COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, ss. **SUPERIOR COURT**
CRIM ACTION
No. 18042-51;

18100-1

COMMONWEALTH OF MASSACHUSETTS

vs.

BERNARD BARAN

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION FOR A NEW TRIAL

June 21, 2006

After a jury trial which occurred from January 21-30, 1985, the defendant was convicted of three counts of rape of child and 5 counts of indecent assault and battery on a child.[1] The trial judge, Simons, J., sentenced the defendant to a life sentence, concurrently, for each of the three rape counts, and additional concurrent sentences of 8-10 years for the indecent assault and battery convictions. A direct appeal was taken by new counsel and the Appeals Court affirmed the conviction in a rescript opinion, 21 Mass. App. Ct. 989 (1986), with further appellate

[1] Indictment nos. 18042 and 18047, both presenting rape of child, and 18046, presenting indecent assault and battery on a child were dismissed upon the allowance of directed verdicts of not guilty. Verdicts of guilty were entered on nos. 18048, 18050 and 18100, presenting rape of child, and on nos. 18043, 18045, 18049, 18051 and 18101, presenting indecent assault and battery on a child.

review denied by the Supreme Judicial Court, 397 Mass. 1103 (1986).

Represented now by his third attorney, the defendant filed, on June 18, 2004,[2] his first motion for a new trial, by which he contends that he did not receive a fair trial. He raises several issues

generally including whether he was convicted upon unreliable evidence[3], that he received ineffective assistance of counsel,

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[2] The motion, supporting and supplemental memoranda exceed 300 pages, and additional material was attached in the nature of a documentary appendix consisting of approximately 800 pages; in addition, transcripts of trial proceedings were filed, contained in 10 volumes.

[3] As the competence of the child witnesses was addressed on appeal, this court does not intend to resurrect that issue. Nor does the court intend to treat the quality of the presentation of the case to the Grand Jury as one upon which the doctrine of waiver should not apply, given the high threshold necessary for the defendant to overcome under the principles of *Commonwealth v. McCarthy,* 385 Mass. 160 (1982) and *Commonwealth v. O'Dell*, 392 Mass. 445 (1984) in the first instance, and to show a substantial risk of a miscarriage of justice at this stage. Also, given the entry of an involuntary dismissal with respect to the allegations of Boy A, and the discussion of the court with respect to the failure of defense counsel to seek to exclude the evidence of gonorrhea, the errors claimed in the motion at bar with respect to the failure of defense counsel to obtain or introduce evidence, to adequately cross-examine the Commonwealth witnesses on issues of bias and credibility or the failure of the prosecution to provide exculpatory evidence is deemed moot or

and that there is newly discovered evidence that appears to have been improperly withheld, amounting to prosecutorial misconduct, as well as other errors.

Due to the retirement of the trial judge and other factors,[4] the matter was specially assigned by the Chief Justice of the Superior Court to the undersigned justice, and an interim order was entered to this effect on January 19, 2001.[5] Thereafter, considerable time was consumed by pre-motion discovery and hearings thereon.[6]

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cumulative to other errors of significance found and discussed below. Whatever value such evidence may have had to the defendant in theory, consistency would require, as a practical matter, that all such evidence, the good along with the bad, be stricken.

[4] The trial prosecutor is a current member of this court who customarily presides in Berkshire County and other western Massachusetts counties.

[5] This assignment came at a time when discovery was first sought for purposes of this motion.

[6] The filing of this motion in 2004, was preceded by an intensive effort on the part of defense counsel, beginning in late 2000, to obtain discovery, including copies of videotaped statements of the complaining witnesses, some of which had been marked for identification or otherwise kept in the custody of the clerk and others likely kept, if at all, in the possession of the Commonwealth. There was much concern expressed, early on, as to the chances of damage to the tapes upon viewing and/or copying and some effort was expended to have them viewed by experts in the videotape industry. Following such study, copies of all videotapes that were located, both edited and

On December 28, 2004, the court granted the defendant's motion for an evidentiary hearing, in part, on certain issues as they relate to the defendant's claim of having received ineffective assistance of counsel at both his trial and for appeal. Evidence was received on January 25, February 2,

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unedited were presented to the court and viewed *in camera*, along with unofficial transcriptions of their content.

Due to the sensitive nature of the case, and out of an abundance of caution concerning the application of G. L. c. 265, §24C, effort was also spent upon the need for and wording of a Protective Order to limit disclosure of information, which was entered on or about April 25, 2003. Counsel cooperatively filed pleadings in redacted and unredacted form, and practicable effort was made to refrain from referring to the victims by their full name, often substituting initials. In this decision, consistent with the defendant's redacted motion, the children are referred to as Boy A, Girl B, Boys C and D, and Girls E and F.

Defense counsel also sought to reconstruct, as best as he was able, the files and information that was or would have been available to the defendant's trial and appellate counsel, given the report that their files had been destroyed. To that end, after hearings, the court entered, in late 2003, some extraordinary orders which granted some access for the parties, through the allowance of a deposition practice under the spirit of Rule 35 of the Criminal Rules of Procedure, to information or documents which may have existed in the files of various participants in the criminal case, or related civil cases, that were in existence at the time of the trial and appeal.

The matter was also delayed somewhat by the death, in December, 2003, of District Attorney Gerard Downing, who had represented the Commonwealth from the commencement of these post-conviction discovery proceedings, and who had assisted in the original prosecution.

February 28, March 21, and April 21, 2005, during which testimony was received from the defendant, his mother, several attorneys, including the defendant's appellate attorney and two others from his office,[7] and one expert on child psychology and learning; in addition, eleven items were marked as exhibits, including a group of 7 videotapes (ex. 11), unofficial transcriptions of the tapes, and a group of 5 DVD's (ex.10). The parties were heard in argument on the merits of the motion on June 16, 2005, and the matter was taken under advisement at that time.[8]

BACKGROUND

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[7] Neither party called the defendant's trial counsel as a witness, reportedly due to his current state of poor health.

[8] Both parties have since sought to reopen the evidentiary record: the Commonwealth requesting to include "admissions" by the defendant, apparently given several years into his sentence, which apparently enabled him to be transferred to a facility at which sex offender treatment was available and thus avoid further retributive conflicts with other prison inmates; the defendant's request involved a second-hand report that one of the original trial jurors was heard to say that given her consideration of information reported by media accounts of proceedings involving this motion, she would not have voted to convict. The court declines to reopen the evidence; to the extent that such requests are made by motion, they are denied. As discussed in fn. 41, *infra*, evidence acquired by the Commonwealth following the conviction do not assist the court in evaluating the fairness of the trial.

In 1984, Bernard Baran worked at the Early Childhood Development Center ("ECDC") as a teacher's assistant. The allegations in this case emanate from his contact with pre-school children who were enrolled in this facility. The first family to bring accusations against Mr. Baran was that of Boy A. (A-94-95.) Previously, the boy's father had filed a complaint with ECDC objecting to Mr. Baran being allowed to work with children because he was a homosexual. (A-94.) On September 12, 1984, the ECDC Board of Directors discussed Mr. Baran's sexual orientation and his possible termination. (A-431.) On October 5, 1984, this family contacted the police to report that Mr. Baran had molested their child. (A-94-95.) The next day, this child was brought to the Berkshire Medical Center for an examination.

That night, the mother of Girl B got a telephone call informing her about the pending investigation against Mr. Baran. (Tr. 4/131-32, 4/144-45.) She was on the ECDC board when the complaints were made about Mr. Baran's homosexuality. (Tr. 4/132.) Additionally, this woman had previously been abused herself. (A-474.) She contacted a friend who was a captain on the police department and reported that her daughter may have been molested. (A-96-97.) This captain in turn contacted two other detectives who, with Department of Social Services ("DSS") worker Brian Cummings, eventually visited this residence that same night at 10:50 p.m. Id. Mr. Baran was arrested the next day on two counts of indecent assault and battery upon these two children. (A-99-100.)

Beginning on October 9, 1984, these accusations became well publicized through local and state print media. (See generally A-164-170.) The DSS held a "good touch, bad touch" puppet show at ECDC on October 11, 2005. No verbatim account or transcript has ever been obtained

and no one has ever said that such account was believed to exist; it is known that the puppet show was attended by many of the children who were the subject of DSS investigations, including some of the children that testified against Mr. Baran. Around the same time, ECDC sent several letters to parents about the accusations, arranged for various parent and child support groups, and advised parents on how to question their children about the possibility of having been abused and about the threat of gonorrhea. (A-630-647.) Following these events, there were four more children who made allegations against Mr. Baran, which became the subject of further police investigation, and who eventually testified at trial: Boys C and D, and Girls E and F.

The six children who testified at trial were interviewed many times by various persons leading up to trial, including parents, DSS investigators, police officers, therapists, rape crisis center workers and prosecutors. Interviews of the children were videotaped, apparently with the intention of substituting them in lieu of the children's live testimony, both at the grand jury and at trial.[9] While the children did eventually testify at trial, they did not testify at the grand jury.

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[9] Some form of the videotaped interviews were found to exist regarding five of the complainants. There was one composite tape containing those edited versions that were shown to the grand jury, full taped interviews for the five children (with one also containing another edited version but longer than that on the grand jury tape) and one tape containing an edited version of one of the five, being the complainant whose case was not presented to the grand jury but made the subject of a waiver of indictment by the defendant and a DA's complaint; the case involving Boy C was never presented to the grand jury, his videotape was not shown to the grand jury, edited or otherwise. Additionally, it is still unclear whether the videotape of Girl F has been found in its entirety. The longest video currently available to the defendant of this

The full videotapes ostensibly contain the entire interviews conducted with the children at the District Attorney's office on the date in question. Some interviews last up to forty (40) minutes. See Videotaped Interviews of Boys A and D, Girls B and F; Transcripts of Videotapes. The grand jury version, however, shows only a small portion of each of these entire interviews. See Grand Jury Presentation Video; Transcript of Videotapes.[10] For example, the transcript of the

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victim is still significantly shorter than the other full interviews and seems to start midway through the interview. Also, there are actually three versions of the video of Girl B: one is the edited portion shown to the grand jury, another is a longer version believed to be the full interview, and the third is a version longer than the grand jury one but shorter than the full one. It is unknown why so many versions exist. No videotape of Girl E has ever been found and produced, however. (There is a reference in a police report dated October 15, 1984, to her interview having been videotaped, however. A-128.)

[10] Mr. Baran was not given access to the unedited tapes until recently. His current counsel made a motion for copies of the videotapes on December 4, 2000. At that time, District Attorney Gerard Downing represented the Commonwealth. On January 22, 2001, an interim order was entered that required the Commonwealth to file a certificate as to the existence of any videotapes or any objections by February 1, 2001. The Commonwealth subsequently requested three extensions. On October 24, 2001, a hearing was held before me regarding the videotapes. The next day, I issued a Second Interim order, noting that one videotape was found in the possession of the Clerk's office and that the Commonwealth had located two tapes which had been shown to the grand jury. I noted my belief and judgment that Mr. Baran was entitled to the videotapes, but asked counsel to first confer and prepare a protective order. There was delay in obtaining the agreement of the Commonwealth to the protective order as proposed and on April 4, 2002, it was submitted to the court.

