court. Give her a minute.

Tr. 6/46. The judge then granted Mr. Ford permission to ask Girl F a few questions.

Q. Hello, Girl F. Girl F, tell these nice people your name. What's your name?
A. (No response)
Q. They don't know your name. Tell them.
A. (Answer inaudible)
Q. I don't think they can hear you. Is it Girl F?
A. Yes.
Q. Girl F. Well, how old are you?
A. Three.
Q. Three years old. Who's that lady sitting right next to you?
A. My mommy.
Q. Your mommy. Do you know what my name is?
A. No.
Q. It's Dan.
A. Yes, I seen you in the paper and Bernie.
Q. You did?
A. Yes.
Q. No, do you know who that lady is over there?
A. Who?
Q. That's Debbie. Now, Girl F, we're going to ask you a few questions. Do you promise to tell what really happened?
A. No.
Q. You don't promise to tell what really happened? Girl F, you're going to tell us what really happened?
A. No.

Q. Why?
A. Because I don't like it.
Q. Are you scared of –
Mother. Girl F, it's all right.
Q. Now that you're closer to mommy, can you talk a little bit with us? What if I sit down here close to you. Is this better?
A. No.
Q. I can't get any lower than this, Girl F.
Mother. Girl F, it's all right. Don't be scared.
Q. Do you want to sit on mommy's lap?
A. Yes.
Q. Okay. Sit on mommy's lap. Girl F, did you ever go to school. I can't see you, Girl F. I can't see you.
A. No.
Q. We can't see your face, we can't see how pretty you are. These nice people want to see how pretty you are. That's a good girl. Did you ever go to E.C.D.C., Girl F?
A. Yes.
Q. You did? Did you have a teacher down there?
A. Yes.
Q. What were their names?
A. I had Eileen and Bernie and Stephanie.
Q. Eileen and Bernie and Stephanie. Well, that's very interesting.
The Court. At some point we're going to have to ratify the oath.
Q. Yes, your Honor. Girl F, would you tell us what really happened while you were at E.C.D.C.? Can you shake your head yes or no?
A. I want to see my mommy.

Tr. 6/46-49.

Defense counsel requested a sidebar where he asked the judge to reexamine Girl F to determine whether she was competent to testify. The judge agreed that the child's inability to take the oath raised the issue of her competency, but decided to allow more questions not related to the case to make her feel comfortable in the courtroom. The oath would be administered when she got to a point where she could proceed. Tr. 6/49-50. Mr. Ford resumed his questioning:

Q. Girl F, are you pretty good at coloring? Do you want to hold her?
(Mr. Ford handing Girl F a doll)
Q. What color is the dolly's dress?
A. Red. Where are her shoes?
Q. She hasn't got any shoes on. What color are mommy's pants?
A. Black.
Q. What color is the teddy.
A. Black and white.

Q. Has he got a ribbon?
A. Yes.
Q. What color is the ribbon?
A. Red.
Q. You're a smart girl. Do you know how old you are?
A. Three.
Q. What are you doing, Girl F? Are you showing us something?
(Child inspecting the doll)
A. No.
Q. Girl F, do you promise to tell what really happened down there at E.C.D.C.?
A. (No response)
Q. Girl F, you've got to say yes or no.
A. No.
Q. Why?
A. Because I don't want to.
Q. You don't want to tell us about what happened?
A. No.
Q. Why?
A. Because I don't like it.
Q. Is it scary?
A. Yes.

Tr. 6/50-52. At this point, defense counsel objected. The judge ruled that the questioning could continue to see if she would feel more comfortable. He explained that nothing she was saying was evidence. Mr. Ford again resumed his questioning.

Q. Girl F, we've talked about this before, haven't we?
A. No.
Q. We've never talked about it?
A. No.
Q. You've talked to me before, haven't you?
A. (No response)
Q. Do you remember what we talked about before?
A. No.
Mother. Girl F come sit down.
A. No.
Q. Girl F, all we want you to do is tell these nice people what happened. Can you do that for us?
A. No.
Q. Will you try?
A. No.
Q. Please?
A. No.
Q. It will help if you do.
A. No, I don't want to.

Q. Are you hungry?
A. Yes.
Q. Do you want to have something to eat?
A. Yes.
Q. Do you want to eat and then come back?
A. (No response)
Q. All right. Why don't we try that. Why don't you get something to eat and then come back and talk to us later.
A. Can I have something to eat here?
Q. What do you want to eat?
A. I want something.
Q. You want a hamburger?
A. Yes.
Q. A hamburger. Do you like hamburgers?
A. Yes.
Q. If you have a hamburger you'll come back and talk to us then?
A. Are you going to stay here?
Q. I think I have to. Why? Do you want me to go with you?
A. Yes.
Q. Why?
A. Because I like you.
Q. Thank you. I like you too.

Tr. 6/52-54. At this point, Girl F's testimony was suspended. Mr. Ford requested permission to go with Girl F. Because the next witness was not immediately available, a ten minute recess was taken. Tr. 6/54-55.

After an extended lunch break, the Commonwealth again called Girl F to testify. Tr. 6/84-85. This time she nodded when asked if she would "promise to tell what happened." Tr. 6/86. Her testimony, however, was nonsensical and contradictory. She said she liked it at ECDC, where her teachers were "Bernie and Stephanie and Eileen." When asked if Bernie ever touched her at ECDC, Girl F said, "No." "I didn't see him touch me." "He just was pretending." Mr. Ford pressed on with an anatomically correct doll. Despite her denial, he asked Girl F to "show us where Bernie pretended to touch you." Girl F put her finger in the doll's opening and said, "Right in here, all the way in." Tr. 6/86-87. When asked what room she was in, Girl F said

that she was in the Room 4 classroom.[110] Tr. 6/87-88. On cross-examination, Girl F's answers continued to be nonsensical and contradictory. When asked if Bernie played a lot of pretend games, her answer was unresponsive - "No, he touched my tookoo." Tr. 6/88. When asked, "What do you mean 'pretend?' How do you mean pretend to touch you?" She answered, "He just pretended if I did talk." Tr. 6/89. Girl F nodded when asked if she still liked Bernie and agreed that Bernie is "a good boy," but when Mr. Conway tried to conclude by confirming that Girl F liked Bernie, she responded, "No, I don't." He rephrased the question, "Now you don't like him?" Girl F shook her head from side to side. "Are you sure?" Girl F shook her head from side to side. Tr. 6/89-90

After the Commonwealth rested, the Court learned that the child's "promise to tell what happened" when she took the stand a second time was not the product of her understanding that she had a duty to tell the truth, but was instead the product of improper coaching by the prosecutor.

> Mr. Conway. ... I was approached by my client's mother and sister today ... and they complained bitterly that the sister had observed Mr. Ford in the hallway with Girl F just prior to her testifying repeatedly telling Girl F that all she needed to say was "Yes." They felt that was undue influence on the child and, in fact, a miscarriage of justice. I ask for a mistrial based on that.
>
> The Court. Do you want to respond?
>
> Mr. Ford. Yes, I would like to respond.
>
> I think that the allegation is ridiculous and I do not agree that that's what happened at all. You may recall, your Honor, that when Girl F testified yesterday she came into court twice. The first time she appeared to be willing to talk, she was willing to speak and to carry on a conversation and that was – Mrs. Capeless asked her to say: Do you promise to tell what really happened? She apparently didn't understand that concept, at least that's the way it appeared to me. I explained to Girl F that when Mrs. Capeless said that she should simply say, "Yes" and

[110] Girl F was never assigned to Room 4. She was in Room 1 with Stephanie Adornetto and Eileen Ferry.

that's exactly what I told her.

I think the Court's recollection that when Girl F testified she was not simply asked questions that would call for a yes or no answer. She was asked to point, she was asked to tell. She did, in fact, say that "He touched me in here" and those types of things.

