

DISTRICT COURT
DENVER COUNTY
COLORADO
1437 Bannock Street
Denver, CO 80202

PEOPLE OF THE STATE OF
COLORADO

Plaintiff,

v.

ALEXANDER NARODITSKY,

Defendant.

Case No. 05 CR 2880
Division 23

For Plaintiff:
G. Aaron Suazo,
Deputy District Attorney

For Defendant:
Mr. Lozow, Esq.

The matter came on for hearing on July 26, 2006,
before the HONORABLE MORRIS HOFFMAN, Judge of the
District Court, and the following proceedings were had.

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THE COURT: Okay. Welcome back everyone.

And it's your -- it's your expert, Mr. Suazo, have any opening remarks, or would you just call your first witness?

MR. SUAZO: Your Honor, I would make some opening remarks, basically I guess outlining the testimony that I'm going to elicit from Ms. Miller. Your Honor, I -- I know the Court has reviewed Ms. Miller's C.V. and also the pleadings that I have filed with regards to this issue. So I am going to limit with the Court's permission the testimony to what her opinions are and why she has reached those conclusions, unless the Court would like more of a foundation. But I would rest on my pleadings.

1 THE COURT: You know, I've -- it's been a long
2 day and frankly I cannot remember whether -- Counsel and
3 I had a discussion about the Shreck issues, and it I
4 think came up in the context of whether we needed your
5 witness actually here or whether we could do it by offer
6 of proof and argument. And in that context I think I
7 shared with Counsel some of my concerns. That my
8 concerns weren't about the witness's qualifications at
9 all.

10 My concerns were about the reliability prong.
11 And I shared those concerns in an effort maybe to avoid
12 to having the witness come -- come down. And I don't
13 know if we were on the record or not. But we are now.
14 And I understand that Mr. Lozow wished to have the
15 witness here, even in light of what I said, to cross-
16 examine her about the reliability issue, which is
17 perfectly fine. And I greatly appreciate the People and
18 the witness getting her here after the Court -- after
19 regular court hours so we don't burden our jury anymore
20 than we already have. I greatly appreciate it.

21 So go ahead with your opening remarks,
22 Mr. Suazo.

23 MR. SUAZO: And, Your Honor, with the Court's
24 statements, what I will -- what intend to do is ask
25 Ms. Miller to take the stand, and I will ask her some

1 general questions regarding what her opinions are and
2 what they base those opinions -- what she bases those
3 opinions upon, and I believe that that will lay the
4 proper foundation for Mr. Lozow for his cross-
5 examination.

6 THE COURT: I should have asked this of you
7 before, but are any of you aware of any cases that talk
8 about this issue in the context of a witness like
9 Ms. Miller? Any post-Shreck cases? I think there may be
10 some pre Shreck cases, but -- but are there any post-
11 Shreck cases?

12 MR. SUAZO: Your Honor, I cited some cases in
13 my response, however I do not believe that any of those
14 cases were post Shreck --

15 THE COURT: Right.

16 MR. SUAZO: So I do not believe and I have not
17 found any -- and I've looked specifically for it.

18 THE COURT: Okay. Thank you, sir. Any opening
19 remarks by you, Mr. Lozow?

20 MR. LOZOW: Briefly. The issue (inaudible) --

21 THE COURT: We're on the taping system so you
22 have to get to a mike somewhere.

23 MR. LOZOW: Your Honor, I -- I think the Rule
24 sets out the parameters, Rule 702. And I think the --
25 the three prongs I think of the tests are that the

1 testimony is based upon sufficient facts or data, the
2 testimony is the product of reliable principles and
3 methods; and that the witness has applied the principles
4 and methods reliably to the facts of the case. I think
5 that's the triangle of things that we'd be talking about.
6 And I will be doing some cross-examination consistent
7 with the Court's comments without belaboring the entire
8 record with an entire cross-examination. But I
9 appreciate the Court giving us this opportunity and
10 having the expert, you know, in front of you so that this
11 question can be parsed out perhaps even by the Court.

12 THE COURT: Thanks. That reminded me of --
13 there -- and again, I'm repeating this because I'm not
14 sure whether we were on the record or not when we had
15 this discussion but it was -- that reminded me that I
16 think I expressed some concern not only about the
17 reliability prong in terms of -- of testability,
18 verifiability, falsifiability, all of those things, but
19 also I -- I think I also expressed some questions about
20 the relevancy prong, that is that portion of the
21 relevancy prong that asks whether this would be of
22 assistance to the jurors, and just to complete the record
23 I thought I'd add that.

24 All right. The People's witness, please.

25 MR. SUAZO: The People call -- the People call

1 Suvi Miller.

2 THE COURT: All right. Ms. Miller, good
3 evening, I guess I should say. Come on up. The witness
4 stand's way over here. If you raise your right hand I'll
5 swear you in.

6 SUVI MILLER

7 called as a witness on behalf of the People, having been
8 first duly sworn, testified as follows:

9 THE WITNESS: I do.

10 THE COURT: Thank you, Ms. Miller. If you'll
11 have a seat. There's probably still some water in that
12 pitcher and some paper cups --

13 THE WITNESS: I have my own.

14 THE COURT: You have your own. Okay.

15 MR. LOZOW: It's a little easier to work --

16 THE COURT: The acoustics in here are bad, and
17 we are on the taping system so you need to keep your
18 voice right into that mike.

19 THE WITNESS: Okay. I will do that.

20 THE COURT: And -- and before we even start, I
21 wanna also thank you for making yourself available on
22 such short and late notice.

23 THE WITNESS: Absolutely.

24 THE COURT: Mr. Suazo.

25 MR. SUAZO: Thank you, Your Honor.

DIRECT EXAMINATION

1
2 BY MR. SUAZO:

3 Q Good evening. Please state your full name and
4 spell your name for the record.

5 A My name is Suvi H. Miller, S-u-v-i middle
6 initial H, M-i-l-l-e-r.

7 Q Ms. Miller, you have been endorsed as an expert
8 in the case of People v. Alexander Naroditsky; is that
9 correct?

10 A That's correct.

11 Q And you and I have discussed your testimony
12 regarding this case; is that correct?

13 A That's correct.

14 Q Now, we have decided that you are going to
15 offer opinions regarding certain issues surrounding
16 sexual assault on children; is that accurate?

17 A That is accurate.

18 Q Ms. Miller, I'll just cut to the chase. The
19 four issues that I have proposed that you would testify
20 about, everyone in the courtroom know what they are, but
21 more importantly for the purposes of this hearing, I'd
22 like you to tell us on what do you base your opinions?
23 What is -- what data, what sources do you base your
24 opinion as stated in our motion to -- or our notice of
25 your expert testimony?

1 A A number of sources. First and foremost I have
2 15 years in the field as a clinical social worker, and 12
3 plus of those I have worked with children, adolescents,
4 and families. Most of those have been victims of trauma;
5 and the majority of those have been victims of sexual
6 abuse and domestic violence. Also some physical abuse
7 victims. Additionally, I have attended a number of
8 trainings, conferences. I have read my fair share of
9 research related to these issues to make me a more
10 informed clinician. So I would say that it's from the --
11 the whole of all of those that I would give my testimony
12 today.

13 Q And, Ms. Miller, during the course of your
14 professional experience, have you treated sex assault
15 victims?

16 A I have.

17 Q What -- what ages were the victims that you
18 treated?

19 A I have worked with children as young as 2 and
20 up to children as old as 18.

21 Q And, Ms. Miller, flipping on the other side of
22 the coin, have you ever treated perpetrators of sexual
23 assault on children?

24 A I have treated some children who also had some
25 sex offenses, but in general no, and no adult offenders.

1 Q Now, as I stated before and I wanna put this on
2 the record, you are going to testify, I submit, on four
3 issues. One, why children delay an outcry. Two, why
4 children make gradual disclosures. Three, to whom
5 disclosure is commonly made. And this fourth one,
6 grooming techniques of perpetrators. And that's the one
7 I wanna ask you about right now. The grooming
8 techniques of perpetrators. On what do you base your
9 knowledge to talk about perpetrators?

10 A In general just my education around that and
11 also seeing this true in patterns with the children that
12 I have treated. Children have come to me expressing
13 history of sexual abuse and have talked about some of the
14 behaviors that have led up to that, which verify much of
15 the research that I have read and the trainings that I've
16 attended, and the common knowledge that is around
17 patterns of perpetrators and the techniques that they
18 enlist in general to bring children in if you will, and
19 kind of keep them in an situation where they might be
20 more likely to either be abused or be abused in an
21 ongoing way.

22 Q Ms. Miller, is it fair for me to say your
23 experience has been in the -- well, has not been in the
24 academic realm. Have you actually been a professor, or
25 have you taught these issues?

1 A I actually am part of the adjunct faculty at
2 Denver University. However at this point I am not
3 teaching around those specific issues, and I have done a
4 number of trainings around sexual abuse of children and
5 its impact, implications, those kind of things. But it's
6 around the question I think you were asking me specific
7 to grooming and the research that I've collected and my
8 experience with that I haven't taught specific to that
9 issue.

10 Q Very good. And, Ms. Miller, I'm losing my
11 train of thought. I apologize. I know where I was
12 going. Ms. