

DISTRICT COURT
DENVER COUNTY COLORADO
1437 BANNOCK STREET
DENVER, COLORADO 80202

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff,

v.

TOMASITTO ULLOA, and
MARK LORENCE ULLOA,
Defendants.

FOR THE PLAINTIFF:

MARGUERITE CONBOY, #29292

FOR THE DEFENDANT TOMASITTO ULLOA:
THOMAS R. WARD, #28877

FOR THE DEFENDANT MARK ULLOA:
KATHARINE WHITNEY, #35730

Case No.06CR10573
Case No.06CR10521
Courtroom 23

The matter came on for hearing on motions on
January 22, 2007, before the HONORABLE MORRIS B. HOFFMAN,
Judge of the District Court, and the following proceedings
were had:

Pamela J. Nilsen, CSR/RMR/FCRR
1437 Bannock Street

Office of Court Reporters, Room 426

Denver, Colorado 80202

(720) 865-9039

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¹ pitcher and some paper cups. Just help yourself.

2 THE WITNESS: Okay, thank you.

3 THE COURT: Ms. Conboy?

4 MS. CONBOY: Thank you, Your Honor.

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DIRECT EXAMINATION

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7 BY MS. CONBOY:

Q. Good afternoon.

9 A. Good afternoon.

Q. Could you please state your name and spell your name for the record.

A. Suvi Miller; S-U-V-I, last name Miller,
M-I-L-L-E-R.

Q. Ms. Miller, where are you employed?

A. Currently employed at Denver University as well as doing some work with the District Attorney's Office, and I am a licensed clinical social worker.

Q. And you said you're employed at Denver University, what do you do there?

A. I am part of the adjunct faculty there. I teach as well as I have a job as a liaison for graduate students in the graduate school of social work.

Q. What is it that you teach?

A. Currently teaching clinical theories. I've also taught social work practice; and I teach a course that's a

1 seminar class that's for students to talk about their
2 field placements.

3 Q. All right. So you are an adjunct professor at
4 Denver University, and you stated that you also do
5 additional work at DU?

6 A. Yes, I have a job as a field liaison.

7 Q. And could you explain that?

8 A. That just means that I -- I'm a liaison between
9 the students who are graduate students and have a job at
10 an internship or an internship, and I am the liaison
11 between the student, the agency, and the school.

12 Q. Prior to being employed at Denver University,
13 what were you doing?

14 A. Immediately -- well, actually at the same time I
15 was employed at Denver University -- I finished last
16 January -- I worked for the Denver Children's Advocacy
17 Center for a period of about nine and a half years.

18 Prior to that I worked for Denver Public Schools
19 for a brief time. I had worked in residential treatment
20 in New York City as well as hospital placement in New York
21 City and have done -- have done an internship in a
22 child-abuse-treatment program in New York as well as an
23 internship in an adult psychiatric facility.

24 Q. Let's talk about the Denver Children's Advocacy
25 Center, you were there nine years, nine and a half years?

1 A. Yes.

2 Q. What exactly were you doing?

3 A. I was, at the time that I left, the clinical
4 supervisor, so I provided treatment to children who were
5 brought in for services as well as provided clinical
6 supervision to the clinical staff, the clinical therapists
7 at the agency.

8 Q. And who were those children being brought in for
9 services?

10 A. The children who are brought in were identified
11 as victims of trauma, either having experienced it
12 directly or witnessed it, and that could include physical
13 abuse, domestic violence, witnessing a homicide, as well
14 as sexual abuse.

15 Q. How did these children find their way, as a
16 general matter, to the Denver Children's Advocacy Center?

17 A. A number of ways, but they were often referred
18 from social services or schools. They had been identified
19 as victims of some sort of trauma and referrals came
20 predominantly from those sources as well as other ones;
21 and individuals in the community.

22 Q. You mentioned that you provided treatment, in
23 what capacity?

24 A. Well, the children would be referred to the
25 organization for services, and part of my job was to do

1 some assessment -- what we called assessment -- first with
2 a primary caregiver, if they were available, to get a
3 sense of how the children were doing and what the issues
4 might be, to gather some history, if possible; and then to
5 work with the child by identifying really what was going
6 on for this child in the immediate time and to provide an
7 environment where they felt safe and supported so that
8 they could work through some of the things that had
9 happened to them.

10 Q. And in doing -- in doing the assessment and
11 providing the environment, were you doing any kind of
12 therapeutic treatment with those children?

13 A. Yes, I was. That was most of what I did.

14 And we did a number of different treatment
15 modalities, depending on the age of the child and where
16 they were developed mentally. So we would provide play
17 therapy, art therapy, we did some direct-talk therapy with
18 older children -- a lot of different kinds of tools that
19 we could use to work with kids because they do better in
20 those contexts than necessarily talking about what's
21 happened to them as adults do.

22 Q. And was this something that you did throughout
23 your nine years at the Denver Children's Advocacy Center?

24 A. I started initially, developing a position for
25 the agency, as a volunteer, and then I provided them with

1 some court/school coordination services so they had a
2 program in place for children who were going to testify in
3 cases, and we did kind of a classroom environment. We
4 never talked about specifics of cases but allowed the
5 children to understand what is a courtroom and what does
6 the judge do and what does a jury do, those kinds of
7 things. So I put that together, and then subsequently
8 provided services to the agency as a therapist.

9 Q. Approximately at what point during your tenure
10 did you begin providing therapeutic services?

11 A. That was -- I think I did the court school
12 coordination for a period of maybe six months, and then I
13 provided the services as I was available, so I think that
14 was -- I'm thinking fall of '97 was probably when I
15 started. I can't recall exactly.

16 Q. Then, Ms. Miller, during the course of your work
17 at the Denver Children's Advocacy Center, are you able to
18 make an approximation of how many victims of -- child
19 victim of trauma that you had provided therapeutic
20 services for?

21 A. I don't have an exact number, but in general it
22 was in excess of two hundred.

23 Q. What were some of your other roles at the
24 Advocacy Center?

25 A. Well, it's a small staff, so I did a lot of

1 support within the staff; and then, as I mentioned, I
2 provided supervision to the other therapists who were
3 providing direct services as well as to supervise graduate
4 students from Denver University.

5 Q. In your role in a supervisory capacity to the
6 other therapists, what kind of things were you doing?

7 A. Well, we met on a regular basis for them to
8 discuss cases, whatever issues they might be having, and
9 also to provide logistical support, if you will, helping
10 them with resources, more practical things; and then I was
11 really just available in an ongoing basis if they had
12 general questions or specific questions as needed.

13 Q. Can you make any generalizations as to -- when
14 you talk about the -- let me ask a better question.

15 What kind of logistical support would you be
16 offering?

17 A. Well, to the clinicians -- I guess my intent by
18 saying that would be that if there were things that they
19 needed help in a very concrete way, so there -- we were
20 managing a number of cases and making sure that they got
21 the right number of cases, the cases that suited them, if
22 there were issues around getting particular clients and
23 that kind of a thing, so there was a lot of management in
24 that piece as well.

25 Q. So, to be clear, though, from about fall of 1997

1 until 2004 when you left, you were also in the role of
2 actually directly providing therapeutic services?

3 A. Oh, yes, I was. The clinical supervisory piece
4 was for the last fifteen months that I was there --
5 sixteen months that I was there. The rest of the time
6 was -- in addition, I provided the supervision but the
7 entire time that we talked about I was providing a direct
8 service to the children and their families.

9 Q. You mentioned that you've had some experience
10 as -- in internships in New York, and could you tell us a
11 little bit about that?

12 THE COURT: You know, Counsel, I don't want to
13 interrupt, but we've spent, so far, the whole time on the
14 qualification issue and that's never a big issue for me.

15 MS. CONBOY: Okay.

16 THE COURT: And if we're going to get done with
17 the other motion that we still have to have oral arguments
18 on, we really need to get to the other -- the deal
19 breakers on reliability, and I need to know what her
20 opinions are and the scientific reliability of them, but
21 I've read the motion, I've read that offer of proof. I
22 have no issue with her qualifications.

23 MS. CONBOY: Very good.

24 Q. (By Ms. Conboy) Do you have an understanding
25 as to why you're being called as an expert witness in this

1 case?

2 A. My general understanding of what my role is as
3 an expert witness is to provide information to a jury to
4 help them understand the impact of sexual abuse on
5 children, specifically around things like: Why would they
6 delay in disclosure, why would they gradually disclose
7 issues related to sexual abuse, as well as to whom might
8 they disclose, and at times I will also talk about some of
9 the behavioral indicators of sexual abuse, or some of the
10 behaviors that are manifest as a result of that trauma.

11 Q. I would like to talk about those one at a time.
12 With respect to delayed disclosure, what exactly is that,
13 in your definition?

14 A. In my definition, as we're talking about sexual
15 abuse, it would be disclosure meaning when the child talks
16 about what's happened to them, to another person, another
17 individual; and delayed disclosures would just mean that
18 there was a delay in the time that they talked about it
19 from the time that it happened, that they didn't
20 immediately disclose.

21 Q. Is that common or rare in your experience?

22 A. It is much more common for a child to do delay
23 in disclosures than to immediately disclose, particularly
24 if the perpetrator is known to them.

25 Q. And why would that be?

1 A. There are a number of factors that are involved
2 in that, but in general what we see is that children have
3 a tremendous amount of anxiety and fear around disclosure:
4 Fear of harm from the perpetrator; fear of loss of
5 affection from the perpetrator because oftentimes there
6 are positive elements to this relationship as well; fear
7 of consequences for telling, to the perpetrator or to
8 themselves; fear of negative reactions from family members
9 or others around them; and a very big fear is not being
10 believed.

11 Children often think that this -- whatever is
12 happening to them -- that nobody would believe that this
13 might be happening despite the fact that others have even
14 believed them in the past.

15 They carry a tremendous amount of shame and
16 guilt around this, so often all of these things come into
17 play when they are considering disclosure, and oftentimes
18 they come into play in terms of delaying in that
19 disclosure.

20 Q. Is this information that you believe would be in
21 the -- in the common knowledge of the average person?

22 A. I would say no. I think most people would
23 assume that a child, if they were being sexually abused
24 and were unhappy with that, on some level, would tell
25 someone because they would want it to stop.

1 So I think most people think that children would
2 tell, especially if they've got an individual who they
3 have access to, about what's happening to them. I don't
4 think that the average person understands the different
5 levels of complication that are involved in that and how
6 hard this is for a child to do.

7 Q. And can you make any generalizations as to the
8 kind of families or home environments that the children
9 that you have treated come from? Are you able to make
10 generalizations?