Over the course of the next year and a half, Mr. Baran continued to seek, through counsel, copies of the unedited videotapes. The three tapes which were located were then being held by the clerk's office. On July 23, 2004, a letter/order was sent to the Clerk with direction to send the tapes to Mr. Baran, which was done. DA Downing

interview of Boy A is over forty-five (45) pages long, yet the portion of the grand jury edited tape regarding his interview covers only approximately two (2) pages. The edited versions omit images such as the inability of Boy A to stay still and answer any questions by the interviewer and the fact that his parents had to come in and try to calm him down, consistent with the way he ultimately testified during trial.[11] The edited tape also omits images of this same victim being preoccupied with toys and snacks. Other children were likewise distracted and needed to be re-focused from time to time, many with the introduction of their parents into the interview process.

In a letter acknowledging receipt of the tapes by Leonard Conway dated January 22, 1985, it appears that trial counsel had access only to the edited versions. See Supplement to Motion for

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continued to look for the unedited videotapes to no avail. Tragically, DA Downing passed away on December 15, 2003. At that point, David Capeless was named acting District Attorney and he took over for Mr. Downing. After taking some time to familiarize himself with the case, DA Capeless represented that the unedited videotapes were not with the file but that he was doing what was reasonably feasible to find them. Mr. Baran's counsel pressed for completion of the search and production. Finally, on September 17, 2004, during a discovery hearing, DA Capeless reported his discovery, in a box of old DUI tapes, of five unedited videotapes of the children's interviews (Boys A, C and D and Girls B and F), and delivered copies to the defendant. The court has viewed all of the videotapes, along with a transcription of the tapes that was prepared at the request of defense counsel; the transcript is found to be generally accurate. The transcription also shows a comparison between the edited and unedited tapes by highlighting the portion of the interview that appears on the edited tape in **bold** type.

[11] Due to Boy A being unable to testify to criminal acts alleged to have been committed upon him, the court allowed a required finding of not guilty to the two counts in which he is the complainant.

New Trial, Exhibit 4.[12] The letter states that Mr. Conway received an edited version of Boy C's interview and the "Grand Jury Presentation" tape of Boys A and D, and Girls B and F. Confirming this inference is a statement at sidebar by the prosecutor in which he acknowledged that the copies which he had given Mr. Conway showed the date of the interview in the video itself before each interview. Tr. 4/8. The dates appear only in the edited versions shown to the grand jury but not in the unedited versions. See Videotapes. The unedited versions contain statements in which the children deny that Mr. Baran had done anything to them and statements where they accuse other persons of abuse. [13] They also contained statements which accused other

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[12] References to the Supplement to Motion for New Trial will be cited as "SMNT" followed by the page number.

[13] All the edited versions omit statements of denial and statements indicative of suggestiveness, as demonstrated by the following excerpts:

Boy A:

Q: Yeah. But if you could tell me a little bit more about what Bernie did to you.

A: He didn't do nothing.

Q: Yeah. I know, you showed me. You showed me where he pulled down your pee pee stick.

A: He didn't now.

Q: He didn't do it now, though. Did he, did he do it more than one time, do you know?

A: No.

Transcripts pg. 14.

DAD: No, you're a good kid. So can you tell her if Bernie said anything, or if you said anything?

A: I don't know.

Q: You don't know. Okay. Maybe you'll remember some other time and you can tell me. Maybe you don't remember right now. Maybe it will come back to you, what Bernie said to you. When you went to the doctor yesterday, was your pee pee okay?

A: Yup. Transcripts pg. 21.

MOM: Paul, you can't remember anything he said to you? Did he say wake up, or-- He didn't say anything at all?

A: No.

Q: He just went and did what?

A: Nothing.

Q: And after he pulled, after he pulled on your pee pee, did he tell you anything then? Did he give you anything?

A: No.

Q: No. Did he give you a box of donuts?

A: What?

Q: Did he give you a box of donuts?

A: No.

Q: No. Did he give you anything or say anything?

A: He gave us a birthday.

Transcripts pg. 28-29.

DAD: Look for a second. We want to know what you told us.

MOM: We can't remember everything.

DAD: Remember?

A: No.

DAD: Now, did Bernie touch you?

A: No.

Transcript pg. 32

DAD: Is Bernie bad?

A: No.

Transcript pg. 34.

39) Girl B:

Q: [ ] Did you play, did you play a game called "The Touching Game" at ECDC?

A: No.

. . .

Q: Yeah. So I was remembering, I know a game that I used to play called "The Touching Game". I wonder if you ever played that at school.

A: I didn't.

Q: You don't remember that game?

A: We didn't do it.

Q: You didn't?

A: No.

Transcript pg. 7-8.

Q: Yeah, he just pulled them down. Were some other children around when he did this to you? Were

there other kids of other people in the room?

A: Um-hum.

Q: Yes?

A: Just two people.

Q: Two people?

A: Two teachers.

Q: Two teachers? Can you remember their names?

A: Um, no. One was named Bernie.

Q: One was named Bernie

A: But there was no [inaudible]. Mommy, what's the girl's name?

M: Was it Stephanie or Eileen?

A: Stephanie.

Transcript pg. 16-17.

40) Girl F:

Q: You're gonna tell your mommy. Did you tell your mommy?

A: At home I did.

Q: At home you did. Did anybody see Bernie do that, honey? Did anybody see Bernie touch you? Did he do it all by himself?

A: I did it.

Q: Huh?

A: I did.

Q: You seen him? Yeah.

A: We put our legs like that.

Q: You did? Yeah? Did Bernie touch you anywhere else? Just down there? And what do you call down there?

A: Tookoo.

Q: Tookoo. And Bernie touched you there? Did he hurt you?

A: Uh, yeah.

Q: Yeah?

A: No.

Q: No? He just touched you? Did he put his hand inside you?

A: No.

Q: – in your pants?

A: No.

Transcripts at 9-10.

41) Boy D:

Q: Okay. We were talking about when you went to ECDC, right, [boy nods yes] do you remember when you were there a long time ago, [boy nods yes] do you remember being touched with bad touch? [boy nods yes] Yeah? Who touched you on a bad touch way?

A: [Boy C].

Q: [Boy C] did? Do you remember any big people, adult people who touched Joey in a bad way that made him feel kind of funny inside, like that person shouldn't do that to me?

A: Mary.

Q: Are you sure it was Mary? [boy nods yes] Yeah?

Transcripts at 6.

Q: Did Bernie, did Bernie ever touch some of the other little boys in school?

A: No.

Transcripts at 18.

Q: Did he go [spitting sound]? He spit it out. What did Bernie do with his weiner?

A: I don't know.

Q: Huh? Did he put it in Scott's mouth?

A: [Spitting sound]

Q: Yuck. Huh?

A: I don't know.

Q: Did Bernie ever do that to [boy D, being interviewed]? [he shakes head no] No?

A: Not even.

Transcripts 25-26

Q: No, you can't bring it home 'cause I got other children I got to talk to and they want to see him too. When Bernie touched [boy D], when he touched him on his dinky, where were you? Try to remember. Where were you? Were you in the classroom? Were you taking a nap with [boy C]? Were you in the bathroom? Do you remember where you were? Is it hard for you to remember?

A: Can I hold that?

Q: Yeah. Sure. Try to think about where you were. [Refers to Boy D by name]? Ah, you've got a cold.

MAN: [Boy C] remembers.

Q: [Boy C] remembers where he was. Do you remember when it happened? Whoops. Do you remember

that it happened in the shed one time? Hm? [asking Boy D by name]?

A: Nothing.

Transcripts at 32-33.

Q: [Refers to boy D by name]? Can you remember something that happened in the woods that you didn't like?

A: No.

Transcripts at 34.

42) Boy C:

Q: So what we were talking about that day was private parts and if anybody ever touched your private parts, right?

A: (Nodding)

Q: Right? Okay. So if you can remember way back a long time ago, do you ever remember anybody touching your private parts?

A: My dupy.

Q: Who touched your dupy?

A: [boy D].

Q: [boy D] touched your dupy?

A: Yes.

Q: Is [boy D] a friend of yours?

A: No (shaking head.)

Transcript pg. 6-7 (found in A-695-696)

Q: Okay. Well, were you playing that game of hide and seek one time in the shed?

A: Uh-huh.

Q: Uh-huh? I know this is kind of hard to talk about; isn't it?

A: (Slight Nodding)

Q: Kind of embarrassing to talk about things that might be a little bit scary; right?

A: slight (Nodding)

Q: 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.

Transcript pg. 15 (found in A-704)

Q: Yeah, he does? 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 D] when he was in the shed?

A: (Inaudible)

Q: On the dupy?

A: (Nodding)

Q: Okay. Can you just kind of show me on this doll? Can you just point to the area where it is?

A: (Indicates)

Q: Right there on the dupy, right?

A: (Nodding)

Q: Who was the person that touched [referring to boy C by name, being interviewed]?

A: Jared.

Transcript pg. 17 (found in A-706)

people of witnessing these alleged acts– evidence which counsel could have used to investigate the veracity of the allegations. Lastly, they also contain examples of the interviewing techniques discussed in detail by the defendant's current expert, Dr. Maggie Bruck, and which form the basis of the defendant's contention that the interviews of the children were improperly suggestive.[14] The videos contain evidence which could have been used by an expert witness, such as Dr. Bruck, to support the defendant's claim that interviewing techniques used were improper and to explain how the techniques taint the children's testimony or are otherwise harmful.

From October 5, 1984, the day that any complainant was first

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[14] The defendant claims that the unedited videotapes are newly discovered evidence in this case as they were never seen by anyone on behalf of the defendant before the commencement of proceedings in connection with this motion. The substance of those tapes is supportive of the defendant's arguments that he either was not given the benefit of effective assistance of trial counsel or not given exculpatory evidence of inconsistent statements, including denials by the children as well as testimony that was tainted by suggestive questioning. This case is thus distinguishable from Commonwealth v. LaFave, 420 Mass. 169 (1999), as the evidence claimed therein as newly discovered was not actual, physical evidence but, rather, the testimony of an expert in suggestive child interviewing techniques, Maggie Bruck, deemed to be merely cumulative of experts who had actually testified during that trial. In the present case, while defendant is relying on the testimony of the same Maggie Bruck, he is not claiming that the testimony itself is newly discovered; instead, the testimony would serve to explain the significance of the newly discovered videotapes.

brought to the attention of authorities, until January 21, 1985, the day that the trial of this case began in the Superior Court, only 105 days passed. The case was presented to the grand jury on November 6-7, 1984, and ten indictments, regarding five victims, (one count of rape of child and one count of indecent assault and battery per child) were returned and filed on November 7th. The defendant was arraigned on November 9th, with defense counsel filing his appearance at that time, having been retained privately. Trial commenced just seventy-three days later.