So I disagree with what Mr. Conway has told you that I said to Girl F. I don't think any further discussion of it is necessary.

The Court. Well, having been exposed to Girl F, knowing that she was in the corridor with her mother and I forget who else – possibly –

Mr. Ford. The grandmother.

The Court. Yes. A public vestibule outside the judge's lobby and outside the courtroom and that Mr. Ford was actually engaged before me in the courtroom, it's hard for me to understand how this brainwashing alleged, could have occurred. I have no doubt that is [sic] was not as is reported. In any event, I feel that defense counsel made the point as he has with all of the child's [sic] witnesses, that each child had spoken to Mr. Ford, how many times spoken to him, and I don't know what else you could do. It certainly is not anything that I am concerned about, and would justify any mistrial, so I'm going to deny the Motion for a Mistrial.

Mr. Conway. The only thing further I want to point out to: Assuming Mr. Ford's version of it is correct, even then it goes to Girl F's competence to testify.

We pared down the oath to a simple statement: Do you promise to tell what happened. Even to that statement it would indicate it had to be explained to her she is to say, "Yes," to it.

Mr. Ford. I disagree. It shows a handicap by reason of age. She's handicapped by reason of lack of development of verbal skills, of the understanding of abstract concepts and nothing more.

The Court. I believe I did earlier, for the record, but just so we're all clear on this, I have considered very carefully this issue of competency with regard to each one of these children separately. I am convinced that – I want the record to be unmistakably clear in this area – that I consider each of them to be competent, that is, I believe they have sufficient understanding to realize what it is that happened to them, to be able to recall and remember those events, and to, in ways, consistent with their age, to relate those events in front of the jury.

It is clear that our system of courtroom procedure is not geared for witnesses of their ages. Each of these children came into a large formal courtroom in the presence of sixteen jurors and lawyers and court officers and a judge, were asked to answer questions, and to the extent that they showed this understanding and this ability, I think it was far more than adequate. I think it's met every reasonable test so I do state for the record.

Tr. 7/5-8 (emphasis added).

It is abundantly clear from this last exchange that the trial judge applied only the first prong of the competency test in making his competency determinations. It is likewise clear, from Girl F's performance at the competency hearing and her trial testimony, that she did not even satisfy the single prong that was applied. The judge had an opportunity to correct the errors when defense counsel asked him to reexamine Girl F for competence the first time she was called to the stand. Her inability to take the modified "oath" should have triggered a competency examination. See *Commonwealth v. Baran,* 21 Mass.App.Ct. 989, 990-991 (1986), the facts remain that the trial judge did not apply the competency test correctly and there was no evidence in the record to support his finding. To the contrary, the only evidence the trial judge had regarding the second prong came from the Competency Hearing when Girl F clearly demonstrated she did not know what was and was not true. The erroneous determination that Girl F was competent created a substantial risk of a miscarriage of justice.

**2. Out-of-court statements made by Girl F were improperly admitted.**

The Appeals Court was mistaken in its conclusion that "the judge wisely refused to allow more than one witness to testify to the content of any one complaint."

R:

S:

*Commonwealth v. Lavalley,* 410 Mass. at 646. The risk that a defendant may be unduly prejudiced by the excessive use of fresh complaint witnesses can be alleviated by clear, emphatic and repeated limiting instructions not to use fresh complaint testimony as substantive evidence of the crime. *Commonwealth v. Bailey,* 370 Mass. at 396. The jury was not told that it could not

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[111] Detective McGuire testified twice on this day. In the morning session, he testified as a fresh complaint witness for Girl E. In the afternoon session, he was recalled as a fresh

consider any of the Girl F fresh complaint testimony substantively. *Commonwealth v. Trowbridge,* 419 Mass. at 761. Here, three different witnesses reinforced Girl F's reluctant testimony. No limiting instructions were given. This case hinged on the issue of credibility. The excessive fresh complaint testimony unfairly tipped the balance in favor of Girl F's credibility.

**C. Ineffective assistance of trial counsel.**

**1. Defense counsel failed to seek meaningful discovery.**

According to the Commonwealth's Certificate of Discovery, filed 11/28/84, the District Attorney provided just three documents concerning Girl F: (1) a one-page police report by Detective McGuire,, *PPD, "Girl F victim in ECDC case,"* 10/19/84. A-120, (2) a one-page record of her visit to the Emergency Room in the wake of her "disclosure," *Berkshire Medical Center Emergency Department Record re Girl F,* 10/13/84, A-456, and (3) the DSS Referral to the District Attorney (the 51A/B Report), A-512, . The record is devoid of any indication that Mr. Conway did any independent investigation. He never made a formal request for discovery pursuant to

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complaint witness for Girl F.

In the morning session, before Detective McGuire's fresh complaint testimony, the judge instructed:

> This is the same Fresh Complaint. You recall, ladies and gentlemen, Fresh Complaint is not positive evidence of the alleged act. It is available for you to use as you see fit as to your evaluation as to whether the alleged victim's testimony is accurate and true.

Tr. 6/56-57. This instruction was not repeated or even alluded to when Detective McGuire returned in the afternoon to give additional fresh complaint testimony.

Mother F testified that Girl F started going to ECDC in June 1984 and that "[s]he stayed there until sometime in October." Tr. 6/91-92. In his cross-examination of Mother F, Mr. Conway failed to develop the fact that she took her daughter out of ECDC "after the news of Bernard Baran's arrest." *PPD, Girl F victim in ECDC Case*, McGuire, 10/19/84, A-130. Girl F's last day at ECDC was Friday, October 5, 1984, *Berkshire Medical Center Emergency Department Record re Girl F*, 10/13/84, A-456. Mr. Conway never attempted to establish how, or from whom, Mother F got the news of Mr. Baran's arrest. ECDC parents were not informed of the issue until school started the following Monday morning. The story did not hit the papers until Tuesday morning. Evidently, Mother F heard it on the grapevine and was sufficiently worried so that she, like Girl E's mother, did not send her child back to school on Monday morning.

The jury heard Mother F's scant testimony that she had a conversation with her daughter during which Girl F disclosed that Bernie touched her "in her tookoo." Tr. 6/93. During cross-examination, Mother F testified that it was not until about two weeks after she learned that Mr. Baran had been charged that she first talked to her daughter. Tr. 6/93. Mr. Conway failed to challenge this testimony. In fact, Girl F "disclosed" on Friday, October 12th, (*DSS Child Abuse and Neglect Report - F*, 10/18/84, p. 3, A-512), in the midst of a community panic fueled by a media frenzy. Mr. Conway never established how, when or why the subject of Bernie Baran came up in a conversation. More importantly, Mr. Conway failed to establish that the same day that Girl F "disclosed," the parental panic had reached a fever pitch. The *Berkshire Eagle* reported that an "alleged victim, a 3-year-old girl, is suffering from gonorrhea," that "police and social workers ... said they believe there may be more victims," and that "Parents of children at the center yesterday received letters ... that were hand-delivered" that said that "a child from ECDC has been treated for gonorrhea" and urged worried parents to take their children to a

pediatrician immediately. *Berkshire Eagle, "Day-care worker faces a new rape charge,"* Lynne A. Daley, 10/12/84, A-173.

Mr. Conway failed to develop evidence that it was Jane Satullo, the counselor from Rape Crisis Center, who Mother F contacted when Girl F made her "disclosure." *DSS Child Abuse and Neglect Report - F*, 10/18/84, p. 3, A-512. Ms. Satullo, of course, was involved in the parents meeting on Monday, October 8th, when parents were informed of the "signs" of sexual abuse, and she was the person responsible for the sexual abuse puppet shows that were staged during that first week. The jury never knew, because Mr. Conway never investigated or asked, why it was that Mother F contacted Ms. Satullo. Had Mother F attended the meeting for frantic parents on Monday? Had she taken Girl F to one of Ms. Satullo's puppet shows? Had she previously spoken to Ms. Satullo or to other panicked ECDC parents?