11 A. I've treated children sort of from across the
12 spectrum. I think certain things in the environment can
13 play more into whether or not a child might delay in
14 disclosure -- not necessarily -- but things like more of a
15 chaotic environment, more people coming and going, a lot
16 of different people residing in the home, less
17 availability of one primary caregiver either because
18 they're working or they're depressed or they are just less
19 accessible.

20 And oftentimes the perpetrator, if they're a
21 person that's trusted by the family, just in general, or
22 providing financial support, or is a parent to this child,
23 that can play in tremendously as to whether or not a child
24 is going to disclose this information.

25 Q. Why do you mention the chaotic environment?

1 What role or what would that have to -- how would that
2 play in a child delaying a disclosure?

3 A. Well, children do much better in terms of
4 general behavioral things and other factors when things
5 are more predictable, but if you have a child who feels
6 that people are coming and going, that things are more
7 chaotic, they don't have a reliable person to which to
8 turn, so they may feel less support from people around
9 them.

10 If there are a number of people that are in
11 their household and they don't have a sense of who is
12 going to be there at all times, or that they're going to
13 be left alone frequently with somebody who has been
14 abusing them, then they might feel much less inclined to
15 share that information. There has been no pattern,
16 necessarily, that they've been supported in the past, and
17 therefore, with something like this they might feel less
18 so.

19 Q. Are you familiar with the facts of this case?

20 A. I do have some knowledge of this case.

21 Q. What is your knowledge of this case?

22 A. I had interviewed the foster-care -- kinship
23 foster-care mother when these children were referred to
24 the Advocacy Center. I don't know exactly what the time
25 frame was on that, but I did provide that initial

1 assessment with her during which we talked about some of
2 her goals for them and some of the services that could be
3 provided by the agency, and additionally I did provide
4 some supervision to the people who were working directly
5 with the children.

6 Q. So you interviewed Louise Lee when this case
7 first came in?

8 A. I did.

9 Q. Were you ever in the role of providing
10 therapeutic services to Monique or Tomas Ulloa?

11 A. I was not.

12 Q. And other than your involvement with the
13 assessment and the supervision, have you ever reviewed the
14 case file -- or have you had any other involvement with
15 the cases?

16 A. I have not had any other involvement with the
17 case other than that.

18 Q. Have you ever reviewed the case file?

19 A. I have not been with the agency over a year, and
20 at the time I did not review the files for those children.

21 I would at times sign off on notes for graduate
22 students who worked with Tomasitto earlier on, so I was
23 aware of some of the issues going on during their session.
24 We would talk about some of those, but they were not
25 related to sexual abuse. It was more current issues,

1 struggles that he was having within the current family
2 dynamics, some of those kinds of things.

3 Q. And how about Monique?

4 A. I did not review Monique's notes because the
5 person providing services to her, it wasn't required that
6 I sign off on her notes.

7 I had some information, again, about some of the
8 dynamics of the treatment sessions; and again, most of
9 that was related to how she was adjusting to this
10 household, because when the children came to the Advocacy
11 Center they had been there for a limited amount of time
12 and a lot of this was around how they were adjusting,
13 living with a new foster mom and other children in the
14 home.

15 Q. So, to be clear, then, have you ever read any of
16 the notes relating to any of the allegations involving
17 these cases?

18 A. No.

19 Q. Any sex abuse or any sex allegations?

20 A. I have not. To the best of my recollection, I
21 have not.

22 Q. Your second one you talked about, to whom a
23 child discloses, can you tell us a little bit about that?

24 A. Well, briefly, there -- to whom a child might
25 share this information, that decision would be impacted on

1 the age of the child, the length or the duration of abuse,
2 and particularly on the relationship to the perpetrator.

3 Children choose to tell someone about sexual
4 abuse -- predominantly to someone that will believe them.
5 That is usually if they're going to delay in the
6 disclosure and then subsequently make a decision to share
7 it, is with somebody that they feel will believe them.
8 It's critical that they have that.

9 So they will make choices based upon that, and
10 depending upon their age, and depending upon what the
11 circumstances are, they might make a choice to share with
12 their peers -- for example if they're an adolescent --
13 because those relationships come more into play.

14 A younger child might choose a primary
15 caretaker, a parent, or they might choose someone in the
16 extended family, even outside of the family, but may
17 choose an adult in that situation because they have those
18 kinds of relationships with adults that they may not have
19 with peers that an adolescent might have.

20 Q. So you're touching on this now, but what role
21 would you say -- generally -- age plays in the disclosure
22 process?

23 A. Well, I think it -- it impacts the -- it impacts
24 the child in terms of when they disclose and to whom they
25 disclose and what they disclose. It can play a very large

1 role -- as an example, you have a very, very young child
2 who would not necessarily understand -- we're talking
3 about a three-year-old, as an example, or four-year-old,
4 that may or may not understand what has happened to them
5 if they have been sexually abused, and they may actually
6 reveal this information to someone accidentally, if you
7 will. I was playing a game with Uncle Joe and he touched
8 me on my pee pee as a game. And so they wouldn't
9 necessarily be disclosing this in order to unburden
10 themselves, but just sharing information.

11 Another example might be that a school-age
12 child -- as children get older -- do develop a further
13 understanding of what is happening to them, and it becomes
14 then, for them, a much more shame-based thing and they
15 feel a great deal of responsibility as they get older.
16 They feel a tremendous amount of responsibility for what
17 has been happening, so that child might seek some -- an
18 adult because they identify adults as people who can help
19 them, but again choosing who that adult might be will
20 depend a lot on the availability of people around them.

21 An adolescent has moved into the time where they
22 would have more peer relationships, seeing them as their
23 most reliable relationships. Adolescents also are
24 entering puberty and there is a whole other element, then,
25 added into what has happened to them because they have a

1 much fuller understanding of sex and sexuality and
2 therefore sexual abuse has a very different meaning for
3 them than it might have when they were younger.

4 So all of those things play in, and so age and
5 developmental level have a lot to do with that.

6 Q. Conversely speaking, are you able to speak to
7 the question of what -- what about when a child doesn't
8 tell someone close?

9 In other words, you know, answering the question
10 for a juror, why didn't he or she tell mom why, or, you
11 know, why he or she might not have told a person that that
12 child was very close to. Can you answer that?

13 A. Well, I think that there can be a number of
14 factors that weigh into that, and not saying specifically
15 to -- to this case, because I don't know what the
16 relationship of this child might have been to a primary
17 caregiver in any real extent -- but in general children
18 might not disclose, and -- to somebody who is a primary
19 caregiver because the perpetrator is someone who is
20 important to their mom, to their caregiver, to someone,
21 that this is a person who -- that is trusted in the
22 family, and so their concern would be that this would be
23 not only very upsetting to mom or whomever, but that they
24 may not believe them.

25 They also may not share this information with

1 mom in general because even if they have a positive
2 relationship with the parent, there's this concern about
3 upset. There is this concern about consequence for
4 themselves or for the perpetrator, or in general, and they
5 may feel that they don't want to cause that kind of
6 disruption within the family.

7 Sometimes they can be due to lack of
8 accessibility -- accessibility or believability, but
9 sometimes it can also just be because this child doesn't
10 think that anyone's going to either believe them or that
11 the consequences for it are not worth the disclosure.

12 Q. Do you think these are things in the common
13 knowledge or experience of the average person?

14 A. I do not.

15 MR. WARD: I object. I don't think there's been
16 anything as far as her qualifications would establish
17 she's qualified to say that.

18 THE COURT: Sustained. I think it's a legal
19 question for me. Sustained.

20 Q. (By Ms. Conboy) Have you done any work or
21 studies with respect to perceptions about these concepts?

22 A. I haven't done any studying independently -- I
23 mean, I haven't performed a research or a study on this.
24 I have studied it and I have seen it in practice.

25 Q. Tell us about that.

1 A. Well, in general what we see in terms of
2 research around children and their understanding of why
3 they would disclose the factors that I've shared with you
4 is what comes up, that people aren't going to believe
5 them, that people aren't going to think these kinds of
6 things happen, that the consequences are too large for why
7 they would share the information, and that they blame
8 themselves.

9 My experience with what people, in general,
10 understand -- particularly related to families -- extended
11 families of children who have been sexually abused -- is:
12 Why didn't they tell me? I'm there. I care. I don't
13 understand why this child wouldn't come to me immediately
14 and tell me. And I would have that question asked over
15 and over again, because the understanding of what might
16 play into a child's disclosure was not there.

17 Q. So you've told us you've treated, ballpark, two
18 hundred children on a therapeutic basis who have been
19 victimized, correct?

20 A. Yes.

21 Q. And now you're telling us that you have also,
22 through that work, had interaction with those extended
23 family and the people surrounding these children, correct?

24 A. Yes.

25 Q. And so when you're making these opinions and

1 you're -- you're telling us that you've had these
2 conversations with them, fair to say then that you have
3 had follow-up and dealt with disbelief, or do you have
4 familiarity with the perception that these extended
5 families have regarding how these kids are disclosing,
6 when they're disclosing, to whom?

7 A. Yes.

8 Q. Okay. And are the opinions that you would be
9 rendering in this case based upon your -- your experience
10 dealing with the extended families of these victims that
11 you've treated?

12 A. They would be both with my experiences as well
13 as what I have studied in terms of research and training
14 and presentations, that -- that would be all encompassed
15 in that.

16 Q. And can you speak to things that you have
17 studied regarding people's perceptions or perceptions that
18 the average person has about disclosure and how that comes
19 about?

20 A. Well, specifically around people's perceptions,
21 it's usually -- most of the research that I have seen and
22 the text that I have seen is encompassed in text
23 surrounding how to treat children, or studies around why
24 children have not disclosed information, or why they delay
25 in disclosure.

1 So a specific study to the average person on the
2 street's perception, I couldn't cite that for you, no; but
3 I do know, you know, from my -- from a learned experience
4 as well as personally, people have these questions all the
5 time: Why wouldn't a child tell -- if they've got someone
6 to tell, why wouldn't they make it stop as soon as they
7 could make it stop?

8 It's very confusing for adults to understand why
9 a child won't try just about anything to make this stop,
10 in my experience.

11 Q. Okay, one of the questions you've heard: If
12 they've got someone to tell, why don't they tell? What
13 other questions have you heard in your experience?

14 A. Why -- why would a child wait so long. If they
15 can tell someone and they finally decide to tell somebody,
16 why would they wait so long? What would play into that?

17 If this person was -- had never threatened to
18 hurt them or be violent, why would they think that they
19 couldn't tell on them because they didn't -- they -- they
20 didn't have the assumption that something terrible was
21 going to happen to them physically, so why wouldn't they
22 just share the information?

23 People look for understanding all the time about
24 why would a child -- as an example, the child who was
25 abducted and the child who was in custody for -- or being

1 kidnapped for four years. Why didn't he runaway? This
2 was a question I heard over and over and over on the news
3 which I felt like I could answer, but people don't
4 understand those kinds of dynamics. So why is a child in
5 a situation where bad things are happening, why do they
6 not take action? That's a question I hear all the time.