On November 28, 1984, (now 54 days before the start of trial) the prosecution filed a seven-page certificate of discovery on which was listed the names of thirty-eight prospective witnesses (29 civilians, including their addresses, at least three of which were physicians, and 9 police officers) and which confirmed the transmission to defense counsel of a number of police and other reports. The defendant's attorney filed no discovery motions with the exception of a motion for a bill of particulars filed on January 17, 1985, the Thursday prior to the Monday commencement of trial, which motion was heard and denied, along with motions to sever and to dismiss, on Friday, January 18, 1985. On this day as well, the court conducted a hearing concerning the competency of the child complainants as

witnesses, in chambers and without the defendant being present.[15]

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[15] 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.

The trial commenced on Monday, January 21, 1985, with the first two days consisting of jury selection and a view. The openings of counsel were given and the first evidence received on Wednesday, January 23rd, and testimony continued through the 28th, at which point the Commonwealth rested. There were 29 witnesses who were called to testify by the prosecution. The case principally concerned 6 complainants all of whom were either three or four years old at the time of their testimony. Among other witnesses who testified were parents of each of the six children, five staff members of Early Childhood Development Center ("ECDC"), four police detectives and one police photographer, a county surveyor, two investigators from the Department of Social Services, three physicians: a pathologist (Dr. Jeffrey Ross), an internist/pediatrician (Dr. Jean Sheeley), and a child psychiatrist (Dr. Suzanne King), and one child psychotherapist employed at the local rape crisis center (Jane Satullo). There is no positive evidence that trial counsel for the defendant ever interviewed, either himself or by others, a single witness for the Commonwealth.

The first allegation of sexual abuse against Bernard Baran was made by Boy A, the first of the six child witnesses to testify. In early October 1984 when the allegation was made, he was three

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

years and eleven months old[16] and living with his mother, an infant half-brother, and his mother's live-in boyfriend, David.[17] Tr. 4/167. At the time of the trial, this complainant was four years and two months old and living in foster care. In connection with these allegations, the jury heard testimony from the following additional witnesses: ECDC teachers and staff; Boy A; his mother; pediatrician Dr. Jean Sheeley; Detective Joseph Collias; and, pathologist Dr. Jeffrey Ross.

Evidence was introduced that this child contracted gonorrhea. As stated above, on the day after Boy A made a disclosure to his mother, she brought him to the Berkshire Medical Center where he was examined by Dr. Jane Sheeley. As part of her examination, she took cultures from his throat and rectum. The boy's throat culture tested positive for gonorrhea. Tr. 6/119-120. Testimony was given that forty to sixty percent of the sex partners of a person infected with gonorrhea will also get gonorrhea. Tr. 6/131. On October 10, 1984, Detective Collias picked Mr. Baran up and took him to Berkshire Medical Center to have him tested for gonorrhea. At 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

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

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

Mr. Baran's negative gonorrhea results was admitted as Exhibit 15. Tr. 5/88.

Dr. Jeffrey Ross, a pathologist and medical examiner, testified at length about gonorrhea, its transmission and treatment. He testified 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 could only guess at the likelihood of transmission as "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.

Due to the inability of this young child to relate any incriminating information to the jury, the court entered a required finding of not guilty. Trial counsel made no motion for a mistrial nor to strike the testimony of any witness whose testimony supported these allegations only.

During his testimony, Mr. Baran denied that he had any sexual contact with Boy A or any of

the other children. Tr. 7/109. He said he never touched him nor did he ever put his penis in his mouth. Tr. 7/168. Notwithstanding his successful motion for involuntary dismissal of the offenses involving this child, counsel asked the defendant if had ever been treated for venereal disease, answering on one occasion, four or five years prior to the trial, when 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.

The second allegation of sexual abuse against the defendant came from a child named Girl B. The allegation was made in October 1984, when she was three years and four months old.[18] When she testified at the trial, Girl B was three years and seven months old. In connection with these allegations, the jury heard testimony from: ECDC teachers and staff; Girl B; her mother; Detective Bruce Eaton; Rape Crisis Counselor Jane Satullo; Trooper Robert Scott; child psychiatrist Suzanne King; and, pediatrician Jean Sheeley. The Commonwealth elicited out-of-court statements made by this child from five witnesses: her mother, Detective Eaton, Trooper Scott, Jane Satullo, and Dr. King. Defense counsel also elicited out-of-court statements made by this young complainant from a sixth witness, Dr. Jean Sheeley. Limiting instructions were given contemporaneously in conjunction with just two of these six "fresh

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

complaint" witnesses: at the conclusion of the testimony of this girl's mother[19] and at the

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[19] The judge gave the following limiting instruction after the mother of Girl 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, Mrs. .... 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.

conclusion of Jane Satullo's direct examination.[20]

> 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 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.

[20] 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

The third and fourth children who testified against Mr. Baran were Boys C and D. Both boys attended a puppet show on October 11 and both talked to the same social worker after the puppet show. After several interviews, a story appears to have evolved that each of them saw Bernie touch the other. Their testimony was presented one after the other. Both boys were four years and three months old[21] 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; boy D; his father; DSS social worker Patricia Palumbo, and rape crisis counselor Jane Satullo.

When Boy D's father was asked to tell the jury what his son had said in conversations about things that happened to him while at ECDC, defense counsel did not object nor request a limiting instruction.When Pat Palumbo testified about what Boy D had told her, trial counsel properly objected. Upon being informed by the prosecutor that the witness was going to provide fresh complaint testimony, the judge addressed the jury: "The jurors will recall the instruction I gave you earlier on Fresh Complaint." Tr. 6/20. When asked by the prosecutor if she had spoken to

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> 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.

Tr. 5/150.

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

Boy C, trial counsel failed to request limiting instructions. While this testimony was given only a short time after the judge's invitation to the jury to recall his earlier fresh complaint instruction, counsel did nothing to suggest to the court that the earlier inadequate instruction should be supplemented with a more complete or effective reminder of the limitation that must be given to this evidence.

The fifth child who testified against Mr. Baran was Girl E. This young girl was five years and five months old[22] in October 1984. In connection with her allegations, the jury heard testimony from: ECDC teachers and staff; the girl; her mother; Detective Peter McGuire; Trooper Robert Scott; and, Dr. Jean Sheeley. The Commonwealth elicited out-of-court statements made by the complainant from three witnesses: her mother, Detective Peter McGuire, and Trooper Robert Scott. In addition, defense counsel elicited out-of-court statements made by the minor from a fourth witness, Dr. Jean Sheeley. At no time during the mother's testimony was a limiting instruction given. 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. Before Trooper Scott's fresh complaint testimony, the judge responded to a defense objection in similar fashion, "Same ruling and the jurors, again, are reminded of the Fresh Complaint instruction." Tr. 6-79. This instruction, following the McGuire instruction, added nothing to the jury's proper understanding of the weight this evidence should carry.

6, 1980.

[22] V.S.'s date of birth was May 13, 1979.

The last child who testified against Mr. Baran was Girl F. She was the youngest of the six alleged victims. She was three years and two months old[23] in October 1984. In connection with her allegations, the jury heard testimony from: ECDC teachers and staff; the girl; her mother; Detective Peter McGuire; and DSS social worker Michael Harrigan. The Commonwealth elicited nearly identical out-of-court statements of the victim from these latter three witnesses. At no time during the testimony of these three fresh complaint witnesses was a limiting instruction given.[24]

The defense called 6 witnesses, including the defendant, his sister and a friend, on January 29th. Trial counsel did not consult with nor call any experts with respect to the testimony of any of the Commonwealth's expert witnesses or to assist him in presenting evidence on behalf of Mr. Baran. Final arguments

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[23] Girl F's date of birth was August 14, 1981.

[24] 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 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 neither repeated nor even alluded to when Detective McGuire returned in the afternoon to give additional fresh complaint testimony.

and instructions were received by the jury on January 30th and a verdict was returned later that same day. Sentencing was held on January 31st.

DISCUSSION

"A trial judge upon motion in writing may grant a new trial at any time if it appears that justice may not have been done. Upon the motion the trial judge shall make such findings of fact as are necessary to resolve the defendant's allegations of error of law." Mass. R. Crim. P. 30 (b). More simply stated, "[a] motion for a new trial is addressed to the sound discretion of the trial judge, and the judge's disposition of the motion will not be reversed unless it is manifestly unjust, or unless the trial was infected with prejudicial constitutional error." *Commonwealth* v. *Russin*, 420 Mass. 309, 318 (1995); *Commonwealth* v. *Sullivan*, 385 Mass. 497, 503 (1982); *Commonwealth v. Medina*, 430 Mass. 800, 802 (2000). "Review of a judge's ruling on a motion for new trial is limited to determining whether the judge abused his discretion, particularly where, ..., the trial judge is the one ruling on the motion. See *Commonwealth v. Moore*, 408 Mass. 117, 125 (1990). In the event that the judge acting on the motion was not the original trial judge, the appellate court has the right to review the trial record without deference to the findings and judgment of the motion judge. However, a judge has no discretion to deny a motion for a new trial if the original criminal proceeding was infected with prejudicial constitutional error. *Commonwealth v. Sullivan*, 385 Mass. 497, 503(1982). In order to determine whether the judge

abused his discretion, we must determine first whether there was error. If they was, we next consider whether the defendant waived his right to complain of the error. Finally, if we find waiver, we must determine whether the error "was of a type and seriousness which should lead [us] to reverse in the absence of a proper exception," under the familiar substantial risk of a miscarriage of justice standard. See *Commonwealth v. Miranda*, 22 Mass.App.Ct. 10, 16 (1986), quoting from *Commonwealth v. Freeman*, 352 Mass. 556, 563-564 (1967)." *Commonwealth v. Azar*, 50 Mass.App.Ct. 767 (2001).