Had this evidence, all of which was known to defense counsel, been properly developed, it would certainly have bolstered the hysteria theory. Yet again, counsel's lack of preparation and his failure to investigate and develop the evidence effectively left Mr. Baran "denuded of a defense" and deprived him of a fair trial.

Because of the paucity of discovery and testimony, it is difficult to determine the evolution of Girl F's story. Mother F, Michael Harrigan, and Detective McGuire all gave very brief accounts of conversations with Girl F in which she said that Bernie touched her tookoo. Nevertheless, a few significant details are worthy of note.

Mother F talked to her daughter about Mr. Baran "maybe ten times." Tr. 6/95. Counsel failed, however, to press Mother F on the substance and timing of the other conversations that she had with her daughter about Mr. Baran.

The jury heard about the October 15th interview by DSS social worker Michael Harrigan and the interview that Detective McGuire did in "October of 1984." Mr. Conway failed to

establish that there were several more interviews or that, during every one of the interviews, the mother was present and participated to some degree.

T: At Mr. Harrigan's direction, Mother F took Girl F to the Emergency Room on October 13th. Girl F not only overheard her mother being interviewed by a nurse at the Emergency Room (Mother F told the nurse that, the day before, Girl F told her "I have been touched" by Bernie at naptime and she pointed at her genitals), but she participated in the nurse's interview and she was also questioned by a doctor. While the nurse was talking to the mother, Girl F said "he touched my tu-tu." Girl F then told the doctor "someone 'touched me here.'" *Berkshire Medical Center Emergency Department Record re Girl F*, 10/13/84, A-456.

U: On Monday, October 15, 1984, DSS social worker Michael Harrigan interviewed Girl F with her mother present. After establishing that she went to school at ECDC and that her teachers were Eileen, Stephanie and Bernie, Mr. Harrigan quickly focused the interview on Mr. Baran.

> When asking Girl F if she ever played games with the teachers, Girl F said, "yes." I asked her what kind of games did she play with the teachers. Girl F said, "stickers."
>
> Girl F was asked if she had ever played with Bernie. Girl F said Bernie would make her go "night-night." When asking Girl F if Bernie had ever touched her, she said, "yes." I asked Girl F where did Bernie touch her. Girl F said her "too koo." Girl F was asked to point to her too-koo. Girl F pointed to her vagina.
>
> I asked Mother F what is Girl F's name for her vagina. Mother F told me Girl F calls it a too-koo. Mother F also stated that Girl F told her the same thing.
>
> When asking Girl F how many times Bernie touched her too-koo, she would not respond. However, Girl F did say that Bernie touched Sandra's too-koo, also. When asking Girl F how did she know that, she would not say.
>
> It was this worker's feeling at this time that Bernie did sexually violate Girl F. It was also felt that further questioning of Girl F would not

prove beneficial for Girl F. A day and time would have to be designated to interview Girl F again.

*DSS Child Abuse and Neglect Report - F*, 10/18/84, p. 6-7, A-512. Mr. Harrigan's questions focused exclusively on what Bernie did. Tr. 6/99.

V: On Friday, October 19, Detective Peter McGuire met with Mother F and Girl F. Before Girl F was interviewed, Mother F told the detective that Girl F's teachers at ECDC were Stephanie, Eileen and Bernie and that Girl F had said that Bernie touched her TuKu. At this point, Detective McGuire then began questioning Girl F.

> I then talked with Girl F. I first asked her if she went to ECDC and she said "yes, but I don't go there anymore." Asked her who her teachers were and she replied Stephanie and Eileen, asked if anyone else was her teacher she said "one more, Bernie."
>
> I then asked her if anyone at ECDC touched her with a bad touch. She then said "Bernie touched my TuKu." While she said this she was pointed to her vagina area. I then asked her what he touched her with and she said "he touched my TuKu with his finger." Asked if anyone seen Bernie touch your TUKU she said "Shanya seen him do it." Asked her where it happened, which room she said "upstairs with the toys," then she said "downstairs."
>
> She was then asked if Bernie told her not to tell anyone, and she replied "he told me not to tell my mommy, I can tell my mommy."
>
> Then I asked her if he pulled her pants down and she said "no." Asked how he touched your TuKu, she said "he put his hand inside." With this she was putting her hand down the front of her pants.
>
> The girl had a cabbage patch doll out at this time, she called Jodie. I asked her to show me how Bernie touched her, pretending Jodie was Girl F. She then lifted the doll dress up, put her finger in area of doll vagina and said "Bernie touched Jodie TuKu right there."
>
> At this the interview was completed. The mother agreed to next week having daughter at DA's Office to be interviewed on video tape.
>
> The girl was very friendly and had no trouble talking about the above.

*PPD, Girl F victim in ECDC Case,* McGuire, 10/19/84, A-130.

W: Girl F was questioned a second time by Detective McGuire for some forty-five

minutes on November 3rd, 1984, in a videotaped interview. Despite Mr. Ford's claim that the tape showed Girl F's "spontaneity ... and the affect with which she spoke," *Competency Hearing,* Tr. 78, it is apparent from the edited videotape[112] that the detective introduced Girl F to "anatomically correct" dolls before he began questioning her. The conversation was already sexualized (Girl F took the male doll and, after examining it, exclaimed that it had a "doodoo") before Detective McGuire zeroed in on who her ECDC teachers were and whether anybody ever "touched" her at ECDC. The innocuous word "touch" triggered the reflexive response from Girl F.

> McGuire. Do you – so Eileen, Stephanie and Bernie were your teachers? Did anybody touch you up there?
> Girl F. Bernie touched me.
> McGuire. Where did Bernie touch you?
> Girl F. – my tookoo.
> McGuire. Where is that? Can you show me?
> Girl F. Right here. [puts hand on crotch]

*Interview of Girl F*, A-741

X: Presumably, Girl F participated in the same six weeks of mock trials that Boy A participated in. There is, however, no documentation of this except for Mr. Ford's suggestive statements at trial:

> Q. Girl F, we've talked about this before, haven't we?
> A. No.
> Q. We've never talked about it?
> A. No.
> Q. You've talked to me before, haven't you?
> A. (No response)
> Q. Do you remember what we talked about before?

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[112] The unedited videotape, marked as "Exhibit A," has not yet been supplied to the defense.

A. No.

Tr. 6/52.

Y: At Mr. Baran's trial, the prosecutor was unable to elicit any incriminating testimony from Girl F until she was prompted with a female anatomically correct doll. When asked if Bernie ever touched her when she went to school at ECDC, Girl F said, "No" She explained, "I didn't see him touch me," and then she added, "He was just pretending." Undaunted by Girl F's denial, Mr. Ford gave her an anatomically correct doll and asked her to "show us where Bernie pretended to touch you." Girl F put her finger in the doll's opening and said, "Right in here, all the way in." She said her pants were up and he did it by putting his hand inside her pants. Tr. 6/86-87.

## IX. <u>Prosecutorial misconduct</u>.

### A. The Commonwealth failed to disclose crucial evidence.

During a pretrial hearing on Friday, January 18, 1985, Mr. Ford made the following representation to the court:

> The fact of the matter is Mr. Conway has every witness statement that I have, every police report that I have, every D.S.S. report that I have. ... I suggest that whatever information we can give him, we've given him.

Hearing on Motions, 1/18/85, p. 17. He later made the unambiguous assertion, "Everything I have, he has." *Id.,* at p. 20. This was patently untrue. Similarly, in the Commonwealth's *Certificate of Discovery,* filed 11/28/84, A-70, Mr. Ford wrote, " There is no exculpatory evidence other than what may be contained in the materials otherwise furnished." Again, untrue.

Mr. Baran is presently aware of three categories of exculpatory documents that were in the Commonwealth's possession at the time of Mr. Baran's trial, but were never provided to trial counsel.