7 Another question I might hear is: If a child
8 finally tells, why don't they tell everything all at once?
9 Why would they tell something a little bit at a time and
10 not tell all the details at once and get it all out there?
11 That's another question that you hear frequently from
12 extended family, individuals, and just people in my own
13 community that are trying to understand.

14 Q. So do you have an opinion then as to whether
15 those are issues that are understood commonly based upon
16 your experience?

17 A. In my opinion those are not commonly understood.

18 Q. Gradual disclosure was another concept you
19 talked about. What is gradual disclosure?

20 A. Meaning for me, when I'm using that term, that a
21 child would disclose some of the information but they
22 would not talk about all of the incidents, all of the
23 sexual abuse at once, they might tell it more gradually.

24 Q. And again, is this something you believe is --
25 you were touching on it and saying that was not something

1 you thought people would understand, why not?

2 A. Well, in my experience people feel that if this
3 child has finally pulled a lid off, if you will, and
4 started to talk about this, why wouldn't they just tell
5 everything? Why wouldn't they unburden themselves
6 immediately and get it all out of there and that way we
7 can follow up and do what we need to do to the
8 perpetrator?

9 They don't understand how the levels of
10 complexity that a child might experience with that, like a
11 child makes a decision to share some information and
12 they're looking to see what the response of the other
13 person is going to be: Will they be believed? Will they
14 cause this person that they're sharing this information
15 with distress? Will they feel more shame? Will they feel
16 like this person tried to convince them that these things
17 didn't really happen?

18 So if they're in a situation where they don't
19 feel heard, then they may decide not to talk anymore
20 because they've at least given some information and it
21 hasn't been received well.

22 Another -- another circumstance might be that
23 they are heard but they're sharing this information with
24 an adult and the adult becomes very distressed, and
25 children don't want to see people they care about very

1 distressed, so they might decide that they've given some
2 information that the perpetrator won't hurt them anymore,
3 maybe this won't happen anymore, but they no longer want
4 to upset this person they're sharing the information with,
5 so they'll just talk about a single incidence of fondling,
6 as an example.

7 Also we see, in a forensic interview, a child
8 might give a forensic interviewer more information than
9 they might have to an immediate family member because they
10 feel like this person is asking these questions and can
11 help and they can be much more matter of fact.

12 Conversely, a child may not want to talk to a
13 forensic interviewer because this is someone who is a
14 stranger to them and they're not sure what this person is
15 going to do with this information. So we do see both
16 sides of that.

17 I can say in my experience in treatment that
18 children -- very often you would have a certain set of
19 information about what has happened with this child based
20 upon a forensic interview, based upon a disclosure to
21 whomever, and later in treatment when this child feels
22 more safe and more secure, we often get much more
23 information about what has happened because the child then
24 feels safe enough to talk about some of the things that
25 they've continued to withhold for a number of reasons, not

1 the least of which is out of shame.

2 Q. You also mentioned behavior implications. What
3 have you observed, in your experience, or what's been --
4 can you comment on whether there are certain behavior
5 implications for these kind of victims?

6 A. Well, I think you look at a large picture
7 because no one behavior can indicate sexual abuse, but
8 what we do see is pattern behaviors in children who have
9 been sexually abused. We see increased aggression. We
10 see increased depression. We see increased clinging
11 behavior, you know, not wanting to let go of mom or that
12 kind of regressed behavior that a child may not have
13 demonstrated before. We see children being much more
14 anxious, fearful to go outside, fearful to go to school,
15 having a much stronger startle reflex so that some small
16 incident can cause them to startle, or a small incident
17 can cause them to be very upset.

18 We also see, in teenagers -- sometimes we see
19 running away, sometimes we see substance abuse, sometimes
20 we see promiscuity.

21 So none of those things taken on its own would
22 be a single indicator that something -- that this child
23 has been sexually abused, but we look at the collective of
24 those and that helps us in understanding what may have
25 happened to this child.

1 Q. How about sexual acting out, can you comment on
2 that?

3 A. Sexual acting out can happen with a child all
4 the way down to a very young child. We have seen children
5 who are two and three years old sexually acting out, and
6 this is very often a behavior that we see with children
7 who have been sexually abused; it can stem from other
8 things, but it's very unusual that it would. And we will
9 see children who, because they have been overstimulated
10 and their systems can't quite integrate what has happened,
11 they will reenact this over and over: public masturbation,
12 inappropriate behaviors, very poor boundaries around their
13 bodies and their private parts, things like that.

14 That they -- you will see in terms of behaviors
15 from a child who may have been sexually abused.

16 Q. In your work with the families of these victims,
17 are these behaviors ever misunderstood by the family when
18 they see that -- when they see the children manifesting
19 the signs?

20 A. Yes.

21 Q. How so?

22 A. I've seen that very many times, and that parents
23 will say, Well, we did see -- he, all of a sudden,
24 became -- he was a happy kid, and all of a sudden he
25 became a very moody kid; or he never fought with anybody,

1 and all of a sudden he started fighting with people; or he
2 was a kid who hit, but he started hitting much more and he
3 started hurting his little brother and I couldn't get him
4 to stop; I would tell him to go to his room, but he kept
5 putting his hand down his pants, things like that, that
6 they thought were some kind of behavioral problem but they
7 couldn't pinpoint it.

8 And I think it's more difficult with kids
9 because when children have depression, it can look very
10 different than an adult's depression. So adults can just
11 think that this child is acting out, you know, over
12 something much smaller, not in a pervasive way that
13 they're seeing real changes in behavior, but you do see
14 caregivers trying to account for those behaviors without
15 knowing what's going on for this child, and then later
16 saying, I can remember a time where I started seeing more
17 of this and that coincides with the sexual abuse and or
18 the disclosure.

19 We receive behavior problems after disclosure
20 oftentimes, too.

21 Q. How -- how does depression manifest itself
22 differently in children than adults?

23 A. Well, it can look very much more like
24 aggravation and increased aggression in children versus an
25 adult who we more often see sleeping more, withdrawing

1 more; but we do see some of those symptoms in children as
2 well, it's just that we can see depression manifest itself
3 in this other way in children.

4 Q. You mentioned that you had met Ms. Louise Lee.
5 Would it be typical for you to meet with a foster-care
6 provider?

7 A. It was -- as a practice within the organization,
8 whomever was caring for that child, we tried to meet with
9 them to create a relationship as well as let them know
10 what was available to them through the organization, so we
11 meet with a foster-care parent. We would also meet with a
12 biological parent, if that was appropriate, if the child
13 was in foster care but had a biological parent involved as
14 well. We would try to involve as many people as were
15 important to this child as we could in order to give them
16 more comprehensive care.

17 Q. But, to be clear, did you ever interview the
18 children?

19 A. I did not.

20 Q. And did you ever treat them in any way?

21 A. I did not.

22 Q. You mentioned that you had reviewed notes, but
23 you say you also never reviewed any therapy notes with
24 respect to Monique, only Tomas, correct?

25 A. Correct.

1 Q. Do you have any knowledge about the particular
2 sex abuse in this particular case?

3 A. To the best of my recollection, it was very
4 general. I don't know anything specific.

5 MS. CONBOY: If I may?

6 I have nothing further. Thank you.

7 THE COURT: Thank you.

8 Cross-exam, Mr. Ward?

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CROSS-EXAMINATION
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11 BY MR. WARD:

12 Q. Ms. Miller, good afternoon.

13 A. Good afternoon.

14 Q. I don't want to ask you a whole bunch of
15 specific questions about your qualifications, education
16 and background, but basically is it a fair summary that
17 your expertise is in the therapeutic realm when it comes
18 to dealing with child victims of abuse?

19 A. Versus -- I'm just trying to understand.

20 Q. Well, you're not actively conducting any
21 research in this field, are you?

22 A. No, I'm not.

23 Q. And you never have done that?

24 A. I have not done research in this field, no.

25 Q. Your focus has been on being available as a

1 source of treatment and therapy for children who have been
2 abused?

3 A. Yeah. I read the research, but I didn't conduct
4 the research, correct.

5 Q. And when you say you "read the research," you're
6 talking about some books that are on your CV?

7 A. Yes, some of the articles, and just different
8 things as they come along, I try to stay current, as well
9 as with trainings, additional things like that, yes.

10 Q. Okay. And primarily what you talk about today
11 and what you would propose to testify about if you're
12 allowed to testify in this case is what you've observed in
13 your experience as a therapist?

14 A. That, as well as my educational experience and
15 exposure to the other resources that I've stated, yes.

16 Q. Okay. And your experience, primarily, would
17 consist of about two hundred victims that you've treated?

18 A. In excess of that, but yeah.

19 Q. Okay. So you obviously -- you don't have a list
20 of who they all are?

21 A. I do not have that.

22 Q. Or keep any running total?

23 A. No. No, I do not.

24 Q. And your belief is that every one of the two
25 hundred or so people that you have treated was telling the

1 truth about having been sexually abused?

2 A. By definition, in my role as a clinician, as a
3 therapist, it wasn't my job to question them, so I would
4 say, yeah, I wasn't -- I didn't provide a forensic
5 interview or question their credibility, correct.

6 Q. That would be more of a forensic role?

7 A. Correct.

8 Q. So you accept the allegation as truthful and
9 don't do any further -- I guess -- looking into whether
10 they were truthful or not?

11 A. Correct.

12 Q. So when you talk about some of the different
13 things that may or may not happen, such as delay in
14 outcry, gradual disclosures, things of that nature, you
15 haven't conducted any research into how that correlates
16 with the truth or falsity of the allegation?

17 A. I haven't conducted any research, no.

18 Q. Okay. And essentially it's possible that some
19 of those things that you described are applicable to
20 people who have made false allegations of abuse just as
21 they are to children who actually have been abused?

22 A. The research that I have has been around people
23 who have been identified as sexually abused and there
24 hasn't been the question of whether or not this child --
25 or this adult, giving information later in life, the

1 question of credibility.

2 There have been -- some of the research is based
3 in -- there have been witnesses of that. Some of the
4 children still don't disclose, even though there's
5 witnesses of the acts.

6 Children who report these things anonymously --
7 but as far as a comparison of whether or not somebody is
8 giving a false accusation within that research, that, I
9 don't recall, has been identified in the research that I
10 have covered.

11 Q. And in a great many of these cases, it would be
12 impossible to determine conclusively whether the
13 allegation is true or false if there's not some sort of
14 physical evidence?

15 A. Or a witness, yes. Usually it is the child's --
16 the child's word, the child's experience that we go with.

17 Q. Okay. So it would be very difficult to draw
18 conclusions about the statistical correlation between the
19 factors you've described and the truth or falsity of a
20 particular allegation?