INEFFECTIVE ASSISTANCE OF COUNSEL

The court's consideration of the defendant's contention that a new trial is warranted is generally limited to the ground that he did not receive the effective assistance of counsel. The defendant claims that he was deprived of the effective assistance of trial counsel in many ways, such as by his failure to properly investigate the alleged offenses, his failure to seek meaningful discovery from the Commonwealth and any assistance from experts in child psychology, failed to properly prepare for trial, failed to develop evidence that would support the defense that the evidence was unreliable and was the creature of an unfair climate of hysteria**,** homophobia and suggestion.[25] The defendant also claims that trial counsel failed to assert Mr. Baran's

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[25] During the discovery phase of this motion, the defendant obtained evidence of other "disclosures" that had been reported to the Dept. of Social Services about Mr. Baran from at least nine additional ECDC students, all of which were investigated and apparently substantiated by the the DSS; it also appears that some, if not all, of these reports were referred to the Berkshire District Attorney for

constitutional right to a public trial. There are other complaints that, while particular to certain children and not common to all, the effect of which is suggested as unmeasurably prejudicial and damaging on all counts, such as that counsel failed to attempt to exclude the inflammatory evidence that one child had contracted gonorrhea, and failed, after the indictments concerning that child were dismissed, to request a mistrial or to strike or remove from the jury' consideration the inflammatory evidence regarding gonorrhea. With respect to other witnesses, it is claimed that he failed to request discovery and failed to object to the substitution of an undisclosed witness, Dr. Suzanne King, who was permitted to testify not only as one child's therapist but also as an expert, that he failed to request proper fresh complaint limiting instructions and failed to object to improperly excessive or repetitive fresh complaint testimony and such testimony that exceeded its proper scope, that he failed to assert Mr. Baran's right to a probable cause hearing or to seek meaningful discovery regarding one victim whose case was not presented to the grand jury, and failed

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prosecution. Ultimately, the Commonwealth provided documentation of a total of eleven DSS investigations, including the five that were provided pursuant to the Commonwealth's original Certificate of Discovery. While the fact that no prosecution resulted from a majority of these reports, supporting a defense claim that they were likely not sufficiently credible to bring forward for prosecution and that therefore, they may have be evidence or suggestive of parental panic, hysteria in the day care community, and unduly suggestive investigation methods, the court views such evidence as a "two-edged sword," and concludes that the failure of trial counsel to have developed these claims is not one that carried a substantial risk of a miscarriage of justice, since whatever value the introduction of such other accusations, while uncharged, may have had in the defense was likely outweighed by severe prejudice to the defendant that he was being accused by other children of similar conduct.

to take advantage of evidence of which he was aware or should have been to develop other explanations for the children being knowledgeable of sexual conduct and behavior apart from the allegations at bar and to take advantage of inconsistencies in the evidence. While many alleged errors had their genesis in his failure to properly investigate and prepare for a significant trial involving notorious allegations of child sexual abuse, the errors did not become manifest until during the trial. Therefore, while much of the following discussion falls under an overarching theme generally involving a failure of proper preparation, which would not necessarily be apparent from the trial record, many errors only became manifest during trial suggestive of a failure to properly protect the defendant. In addition, some errors discussed under this heading may overlap or be more properly considered as newly discovered evidence.[26] For example, there remains an unanswered question as to whether the unedited videotapes were ever made available to defense counsel.

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[26] Among items claimed as newly discovered evidence are "recantations" of some of the witnesses, including three of the children, one of whom was the child who was unable to provide incriminating testimony during trial, resulting in involuntary dismissal of the related indictments. The evidence relating to two other children was of a recantation when the children were still quite young, and one of which was also reported to have recanted the recantation. As the evidence of recantation comes from hearsay sources, it is viewed as insufficiently reliable to meet the governing standards for consideration of this ground for a new trial.

If the full tapes had been made available to trial counsel but he never viewed them, such a circumstance is suggestive of ineffective assistance of counsel, whereas if the tapes were not made available, the issues of newly discovered evidence and the withholding of exculpatory evidence by the prosecution are thus raised.

The Sixth and Fourteenth Amendments to the Constitution of the United States and Article 12 of the Declaration of Rights of the Commonwealth of Massachusetts guarantee defendants charged with criminal offenses the effective assistance of counsel. *Strickland v. Washington*, 466 U. S. 668, 690 (1984); *Commonwealth v. Fuller*, 394 Mass. 251 (1985). It is "something less than a guarantee of a perfect defense; rather it is to insure a fair trial." *Commonwealth v. McGann*, 20 Mass. App. Ct. 59, 61 (1985). In order to qualify for a new trial on these grounds, the defendant must demonstrate a "serious incompetency, inefficiency, or inattention of counsel- behavior falling measurably below that which might be expected from the ordinary fallible lawyer, and, if that is found, then typically, whether it has likely deprived the defendant of an otherwise available, substantial ground of defense." *Commonwealth v. Saferian*, 366 Mass. 89, 96 (1974). The latter requirement has been described as requiring some showing that better work might have been accomplished something material for the defense. *Commonwealth v.*

Satterfield, 373 Mass. 109, 115 (1977). In evaluating trial counsel's performance, judicial scrutiny must be deferential. *Strickland v. Washington*, *supra*, at p. 689. Counsel's failings must be so grave, so fundamental, that "the trial cannot be relied on as having produced a just result." *Id*, at p. 686. Further, it has added that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id*, at p. 690, and cannot give rise to a claim of ineffective assistance unless they are "manifestly unreasonable." *Commonwealth v. Adams*, 374 Mass. 722, 728 (1978), *Commonwealth v. McCormack*, 48 Mass. App. Ct. 106, 108 (1999).

A defense attorney has a constitutional duty "to conduct an independent investigation of the facts, including an investigation of the forensic, medical, or scientific evidence on which the Commonwealth will rely to prove guilt." *Commonwealth v. Baker*, 440 Mass 519, 529 (2003), Commonwealth v. Haggerty, 400 Mass. 437 (1987).[27] In *Haggerty*, the Court noted that, rather than being a case where arguably reasoned tactical decisions were being questioned in hindsight,

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[27] See also the American Bar Association Standards for representation of criminal defendants which 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

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). In the recent case of *Commonwealth v. Garcia*, 66 Mass. App. Ct. 167 (2006), the court affirmed the grant of a new trial by the trial judge for the failure of defense counsel to have made any attempt to communicate with the likely Commonwealth's witnesses in the case before trial, together with having had no preparation with defense witnesses, and his failure to call a witness that was able to contradict some aspect of the complainant's testimony, as well as being able to support the defense claim of parental pressure by being prepared to say that the child complainant made no incriminating statements to her (a teacher at the pre-school and the child's babysitter) until a parent appeared.

A. Credibility as sole realistic defense

The credibility of the 6 complainants, all of whom being just three or four years old at the time of their testimony, was the central issue of the case for both the prosecution and the defense. Indeed, defense counsel's opening statement highlighted various issues concerning credibility, but primarily focused on the susceptibility of the children to suggestion. While he did make the suggestion to the jury that the defendant would have been unlikely to have committed the offenses knowing that such opportunity as he had to be alone with a child was subject to

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to plead guilty. (Emphasis supplied)

being discovered by other staff members, being unable to predict the comings and goings of other people, staff or otherwise, primarily, it was the "suggestibility" of the child witnesses that became of critical importance to the defendant. Indeed, no other defense was realistically offered. Other than asking the children how many times that they may have spoken with the prosecutor and others, no defense based upon a lack of credibility of the complainants' testimony was realistically given. No preparations or effort was made to explain to the jury the dangers of multiple interviews, preconceived agenda, or leading questions; nor was there any effort by counsel to uncover and/or demonstrate the inconsistencies between the children's multiple statements.

Each of the children had been interviewed multiple times by many people. Interviews were videotaped as well, with edited versions being used as part of the presentation to the grand jury. Among other key witnesses who testified were parents of each of the six children, police detectives, two investigators from the Department of Social Services, three physicians: a pathologist, an internist, and a child psychiatrist, and one child psychotherapist employed at the local rape crisis center.

Nonetheless, while the case against Mr. Baran was largely one-sided, the evidence was not overwhelming convincing. The defendant made no admissions nor was there any objective, scientific evidence that linked the defendant to these offenses. None of the day care staff or

parents testified to ever having seen him touch a child inappropriately. None of the complaints by the children of sexual abuse came spontaneously but rather only after some questioning or prompting, most by direct questioning and some by leading questions, *i.e.*, where did Bernie touch you. Each parent/witness was permitted to give fresh complaint evidence, as were the civilian and police investigators. Moreover, notwithstanding a sequestration order that had been entered, a parent was able to accompany his or her child to the witness stand and then follow the child to the witness stand shortly thereafter as fresh complaint witnesses, without any voir dire or other efforts to limit their expected testimony.

B. Waiver

The Commonwealth contends that many of the grounds of the defendant's motion can be disposed of by the doctrine of waiver, as is codified in Rule 30(c)(2) of the Rules of Criminal Procedure, either because some of the claimed errors were brought to the attention of the Appeals Court and considered as part of the direct appeal, or that they could have been, but were not. Despite a trial record that betrays a significantly questionable performance by trial counsel, defendant's appellate counsel failed to bring any claim of ineffectiveness to the attention of the court either directly in his appeal to the Appeals Court or contemporaneously through a motion for new trial addressed to the trial court in the first instance. The standard of review for unpreserved error thus depends upon 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. By failing to raise the issue in the direct appeal, the claim of ineffective assistance of counsel was arguably waived.[28]

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[28] Moreover, the recent case of *Commonwealth v. Zinser*, 446 Mass. 807

As was noted by Justice Fried, writing for the court in *Commonwealth v. Amirault*, 424 Mass. 618, 636-637 (1999). "the condemnation and punishments of the criminal justice system are awesome and devastating. That is why their imposition is hedged about with presumptions and procedural safeguards that heavily weight the risk of error in favor of the accused and are designed to assure both the appearance and the reality that the accused had every fair opportunity of defense. But once the process has run its course– through pre-trial motions, post-trial motions and one or two levels of appeal– the community's interest in finality comes to the fore."

"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,* supra, at 637. 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

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(2006), held that failure to raise a claim of ineffective assistance of counsel in a direct appeal does not amount to waiver in many cases, recognizing that the preferred vehicle for asserting such a claim to be in a motion for new trial, since the support for many such claims will often not be apparent from the trial record. In such cases, the *Saferian* test will continue to be the standard against which such claimed errors are measured. Only with respect to those errors that are apparent from the trial record does the question of waiver continue to be relevant.

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? *Idaho v. Wright,* 497 U.S. 805 (1990)*Id.,* 812-813.

During the evidentiary hearing arising out of this Motion for New Trial, Dr. Maggie Bruck, a recognized authority[34] in the area of suggestibility, memory, and child interviews discussed

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[29] In its brief in opposition to the defendant's motion for new trial, the Commonwealth rather tellingly does not offer any argument on this issue, in any respect, including the fact that the unedited tapes contain denials of the allegations by several of the children as well as many examples of suggestive interviewing techniques, nor does the brief offer any significant argument that an expert was unnecessary for an adequate defense or that one would not have found material contained in the unedited tapes to support opinions on improper interviewing techniques.

[30] Thus, under the standards discussed in *Commonwealth v. Zinser*, *supra*, at fn. 28, waiver considerations for failure to have raised it during the defendant's direct appeal do not apply to this issue, nor to the failure by trial counsel to retain or consult with an expert, since such an error would likewise not be apparent from the trial record.

[31] During the January 18th hearing on preliminary trial motions, the prosecutor informed the court 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. On the fourth day of trial, on the eve of the first of the child witnesses to testify, Mr. Conway admitted that he was "looking at the tapes last night for the first time." Tr. 4/10.

[32] The defendant's mother, Bertha Shaw, testified credibly that she paid Mr. Conway a beginning retainer of $500.00, and maybe a couple of hundred dollars more, in total.