5. Police reports that, on their face, support Mr. Baran's claim that the Mother A and David complained to ECDC that Mr. Baran was gay and that, because of that, he should not be permitted to work in day care with children.

6. "Disclosures" about Mr. Baran from at least nine additional ECDC students, all of which were investigated and substantiated by the Massachusetts Department of Social Services, some, if not all, of which were referred to the Berkshire District Attorney for prosecution. To date, the Commonwealth has provided documentation of a total of eleven DSS investigations, including the five that were provided pursuant to the Commonwealth's original Certificate of Discovery. These reports, on their face, support Mr. Baran's defense theory that complaints against him were fueled by parental panic, hysteria in the day care community, and unduly suggestive investigation methods.

7. Reports of two additional DSS investigations that were conducted in response to allegations made by two of the alleged victims, Boy A and Girl E, that their mother's boyfriends had done the same thing to them that they were accusing Mr. Baran of having done. The A report was particularly crucial. Boy A's "disclosure" set everything in motion. His subsequent diagnosis of gonorrhea of the throat fueled a community-wide panic. In the week before Mr. Baran's trial, Boy A disclosed that his mother's boyfriend put his penis in Boy A's mouth and

> "went to the bathroom" in his mouth and that "it was yucky" and that "John was one and Bernie was two." In other words, John molested Boy A first.

In addition, it is clear from the trial transcript that Mr. Ford failed to disclose a medical report from Dr. Jean Sheeley, dated 1/16/85. Defense counsel did not learn until he was cross-examining Dr. Sheeley that she had prepared a second report in connection with a second gynecological examination of Girl B and had formed the opinion that Girl B had a "ruptured hymen."[113]

"[S]uppression by [a] prosecutor of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Commonwealth v. Ellison*, 376 Mass. at 22. "'Exculpatory' in this context is not a narrow term connoting alibi or other complete proof of innocence, *Commonwealth v. Pisa*, 372 Mass. 590, *cert. denied* 434 U.S. 869 (1977)*Commonwealth v. St. Germain*, 381 Mass. at 261 n.6. If the exculpatory evidence is material, the Commonwealth is required to disclose it "at such time as to allow the defense to use

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[113] During defense counsel's cross-examination of Jean Sheeley, the following exchange took place:

> Q. Now, does the report anywhere say full rupture of hymen?
>
> A. I say here twice – I don't know if you have my second exam on her.
>
> Q. Could you give me – let me – give us the date of the two exams.
>
> A. Yes. October 8th and then because of further information from the family regarding the internal penetration by various objects, we brought her back in to do a careful internal inspection on January 16th, to look for vaginal or rectal tears.

Tr. 6/126.

the favorable material effectively in the preparation and presentation of its case.'" Commonwealth v. Wilson, 427 Mass. 336 (1998) and cases cited.[114]

The prosecutor cannot sidestep his duty to disclose this crucial information on the ground that the material was in his personal possession, but rather was in the possession of the Pittsfield Police Department or the Department of Social Services. "The prosecuting attorney's obligations ... extend to material and information in the possession or control of members of his staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report or with reference to the particular case have reported to his office." *Commonwealth v. Healy,* 438 Mass. at 683. Regarding the homophobia theory, Mr. Conway knew there was some mention of a complaint from the As, but when Mother A denied on the witness stand that she heard David call the school or that she was the one who called the school to complain, he was flummoxed. If the District Attorney had provided the withheld police reports that revealed that the As complained to their social worker Susan Eastland who in turn complained to Lynn Witter at ECDC, Mr. Conway would have been prepared develop the evidence properly. The Commonwealth's failure to disclose these reports contributed to the

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[114] The duty to disclose derives from the prosecutor's responsibility to see that "justice shall be done," as well as that "guilt shall not escape," *United States v. Agurs*, 429 U.S. 97, 111 (1976), quoting *Berger v. United States*, 295 U.S. 78, 88 (1935). A prosecutor's duty to disclose under Brady "must be measured by the directness of the materiality of the item of evidence in question to the defense taken together with the sheer volume of all the evidence in the hands of the prosecution." *Commonwealth v. Salvati*, 420 Mass. 499, 503 (1995). Much will depend on "the particular circumstances and the nature, importance, and relevance of the allegedly suppressed evidence." *Id.* quoting *Commonwealth v. Cassesso*, 360 Mass. 570, 578 n.5 (1971).

collapse of the homophobia theory.

Similarly, Mr. Conway could have made a more credible argument regarding the hysteria defense had the District Attorney properly disclosed the fifteen complaints that had already been substantiated against Mr. Baran within two weeks of the first "disclosures." The District Attorney chose to prosecute only six of the fifteen cases. Why did the District Attorney decline to prosecute nine of fifteen criminal referrals from DSS? Perhaps because nine of the fifteen cases were even sillier than the ones the District Attorney elected to prosecute. Without this material evidence, it was virtually impossible for the defense to make a plausible presentation of the mass hysteria defense. With these additional reports, the defense could have shown the pattern of how children who were questioned by concerned parents in the wake of the A and B allegations and the children who attended the puppet shows "disclosed" what Bernie did to them, even though the children had always liked having Mr. Baran as a teacher.

Finally, the defense could have demolished the A and perhaps the E allegations, had the defense been armed with the DSS investigations into the allegations made by these two children about identical sexual abuse by their mothers' boyfriends. The Commonwealth's experts testified that children cannot describe sexual abuse unless they have experienced it. In his closing argument, Mr. Ford argued that child would not talk about sexual abuse unless it really happened. Tr. 8/48, 64. Yet he knew, or should have known, that DSS had investigated identical allegations made by these two children against someone other than Mr. Baran. In Boy A's case, DSS substantiated the child's allegation against his mother's boyfriend and referred the case to the District Attorney's Office for prosecution *during* Mr. Baran's trial. The outcome of the E investigation is unknown because the Commonwealth has yet to provide it to the defense despite numerous requests. Were it not for the fact that the A report was attached to a pleading in a civil lawsuit, Mr. Baran might never have known about it because the Commonwealth has

not yet provided it to the defense either.

Mr. Baran was gravely prejudiced by the Commonwealth's failure to disclose the foregoing exculpatory material. The importance of this information cannot be overstated. Competent counsel would have shredded the A case and would have cast serious doubt on the other cases. The Commonwealth's failure to disclose this evidence at the time of Mr. Baran's trial deprived Mr. Baran of a fair trial.

The District Attorney's ongoing refusal to disclose the A and E DSS investigations into identical allegations, despite numerous specific requests, can only be viewed as a deliberate violation of *Commonwealth v. Hernandez*, 421 Mass. 272 (1995)*Commonwealth v. Jacobsen*, 419 Mass. 269 (1995) *Commonwealth v. Cinelli*, 389 Mass. 197, cert. denied, 464 U.S. 860 (1983)The prosecutor has a particular obligation not only to argue the Commonwealth's case

> forcefully and aggressively, but also to do so in a way that states the evidence clearly and fairly and inspires confidence that the verdict was reached based on the evidence rather than sympathy for the victim[s] and [their] famil[ies].

Commonwealth v. Santiago, 425 Mass 491, 494 (1997). Mr. Ford felt no such constraints. Indeed, he told the jury: "If ever there was a case where the ends of justice literally cry out for a guilty verdict, this is that case and you will find me unrestrained in urging you to return one ..." Tr. 8/46. Mr. Ford made good on his word; he did everything in his power to evoke sympathy for the alleged victims and to foment juror outrage over the purported crimes.

**1. Sympathy for the children and their parents.** In a calculated effort to generate sympathy, Mr. Ford relentlessly emphasized the tender age of the alleged victims. In his opening statement he mentioned the age of the alleged victims, in one way or another, no less

than twenty times.[115] When he called four of the six children to the witness stand, he announced

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[115] "[T]he indictments allege that ... Bernard Baran perpetrated [crimes] upon six very young children." Tr. 3/19.