21 A. I wouldn't want to venture to say if that would
22 be difficult or not. I haven't studied it so I don't
23 know.

24 Q. You don't know?

25 A. I don't know.

1 Q. That's not something that you're focused on?

2 A. It's not something that I'm focused on.

3 Q. You're focused on helping people who have
4 disclosed, true or false, that they have been sexually
5 abused?

6 A. As -- in my role, yes, to not question them,
7 yes.

8 Q. Okay. Now, how much of your experience did you
9 give an estimate out of the two hundred or so cases that
10 you have been involved in -- specifically concerns cases
11 where abuse happened to a child who was very young, say
12 under the age of six, and a disclosure is made at the time
13 that that person has become an adolescent, say over the
14 age of fourteen?

15 A. I wouldn't be able to give you an exact
16 statistic on that.

17 I would say -- I will have to venture a guess,
18 really, because I would have to think about it a little
19 bit more than the Court would have time for. But I
20 certainly have seen that in my practice with children,
21 with an adolescent coming back and saying these are things
22 that happened to me when I was very much younger.

23 Q. And I guess that just brings up a point that,
24 you know, I asked you about -- that you don't keep a list
25 or an exact tally of the number of people that you've

1 treated, correct?

2 A. Correct.

3 Q. And you also don't keep any kind of statistics
4 or data about how often you observe these specific
5 phenomena that you testified about that sometimes come up
6 with abused children?

7 A. I haven't kept specific data on it, no; but
8 there is research that does keep specific data on it, and
9 it seems to correlate with that.

10 I mean, what we see is the majority of children
11 do delay in disclosures, and that's been my experience.
12 That's what I've seen in the research as well.

13 Q. When you say "in the majority," you don't know
14 what -- in what percentage of cases people delay in
15 disclosure?

16 A. The research says somewhere between 60,
17 80 percent, if not more.

18 Q. Okay. And I guess that would correlate to
19 meaning in 20 to 40 percent of the cases the children
20 don't delay?

21 A. I guess that you could say that. I think there
22 are -- there are a number of things that factor into that,
23 so it's probably not quite that simple.

24 Q. Okay. So it -- suffice it to say that in your
25 experience and in the research, sometimes children delay

1 disclosure and sometimes they do not delay in disclosure?

2 A. Most of the time they delay in disclose and
3 sometimes they don't delay in disclosure.

4 Q. Okay. And you are not able to say how that
5 delay in disclosure correlates with the credibility of the
6 accusation?

7 A. I could not say to that.

8 Q. And you gave some reasons for why these delays
9 occur. One of those is that children could be afraid?

10 A. Correct.

11 Q. And another was, I think, it could be because
12 they don't understand what happened to them, maybe with
13 younger children?

14 A. It, again, comes back to where they are age-wise
15 and developmentally, but it can be that there is a piece
16 of that, whether or not they're not quite sure what's
17 happened, yes.

18 Q. And there can be a whole bunch of other reasons,
19 too.

20 A. Why a child might delay in disclosure? Yeah.
21 Yes.

22 Q. All right. And you don't -- you haven't
23 interviewed or met with the alleged victim, Monique Ulloa,
24 in this case?

25 A. I have seen her in the organization, but I have

1 never met with her or interviewed her, no.

2 Q. So you don't even know in this case whether
3 there was a delay in outcry or whether she's exhibited any
4 of these other factors that you talked about?

5 A. I don't recall any information about how the
6 disclosure happened. My recollection was really around
7 the behaviors that her foster-care mother was concerned
8 with about her now -- or then, when I met with her at that
9 time that she was living with her. And that was more
10 around boundary things that she had some concerns that
11 she -- she was -- she might attach to men too readily, be
12 too open, and that is something that is consistent with
13 sexual abuse, yes.

14 Q. And it's also consistent when a young person
15 doesn't do those things?

16 A. Yes.

17 Q. Now, back then, why children delay in
18 disclosure, it's also a possible reason that one of the
19 reasons there might be a delay is because the allegation
20 is false?

21 A. Why they might delay in the disclosure?

22 Q. Why they might say something happened but a long
23 time ago?

24 A. I guess that's a possibility, yes.

25 Q. You talked also about to whom a child might

3 Q. And it's your testimony that it's possible that
4 a child might disclose it to a parent or a guardian?

6 Q. Possibly that they might disclose it to a
7 sibling?

9 Q. Possibly they might disclose it to a stranger
10 that they meet on the bus?

12 Q. Well, you've actually previously testified in a
13 number of cases concerning your expertise, right?

15 Q. And do you recall testifying in the case of
16 People versus Arturo Marquez?

17 A. I recall testifying. I don't remember my exact
18 testimony in that case.

19 Q. Okay. And you testified on June 15th, 2005, in
20 that case.

21 MS. CONBOY: Does Mr. Ward have a copy for me to
22 look at?

23 MR. WARD: I'm sorry, I do not; but I'll be
24 happy to hand you this one as soon as I ask one question
25 about it.

1 Q. (By Mr. Ward) And I'll show you a transcript
2 of your testimony in that hearing.

3 You were asked the question about younger
4 children, and you said, What I'm talking about are two- or
5 three-year olds. They might come and talk about that
6 they -- that something happened to them that day. They
7 may tell a stranger on the bus as well as their mom.

8 A. Oh, okay. So that puts it in a context for me,
9 because I was in a different developmental stage than
10 that.

11 Yes, that's, in fact, possible. A two- or a
12 three-year-old, as they tell strangers all kinds of things
13 sometimes -- not all of them -- but, you know, two- or
14 three-year olds can often just talk about things; and if
15 they're that excited or interesting or fun, they might
16 share it with someone on a bus: We're going to my
17 grandma's house today, to someone that they've never seen
18 before. We're going to the store to buy me a new toy.

19 With children who have had sexual abuse
20 exposure, if this is something that they really don't
21 understand what has happened, they might say, My grandma
22 touched me in my pee pee. And usually a parent, right
23 there, would say, You can't talk about that to other
24 people. So in that context, I apologize, you're right,
25 the stranger on the bus does apply there.

1 Q. And no need to apologize. I'm just making sure
2 that we get your responses correct.

3 A. Okay.

4 MR. WARD: Do you want to take a look?

5 Q. (By Mr. Ward) So the bottom line with regard
6 to that is that these types of disclosures can be made to
7 all different types of people?

8 A. Yes.

9 Q. And any one of those is consistent with an
10 allegation of sexual abuse, in your view?

11 A. Disclosure to any of those people would be
12 consistent.

13 Q. Well, to just about anyone, correct?

14 A. Well, I think it does matter who the person is
15 in terms of to whom this child would disclose. It
16 wouldn't just be any random person. There would be a
17 reason why, and predominantly because this child feels
18 this is someone who is going to believe them.

19 Q. And who the child discloses to does not in any
20 of the research you are aware of -- or your experience --
21 you're not able to say how that correlates to the truth or
22 the falsity of the accusation?

23 A. I am not.

24 Q. You talked about gradual disclosures and why
25 children do that sometimes.

1 A. Yes.

2 Q. And the truth with regard to gradual disclosures
3 is that sometimes it happens and sometimes it doesn't?

4 A. Correct.

5 Q. So in your experience -- and in the research
6 that you've reviewed, either one of those would be
7 considered -- consistent with an allegation of sexual
8 abuse?

9 A. Correct.

10 Q. Either gradual disclosure or an all-at-once
11 disclosure?

12 A. Correct.

13 Q. And another way of describing a gradual
14 disclosure could be that the child's statements from one
15 time to the next time are inconsistent with each other?

16 A. I wouldn't necessarily -- I mean, I think I
17 would have to know more information other than to say that
18 that would be gradual disclosure.

19 Q. Well, let's say a hypothetical, if the first
20 time the child said something about this, he described an
21 act of sexual abuse and said the perpetrator had touched
22 his privates, and then the next time that he talked about
23 it, the child said that the perpetrator had sexually
24 penetrated him --

25 A. Yes.

1 Q. Now, would you -- you would consider that a
2 gradual disclosure?

3 A. I would.

4 Q. And another way of looking at that is as an
5 inconsistent statement?

6 A. Yeah, I -- I suppose you could look at that as
7 an inconsistent statement.

8 Q. And another reason someone might make those
9 inconsistent statements is because the disclose that
10 they're making is not true?

11 A. I would say that it's a possibility that the
12 inconsistent statements might go along with somebody
13 making a false accusation, however, moving up in terms of
14 sexual abuse and the kinds of things that have happened
15 would not be consistent in terms of a child who has been
16 sexually abused. In my experience, they would not want --
17 they wouldn't want to maximize what's happened. They want
18 to minimize it because of all the ramifications of what
19 has happened and what they feel their role is, so I would
20 say that your example, I would not think would be
21 inconsistent.

22 Q. Okay. And it's also possible to see a situation
23 where a child tells a more fantastic or extreme story
24 initially and then scales it back to something lesser?

25 A. Yes.

1 Q. You do -- and that would also be consistent with
2 the sexual abuse, in your experience, in research and
3 review?

4 A. Yes.

5 Q. You talked about some of the behaviors you see
6 exhibited in children who have made allegations of sexual
7 abuse?

8 A. I did.

9 Q. I think you said increased clinginess?

10 A. Can be.

11 Q. Antisocial, fear, sometimes you see children
12 runaway, sometimes you see substance abuse or bad
13 behavior, and it's true that sometimes none of those
14 things are present?

15 A. Yes.

16 Q. And sometimes parent and caregivers aren't able
17 to discern any difference in the child's behavior
18 whatsoever?

19 A. In general -- in my experience parents aren't
20 able to discern a difference in behavior but then later
21 they are able to identify a difference because the child
22 is demonstrating something different, in my experience.

23 Q. So if I understand you correctly, you're saying
24 that after the disclosure has been made, then the parents
25 will say, Oh, jeez, he has been kind of moody but I didn't

1 really notice it before?

2 A. That can happen.

3 I think when a parent says there have been
4 absolutely no changes in behavior, I've seen an indication
5 all things have remained the same, what we see is that
6 there were some changes in behavior, perhaps more subtle
7 than with another child, but a parent may not notice those
8 for a number of reasons and then later will say, now that
9 you mention it, I did see, you know, she did seem more
10 sad. She didn't want to talk to her friends as much as
11 she used to. There was some shift.