[33] The full range of interviewing techniques would likely not have been known to counsel since evidence of their existence was only found on the unedited videotapes, which he likely did not see.

[34] She has authored or co-authored over 74 articles, 20 book chapters/monographs, 5 editorials/reviews, and 2 books–one of which, *Jeopardy in the Courtroom: A scientific analysis of children's testimony*, won the William James Book Award from the American Psychological Association. She has extensive experience teaching both undergraduate and graduate level courses/seminars. She has served on various editorial boards, including her current appointment as associate editor of the Journal of Experimental Child Psychology. She has submitted

techniques used to interview the children. Many of these techniques have been the subject of discussions in recent cases, such as *Commonwealth v. Allen*, 40 Mass. App. Ct. 458 (1996) and *State v. Michaels*, 136 N. J. 299 (1994), cited therein. Indeed, in the intermediate review of State v. Michaels, 264 N. J. Super. 579 (1993), the Appellate Division noted, at p. 622:

> There is an enormous amount of literature on children's memory, suggestibility, ability to distinguish fact from fantasy, and jurors' perceptions of children's credibility. *See* Josephine A. Bulkley, *The Impact of New Child Witness Research on Sexual Abuse Prosecutions, in Perspectives on Children's Testimony* 208, 213 (Stephen J. Ceci et al. eds., 1989). Bulkley comments that the research is so overwhelming that even researchers cannot keep up with it. *Id.* at 215. Moreover, the views and conclusions of the researchers and writers vary greatly. There is, however, consistent concern about the interview process and the possibility of distorting recollections by suggestive or leading questions. For example, two researchers (who acknowledge that many of their recommendations are slanted in favor of prosecution of sex abuse cases), emphasize that an interviewer should be highly trained and unbiased, because the least accurate reports in sex abuse cases are obtained from child witnesses when the interviewer harbors preconceived notions about what happened. Gail S. Goodman and Vicki S. Helgeson, *Child Sexual Assault: Children's Memory and the Law,* 40 *U. of Miami L.Rev.* 181, 195, 207-08 (1985) (citing H.R. Dent, *The Effects of Interviewing Strategies on the Results of Interviews with Child Witnesses, in Reconstructing the Past* 279 (A. Trankell ed., 1982)).

Furthermore, the court in *Commonwealth v. LeFave*, 430 Mass 169, 174 (1999), noted the trial testimony and research of Dr. Daniel Schuman, including a presentation made by him on False Accusation of Physical and Sexual Abuse to the Annual Conference of the American Academy of Psychiatry and the Law in October, 1984, as well as Piaget's *The Moral Development of Children*. At fn. 11. The motion testimony of Dr. Bruck credibly supports the following facts and conclusions relative to problems now widely recognized by researchers in connection with the interviewing of child witnesses, some of which problems being evident in the unedited

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affidavits in several state and federal courts concerning the same or similar subject matter currently before this court. She is currently a professor in the Department of Psychiatry and Behavioral Science at Johns Hopkins University and an adjunct professor in the Department of Psychology at McGill University.

videotapes; such expertise in this field would have been of assistance to the defendant at the time of his trial, described in paragraphs 1-5 below:

1) There are proper and improper methods for interviewing children. Improper methods will elicit inaccurate and false reports while proper methods should not. Studies show that children who have been abused might initially be silent. However, when properly and directly asked about their experience, they will provide statements. If they deny in those situations, the denial should be considered reliable. During the time of Mr. Baran's case, authorities believed, and the children's questioners acted consistent with the belief that silence and denial were not indicators that nothing happened; rather, they believed they were products of fear and embarrassment.

2) among techniques considered proper in interviewing a child are the following: An interviewer should try to get a child to say in his own words what happened; an interviewer must be neutral and open-minded, without guiding the child towards a specific conclusion; if a child says something, the interviewer should test it to verify why it was said and if it makes sense.

3) Improper techniques can lead to unreliable statements. These techniques are numerous, and many were used in Mr. Baran's case. It is improper, for example, to use leading questions and not allowing a child to say what occurred in his own words. Repeated interviews and repetitive questions that have already been answered are also discouraged because a child is led to believe that the answers s/he has already given are incorrect; eventually s/he assents to the interviewers version of events. Negative connotations are also seen as suggestive such as telling the child that they must have been "scared," that the suspect is a "bad boy," and that things are "not their fault." Selective reinforcement also suggestively taints the interviews, such as telling a child he is

"good" only after the child reveals something but castigating him by, for example, being critical or disapproving when he says nothing.

4) In addition to improper techniques, other factors can lead to false accusations. It is problematic to have parents present, since multiple interviewers can gang up on the child. Additionally, children want to please their parents. If they make a false accusation, it is not necessarily that they are lying but, rather, that they are being compliant.

5)The use of anatomically correct dolls is an extremely problematic technique which often produces false accusations. While it was originally believed that the dolls would help children who were incapable of expressing themselves or simply too afraid to do so, it is now believed that children merely use the dolls as play objects. They cannot differentiate between playing and demonstrating an actual occurrence. In Mr. Baran's case, anatomically correct dolls were used in the interviews of each child who testified at his trial.

More problematic is that children, especially 3-4 year olds, cannot understand the concept of symbolism. They cannot understand that the dolls are supposed to represent themselves or even someone else. They simply lack the cognitive ability to make that connection.[35] [36]

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[35] To illustrate this problem, a video was introduced as an exhibit in the motion hearing. The video showed children receiving a routine doctor's examination. The doctor repeated certain actions with each child, such as using a stick to tickle the child's foot, or using a stethoscope to listen to the child's heart. The entire examination was videotaped. A day or two later, the children were once again videotaped, this time being interviewed with the help of anatomically correct dolls. When asked to demonstrate with the dolls what the doctor had done to them, the children showed actions consistent with sexual abuse, yet nowhere resembling their interactions with the doctor. One child, for example, was seen jamming the same stick used to tickle her foot into the dolls vagina. The video clearly demonstrates that the use of anatomically correct dolls not only fails to act as a good vehicle for children to express abuse but, also, results in serious, yet untrue, allegations of abuse.

[36] Elizabeth Keegan, who was at the time of this trial the only victim-witness advocate employed by the Berkshire County District Attorney's office, and who is now the director, testified that their office no longer use anatomically correct dolls because "times have changed." Other District

The motion record amply demonstrates that an expert, even without the unedited tapes, would likely have found evidence in the documents that existed at the time to support testimony that the context and manner in which this case was generated and investigated, similar to the observations noted in *Amirault*, *supra*, created problems in the reliability of the interviewing techniques, such as the parents being given suggestions as to how to question their children, the multiple interviews, the leading questions and interviewers with preconceived agenda. With the unedited tapes, the expert would have had more evidence for use to demonstrate the use of improper techniques during the interviews as well. This is not to say, however, that a jury would have been persuaded; even with experts to provide such information in the Fells Acre cases, the juries were not persuaded. However, without an expert, the defense had no one capable of explaining to the jury the reasons why children should not be interviewed in the manner they were; moreover, without an expert, the defense was at a severe disadvantage considering the testimony of Jane Satullo and Dr. Suzanne King, discussed below. The defendant had no link to vitally important sources of information that was available on these critical subjects which could have been utilized to challenge the opinions of the Commonwealth's experts and was thus unable to counterbalance the critically important and powerful opinions given by the Commonwealth's experts on the truthtelling of child sexual abuse victims.

3. Failure to challenge vouching/opinion testimony on

Attorney offices throughout Massachusetts have now changed their practices. In *Commonwealth v. LeFave*, the Middlesex District Attorney's office conceded that they no longer use the suggestive interview techniques that were used when Cheryl Amirault LeFave was convicted, techniques similar to those used against Mr. Baran. See *Commonwealth v. LeFave*, Superior Court Doc. Nos. 85-63, 85-64, 85-66, 85-67, 85-2678, 85-2679, 85-2680, Slip Opinion at 113 n. 16. (1997).

truthtelling of children

"The issue of credibility of a witness focuses on both the individual's ability and willingness to tell the truth. *Commonwealth v. Widrick*, 392 Mass. 884, 888 (1984). This court has made clear that an expert may not offer an opinion on a witness' credibility. 'Evaluations of credibility are, of course, within the exclusive province of the trier of fact. *Commonwealth v. Bohannon*, 376 Mass. 90, 94 (1978). Accord *United States v. Azure*, 801 F.2d 336, 341 (8th Cir.1986) (trial court abused discretion in allowing pediatrician to give opinion as to the believability of child alleging sexual abuse). 'We look to the jury after an adversary trial to make the decision as to what testimony to believe.' *Commonwealth v. Francis*, 390 Mass. 89, 100-101 (1983). An expert may not render an opinion on the credibility of a witness because the jury is capable of making that assessment without the aid of an expert. *Simon v. Solomon*, 385 Mass. 91, 105 (1982)." *Commonwealth v. Ianello*, 401 Mass. 197 (1987). In that case, the court was asked by a defendant to admit an expert opinion on the likelihood of a child's lying about sexual abuse if the child's parents were locked in a custody or visitation dispute. There, the court stated that "we believe the proffered opinion was no more than the expert's over-all impression of the truthfulness of members of a class (children in custody disputes) of which the specific complainant was a member. While the proposed testimony fell short of rendering an opinion on the credibility of the specific child before the court, we see little difference in the final result. It would be unrealistic to allow this type of expert testimony and then expect the jurors to ignore it when evaluating the credibility of the complaining child. Since we believe that Dr. Sacco's opinion ultimately would have been applied to the child alleging sexual abuse, we rule that the

judge was correct in excluding the expert testimony. If the testimony had erroneously been allowed, Dr. Sacco would have impermissibly intruded upon the vital function of the jury." at p. 201-202.

Moreover, the issue concerning the vouching of credibility is not limited to experts: "[i]t is a fundamental principle that 'a witness cannot be asked to assess the credibility of his testimony or that of other witnesses.'" *Commonwealth v. Montanino*, 409 Mass. 500, 504 (1991). To violate this principle, testimony supporting a witness's credibility "need not be direct. The question is whether the witness's testimony *had the same effect* as if [the witness] had directed his comments specifically to [another witness's] credibility." *Commonwealth v. Lorette*, 37 Mass.App.Ct. 736, 739-40 (1994) (brackets and emphasis in original) (citations omitted). Indeed, allowing one witness to directly or indirectly vouch for a complainant's credibility is "especially prejudicial" where the complainant's credibility is a key issue. *Quincy Q,* 434 Mass. at 874; see also *Montanino,* 409 Mass. at 504-505 ("In light of the fact that . . . the alleged victim was the key prosecution witness in this case, his credibility was a crucial issue. The improper use of [a police officer's] opinion testimony to bolster [the complainant's] credibility was error requiring reversal."); *Triplett*, 398 Mass. at 567 ("Where, as here, the evidence presents a duel of credibility, asking a witness to opine as to the honesty of the other witness's testimony cannot have a non-prejudicial [or] inconsequential effect on the deliberations of the jury") (citations omitted); *Lorette,* 37 Mass.App.Ct. at 743 (mother's testimony that complainant never strayed from her story and that "everything just fit" constituted plain error where complainant's credibility was "critical" to case). Here, the prejudicial impact would have been particularly high

in light of the fact that these witnesses were serving in dual roles, that of expert and as fresh complaint witnesses; *Perreira*, 38 Mass.App.Ct. at 903 (reversing conviction in part because social worker witness's "obvious belief" in complainant's story "must have carried great weight with the jury, given her professional credentials").