"[M]ost of the children who go there are very young ranging is ages, in some cases, under two up to approximately five years." Tr. 3/20.

"[T]he children involved here range in age from three to five with Girl F being the youngest – she just recently turned three – up to Girl E the oldest. She's now five years of age." Tr. 3/20-21.

"... Mr. Baran came into very close contact with all those young children at the school including the six who are named in the indictments in this case." Tr. 3/21.

"On October 4 of last year, Boy A, four years of age, came home from school ..." Tr. 3/25.

"Boy A will take the witness stand ... and believe me it's very difficult to predict with any measure of certainty exactly what a four-year-old child is going to say ... All any attorney can do is tell you what he expects ... and with a four-year-old it's especially difficult. Tr. 3/26-27.

" ... Mother B, who had a three-year-old daughter named Girl B ... " Tr. 3/28.

"Girl B is three years old. She will tell you ... ... Mother B will tell you that privies is the word little Girl B uses to describe her vagina." Tr. 3/28.

"... Jane Satullo will testify and tell you exactly what three-year-old Girl B had to say ..." Tr. 3/29.

"... indicating some previous trauma to the inside of Girl B's vagina consistent with the insertion of something like a penis into three-year-old Girl B's vaginal opening." Tr. 3/30.

both the child's name and age.[116] He asked each of the children how old they were; one of the children, Girl F, he asked twice for good measure. Tr. 4/101, 4/113, 5/37-38, 5/53-54, 6/29, 6/47, 6/51. He asked parents to state the age of their child. Tr. 4/130, 5/72, 5/76-77, 6/38, 6/92. In addition, during the direct examination of various witnesses, he used diminutives like "little girl," Tr. 4/130, 6/92, "young girl," 5/138, "little boy," Tr. 5/72, 6/21, "young boy," Tr. 6/19, and "small child," Tr. 6/56, 6/97.

It was not until Mr. Ford's closing argument that he fully exploited the age and appeal of the alleged victims. He began by improperly vouching for the testimony of all the children. "... nothing I – or for that matter any trial lawyer – could say could possibly be as persuasive or as

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"... Mother E, will you that she questioned her five-year-old daughter Girl E ..." Tr. 3/31.

" ... Trooper Robert Scott ... was assigned ... to interview little Girl E, five years of age." Tr. 3/31.

"Now, Girl F is the youngest of these children. She just turned three years of age, ..." Tr. 3/32.

"Girl F, because she is so young, ..." Tr. 3/32.

"Boy D's father will tell you ... that when he would come home four-year-old Boy D would ..." Tr. 3/33.

[116] "The next witness is ... four years old. His name is Boy A." Tr. 4/98.

"The next witness, your Honor, is a four-year-old boy named Boy C." Tr. 5/36.

"The next witness is a five-year-old child, Girl E." Tr. 6/27.

"The next witness, your Honor, is Girl F, age three." Tr. 6/45-46.

convincing as the testimony of those little children ... I dare say that the great Clarence Darrow himself would pale in comparison next to them." Tr. 8/46 "... in this case truth came literally from the mouths of babes." Tr. 8/46-47. Later, he turned his attention to Girl B:

> Finally, there's Girl B whose testimony would melt your heart. Whoever wrote the old saw about little girls being made of sugar and spice and everything nice, must have had Girl B in mind. She told you that Bernie, her teacher, touched her here and pointed to the area that she called her privies. Touched her here, she pointed to her fanny. Well, that's indecent assault and battery. Then she told you that Bernie put his peniey, as she calls it, into her vaginal opening and into her mouth and something that she called pretend worms squirted from Bernie's penis on to her leg and that when Bernie put his peniey into her privies it hurt her and she began to bleed. The very thought of doing that to a three-year-old child like Girl B, the personification of innocence,

> is so monstrous, so horrible, so ghastly that there is something inside all of us that wants to cry out and say: "No, it can't be true. He couldn't have done a thing like that."

Tr. 8/57-58. (Emphasis added) These remarks were improper. Although a prosecutor can humanize an alleged victim, proper argument must (1) accurately describe the victim and (2) be relevant to the defendant's guilt. These statements go well beyond mere description; this verges on beatification. Moreover, the statements are irrelevant to guilt and are nothing more than a blatant, impermissible appeal to the sympathy of the jury.

> Prosecutors should bear in mind that when the question is *whether* the defendant committed the crime, luxuriating in the ghastliness of the crime and the suffering of the victim does not help to answer the question. Such irrational and irrelevant comments "only serve to make it less likely that the jury will return a verdict based on fair, calm consideration of the evidence." Commonwealth v. Shelley, 374 Mass. 466, 470 (1978), and authorities cited. [emphasis in original]

Commonwealth v. McLeod, 30 Mass.App.Ct. 536, 538-539 (1991)(conviction reversed where prosecutor failed to stay within the bounds of proper closing argument by unfairly exploiting victim's expression of emotion). Mr. Ford did not stop there. Bernard Baran, he argued, "entered that child psychologically and physically and now today it's his day of reckoning." Tr. 8/58. He reviewed Dr. King's testimony about Girl B's dreams and her play scenarios and asked, "Can you imagine the psychological damage that Girl B has suffered?" Tr. 8/59-60. It is improper to suggest that a jury should convict because of the victim's suffering. *Commonwealth v. Deveau,* 34 Mass.App.Ct. 9, 13-14 (1993).

It was likewise improper for Mr. Ford to present evidence of the parents' emotional

reactions to their children's disclosures[117] and then to argue that the children's families had endured a nightmare. In the context of denying that responsible parents would coach their children to say they were molested, he argued:

> Don't you think that [the] most welcome discovery that a parent could make under these circumstances would be that his or her child had not been sexually abused? All the trauma would be eliminated.
>
> The necessity of having the child testify would be avoided and the terrible nightmare that these people have had to go through would be put behind them once and for all. Why in God's name would any parent pressure to come to court and testify before sixteen jurors about the horrible bloodcurdling things that these little children had to say? The answer is: They wouldn't.

Tr. 8/48. (Emphasis added) These remarks strike a very similar chord to arguments that were ruled improper in Commonwealth v. Lorette, 37 Mass.App.Ct. 736 (1994). In *Lorette* (which coincidentally was tried before the same judge who presided over Mr. Baran's trial), the prosecutor argued:

> You saw, and I am sure most of you felt the pain of what it was like to be the parents of a child that was molested. You saw [the father], how difficult it was ... You saw [the mother] try to explain what had occurred on those days. That sick feeling that hit her stomach.

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[117] In his opening statement, Mr. Ford told that jury, "Mother B will tell you that upon hearing that she was absolutely devasted [sic] .." Tr. 3/28. During direct examination of Mother B, he asked, "Upon hearing Girl B saying that, how did that make you feel?" She replied, "Terrified." Tr. 4/133.

Similarly, on direct examination of Mother A he asked about the time she saw blood on the tip of Boy A's penis: "I assume you were scared?" "Yes, I was," she answered. Tr. 4/161.

...
[The victim's family] came and told you what was a nightmare of their life. What was the nightmare for their child for the rest of her life. A nightmare that will not go away.

*Id.,* at 743.

**2. Manufactured, mischaracterized and misused testimony.** Fear was a major theme of the Commonwealth's case. To counter testimony that Mr. Baran was well-liked by the children, the prosecution tried mightily to create the impression that there was a darker side. Throughout the course of the children's testimony, Mr. Ford manufactured fear by frequently making the gratuitous suggestion to the children that it was scary to talk about the things that Mr. Baran had ostensibly done to them.[118] In almost every instance, the child

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[118] In his direct examination of Girl B, he asked:

Q. Is it scary to talk about these things, Girl B?

A. Uh-huh.

Tr. 4/119.