12 Q. Okay. And we don't need to go into what all of
13 them are, but it's also fair to say that all of those
14 things that you described can be manifested in a child or
15 an adolescent as a result of all kinds of different
16 reasons --

17 A. Yes.

18 Q. -- that are not sexual?

19 A. Yes.

20 Q. It could be instability in the home?

21 A. Yes.

22 Q. Anything along those lines?

23 A. Yes.

24 Q. Okay. And you don't know, again, whether any of
25 those behaviors or factors are present in this case?

1 A. Only when I mentioned to you about my knowledge
2 of Monique having some boundary issues with men.

3 Q. All right. And again, you can't say with any
4 kind of statistical accuracy or anything along those lines
5 how often any particular behavior that's observed is
6 correlated with an accurate or true allegation of sexual
7 abuse as opposed to a false one?

8 A. I cannot.

9 MR. WARD: I don't have any further questions.

10 THE COURT: Thank you.

11 Ms. Whitney?

12 MS. WHITNEY: I don't have anything further than
13 what Mr. --

14 THE COURT: Redirect?

iiiiiiiiiiiiiiiiiiiiii
REDIRECT EXAMINATION
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17 BY MS. CONBOY:

18 Q. Ms. Miller, is it your role to tell the jury
19 whether or not the victim is telling the truth?

20 A. It is not.

21 Q. What is your role?

22 A. As I see it, it's to help them understand the
23 impact of sexual abuse on children and how that might
24 affect how they communicate what has happened to them and
25 some of the behaviors that might manifest as an end

5 A. I am not.

7 A. I am not.

9 THE COURT: Okay. Thanks very much.

12 THE COURT: Did you do -- yeah, you did cross,
13 so recross. Sorry I left you out.

16 BY MR. WARD:

20 A. I wouldn't say my role is to correct the
21 perception. My role is to just provide information to
22 give further understanding. I don't assume that a jury
23 does or doesn't know, but I would want to give them
24 information to consider, but not correct a perception.

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1 treatment and therapy that you conduct is that family
2 members or people who are close to these children often
3 say to you, why didn't he or she tell me sooner, or why
4 did he only tell me a little bit now and tell me more
5 later, and things along those lines?

6 A. That has happened in my practice, yes.

7 Q. And those people are often in shock or emotional
8 pain for a whole variety of reasons surrounding this?

9 A. They can be, yes.

10 Q. And one of them would be a lack of understanding
11 of why the person -- the child that's close to them
12 behaved in that particular way?

13 A. Yes.

14 MR. WARD: That's all.

15 THE COURT: Okay, thank you, ma'am.

16 Ms. Conboy, any other witnesses on the Shreck
17 issue?

18 MS. CONBOY: No, Your Honor.

19 THE COURT: Shall we hear some brief argument on
20 Shreck?

21 MS. CONBOY: Jodi Byrnes is still here.

22 THE COURT: Who is still here?

23 MS. CONBOY: She was here at the defense's
24 behest.

25 MR. WARD: Rape shield.

4 iiiiiiiiiiiiiiiiiiii
CLOSING STATEMENT
5 iiiiiiiiiiiiiiiiiiii

9 Just speaking generally about it -- thank you --
0 Your Honor, I think the question that the Court must ask
1 is whether or not Ms. Miller can offer assistance on a
2 matter which is not within the knowledge or common
3 experience of people of ordinary intelligence.

17 Tell me if I'm right, I have four of them down,
18 why -- well, I wasn't sure whether she was going to
19 testify about why people delay in outcry. I'm not sure
20 she's going to testify that this specific-named victim
21 delayed in outcry because of these things or whether she
22 was just going to testify that victims of sexual assault
23 more often than not delay in outcry.

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1 MS. CONBOY: Well, it would be my intension
2 to -- I would want to use Ms. Miller to explain to the
3 jury why it is that Monique was sexually assaulted and
4 will come in to describe acts of sexual assault by her
5 father when she was five or six years old and then acts
6 that occurred at the hands of Mark when she was ten or
7 eleven, but then waits to disclose until she gets to
8 Ms. Lee's house.

9 THE COURT: Except I didn't hear her opine about
10 them. She just said, More often than not victims delay.
11 There are lots of reasons they might. It might be this,
12 it might be that, it might be this; but I didn't hear
13 anything tying up to an opinion about why this victim
14 might have delayed. Maybe it's not even an appropriate
15 opinion, but --

16 MS. CONBOY: Well, the reason that she is -- the
17 reason that Monique -- we want to use the jury to explain
18 why Monique delayed -- is because Monique wasn't in any
19 kind of safe environment.

20 This case has a horrific chronology, Your Honor,
21 and one that I'm not sure -- and I recognize this Court
22 has sat through quite a few hearings in this case.

23 THE COURT: I not only sat through, I've gone
24 through the social services records.

25 MS. CONBOY: Fair enough. Then you are as

1 familiar as anybody in this room with the chronology; and,
2 Your Honor, I believe that the average juror that's going
3 to sit in that box is not going to understand -- I'm
4 sorry.

5 THE COURT: I just need to know what opinions
6 she's going to elicit. That's step one. What are you
7 going to get her to say?

8 MS. CONBOY: That Monique did not tell until she
9 got to Louise Lee's house because she was safe there.

10 THE COURT: That's surprising to me because she
11 didn't say that today. You didn't ask her that. She
12 didn't say that.

13 MS. CONBOY: Well, I -- she doesn't know the
14 facts of the case. I -- I can ask her hypotheticals about
15 the case. I can say: If a child -- if a child is -- Suvi
16 Miller is going to explain to the jury why it is that if a
17 child is not in a safe environment, they are in a chaotic
18 place, they may not feel safe.

19 THE COURT: Sure, they may not -- they may.
20 60-40, 70-30. I mean, they may, they may not.

21 Can -- maybe we can focus a little bit. What
22 about gradual disclosures, what do you want her to opine
23 about in terms of gradual disclosures, that they happen?
24 That they happen more often than not?

25 MS. CONBOY: Yes, that the reason that Monique

1 might have only told -- as you know from reading the
2 social services history, Monique had some sexual acting
3 out way back when she's three years old, in 1995. In
4 19 -- they have a sexual abuse consultation because she's
5 having inappropriate behaviors with a doll.

6 At that point she says Tommy touches her.
7 Nothing's ever done about it, so she says nothing further
8 until she makes a disclosure in 2000 about her Uncle
9 David. And, again, she only tells an aunt.

10 And then they follow-up and have her interviewed
11 with a Detective Joe Rodarte, which she says it again.
12 Then, all along, there's this horrible family history
13 where mom is out, dad's in, they're bouncing around with
14 Lori Lupprino. Ultimately she gets to Louise Lee's,
15 then -- then it's only then when her life is getting on
16 track, that she's able to really come out and say, Hey,
17 here's what really happened to me.

18 THE COURT: But I guess I have the same kind of
19 question: Is it your expectation that Ms. Miller will
20 testify at trial in a way more specific than she testified
21 at this hearing? That is to say, is she going to say that
22 in her professional opinion within a degree of
23 professional, reasonable certitude that this victim
24 delayed outcry because of these factors that I haven't
25 heard? Or is she going to say victims sometimes gradually

1 disclose -- gradually?

2 Is it going to be a general: This is what
3 sometimes happens? Because that's what I heard here
4 today. Or is it going to be, It's my opinion that this
5 victim may have delayed because she suffers from these
6 behavioral -- from this hist -- terrible history?

7 MS. CONBOY: Given -- given the Court's inquiry,
8 I think it would be prudent to have Ms. Miller read the
9 file and make exactly that opinion based upon her
10 experience.

11 THE COURT: So why hasn't she? This was the
12 hearing to find out what her opinion was going to be.

13 MS. CONBOY: Because, Your Honor, it is still
14 the People's position that under Rule 702 it is still very
15 helpful -- if we've got jurors that don't understand
16 anything about delayed disclosure, don't understand about
17 gradual -- have all the questions that she told us, based
18 upon 200-plus families that she's been working with, that
19 these are all questions that people ask so the standard
20 for letting someone come in and opine -- I recognize
21 there's five for cross-examination, absolutely, but that
22 doesn't change the fact that if it's going to assist the
23 trier of fact if these are questions -- if we have a
24 professional who is out there in the field who is telling
25 us that she's been in the trenches with these people, the

1 families who are asking all of the questions that I am
2 concerned our jury is going to ask, I'm not offering her
3 to say Monique is telling the truth or not.

4 THE COURT: Right. Right. But that's, of
5 course, the big problem we all ball up against with this
6 kind of evidence when you just throw it out there and
7 there's kind of -- from therapists whose world is to
8 assume this happened in a context where in our world we
9 assume it didn't.

10 There's this -- there's this friction, and so
11 when you say it will be helpful to the jury to answer
12 these questions, what's the answer to the question going
13 to be? Is it that -- is it that this sometimes happens
14 because of these factors, or that it more likely than not
15 happened in this case because of these particular factors?

16 MS. CONBOY: The latter for sure, but I --
17 definitely the latter. But that's what we want to tie up
18 to the jury.

19 Suvi Miller, Your Honor, is only one piece of
20 the puzzle in this case.

21 The cases that I handed to you and also handed
22 to counsel, this is not a new area for the courts to
23 allow. For example, in the Morrison case that I have in
24 the file, expert testimony was allowed -- or was held
25 proper to help the jury understand the reactions that

1 happened by young boys who were the victim of sexual
2 assault; or the Fasy case, expert testimony on the
3 posttraumatic syndrome is admissible on the issue of child
4 victim delay in reported sex assault.

5 Again, I think that these are -- if these are
6 all admitted under 702, the Carter case, which is the
7 second in the packet, testimony based upon professional --
8 clinical observations of professionals regarding pattern
9 affects and dynamics of child sex abuse is admissible.

10 These are -- I think it's a regular -- a regular
11 thing for these -- the courts to be allowing -- if it's --
12 if it's to assist the trier of fact.

13 THE COURT: Can -- what about the third thing
14 that I have down, behavioral indicators, what's the actual
15 opinion going to be there? Because the opinion I heard
16 here is, Here's seven things, we sometimes see it, we
17 sometimes don't. Sometimes it's an indication of sexual
18 abuse, sometimes the engine can be other things.

19 What's the actual -- is she going to give an
20 actual opinion about behavioral indicators that she saw
21 these six things in this file and she believes within a
22 reasonable degree of -- whatever -- social-worker
23 expertise that this -- these are indicators of sex abuse?
24 Or is she just going to say in general, These are the
25 things that sometimes are indicators?

1 MS. CONBOY: Your Honor, I don't think that --
2 well, let me answer your question. The -- she's going to
3 talk about how she saw Monique getting herself together.
4 You heard Tomasitto talking today about this terrible
5 period of time when they first got to Louise's house and
6 they got themselves back on track, and there were
7 significant behavior changes in both of these kids, but
8 most specifically and most important with Monique when she
9 finally arrived at Louise's and got into a safe
10 environment was able to settle down and feel that someone
11 was taking care of her and she wasn't in this chaotic,
12 tumultuous environment that finally she was -- she felt
13 like she was in a place where she could disclose. And I
14 do expect Ms. Miller is going to be able to tie that.