In the case at bar, Jane Satullo and Dr. King offered critical expert testimony concerning the credibility of the minor complainants in addition to testifying as "fresh complaint" witnesses. Jane Satullo gave testimony regarding her interviews of two of the children, Boy A and Girl B. 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. Based upon these fairly limited qualifications, Ms. Satullo appeared relatively new to the field of child sexual abuse and could not realistically be viewed as an authority on child sexual abuse. She was permitted to testify, as Dr. Suzanne King would also be allowed, without objection, not only about the behavioral symptoms of a sexually abused child, which is generally admissible, given appropriate qualifications, but also was permitted to opine on the credibility and truthfulness of sexually abused children in general and, more importantly, but inferentially, the children she interviewed.

When she was asked whether it was possible to plant an idea concerning sexual abuse in a child's mind, Ms. Satullo opined, without objection: "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. When she was later asked if she would consider it to be significant if a child continually repeated allegations of sexual abuse, she responded that this 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. 5/148.

Even without defense counsel having failed to recognize a problem, nor having made any objection, the judge recognized that this testimony, especially this last response from Ms. Satullo, presented a problem which needed some correction. He told the attorneys at side-bar: "[T]hat 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." This instruction was given at the conclusion of Ms. Satullo's direct testimony.[37] Tr. 5/149.

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[37] 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.

Defense counsel's cross-examination of this first of two witnesses who offered such critical support to the credibility of the young children consumed a total of 8 pages of transcript. (Tr.6-3 to 6-7, 6-10 to 6-12.) Contrary to the Commonwealth's description of his cross-examination, his efforts cannot be viewed realistically as having "effectively examined the Commonwealth's child witness experts, Ms. Satullo and Dr. King, by impressing upon the jury the suggestibility of child interview techniques." (See Commonwealth's Brief in Opposition, at p. 21.) Mr. Conway appeared to be unprepared to challenge and did not challenge either Ms. Satullo's credentials, the basis of her knowledge and experience in the field of child sexual abuse or her opinions, either directly, on cross-examination, or indirectly, by calling his own expert witness to rebut her testimony. As an example, on cross-examination, she asserted that "as far as the reading I have done, naming the wrong person- children have withheld the name of the person out of fear but there haven't been any cases of young children falsely accusing somebody." This statement was followed by a question from defense counsel: "Children are very susceptible to suggestion?" She answered that children are "no more susceptible to the rest of us." Tr. 6-12. Having had no assistance from an expert, trial counsel was unarmed to challenge these statements and did not; the lack of follow-up by trial counsel betrayed the lack of preparation and investigation but more significantly, likely telegraphed to the jury his acceptance of these statements at face value. This was followed by a question on re-direct by the prosecutor,

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Tr. 5/150-151.

however: “Do you think that children are susceptible to suggestion about sexual abuse? She answered again “ I think no more than the rest of us.”

Even if the opinions offered by Ms. Satullo were true, or if defense counsel was unprepared to challenge them directly with authoritative sources to the contrary, trial counsel could have, but made no attempt or effort to demonstrate to the jury, through questions to this witness, that the situation she described in her opinions was not descriptive of this case, *i.e*., the difference between the likely truthfulness of a child who spontaneously narrates and accurately repeats a story with details over time and the problems that must exist in the situation where details must be coaxed from a child, such as occurred here when some of the children responded with silence and/or denials followed by leading questions. Even if counsel did not have the advantage of the unedited tapes to demonstrate this difference, he had the experience of the testimony of the first four of the six child witnesses by that point in the trial, including that of Boy A, who could not provide incriminating evidence even being led through his testimony, Boys C and D, who gave non-verbal responses (nods and shakes of the head) to many of the questions asked of him.[38] Moreover, while it is not clear what version of the videotape he saw - short edited, edited, or unedited - he failed to utilize the contents of any of the children’s testimony or the videotapes to any advantage for the defendant. He never used the tape in any way to explore inconsistencies in the statements of the children, never asked whether the children had denied sexual contact, never sought to impeach Ms. Satullo’s opinions by comparison with the apparent difficulty some of the child witnesses had in testifying nor did he challenge her simplified account of the interviews

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[38] A sampling of many of the leading questions put to the child witnesses during their testimony may be viewed in the defendant’s brief on appeal, at A.221-302, pp. 43-63 of brief.

wherein she appears to have characterized or glossed over the early stages of the interviews, during which the children were non-responsive or denied contact, as merely "getting comfortable"; he also failed to use the tapes to support his claim of suggestiveness in the interviews by illustrating techniques used by her on the tapes, *i.e.*, the coaxing and cajoling nature of her questioning of the children by her constant reassurance when they gave positive evidence against the defendant and the repetitive and leading nature of the questioning when they gave negative evidence. He also made no use of the fact that some children appeared to be unable or unwilling to provide any information of an incriminating nature, either on tape or on the witness stand, unless accompanied by a parent, nor was he equipped to challenge the appropriateness of parental involvement in the questioning.

Like Ms. Satullo, Dr. King testified in a dual role, as Girl B's psychotherapist and as an expert in child psychiatry. In her capacity as therapist, Dr. King opined that her patient 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. She was permitted to testify, without objection nor serious challenge on cross-examination that:

1) a three-and-a-half year old child would not have the cognitive ability to make up a story of sexual abuse. She stated: "[A] child of her age is not cognitively able to describe in graphic detail some sexual event unless she actually experienced it."[39] Tr. 6/114;

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

2) that the girl's nightmare suggested a preoccupation with injury. "A child of this age would not exhibit such a preoccupation unless she had actually suffered some sort of injury." Tr. 6/113; 3) The tunnel play scenario was "an enactment in her play of what she says has actually occurred. What she says actually occurred in terms of being sexually abused." Tr. 6/114; 4) The emotional trauma that she exhibited 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.

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 as both a treating psychiatrist for one of the children and as an expert in cognitive development. There is no evidence that trial counsel for the defendant objected to the Commonwealth's failure to disclose her as a witness, nor that he made any effort to find out about Dr. King's credentials, prior testimony, and likely opinions, nor is there any evidence that he attempted to obtain the treatment records. Her opinion that her patient 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 relevant and likely discoverable. See Commonwealth v. Oliveira, 431 Mass. 609, 614-616 (2000). Mr. Conway's failure to request the records that documented the factual basis for an expert witness's opinion is

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suggest something 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 [this girl], for example, has shown along with all the other symptoms that suggest that a child has been hurt in some way." Tr.

claimed to be a 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 troublesome, especially given her interpretation of the child's play and her nightmares, in the context of the "history" that she got from the patient and her mother. At one point in the direct examination of this witness she was asked: "Doctor, in your opinion, would a child of three and a half years like [the patient], have the cognitive power and cognitive ability to make up a story concerning sexual abuse?" She answered: "No, I don't think so. I think a child of her age- and many people have said this, this is 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." This was followed by a question "why not" to which she answered "because a child of that age is not really at a stage where they can talk about something that they haven't experienced in some way to one of the senses." Tr. 6-114.

Cross-examination of this witness began on the next page, and consisted of two and one-half pages of testimony (Tr. 6-115 to 6-117), during which the previous answers of the witness, including those referred to above, went virtually unchallenged. The closest that defense counsel came to testing the witness was with his first two questions, inquiring about but not following up upon the possibility of suggestion and anxiety being transferred from the interviewer to the child, to which the

6/115.

witness responded that she did "not think the anxiety would necessarily be transferred" and certainly not to the level this patient showed. The form of questions put to this witness, as with Ms. Satullo, and their responses, in which they were permitted to answer "I do not think that" or "I think that" revealed areas worthy of follow-up, as they were suggestive of a lack of scientific foundation and probity. The lack of preparation for such testimony by the retention of any expert to assist him left trial counsel unequipped to confront such damaging evidence leaving the defendant virtually defenseless.

The lack of attention by trial counsel also allowed the prosecutor's final argument to go unchallenged in several respects, including when it was stated that Dr. King testified that a child does not have the cognitive ability to fabricate a story about sex abuse, (Tr. 8/48), or when the prosecutor noting 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 without objection:

> 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?

This argument was objectionable due to the very same concern that caused the trial judge to offer a limiting instruction, *sua sponte,* after the direct testimony of Jane Satullo, since it made an improper connection to the credibility of these actual children, implying that the professional witnesses highlighted by the prosecutor had special knowledge of and vouched for their truthfulness.

The testimony by the two Commonwealth experts, followed up as it was by the prosecutor's final argument, brought this case squarely within the suggested proscriptions later offered by the Appeals Court in the case of *Commonwealth v. Rather*, 37 Mass. App. Ct. 140 (1994), that if a judge allows the testimony of an expert who is offering opinion testimony on the patterns of disclosure of child sexual abuse victims, "the witness should be advised not to render an opinion as to the credibility of the particular victim's testimony or any portion of it or as to the general veracity of sexually abused children," and "the proponent of the testimony should be very careful not to imply in the closing statement that the expert vouched for the credibility of the particular victim before the court." at 150-151. [underline added.]

In *Commonwealth v. Richardson*, 423 Mass. 180, 186 (1996), the court recognized that "the line between permissible and impermissible opinion testimony in child sexual abuse cases is not easily drawn." In *Commonwealth v. Deloney*, 59 Mass. App. Ct. 47 (2003), the court observed that the "principles, while seemingly clear in the abstract, become hard to apply in actual practice. ... So the question remains how to distinguish in a given case between that expert testimony that fulfills a legitimate educational function helpful to the fact finder, and that expert testimony that unlawfully coaches the fact finder whether to accept or reject the testimony of

particular witnesses." at 55-56.

Contrary to the view of the Commonwealth, however, the testimony of Ms. Satullo and Dr. King, highlighted above, is not viewed as descriptive of "general behavioral characteristics of sexually abused children," and was not "expert testimony that explains to the jury that child abuse victims may behave in ways that to lay persons may seem illogical;" these opinions directly commented on the truthtelling of child sex abuse victims generally at the least, with the additional and substantial risk that the jury would made the connection between these general opinions and the children with whom the witnesses had actual contact. This brings the testimony of these witnesses directly within the danger observed in *Commonwealth v. Rather*, 37 Mass. App. Ct. 140 (1994) at fn. 4: "[A] serious problem is created when the witness who is asked for an opinion concerning the general characteristics of sexually abused children has also seen the alleged victim in his or her professional capacity. The danger is that the jury will believe that the witness is endorsing the credibility of the alleged victim." In *Commonwealth v. O'Brien*, 35 Mass. App. Ct. 827 (1994), cited therein, the court stated that "there are cases where the proffered expert testimony itself approaches so closely the credibility of the alleged victim that it is best excluded." at 832.