On redirect examination of Boy C (and immediately after Boy C was unable to tell defense counsel the difference between a fake story and a real story, Tr. 5/50-51), Mr. Ford asked:

Q. Is it kind of scary to talk about this, Boy C?

A. (Child nods head up and down)

Q. Are you a little scared?

A. (The child nods head up and down)

Tr. 5/51.

Mr. Ford began his redirect examination of Boy D by suggesting he was scared:

acknowledged that he or she was scared. This tactic was particularly effective, and most prejudicial, when a child was unwilling to say what the prosecutor wanted her to say[119] or when a

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Q. You're a real good boy, Boy D. This has been a little scary for you?

A. (Child nods head up and down)

Tr. 5/71.

On direct examination of Girl E, he asked:

Q. How did it make you feel when Bernie did these things to you, Girl E?

A. (No response)

Q. Did it make you feel kind of scared?

A. (Child nods head up and down)

Tr. 6/31.

[119] When, on direct examination, Girl B said that she did not want to talk about the bird's nest game, Mr. Ford twice suggested that it was because she was afraid:

Q. Did Bernie ever tell you a story about the bird's nest?

A. Uh-huh.

Q. Tell us what the story was?

A. The baby bird got killed.

Q. Girl B, these people can't hear you so can you speak up good and loud so they can hear what you're saying?

A. I don't want to.

child was unwilling to testify at all.[120] At no time did any of the children testify about what it

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....

Q. Can you tell us about the bird's nest, now? Girl B, take a deep breath, think hard. It's okay to tell.

A. I don't want to.

Q. You don't want to talk about that?

A. I just don't want to.

Q. Is it scary?

A. Uh-huh.

Tr. 4/119-120.

Q. Can you tell us now about the bird's nest game?

A. No.

Q. Do you want to tell us?

A. No.

Q. Is that scary?

A. Yes.

Tr. 4/127.

[120] When Boy A refused to testify, Mr. Ford suggested that it was because he was afraid:

Q. Boy A, are you afraid, Boy A?
A. Yes.
Q. You're scared?

A. Yup.

Q. Do you want to talk any more?

A. No.

Q. Why not?

A. ‘Cause.

Q. Because why?

A. (No response)

Q. Something scare you?

A. (No response.)

Tr. 4/102.

Q. ... Now show us where Bernie touched you, Boy A?

A. No.

Q. Why?

A. ‘Cause.

Q. ‘Cause why?

A. I don’t like to.

Q. Is it hard to talk about this?

A. Yup.

Q. Is it scary?

A. Yup.

Q. There’s nothing to be scared of, Boy A.

Tr. 4/104-105.

Q. Boy A, show me where Bernie touched you. Then you can go.

A. (No response)

Q. Show us?

A. (No response)

Q. Are you scared?

A. (No response)

Tr. 4/107.

Similarly, when Girl F refused to testify, Mr. Ford suggested that it was because she was afraid:

Q. ... Do you promise to tell what really happened?

A. No.

Q. You don’t promise to tell what really happened? Girl F, you’re going to tell us what really happened?

A. No.

was that they were afraid of, but the question clearly insinuated that the children were fearful of Mr. Baran.

In a like vein, Mr. Ford improperly elicited testimony from various fresh complaint witnesses about expressions of fear and/or the exhibition of fear by the children when they were being asked about what Mr. Baran had purportedly done to them.[121] In particular, Mr. Ford

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Q. Why?
A. Because I don't like it.
Q. Are you scared of –

Tr. 6/48.

Q. Girl F, do you promise to tell what really happened down there at ECDC?
A. (No response)
Q. Girl F, you've got to say yes or no.
A. No.
Q. Why?
A. Because I don't want to.
Q. You don't want to tell us about what happened?
A. No.
Q. Why?
A. Because I don't like it.
Q. Is it scary?
A. Yes.

Tr. 6/51-52.

[121] In direct examination, Mother A testified that Boy A seemed afraid:

Q. ... tell us how Boy A was acting at that time when you saw the blood?
A. Nervous. He wouldn't stand still, he was shifting back and forth.
Q. Did he seem scared?
A. Yes.

Tr. 4/161.

Several witnesses testified about Girl B's fear. On direct examination, Mother B testified:

Q. When these three gentlemen came to your house did they talk to Girl B?

elicited testimony from Trooper Scott about what happened when he showed the photo array containing Mr. Baran's picture to Girl E and Girl B.[122] Before he turned the cardboard over, Girl E began crying and said "You're going to show me a picture of Bernie." Tr. 6/82. Girl B pointed to Bernie's picture when Trooper Scott asked if she saw his picture but, when asked to say his name, she would only whisper it. Tr. 6/83. Only one witness, Dr. Suzanne King, testified that a child ever actually said that she was fearful of Mr. Baran.[123]

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A. Yes. They asked her some questions.

Q. Can you tell us how Girl B was acting at that time?

A. She was terrified.

Tr. 4/134.

"... Girl B asked if we could leave because she was frightened. She and I walked into the hallway ... She explained to me that she was frightened ..."

Tr. 4/135.

Q. When Girl B told you [the bird's nest] story was there anything about her behavior, her demeanor, that you noted?

A. She was frightened.

Tr. 4/135-136.

In direct examination, Jane Satullo testified that when she first met Girl B, "she was exhibiting some fear." Tr. 5/139. When Girl B began to talk about games that she played with Bernie, "she began to be afraid." Tr. 5/140. She summarized how the interview went:

"Mostly once the subject got broached with her doll stating what she said Bernie had done to her. The rest of the was spent with her saying she was frightened." She continued, "Some of that time she need to go to the bathroom which is really a very normal response of children who are frightened."

Tr. 5/141.

[122] Mr. Ford played something of a shell game with respect to evidentiary basis of the photo array that was shown to the children. He initially argued that it was admissible as identification, later as fresh complaint, but finally admitted the real reason he wanted to use the photo array evidence. "This is offered not so much on the issue of identification which there are really no ... issue, but it's offered to show ... her reactions when she saw the photo array." Tr. 6/59.

[123] Dr. Suzanne King testified about Girl B's fear:

Q. You say that Girl B has talked about being afraid, a fear, that type of thing?

Undeterred by the lack of evidence that the children were afraid of Mr. Baran, fear of Mr. Baran (or the illusion thereof) figured prominently in Mr. Ford's closing argument.

> ... just to be sure the children would say nothing about it, just to be sure his scheme wouldn't be revealed, he took out a little insurance and he told these children some wonderful children's stories, some perfectly delightful fairy tales designed to frighten them to the point where they wouldn't breathe a word of it. ... Like telling Girl B about the bird's nest game, that if she told anybody about what Bernie did to her the baby bird's mother would be taken away by the pretend police and the baby bird would be hurt. That one frightened Girl B so much she couldn't even tell us about it here in court. She could talk about being raped, she could talk about being sodomized but she wouldn't repeat the bird's nest story. That's how much that one scared her.
>
> We can only imagine what the story must have been to her.

Tr. 8/52-53. The first portion of this argument was improper because it was little more than conjecture. There was no evidence that Mr. Baran told children stories to scare them into silence so there is no way this can be considered a fair inference. In addition, the reference to the bird's nest game was improper. Girl B did not testify "that if she told anybody about what Bernie did to her the baby bird's mother would be taken away by the pretend police and the baby bird would be hurt;" her mother did. Her mother was a fresh complaint witness. Assuming, *arguendo*, that this statement even qualified as a fresh complaint, Mother B's testimony about what Girl B said was admitted for the limited purpose of corroborating Girl B's testimony. But here, Mr. Ford is urging the jury to use the testimony substantively - as evidence of a threat to silence Girl B. This was highly improper. A prosecutor may not present to the jury evidence admitted for a limited purpose as if it were substantive evidence. Commonwealth v. Rosa, 413 Mass. 147, 156 (1992)(prosecutor's summation was improper and required reversal where prosecutor made substantive use of testimony admitted solely to impeach a witness's credibility).

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A. Yes.