15 Respectfully, Your Honor, I don't know that she
16 needs to testify to a reasonable degree of certainty as a
17 professional in her field. I think the question is
18 whether or not she -- what she has to say would be
19 assisting the trier of fact.

20 I recognize that there are cases out there where
21 there -- where we do put on an expert, we qualify them,
22 and they say, To a reasonable degree of medical certainty,
23 I believe that her patella was fractured. But we also --
24 okay. We also have all kinds of experts that come in and
25 talk about things such as rape-trauma syndrome -- I had a

1 case with an expert -- I mean, I could cite for the Court
2 all kinds of cases where the Court of Appeals have said
3 the trial court was within its discretion in order to
4 allow an expert to come in and testify about the affects
5 that a rape would have and what we might expect to see
6 from a victim. And those cases, I think, are very, very
7 analogous to what we have in the present case.

8 THE COURT: Right, but in those cases they
9 don't -- do they or don't they -- say, And we saw them in
10 this case and therefore this is consistent with being
11 raped?

12 MS. CONBOY: No, I don't believe so, Your Honor.

13 THE COURT: So you are not going to ask the
14 specific question in this case, you're just going to have
15 hearsay, This is what we see sometimes?

16 MS. CONBOY: I think the way the Court's asking
17 those questions of me, I think I'm going to have to ask
18 her that question, that's with just what I'm hearing.

19 THE COURT: These are just questions. I don't
20 know what her opinions are. You are telling me one thing.
21 After hearing what she said, it basically -- I'm not sure
22 I can compare. That's why this is an unusual Shreck
23 hearing for me. She says this sometimes happens but I
24 don't know anything about this case. This sometimes
25 happens, but I don't know nothing about this case.

1 Is that the opinion that she's giving -- or
2 she's going to, between now and trial, know something
3 about this case?

4 MS. CONBOY: Your Honor, if the Court's troubled
5 by the fact that she has not -- I heard her give quite a
6 few opinions today -- but is the Court troubled by the
7 fact that she has not read the case file? That's
8 something that can be rectified, and that's not something
9 that I understood was the problem. I felt that Ms. Miller
10 gave quite a few opinions.

11 THE COURT: She did, but not about this case in
12 particular.

13 MS. CONBOY: No.

14 THE COURT: Okay, that's all I wanted to know.
15 So she's not or she is?

16 MS. CONBOY: Well, I'll ask -- I'm going to ask
17 her and say, Given -- Given what we know, if you have --
18 if you have a child who does this, this, and this, is that
19 to be expected? Are these behaviors to be expected?

20 THE COURT: Are they consistent with being
21 sexually abused?

22 MS. CONBOY: Yes.

23 THE COURT: Are they consistent with not being
24 sexually abused?

25 MS. CONBOY: Yes.

1 THE COURT: How does that help the jury again?

2 MS. CONBOY: Because -- because I think the jury
3 is -- the jury -- the average person is going to come: My
4 kid will tell me. My kid will tell me. I've got a great
5 relationship.

6 The average juror has not dealt with sexual
7 abuse so the average juror is going to say, I don't get
8 it, Monique had a mom. She called this lady, Lori
9 Lupprino, her grandma, her mom. This woman took on this
10 raising/caretaker role for her. Why didn't she tell Lori
11 Lupprino? Why did she tell Louise as soon as she got
12 there? Tomasitto is in jail. I don't get that.

13 THE COURT: And the expert will be of assistance
14 because the expert will say, sometimes 60-40, or 70-30,
15 they don't tell, and that will be the extent?

16 MS. CONBOY: No, I think the expert is going to
17 say, I treated over 200 victims of child sexual assault
18 and I am telling you, based upon my experience, that this
19 is what happens, that she didn't say 60-40.

20 Mr. Ward might have gotten her to use that
21 percentage on cross, which I don't recall, to be honest,
22 but she -- she's saying that it is -- it is far more
23 common this is what happened, why children delay
24 disclosures. Children disclose when they feel safe.
25 Children disclose -- you know, all of the things that we

1 can tie into the facts of this particular case.

2 THE COURT: Right. More often than not they
3 disclose, is what she said; probably far more often than
4 not.

5 MS. CONBOY: Yeah. Based upon her experience,
6 and I think coming in with two hundred -- treating two
7 hundred victims is nothing to scoff at, and I think she --
8 she's saying, Look, I'm out there in the trenches, and not
9 only is she treating the two hundred kids, she's treating
10 the families, too; and she's saying, Look this is
11 happening. These kids aren't talking.

12 And the way I heard her to say -- and the way I
13 understood it through all my preparation with her is that
14 kids delay. That's the vast majority of them. They're
15 not coming home and saying, Mom, I got sexually abused by
16 my teacher or by my dad or by my uncle.

17 They are delaying. They are telling in bits and
18 pieces and they are -- they are telling at times when
19 they're feeling safe. And I'm planning on taking facts of
20 this case and applying them directly when I question her.

21 But just -- like I say, I have further argument
22 if the Court wishes further argument, or I can reserve it
23 for rebuttal.

24 THE COURT: Okay, thanks.

25 Mr. Ward, your brief argument?

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 CLOSING STATEMENT
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MR. WARD: Well, Your Honor, first of all, I've got a big problem with the District Attorney now stating that there's going to be some other kind of opinion that will be expressed that was not stated in the offer of proof, in the written motion, and it was not testified to by her witness today. I mean, if that's the case, what is the point of having this hearing at all?

She can just, you know, double back and try to retread this thing for a different angle since she doesn't appear to believe that the Court likes the original angle that she was trying as to what was said today.

You know, as far as the prongs of Shreck, we have reliability and relevance. I'm not going to talk about whether the witness is qualified to opine, she obviously has some specialized experience that the rest of us don't; but I think there's a problem with whether the principles that she's talking about are reasonably reliable.

You know, the social sciences are not hard sciences in a lot of people's eyes, but they are science and there are ways that these types of things that she wants to express opinions about can be studied in a reliable manner, can be quantified.

1 THE COURT: If I allow her to give the -- what
2 I'm going to call the general opinion that -- that victims
3 who survive sexual abuse more often than not -- greatly
4 more often than not -- delay; greatly more often than not
5 give gradual disclosures, they are no more complicated
6 scientific principles than that in arithmetic, counting up
7 the number of cases that she's had and say, Hum, how many
8 delay?

9 MR. WARD: Which is something she said that she
10 has not done, Your Honor.

11 Your Honor, she hasn't kept track of anything
12 that's happened in the specific cases. She just says:
13 For all we know. It's kind of -- yeah, it seems to me
14 that that happens a lot.

15 THE COURT: But she referred to studies that
16 were -- and the studies are attached to them -- to her CV
17 and the motion.

18 MR. WARD: Well, she didn't refer specifically
19 to any studies that say a number with regard to that. And
20 none of the -- I suppose I can go pull each and every one
21 of those studies and see what each one says.

22 The CV doesn't list that -- what that
23 information is. And taken aside, the one thing that she
24 did express some sort of a probability for -- all of the
25 other opinions she didn't say anything as to how

1 frequently we might observe this particular phenomenon --
2 those are all things that could be studied by legitimate
3 social science tests and could be quantified and a
4 reliable opinion would be able to be expressed on those
5 things: How frequently is this phenomenon seen in what
6 context.

7 What this evidence is really about, Your Honor,
8 is whether this is a true allegation or a false
9 allegation. I mean, that's the bottom line of what the
10 jury needs to figure out here.

11 I guess that's kind of shifting a little bit to
12 the -- more of the first question, or whether it's
13 relevant here. And I think that's probably the bigger
14 problem with this evidence than the reliability problem.
15 There is some kind of notion being touted here that this
16 is going to be a problem for jurors to understand, that
17 children sometimes delay in making outcry or disclosure.

18 She wasn't able to state any evidence that would
19 support that as far as whether there is any general public
20 perception of that sort that would have to be rebutted by
21 any kind of opinion she could provide.

22 What they said is that based upon family members
23 that she's talked to, she's heard people say, Well that's
24 a whole lot different from the public at large and from
25 the typical juror. That's a person that is directly

1 connected to the case that she's working on and is likely
2 to feel hurt or cheated or betrayed by someone who hasn't
3 told them these things sooner and much more likely to have
4 those concerns.

5 What she wants to tell the jury is that
6 sometimes the disclosure is delayed, sometimes it's not;
7 sometimes a victim may exhibit behavioral changes or other
8 psychological problems, sometimes they don't; sometimes a
9 person that commits those things, it might be as a result
10 of sexual abuse, it might be as a result of other factors.
11 Those are things that the typical juror is already going
12 to know, for one thing, coming in here. And she's not
13 providing them with any information that's not part of the
14 basic knowledge of a citizen of this country -- I think,
15 at this point -- and unless she can be more specific than
16 that, it's not helpful to the jury and it's going to
17 result in a waste of time, and I think, confusion; and I
18 would ask the Court to keep this testimony out of the
19 trial.

20 THE COURT: Thank you.

21 Ms. Whitney, anything you want to add?

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 CLOSING STATEMENT
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24 MS. WHITNEY: The only thing that I want to add,
25 with respect to Mr. Ward's argument, is just a 403

1 analysis. If she is allowed to testify, the danger of
2 unfair prejudice to the jury in terms of the danger of her
3 testimony validating Ms. Ulloa's statements as it goes to
4 her general credibility, that's the issue in this case;
5 and the 403 analysis should be considered also.

6 That's all I have.

7 THE COURT: Thanks.

8 Ms. Conboy, anything else from you then?

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CLOSING STATEMENT

MS. CONBOY: Your Honor, just to point out --
and again, just to point out for the Court and counsel, on
the first case of the packet that I handed everyone is the
People v. Morrison, and that was at 985 P.2d 1st, Colorado
Court of Appeals from 1999.

THE COURT: Is that the one where it says cert
granted?

MS. CONBOY: Yes, cert was granted; and, Your
Honor --

THE COURT: So what happened?

MS. CONBOY: Your Honor, I do not have the
follow-up -- the follow-up history -- subsequent history.

I will tell the Court that --

THE COURT: It was affirmed.

MS. CONBOY: Thank you.

1 THE COURT: I don't know what was affirmed
2 though, what cert was taken on, but my intern just looked
3 it up.

4 MS. CONBOY: Thank you.

5 THE COURT: Okay.

6 MS. CONBOY: As part of the prosecution's case,
7 they had a licensed marriage and family therapist with a
8 Ph.D. in clinical psychology testify as an expert in the
9 area of sexual abuse treatment and the dynamics of sexual
10 abuse, and I just want to point out that during the
11 expert's first day of testimony, that expert testified in
12 general terms.