The general behavioral characteristics that have been allowed to serve as the basis of expert opinion have included some evidence admitted in the case at bar, such as bedwetting, sexualized play, and the like. The Commonwealth has cited no case that has endorsed the admissibility of the kind of testimony offered herein. While the cases relied upon by the Commonwealth, including *Commonwealth v. Dockham*, 405 Mass. 618 (1989), and *Commonwealth v. Deloney*,

59 Mass. App. Ct. 47 (2003), allowed testimony concerning patterns of disclosure, *i.e*., delayed or gradual disclosures, the court believed the line to have been crossed at inconsistent disclosures or when the risks of evidentiary links between the expert opinion and the actual child victims were apparent. See *Commonwealth v. Montanino*, 409 Mass. 500 (1991), and the *Deloney*, and *Rather* cases, *supra*, finding impermissible vouching but determining that the error was harmless under the circumstances of those cases. Here, the defendant's trial counsel was unprepared to challenge the admissibility of this testimony, and the testimony itself; moreover, his efforts at cross-examination served to worsen the damage. This opinion testimony was clearly impermissible and crossed the line; the error was not harmless. See also *Commonwealth v. Perkins*, 39 Mass. App. Ct. 577 (1995), a case in which a new trial was granted for impermissible vouching by experts.

Furthermore, Dr. King's 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), might well have served to open the door to evidence that another child, Girl E, had been previously abused by someone other than this defendant. When asked by Dr. Sheeley if anyone else had done these things to her, Girl E answered, "Chino did the same thing." As to what Chino did, the girl 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." The girl's step-brother was also there. *Notes of Dr. Jean Sheeley re: Girl E,* 10/13/84, p. 2, A-454. The girl's mother was reportedly present for this conversation.

According to the *Certificate of Discovery*, A-90, Dr. Sheeley's notes were provided to

Mr. Conway in early November 1984. It appears that no other information about this allegation was ever disclosed. Notwithstanding this slim amount of information, it should have been sufficient to give trial counsel a good faith basis for an investigation and further discovery, as well as a basis for cross-examination of the girl, her mother, and Dr. Sheeley concerning the identity of Chino, why the child was in a motel with him, the location of this motel, whether the girl said anything more about this abuse, whether this allegation was reported to DSS and the police, whether it was investigated and by whom, and whether Chino was ever 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).

Had he followed up, he likely would have discovered that which motion counsel has obtained, including a type-written letter to Sergeant Sgt. Pacitti of the West Springfield Police Department by Pittsfield Police Detective McGuire, in which he wrote:

> This department is investigating a sexual child abuse case involving a day care center in Pittsfield. One of the children involved is [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" [surname omitted] 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. Quite obviously, Girl E told her mother about what Chino did to her, and her mother 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. In the written statement of the girl's mother, in which she reports the girl's disclosure about Mr. Baran, dated 10/13/84, which was witnessed by Detective McGuire, omits any mention of the Chino disclosure. Furthermore, motion counsel has obtained DSS 51A/B report from this incident. (Exhibit 1 to the Defendant's Supplemental Memorandum). The very same day that Girl E made an allegation against Mr. Baran, she also made an extensive one against Carlos [surname omitted], a/k/a/ Chino. The report documents that Girl E claimed Chino assaulted her on or around July 4, 2004–a full three months before her allegation that Mr. Baran did the same. She alleged that Chino took her into the bathroom of a motel and put his penis in her mouth while rubbing her vagina.

While neither party in 1985 might have foreseen the court's 1987 decision in *Commonwealth v. Ruffen*, 399 Mass. 811, 815 (1987), involving a case of first impression in Massachusetts that was actually tried prior to that of the case at bar, the proponent of such evidence could have made a strong argument for its discovery and of its relevance for the very reason expressed in the opinion of Dr. King, consistent with the rationale of the case which affirmed its importance: "[i]f the victim had been sexually abused in the past in a manner similar to the abuse in the instant case, such evidence would be admissible at trial because it is relevant on the issue of the victim's

knowledge about sexual matters." *Commonwealth v. Ruffen*, *supra*, at 815 (1987). Unfortunately, trial counsel did not follow up upon the signal that Dr. Sheeley's notes provided and failed, yet again, to challenge the Commonwealth's evidence. The defendant was seriously prejudiced by Mr. Conway's failure to develop this Chino evidence. See also *Commonwealth v. Owen*, 57 Mass.App.Ct. 538, 544-45 (2003), and *Commonwealth v. Scheffer*, 43 Mass.App.Ct 398 (1997), cases that resulted in reversal of convictions for Ruffen violations; while they involve trials that occurred post-Ruffen, the importance of the availability of this line of inquiry to the defense is emphasized.

4. Failure to attempt to exclude evidence of gonorrhea

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 results of these tests came back from the lab, with the throat culture testing positive for neisseria gonorrhea. The police then obtained a warrant for Mr. Baran, who was taken into custody and transported to the Berkshire Medical Center for gonorrhea testing. Swabs were taken from his throat, penis and anus with negative results on all three. Had the defendant and the child both tested positive for gonorrhea, such evidence would have been probative and admissible; the jurors could reasonably have inferred, based upon sufficient corroborating evidence, that the child 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). There was no evidence offered during the trial, however, that the defendant had gonorrhea at any relevant time.[40] [41] Under these circumstances, the evidence that this child had 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 the defendant 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). No motion *in limine* was ever filed, nor did Mr Conway ever voice an objection to the admissibility of the gonorrhea evidence during trial. Defense counsel should have objected to the introduction of this evidence and, given the state of the evidence, and the inability of the Commonwealth to offer a good faith basis for its introduction, this evidence was simply not admissible. Any link between the defendant and his evidence came through speculation and innuendo with the testimony of Dr. Jeffrey Ross, who testified about gonorrhea, its transmission, its relatively easy cure in a day or two, and that homosexuals are more likely to be infected with gonorrhea than the general population. The Commonwealth sought to build upon this less than firm foundation with the following: (1) that Mr. Baran likely had gonorrhea because homosexuals are more likely to

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

[41] The Commonwealth has sought to reopen the evidence in connection with this issue, suggesting that contradictory evidence might be available. However, given the directed verdict, all evidence on the issue of gonorrhea should have been stricken. Moreover, evidence acquired by the Commonwealth long after the indictments were dismissed provides no assistance on the question of the fairness of the proceeding that led to his conviction and the effectiveness of representation by his counsel in that proceeding.

have gonorrhea, (2) that this child 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,[42] no motion *in limine* was ever filed, nor did counsel object while Dr. Ross was testifying. It is of particular significance that Attorney Conway failed to object to speculation that Boy A was infected with gonorrhea in his throat by Mr. Baran given that there was no evidence that this child ever had oral sex with Mr. Baran - his mother testified only that her son said that Bernie touched his penis.[43]

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 to offer conflicting gonorrhea tests (the defendant tested positive for gonorrhea, while the

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[42] 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.

[43] 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 [the boy's] mouth." Tr. 3/27. When the child took the stand, however, he provided no substantive testimony.

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. As in the *Kirkpatrick* case, *United States v. Ham,* 998 F.2d 1247 (4th Cir. 1993)*Commonwealth v. Gillette*, 33 Mass. App. 427 (1992)*State v. Bates,*

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[44] 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 [his] mouth and you'll hear that the culture taken from [his] 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.

Tr. 3/39-40.

[45] 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

507 N.W.2d 847 (Minn. App. 1993) *United States v. Ham,* 998 F.2d 1247, 1252 (4th Cir. 1993)(reversible error where unduly prejudicial evidence including homosexuality and child molestation was admitted.) Evidence implicating a defendant's sexual orientation is particularly prejudicial where he is being tried on numerous sex offense charges. A jury's inference that a defendant is gay can cause it also to infer that he deviated from traditional sexual norms in other ways, specifically that he engaged in illegal sexual conduct with minors. Guam v. Shymanovitz,

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> 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."

Tr. 8/61-63.

[46] *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 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

157 F.3d 1154, 1160 (9th Cir. 1998) (reversible error to admit articles from sexually explicit magazines related to adult gay male sex in trial of male middle school guidance counselor charged with sexually abusing eleven boys while under his supervision). "Because in our society homosexuality - and indeed any other sort of deviation from the norm of heterosexual procreative sex - is often equated with indecency, perversion, and immorality, and gay persons are often greeted with distrust and suspicion, particularly in their interactions with children, we cannot assume that the jury's decision was not affected by biases and prejudices." the rules of criminal procedure*Commonwealth v. Quincy Q.,* 434 Mass 859 (2001)*Commonwealth v. Licata,,*412 Mass. 654 (1992)*Commonwealth v. Montanino*, 409 Mass. 500

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inflammatory," and "so prejudicial as to constitute reversible error.")

[47] In a July 1988 deposition in her civil lawsuit against ECDC, the mother of boy A testified that she did not like Mr. Baran from the time her son 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 dated, 7/6/88, pps. 75-79. When they heard this, the boy's mother and her boyfriend 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 and told someone (the mother 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 they 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. His mother 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.

[48] This court is mindful of the resolution of this issue by the Appeals Court. It is included herein, nonetheless, in connection with an analysis of counsel's performance in a case in which credibility was so critical to the outcome of the case and the potential impact on the result by counsel's lack of preparation and attention to this credibility-enhancing device.

[49] See *Commonwealth v. King*, 445 Mass. 217 (2005), which ordered a sea-change in this area of evidence, introducing the concept of "first complaint".

[50] At the time of this trial, *Commonwealth v. Bailey,* 370 Mass. 388 (1976)Commonwealth v. Bailey, 370 Mass. 388 (1976), appears to have been the most comprehensive decision by the Supreme Judicial Court on the fresh complaint doctrine. Since that case, the fresh complaint doctrine have been considerably refined, however. Numerous issues regarding the timeliness of fresh complaints, details of complaints, repetition of complaints, and

(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 a 1992 case, 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).