Q. Has she talked in particular about who, if anyone, she is afraid of?

A. She said repeatedly that <u>she is afraid of a man named Bernie</u>.

Tr. 6/114-115.

Mr. Ford also urged the jury to recall the fresh complaint testimony of Trooper Robert Scott as evidence of Mr. Baran's guilt.

> ... Remember how he testified he showed those ten photographs to both Girl E and to Girl B? ... a reaction of absolute terror when they looked at Bernie Baran's photograph.

Tr. 8/54. Not only did Mr. Ford mischaracterize Trooper Scott's testimony - Trooper Scott never said anything about the children being terrified when they actually looked at Mr. Baran's picture - but he once again improperly argued that evidence admitted for a limited purpose should be viewed as substantive evidence.

Dr. Sheeley testified that there would be bleeding with a ruptured hymen. No one ever saw any evidence that Girl B experienced vaginal bleeding. To get around this problem, Mr. Ford reminded the jury that Mother B testified that Girl B came home from school one day with a cut on her foot. He then misstated Girl B's testimony about seeing blood, claiming that she said that "when Bernie hurt her by putting his peniey in her privies she started to bleed."[124] Tr.

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[124] On direct examination, Mr. Ford led Girl B to say that she saw blood when Bernie touched her, not that she started to bleed when he penetrated her with his penis.

Q. Now, Girl B, when Bernie touched you down here – For the record, your Honor, I'm referring to the vaginal opening of the female doll that the witness has already pointed to. When Bernie touched you down here, did something happen to you?

A. (Shakes head from side to side.)

Q. Remember something coming out?

A. (No response.)

Q. Did you bleed?

A. I forget it

Q. You forgot that?

A. (Nods head up and down.)

Q. You remember seeing some blood?

A. Uh-huh.

Q. You did?

A. Uh-huh.

Q. What did Bernie do when the blood came out?

8/59. He concluded his argument about the presence of blood with a quantum leap, "So, to account for the blood Baran cut her foot so there wouldn't be any reason to question the presence of blood and his secret wouldn't be discovered." Tr. 8/59. Mother B had earlier blurted out this absurd speculation during cross-examination. It was clearly inadmissible at the time and it was error for the judge to overrule a defense motion to strike the statement. Mr. Ford exacerbated the error by repeating the speculation as if it were fact. "Arguments that are unsupported by the evidence and thus are speculative and conjectural are, of course, improper." Commonwealth v. Kozec, 399 Mass. 514, 522 (1987).

To get around the fact that no one at the school saw the cut on Girl B's foot or filed an accident report, Mr. Ford argued maybe an accident report was never filed. Or, if a report was filed, maybe Mr. Baran stole it:

> Mr. Conway says: "Well, if Girl B were cut there would be a record of it." Where's the record? Well, you heard the testimony. The people responsible for keeping those record have been fired. Mother B told us that. She was on the Board of Directors of ECDC. The Center was in a turmoil. Even if a record had been made the record was in a place to which Baran would have had access ... There was absolutely no reason why that record couldn't have been removed and destroyed.

Tr. 8/60. It was grossly improper for Mr. Ford to make this argument. There was not a shred of evidence to suggest that Mr. Baran ever stole anything, much less an accident report about a cut on Girl B's foot from the ECDC's files. Once again, Mr. Ford was relying on speculation and conjecture to smear Mr. Baran.

**3. Vouched.** Time and again, Mr. Ford improperly vouched for the credibility of his witnesses. His manner of leading the children through their testimony and

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A. He scooped it out with scissors.

Q. With scissors? How did that make you feel, Girl B?

A. Bad.

Tr. 4/117-118.

putting words in their mouths to get the story he wanted to tell tacitly, but effectively, conveyed to the jury that Mr. Ford had knowledge of what really happened. See Commonwealth v. Smith, 387 Mass 900, 907 (1983).

In his closing argument, he insinuated that both he and his experts knew the truth. The "truth came literally from the mouths of babes." Tr. 8/46-47. He pointed out that Dr. King testified that a child does not have the cognitive ability to fabricate a story about sex abuse. Tr. 8/48. He recalled that Jane Satullo, who he described as a "distinguished child psychotherapist," testified that a child would not be able to remember and repeat a lie or an untruth; that when a child consistently tells a story, the child is telling the truth. Tr. 8/48-49, 60. He then argued:

> We were fortunate in this case, very fortunate to have a number of well-trained, very experienced, highly professionaly [sic] investigators who have spent years studying the phenomenon of child sexual abuse and interviewing children who have been sexually abused. Do you really think all of them could be fooled? All of them? Jane Satullo, Patricia Palumbo, Mike Harrigan, Robert Scott a State Police Investigator assigned to a major criminal investigation unit, Peter McGuire a Pittsfield Police Detective with years of experience, all highly trained in this type of investigation. Do you think that they could all be taken in?

Tr. 8/49. First of all, it was simply not true that all of the people were highly experienced professionals who had spent years studying child sexual abuse and interviewing children who had been sexually abused.[125] More importantly, the questions, "Do you really think all of them could be fooled? All of them?" and "Do you think that they could all be taken in?" improperly insinuated that all of the investigators believed the children were telling the truth. Witnesses cannot comment on the credibility of other witnesses. In his closing argument, Mr. Ford derided the fact that the defense called the ECDC witness who showed some school children a dead bird in a nest in an effort to provide a plausible explanation for Girl B's

[125] Ms. Satullo had only been working full-time at the Rape Crisis Center for "about a year" and part-time for a year. Tr. 5/136. Ms. Palumbo had only been working for DSS since May 1984. Tr. 6/13. Mr. Harrigan had been an investigator for DSS for just over two years. Tr.

talk of a bird's nest.

> So, Girl B never saw the bird that Mr. Herdman found. So it's abundantly clear, ladies and gentlemen that summoning Mr. Herdman into court and implying that he might be in some way responsible for this is nothing short of reprehensible. The act of a desperate man trying to shift blame away from where it really belongs.

Tr. 8/53. This argument impermissibly denigrates Mr. Baran's constitutional right to present a defense.

**5. Deliberately inflamed the jury.** During his case in chief, Mr. Ford repeatedly asked questions which had no value other than to deepen the juror's revulsion at the allegations. After eliciting descriptions of various disgusting acts purportedly committed by Mr. Baran, he gratuitously asked the child witnesses, "How did that make you feel?"[126] The

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6/97.

[126] Direct examination of Girl B included the following:

Q. What did Bernie do to you with his peniey?
A. He stick it in my privies.
Q. He stuck it in your privies?
A. Uh-huh.
Q. How did that make you feel, Girl B?
A. Pretty bad.
Q. Mad?
Mother B. Bad.

Tr. 4/116.

Q. What did Bernie do when the blood came out?
A. He scooped it out with scissors.
Q. With scissors? How did that make you feel, Girl B?
A. Bad.

Tr. 4/118.

Q. Did Bernie ever do something with a jump rope?
A. Uh-huh.
Q. What did he do?

A. He poked you.

Q. He poked you?

A. Uh-huh.

Q. With a jump rope?

A. Uh-huh.

...

Q. How did that make you feel?

A. Bad.

Tr. 4/118-119.

Q. Girl B, remember when Bernie put his peniey on your tongue? You told us about that?

A. (Witness nods head up and down)

Q. How did that make you feel?

A. Bad.

Q. Did it make you feel sick?

A. (Witness nods head up and down)

Tr. 4/121.

Direct examination of Boy C included the following:

Q. Did Bernie ever put his do somewhere on you, Boy C?

A. (Child nods head from up and down)

...

Q. Did he ever put it up here?

[Mr. Ford pointing to his own mouth]

A. (Child nods head up and down)

Q. He did?

A. (Child nods head up and down)

Q. How did that make you feel, Boy C?

A. (No response)

Q. Pow [sic] did that make you feel?

A. Mad.

Tr. 5/43-44.