13 The Court notes about many aspects of the sexual
14 abuse, including, number one, the grooming of the victim
15 by the sex offender; to common patterns of disclosure of
16 sexual abuse by children, including delayed reporting; and
17 three, differences between male and female victims. These
18 were general -- again -- general matters that this expert
19 was testifying to.

20 And the other thing I wanted to point out is the
21 matter of People v. Carter, which is the second case in
22 the packet, 919 P.2d 862; and that was April 11th of 1996.

23 The Court of appeals noted that, "While the
24 behavioral changes in children are -- that frequently are
25 associated with sexual abuse are not conclusive on the

1 issue of whether the abuse actually occurred, these
2 behavioral changes may constitute corroborative evidence
3 of the existence of the sexual abuse of which the victims
4 have complained; thus, evidence of this type is admissible
5 even if it tends to support the credibility of a
6 child/victim's out-of-court statements as long as it's not
7 offered as evidence that the victim was being truthful on
8 a particular occasion."

9 Again, I've cited the Court to the Fasy decision
10 as well, which was 829 P.2d 1314, which is a Supreme Court
11 decision in which the Colorado Court of Appeals allowed
12 the expert to testify about the delay in reporting.

13 Your Honor, I'm just asking this Court to
14 recognize that the average person, contrary to what
15 counsel said, is not going to understand or have any
16 experience with child victims of sexual assault.

17 There are a lot of questions in this case. I
18 think that the average person will have a lot of questions
19 about why Monique waited, why she chose to disclose to
20 Louise Lee, why she didn't tell Nisa Pelman, with whom she
21 had apparently a very close relationship for a period of
22 time, albeit a tumultuous one.

23 All of those are questions that I think it's
24 fair to the jury to allow them opportunity -- and I will
25 tie up through her -- through Suvi Miller -- the specific

1 patterns or the specific behaviors that then we will seek
2 to argue later on to the jury are corroborative evidence
3 of what happened in this case. So I would ask this Court
4 to allow us to present evidence of Suvi Miller's
5 expertise.

6 THE COURT: Thank you.

7 Let me start with what Ms. Conboy ended with.
8 Ms. Miller will not be permitted to testify -- quite apart
9 from Shreck and 702 -- to any opinions she did not give
10 today. That's the whole purpose of this hearing, so the
11 universe of opinions that I'm dealing with are the
12 opinions that she gave today.

13 The other thing I want to start out by saying --
14 and I can't remember if I've had you all ever before,
15 maybe some of you and maybe not some of you in these -- in
16 these hearings -- these are difficult for me because -- I
17 guess for two reasons: I have -- I have so much trust in
18 jurors that if it were up to me, I would let every kind of
19 opinion in as long as there was some minimum qualification
20 and relevance and would let them decide reliability; but
21 it isn't up to me, it's up to our Supreme Court, so the
22 Supreme Court has told us that we have some gatekeeping
23 responsibility with respect to these issues, including
24 reliability.

25 The other thing I do want to say, generally

1 speaking, is sometimes I think we -- sometimes I think we
2 treat all expert opinion as if it's scientific opinion and
3 it's not true and 702 recognizes that it's not true. 702
4 talks about scientific, technical, or other specialized
5 knowledge, and so the question really isn't whether
6 Ms. Miller is a scientist or whether this is science, the
7 question is whether she has specialized knowledge that's
8 reliable and relevant, which of course we'll talk about in
9 a second.

10 The problem comes up -- the -- the problem is
11 sort of exacerbated by the fact that many of these
12 nonscientific experts act like they're scientists so they
13 talk about research, and that's where sort of the rubber
14 meets the road and I start to have problems with
15 reliability.

16 So let me talk about what I understand are the
17 opinions that are on the table. I heard three opinions
18 that -- for the reasons Ms. Miller articulated -- and
19 there were many of them; some may apply to this case, some
20 may not apply to this case -- victims of sexual assault
21 often do not -- often delay in their outcry. I think the
22 testimony was much more often than not delay in their
23 outcry. That's one opinion.

24 The other opinion is victims of child sexual
25 assault much more often than not give a gradual

1 disclosure, again, for the reasons -- various reasons she
2 articulated, some of which may apply here and some of
3 which may not.

4 And then the third opinion that I heard her give
5 today was that there are behavioral indicators that are
6 neither sufficient nor necessary, as I understood her
7 testimony with respect to sex -- sexual abuse, but often
8 times accompanying sex abuse. And she ran through a list
9 of about seven or eight, increased aggression, increased
10 clinginess, anxiety, fearfulness, sometimes substance
11 abuse. All of these are -- sometimes promiscuity, sexual
12 acting out. Those -- and those are the three opinions
13 that I heard. So, of course, there's the reliability
14 prong and the relevance prong.

15 Let me talk about reliability first. Two issues
16 she qualified -- yes, no doubt she qualified on all three
17 of these -- is she a scientist? No. But I think her
18 experience and her -- not only clinically but academically
19 gives her qualification to give these opinions.

20 The most difficult prong -- well, maybe not the
21 most, but one -- another difficult prong is reliability,
22 and the reliability prong asks: Are there scientific
23 principles -- are the scientific principles that the
24 witness is testifying about reliable? And this is the one
25 I was talking about. It doesn't have to be scientific

1 principles, but when it's dressed up as science, then I
2 expect some doubt or like evidence.

3 And in this case, let me start with the third
4 opinion, these behavioral indicators that Ms. Miller wants
5 to opine about are dressed up as science and so I expect
6 some Daubert kind of backup for this, and Shreck says we
7 can look at Daubert even though Daubert is not dispositive
8 of the reliability inquiry. These are things that we can
9 look at when somebody's professing to give a scientific
10 opinion.

11 Has the technique been tested? I don't know.
12 I -- she didn't testify about whether any of these
13 indicators are corroborative of whether somebody actually
14 was sexually assaulted, when these -- whether there has
15 ever been any studies about what variables weighted more
16 than any other variable.

17 Some of the other Dalbert things subject to peer
18 review and publication, no doubt that's true. I don't
19 know about peer review, but certainly publication.

20 Scientific techniques known -- no evidence about
21 whether there's any science behind these behavioral
22 factors, except, you know, anecdotal things that a barber
23 could tell you, somebody who has been sexually assaulted
24 is sometimes fearful, you know.

25 Whether the technique has been generally

1 accepted, no, no evidence about that. I'm not even sure
2 there was a technique about error rates -- no nothing
3 about error rates because that gets to the thing that I
4 mentioned at the very beginning, which is that -- and I
5 think counsel touched on it in their cross-examination --
6 we have the world of therapy which presumes these
7 allegations are true and doesn't care whether -- what --
8 Ms. Miller doesn't care whether the two hundred clients of
9 hers were actually sexually abused, it doesn't matter to
10 her, is what I heard, because people get treated -- people
11 have psychiatric problems if they believe they were
12 sexually assaulted and or even if they weren't just as
13 much they have if they really were.

14 And I appreciate that and respect it, but it's a
15 very different thing than we do. What we deal with in
16 courtrooms is the truth, and in courtrooms the presumption
17 is exactly the opposite. The presumption is that these
18 allegations are not true.

19 And so it's not surprising that there's not any
20 Daubert kind of evidence which would support the
21 reliability prong, because we never get -- in this body of
22 work -- to the question of whether these indicators are
23 indicators of anything. For all I know, every one of
24 these indicators applies only when somebody is not telling
25 the truth as opposed to when somebody is telling the

1 truth, or vice versa, or some subset of indicators, so I
2 think opinion three about the behavioral indicators fails
3 the reliability prong. It also fails the fifth -- let me
4 move to relevance now.

5 Will it be of assistance to the jury? I don't
6 think so. I answer no to all of these, that's my way of
7 saying jurors know that somebody who has been sexually
8 abused may be fearful, it may screw them up. That's
9 basically what Ms. -- what Ms. Miller says about
10 behavioral indicators: If you get sexually abused when
11 you're a child, you might get screwed up emotionally,
12 psychiatrically, in all kinds of ways. Everybody knows
13 that. And since she can't distinguish between the screw
14 up that happens when you're actually sexually abused and
15 the screw up that happens from some engine that causes you
16 to think you were sexually abused or to lie about your
17 being sexually abused, this really does not -- gives the
18 jurors no additional information or useful information.

19 And, finally, on the relevance prong, let me
20 talk about the prejudice. The prejudice is that these
21 jurors will think that this is science when it's not.
22 Even though Ms. Miller won't be permitted to testify about
23 her beliefs about whether this victim is testifying
24 truthfully or not, that's what all these have a risk of
25 causing the jurors to think: Hum, people who are sexually

1 assaulted are sometimes aggressive, sometimes clingy,
2 sometimes anxious, sometimes fearful, sometimes they abuse
3 substances, sometimes they're promiscuous. Gosh this
4 victim has all of those things, she must be telling the
5 truth.

6 I mean, that's the whole purpose, it seems to
7 me, of this kind of testimony and it's just not reliable
8 enough and there's substantial risk, in my judgment, that
9 jurors will give this reliability that it does not
10 deserve, so I'll not permit Ms. Miller to testify about
11 the behavioral indicators.

12 The other two opinions are harder for me because
13 I think Ms. Conboy is right, not every expert opinion --
14 it's really interesting, and I don't think there's ever
15 been many cases that talk about this -- but not every
16 expert opinion -- we all go through the motions and say,
17 you know, you understand, Doctor, that every question I'm
18 going to ask you needs to be answered and your opinion has
19 to be within a degree of reasonable scientific certainty
20 or expert certainty, and some expert opinions aren't like
21 that. Some expert opinions are, You know, Doctor, does
22 this sometimes happen to somebody's knee? You know,
23 that's not within a reasonable degree of medical
24 probability because the whole question presumes sort of a
25 lower level of probability, and I think that's what we're

1 faced with in these other two opinions.

2 The other two opinions are: Do -- is it more
3 common than not -- much more common than not for victims
4 of sexual assault to delay and to give their outcries
5 gradually?

6 I think there's some marginal probative value of
7 that, although I think Mr. Ward's point was really well
8 taken. It's -- it's family members and parents who are
9 astonished that I would -- I think -- astonished that
10 people -- that children who are sexually abused don't
11 outcry immediately.

12 I'm not sure that's a belief in the general
13 public. If it is, people have been asleep at the wheel
14 for about twenty years. I mean, every time you read a
15 newspaper, watch television, see a movie, it's about
16 delayed outcries. I think that's very common out there,
17 but -- but again, I'm not going to be so presumptuous to
18 think that everybody knows that, and I think this has some
19 marginal probative value as to the reliability prong.