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. Trowbridge,* 419 Mass. at 762 (substantial risk of miscarriage of justice where jury was not properly instructed not to use fresh complaint as substantive evidence of the crime); Commonwealth v. Goss, 41 Mass.App.Ct. 929 (1996)(judgment reversed because of substantial risk of miscarriage of justice where prompt limiting instructions were not requested or given). In connection with the fresh complaint testimony of some witnesses, the judge gave this

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limiting instructions regarding fresh complaints, as well as the impact on a defendant's fundamental right to a fair trial, have been decided many cases in the last twenty years, culminating in the case of *Commonwealth v. King*, supra.. Nonetheless, a fair reading of *Bailey* should have alerted trial counsel to the dangers of fresh complaint testimony that extends beyond the confines of the complainant's actual testimony and to be prepared to either seek to exclude or strike such testimony, or to use it to his advantage, as suggested by *Bailey*, to show the inconsistencies, which would impeach not only the victims but the premises and opinions of Satullo and King that implied the children were worthy of belief since they repeated details consistently and repeatedly.

instruction: "The jurors will recall the instruction I gave you earlier on Fresh Complaint." See Tr. 6/20. This instruction failed to expressly remind the jury that fresh complaint evidence cannot be used as substantive evidence that the crime occurred, but only to corroborate the alleged victim's testimony as it relates to credibility. *Commonwealth v. Licata,* 412 Mass. at 660, the judge's instruction that "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", and, in particular, the language that the testimony "is available for you to use as you see fit" could easily be viewed by the jury as permitting its substantive use.

In addition, there were examples of the fresh complaint witnesses being permitted without objection to testify beyond the parameters of the testimony of the child victims. 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 the child's testimony. There is no evidence that he indicated, either verbally or by gesturing, that Bernie touched his behind or 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 the child's behind and Bernie's behind were not just details added to a summary of the testimony that Boy C gave. This was new information.

i) The father of Boy D and Pat Palumbo testified, without objection, to nearly identical fresh complaints that exceeded the scope of the boy's testimony: his father testified that his son said that Bernie touched his "weeney" in the woods and the shed, and 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 this child's testimony suggested, however, that Bernie touched him on more than one occasion. He 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.

Additionally, another pair of statements from these "fresh-complaint" witnesses involved an allegation that Mr. Baran urinated on another child: the father of Boy D testified that his son said that Bernie had pepeed in somebody's face (Tr. 5/79), and Ms. Palumbo testified that the child told her 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, while the statements might be viewed as complaints of sexual assault, Boy D was not the alleged "victim" in the statement- "his friend"

was. This statement was highly prejudicial because, when viewed in context, it implied that the friend to whom this happened was Boy C, which was not true and Ms. Palumbo knew it not to be true. In her 51B report, she wrote that Boy D "said Bernie peed on [another named child's] face and in his mouth. He said [the other child] was mad. Worker asked if Bernie did this to [Boy D] He said, 'No.'" *DSS Child Abuse and Neglect Report* - L., Palumbo, 10/17/84, p. 7, A-488. These statements were inadmissible hearsay. There are other examples itemized by the defendant in his supporting memorandum of additional abuses of the fresh complaint exception, including the admission of the demeanor of the child declarant and the parent as well. The ordinary fallible lawyer would have sought, in advance of the testimony to be offered by a fresh complaint witness, to exclude or limit that testimony, or, in default thereof, objected contemporaneously when the testimony was offered. *Rule 3(b)(1), Mass. R. Crim. P.Rule 3(b)(2), Mass. R. Crim. P.Commonwealth v. Myers,* 363 Mass. 843 (1973)*Commonwealth v. Lataille,* 366 Mass. 525 (1974)M.G.L. c. 278, § 16AG.L. c. 278, § 16A violates the First

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[51] The first entry on the docket sheets of cases #18100 and #18101 is "Defendant's waiver of indictment." Neither the docket sheet, the form signed by the defendant nor the transcript indicate that the court engaged in any sort of colloquy with Mr. Baran to determine that his waiver of indictment was voluntary and intelligent and to inquire if he knew the extent to that he was giving up by proceeding by complaint. See *DeGolyer v. Commonwealth,* 314 Mass. 626, 632 (1943).

[52] 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 [boy C's father] 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 R. T. 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]

Amendment. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 603 (1982), rev'd 383 Mass. 838 (1981). The Court recognized that safeguarding the physical and psychological well-being of a child was a compelling interest, but it ruled that such a determination 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

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touched a little girls nipples. He also touched the little girls vagina and but [sic]. Boy C also said that J. L. 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.

[53] At the conclusion of the hearing conducted in the judge's chambers on January 18, 1985, concerning the competency of the child witnesses, a hearing at which the defendant was not present, the following exchange took place:

The Court:	... I have to close the courtroom for each child.
	Who's going to be there on behalf of Defendant?
Mr. Conway:	I expect his mother, his sister and his brother; they should be allowed to remain present during the –
The Court:	Yeh.
Mr. Conway:	(continuing) – even the testimony of the children, I would assume.
The Court:	I would permit certainly the mother. What about his brother; how old is he?
Mr. Conway:	He's an older fellow.
The Court:	He's an adult?
Mr. Conway:	He is an adult. The sister is an adult.
The Court:	Yeh, they may certainly be there.
Mr. Conway:	Those are the people in the family that I have to deal with that I know of: mother, sister, and brother.
The Court:	Except for that, I'm closing the courtroom when the children are testifying.

Competency Hearing, Tr. p. 91.

[54] It was reported by the local print media that the closure extended to the press: "[t]he courtroom has been closed to all but the jury and court officials for the testimony of the six young witnesses." *The Berkshire Eagle,* "Three of 12 charges brought against Baran are dismissed," Lynne A. Daley, 1/29/85. A-213.

victims are injured by testifying, but rather in the incremental injury suffered by testifying in the presence of the press and the general public." Sixth Amendment guarantees that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ." The United States Supreme Court has recognized that the right to a public trial also implicates a defendant's right to due process under the Fifth Amendment. See, Levine v. U.S., 362 U.S. 610, 614, 616 (1960). Although the Massachusetts Constitution has no provision corresponding to the *Commonwealth v. Marshall,* 356 Mass 432 (1969)Fourteenth Amendment. Commonwealth v. Stetson, 384 Mass. 545, 549 (1981). Moreover, our courts have repeatedly "acknowledged and ... affirmed with emphasis ... the 'general principle of publicity.'" Ottaway Newspapers Inc. v. Appeals Court, 372 Mass 539, 546 (1977). See also, Boston Herald v. Superior Court, 421 Mass. 502, 505 n. 3 (1995).

In March of 1984, ten months before the trial in this case, the Supreme Court observed that while recent public trial cases, including First Amendment grounds, those decisions did not diminish a defendant's right to a public trial under the *Waller v. Georgia,* 467 U.S. 39 (1984)*Gannett Co. v. DePasquale*, 443 U.S. 368, 38 (1979)*Waller v. Georgia,* 467 at 45. The Court then reiterated the test for closing a courtroom:

> Under *Press-Enterprise* [464 U.S. 501 (1984)], [1] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] the trial court must consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support the closure.

Id., at 48.

With these two Supreme Court decisions, it should have been apparent to all concerned that

courtrooms were no longer subject to mandatory closure pursuant to *Waller*. Ten years after the trial of the case at bar, our Supreme Judicial Court has explicitly held that a courtroom cannot be closed pursuant to 16A unless the four *Commonwealth v. Martin*, 417 Mass. 187 (1994)Sixth Amendment right to a public trial can be waived, but that waiver must be knowing, intelligent and voluntary. Commonwealth v. Adamides, 37 Mass.App.Ct. 339, 340 n.1 (1994); Martineau v. Perrin, 601 F.2d 1196, 1199-1200 (1st Cir., 1979). There is no record evidence that the court made any inquiry of the defendant in any form to inquire if he knew that he had a right to a public trial, or that he waived it voluntarily. The defendant was not even present when closure of the courtroom was discussed at the conclusion of the hearing conducted on Friday, January 18, 1985, relating to the competency of the child witnesses, which may itself be violative of his constitutional right of confrontation. While a defendant's right to a public trial may be waived as a trial tactic by competent counsel, Commonwealth v. Williams, 379 Mass. 874, 876 (1980), Commonwealth v. Wells, 360 Mass. 846 (1971), there is no evidence that the acquiescence by counsel in the exclusion of the public from the competency hearing or and from the trial during the children's testimony was a trial tactic.[55] No conceivable benefit in the exclusion of the press and the public from Mr. Baran's trial can be imagined, but rather, there was benefit to Mr. Baran to exposing the judicial process to public scrutiny.

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[55] Even if Mr. Conway was unaware of these recent cases decided by the United States Supreme Court, he should have been aware that G.L. c. 278, § 16A had been interpreted by the SJC 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 case law 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

[The *Commonwealth v. Stetson,* 384 Mass. 545, 549-550 (1981). Mr. Conway's acquiescence in this proposal, without objection or reservation, appears simply to be another aspect of a general lack of attention on his part to the rights and best interests of the defendant.[56]

For reversal of a conviction which is not the result of public proceedings, a showing of prejudice has been held as not necessary. *Martin, supra* at 196, citing G.L. c. 278, § 16A, Mr. Baran's conviction would have been reversed. Appellate counsel's failure to raise this fundamental issue in his direct appeal created a substantial risk of a miscarriage of justice.

D. Conclusion

Upon consideration of the record of the proceedings of this case and of the arguments of the parties, several of the errors of counsel discussed above, especially those at sections 1 through 4 at the least, even when considered separately, in the view of this court support the conclusion that a new trial is necessary as they show that "better work might have accomplished something material for the defense," *Commonwealth v. Satterfield*, 373 Mass. 109, 115 (1977), but that counsel's failings were so grave, so fundamental, that "the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U. S. 668, 686 (1984), and that these several errors, considered severally and jointly, and certainly when combined with the other failings of counsel demonstrates that there exists "substantial risk of a miscarriage of justice" in that there exists "a

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reporters to attend trial).

[56] For example, and as previously noted, notwithstanding a motion 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.

serious doubt whether the result of the trial might have been different had the error not been made."

This court has not and does not come to this decision lightly, having taken a considerable amount of time which was necessary to examine and reflect upon the extensive record of the proceedings of the trial of this case and the motion at bar, as well as the serious issues that were raised and joined, and the arguments of the parties on those issues. The resultant and obvious prejudice to the Commonwealth has not been overlooked; indeed, it has weighed heavily on the court's deliberation. The passage of 19 years between conviction and the filing of the motion, by itself insufficient cause to overcome the serious flaws in the representation provided to the defendant, serves to highlight the concern expressed in *Amirault*, *supra*, that "a decision to reopen a matter long since adjudicated will often in effect resolve the dispute in favor of the accused because witnesses will have died, disappeared, their memories faded, or they may simply be unwilling once again to undergo the ordeal of testimony." at p. 637. This court well knows that the power to grant a new trial, especially in cases by which the governing standard to be applied is whether there exists a substantial risk of a miscarriage of justice, is an extraordinary one which should only be exercised in the most unusual circumstances. *Commonwealth v. Amirault*, 424 Mass. 618, 646 (1997), quoting from *Commonwealth v. Crawford*, 417 Mass. 358, 364 (1994). Nonetheless, the cumulative weight of these errors leaves us with an overriding "uncertainty that the defendant's guilt has been fairly adjudicated," *Commonwealth v. Azar,* 435 Mass. 675 (2002)