Direct examination of Boy D included the following:

Q. Now, how did that make you feel, Boy D, when Bernie touched you down there?

A. Mad.

children's answers had no probative value. Their answers were superfluous; it was the question that landed the blow.

In his closing argument, Mr. Ford fully embraced the power of inflammatory argument. He made a several truly outrageous remarks, each of which was obviously designed to inflame the passions of the jury:

$ Bernard Baran was alone with those children on practically a daily basis. With the chances he had he could have raped and sodomized and abused those children whenever he felt the primitive urge to satisfy his sexual appetite. Tr. 8/50.

$ If there ever was a man with the opportunity to commit a crime with which he is charged Bernard Baran is that man. He was like a chocoholic in a candy store and indeed, for him perpetrating these despicable acts was like taking candy from a baby. Tr. 8/51-52.

$ The air in this courtroom literally reeks with the smell of Bernard Baran's guilt. Tr. 8/66.

These statements went far beyond rhetorical flourish; they could only have been made for their

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Tr. 5/56.

Q. How did that make you feel, Boy D?

A. Sad.

Q. Did it make you feel scared?

A. No, sad.

Tr. 5/59.

Direct examination of Girl E included the following:

Q. How did it make you feel when Bernie did these things to you, Girl E?

A. (No response)

Q. Did it make you feel kind of scared?

A. (Child nods head up and down)

Tr. 6/31.

Direct examination of Girl F included the following:

Q. How did that make you feel, Girl F, when Bernie –

A. That made me feel sad.

Tr. 6/88.

emotional impact.

Even though the judge had already entered a required finding of not guilty with respect to the Boy A case, Mr. Ford could not resist smearing Mr. Baran one more time with speculation that he must have infected Boy A with gonorrhea. Tr. 8/61-62. Before he left the subject, he subtly reminded the jury that Mr. Baran was a homosexual:

> Remember Dr. Ross told you that people who have had it once have a greater chance of getting it a second time by virtue of their life style. You recall Bernard Baran's own testimony that when he was fourteen or fifteen he had venereal disease. What does that tell you? That tells you why Boy A had gonorrhea in his throat. Poor little boy.

Tr. 8/62-63. These comments were clearly improper. See Commonwealth v. Clary, 388 Mass. 583, 592 (prosecutor's insinuations regarding the defendant's sexual preference clearly were likely to instigate prejudice).

As Mr. Ford came to the conclusion of his summation, he steadily built toward an resounding crescendo, pleading for a guilty verdict on every charge.

> Members of the jury, at that outset of this trial you came into this courtroom as part of a very large panel of jurors. You may have asked yourselves: Why out of all those people was I chosen to sit as a juror on this most unpleasant case? The answer is simple. Before you were chosen and sworn you were asked a series of questions by Judge Simons and in answering those questions as you did, you promised the Court and you promised me that you would decide this case fairly, with courage, integrity, and that you would try your best to see to it that justice is done. I ask you now to be true to that oath and to return the only verdict that is truly consistent with and warranted by the evidence that you've heard and the law that you are about to hear – because the pieces of the puzzle have been finally assembled. The brick wall has been constructed. The guilt of Bernard Baran has been finally established.
>
> I would remind you that the only way we can all walk out of this courtroom today with our heads held high is if justice is done. I ask you to do justice and I ask you to do it by returning a verdict, which you know in your hearts, is the right one.
>
> You know, I've been trying cases in the courtroom now for over six years and I've tried a lot of them – more than I would care to think about. I've never won one – I've never lost one – because I don't win or lose cases. The only ones who win are the people of the Commonwealth of Massachusetts who win when justice is done. And the only ones who lose are the people of the Commonwealth who lose when justice is thwarted.

I ask you to do justice – to do it by maintaining the courage of your convictions and by doing what you know has to be done. I beseech you – I beg you – think of those children and bring back a verdict of guilty on each and every one of these charges.

Tr. 6/66-68. These remarks can only be viewed as "the equivalent of an exhortation that the jury had a duty to the victim[s] to return verdicts of guilty." *Commonwealth v. Sanchez,* 405 Mass 369, 375 (1989). Accord, *Commonwealth v. Shelley,* 374 Mass. at 473. Nevertheless, because trial counsel did not object to Mr. Ford's tactics, the standard of review is whether his misconduct created a substantial risk of a miscarriage of justice. Commonwealth v. Freeman, 352 Mass. 556, 563-564 (1967); Commonwealth v. Miranda, 22 Mass.App.Ct. 10, 21 (1986).

The trial judge has the ultimate responsibility of guaranteeing the defendant a fair trial. "[A]s to clear excesses by the prosecutor, the preferable practice is for the judge to intervene then and there on his own motion." *Commonwealth v. DeChristoforo,* 360 Mass. 531 (1971)*Commonwealth v. Cabot,* 241 Mass. 131.Commonwealth v. McLeod, 30 Mass.App.Ct. at

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[127] The Court's final instructions included the following:

> The respective roles of the parties in a trial, I think, are probably clear to you. The attorneys have a very important responsibility. They present the evidence in a light that's most helpful to their respective positions and they make an opening statement of what it is they intend to prove and they make a closing argument of their recollection of the evidence they feel should be stressed to you. I've instructed you on an earlier occasion – I'll repeat to you now – that what the attorneys say in either the opening or closing statement is not evidence. What they recollect if it's different from what you recollect, it's to be ignored. It's your recollection that controls. I remind you now of those instructions.

Tr. 8/69-70.

> In determining whether or not this Defendant is guilty or innocent of the charges made against him you should, of course, determine without prejudice, without fear or favor and solely from a fair consideration of all of the evidence. Emotion or sympathy for one side or another have no place in your deliberations and, of course, you are not to decide this case on the basis of what you might have heard or heard outside of this courtroom or on the basis of any suspicion or guess work or speculation or any

540, quoting Commonwealth v. Gallego, 27 Mass.App.Ct. 714, 720 (1989).

The evidence of Mr. Baran's guilt was far from overwhelming. No one ever saw any inappropriate conduct from Mr. Baran or even anything remotely suspicious. No forensic evidence pointed to Mr. Baran. Until the As' August 1984 complaint about Mr. Baran being a gay man working in a day care center, no one had ever complained about him. The case came down to a credibility contest between the children and Mr. Baran. In these circumstances, there is ample room for overreaching by the prosecutor to cloud the jury's judgment.

> [The prosecuting attorney] is the representative not of an ordinary party to a controversy but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.
> ...
> [T]he average jury, in a greater or less degree, has confidence that these obligations ... will be faithfully observed. Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.

*Berger v. United States,* 295 U.S. 78, 88 (1935).

In Mr. Baran's case, justice was not done. The combined effect of the Mr. Ford's tactics was sufficiently prejudicial to create a substantial risk of a miscarriage of justice. Accordingly, Mr. Baran's convictions should be set aside.

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> unanswered questions in your mind. You may not speculate as to what might or might not have been a fact or be influenced by the lack of popularity of the crimes charged. Rather you should confine your deliberations to the evidence and nothing but the evidence.

Tr. 8/72.

## X. Conclusion

Based upon the foregoing memorandum of law, Mr. Baran was deprived of his basic constitutional rights to a fair trial, to due process, to effective assistance of trial and appellate counsel, to confrontation, and to a public trial. In addition, Mr. Baran has presented newly discovered evidence which casts grave doubts on the justice of his convictions. Each independent claim provides more than sufficient grounds for the requested relief. Considered collectively, the claims present an overwhelming case for a new trial. In short, justice was not done.

Dated: _____, 2004.

BERNARD F. BARAN, JR.
By his attorneys,

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## CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of this "Motion for New Trial" and unredacted versions of the accompanying "Memorandum of Law" and "Appendix" were delivered to David Capeless, Berkshire County District Attorney, 7 North Street, Pittsfield, MA 01202 on June 16, 2004.

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John G. Swomley