20 As I indicated with counsel, this is really just
21 arithmetic, so, you know, she's done two hundred of these,
22 she's read studies about a bunch of them, and this happens
23 much more often than not. I think that's -- since it's so
24 modest, is reasonably reliable, so for all those reasons,
25 I will permit those two opinions, but not the third.

1 Anything else on Shreck from the People?

2 MS. CONBOY: No, Your Honor. Thank you.

3 THE COURT: Defense?

4 MR. WARD: No. Thank you.

5 THE COURT: We have to talk quickly about -- I
6 don't mean fast, because the court reporter's exhausted
7 already -- but we need to get a new date for the continued
8 trial.

9 Hearsay -- should we also have that be the time
10 we talk about rape shield, or do you want to do rape
11 shield tonight?

12 MR. WARD: I would like to actually clarify
13 where we are as far as the rape shield.

14 THE COURT: Yes, because, as I said, I have no
15 doubt that the District Attorney's Office did mail or
16 serve me with the response to the Court's order, however,
17 I didn't receive that or see it until today. There are
18 two responses though, right?

19 MR. WARD: Well, they filed a response to my
20 motion seeking the evidence.

21 THE COURT: Right, I saw that.

22 MR. WARD: Then the Court issued an order
23 directing them to -- if they wished to contest the offer
24 of proof, to say that they were going to do that on or
25 before -- I can't remember exactly what the date was --

1 the end of November sometime, and their response to the
2 court order saying that they did wish to contest the offer
3 of proof is what I didn't receive.

4 THE COURT: And I haven't seen that either. I
5 don't know if it's lost in the files or --

6 MS. CONBOY: If I could approach, Your Honor?

7 THE COURT: So the point of all this?

8 MR. WARD: So the point of all this is that I
9 don't have any witnesses under subpoena, and I guess if I
10 understand what they're saying, is that they have a
11 problem with this being done by offer of proof and that I
12 need to present some evidence for an in-camera hearing
13 that the statute calls for.

14 THE COURT: Can I tell you what my views of this
15 are and let me find out if you agree?

16 I think everybody agrees based upon the written
17 briefs that I did read that this evidence is not within an
18 exception.

19 Defense counsel are in agreement with that,
20 right?

21 MR. WARD: I think so, yeah.

22 THE COURT: That is to say, it's presumptively
23 inadmissible, unlike garden-variety evidence that is
24 admissible. Right so far?

25 MR. WARD: Right.

1 THE COURT: So you have the burden of overcoming
2 that presumption of irrefutability.

3 MR. WARD: Essentially I don't know how much it
4 changes things, as a practical matter, because, as I
5 understand it, I think the test is if it's relevant and it
6 passes a 403 analysis, then the presumption has been
7 rebutted, so --

8 THE COURT: I guess we can talk about what it
9 means, but there is a presumption of irrefutability. Is
10 that what everybody agrees?

11 MR. WARD: Of irrelevance?

12 THE COURT: Of irrelevance. Presumption of
13 irrelevance.

14 Well, I don't want to get on the slippery slope.
15 I think I've said I read Kyle, I've thought about it. I'm
16 not sure how it came up in Kyle.

17 This is not a situation, it seems to me, where
18 defense counsel is trying to elicit prior sexual -- I know
19 there's a case that says prior -- involuntary sexual
20 conduct is sexual conduct. It -- it doesn't have to be
21 conduct. It can be hoisted upon them -- the victim --
22 maybe that's even Kyle.

23 But, in Kyle, if I understand it correctly,
24 defense counsel wanted to introduce evidence of a prior --
25 of prior sexual assaults. In this case defense wants to

1 introduce evidence that the outcry about this case was
2 coupled with an outcry about the other case -- the other
3 incident. The David outcry is all bound up with this
4 other outcry, at least I think -- at least with respect to
5 Mark.

6 MR. WARD: Right.

7 THE COURT: Is that right?

8 MR. WARD: That's right. There are some other
9 bits of evidence.

10 THE COURT: And that just sort of seemed
11 different to me and I was willing to hear arguments about
12 that but I can't imagine that we would have to have a
13 hearing.

14 MR. WARD: That's fine. I -- if the Court is
15 going to accept my offer of proof, then I don't have any
16 need to put on additional evidence about it.

17 There's one thing --

18 THE COURT: I guess I'm a little bit confused
19 about the cases and statutes. Am I to make some threshold
20 decision about whether I believe your witness or something
21 like that? Is that why we have to have a hearing?

22 MR. WARD: You know the statute says the Court's
23 supposed to hold an in-camera hearing. I'm not aware of
24 if there is any authority saying that it has to be shown
25 to have happened by a preponderance. I mean, that would

1 be similar to what we do in 404(b)-type of issues.

2 THE COURT: Not only that, but the evidence
3 that's coming from the People's own witness, I mean the
4 main evidence, the outcry that combines "Mark did this to
5 me and David did this to me," is from the People's
6 witness.

7 So, what was the additional witness that you had
8 on call that you thought you might want to offer
9 available?

10 MR. WARD: The witness that's here today, Your
11 Honor, is Jodi Byrnes from the Department of Social
12 Services. The reason that I think Ms. Byrnes is important
13 kind of comes from the Kyle case where one of the reasons
14 the Court of Appeals found that the Court didn't abuse its
15 discretion in keeping that evidence out was that there
16 wasn't any kind of expert testimony to say that this
17 repackaging type of thing did happen or that the victim
18 was -- had confusion about who had assaulted him.

19 In this case Ms. Byrnes is a -- some sort of a
20 clinical specialist at the Department of Social Services.
21 I did subpoena her CV today and when she got here today
22 she told me she doesn't have one but she would be willing
23 to e-mail me her r, sum,, which I think would shed some
24 light on what her qualifications are.

25 But after observing the forensic interview,

1 Ms. Byrnes came to the conclusion, wrote -- a quote from
2 her report -- that, "It appears that Monique was sexually
3 abused by all three of these men so often and over such a
4 long time period that she's unable to differentiate and
5 recall one specific incident from start to finish."

6 Well, that is part and parcel exactly what we're
7 saying our repackaging theory is, that they can't
8 differentiate other than the fact that she says abused by
9 all three of them.

10 THE COURT: That's not exactly repackaging,
11 that's that there's one package.

12 MR. WARD: No, what it is, is when she's
13 describing one incident, she's not able to differentiate
14 is it from another or to reliably state who it was that
15 was sexually assaulting her at that time.

16 THE COURT: Let's do this -- I think that's
17 important enough, and you reminded me that is one of the
18 reasons the Kyle court came to the conclusion it did, was
19 there wasn't that kind of evidence.

20 I think this is the kind of evidence Ms. Conboy
21 should be able to cross-examine the expert on, so let's
22 just kick this to the -- did we finish one thing today, at
23 least?

24 MR. WARD: We finished --

25 MS. WHITNEY: -- the Shreck hearing.

1 THE COURT: So we need time, Linda, probably
2 about two hours, I would think, between finishing both of
3 these motion. You can have your witness come in to clear
4 some dates, Mr. Ward.

5 MS. WHITNEY: Should I -- should I plan on --
6 I'm filing my motion tomorrow, so I want to allow enough
7 time -- are you planning on doing that one at the same
8 time as well?

9 THE COURT: Yes.

10 MS. WHITNEY: Okay.

11 THE COURT: And I'm not going to make the People
12 respond. We'll just assume it's the same kind of response
13 and that it's basically piggybacking. There may be
14 nuances of differences, and you're welcome to talk about
15 those at the hearing, but let's not have a whole, long
16 briefing schedule because we don't have time.

17 The first trial date is when? March?

18 MR. WARD: 13th -- or 12th. I'm sorry.

19 THE COURT: I think we moved it to the 12th, so
20 we do need two hours, basically.

21 MS. CONBOY: The other restriction is that it's
22 got to be after February 8th, which I believe would be the
23 last day of medical restriction for Shannon Christner.

24 MR. WARD: So that would be the 12th or 13th or
25 26th or 27th?

1 THE COURT: March 13th works.

2 MR. WARD: March 13th --

3 THE COURT: Did you say February? Sorry,
4 March 13th is the trial date.

5 MS. CONBOY: February 13th, right, works for us.

6 MR. WARD: I cannot do February 13th. I will be
7 out of town. The following week, the 19th or 20th, I have
8 available.

9 THE COURT: I'm gone. The 26th looks like the
10 only day.

11 MS. WHITNEY: I'm not available on the 26th.

12 MR. WARD: 27th?

13 MS. WHITNEY: I'm available on the 27th.

14 MS. CONBOY: Can we go backwards?

15 THE COURT: Let's go off the record while we're
16 doing this so we don't drive the reporter nuts.

17 (Whereupon, a discussion was had off the
18 record.)

19 THE COURT: February 27th at 1:30.

20 MS. CONBOY: February 27th, Your Honor?

21 THE COURT: Right.

22 Anything else for me today?

23 MR. WARD: Your Honor, Jodi Byrnes is the
24 witness I've been describing. I apologize to her.

25 THE COURT: I apologize. Is it Ms. Byrnes or

1 Dr. Byrnes?

2 THE WITNESS: Ms. Byrnes.

3 THE COURT: I'm sorry that you've been waiting.
4 We have a new date, February 27th.

5 Have you subpoenaed her?

6 MR. WARD: Well, she's under subpoena for today,
7 so I was going to ask the Court to continue that subpoena.

8 THE COURT: Did you clear that date with her,
9 too?

10 MR. WARD: Does that date work for you?

11 MS. WHITNEY: She's under my subpoena as well,
12 which was informally continued by way of telephone.

13 THE COURT: And that date works for her?

14 MR. WARD: It does, Your Honor.

15 THE COURT: So let's go back on the record, in
16 case we're not now.

17 We agreed -- does that February 27th date -- it
18 works for almost everybody. It works for counsel, and
19 does it work for your expert, Mr. Ward?

20 MR. WARD: My expert is Ms. Byrnes.

21 THE COURT: Right. I'm just asking, does it
22 work for her?

23 MR. WARD: It does.

24 THE COURT: It doesn't really work for us, but
25 I'm outvoted, so we'll do it on the 27th.

C E R T I F I C A T E

I, Pamela J. Nilsen, Certified Shorthand Reporter, Registered Merit Reporter, Federal Certified Realtime Reporter, State of Colorado, in my capacity as Official Reporter of Courtroom 23, do hereby certify that I was present and recorded the above proceedings in stenotype and reduced the same to typewritten form, that if the labels affixed to the foregoing 156 pages are not tampered with that the foregoing 156 pages constitute a true and complete record of the proceedings had and done on March 22, 2007, before the Honorable Morris B. Hoffman, in the Denver County District Court, Courtroom 23, State of Colorado.

Dated this 9th day of March, 2007.

Pamela J. Nilsen, CSR/RMR/FCRR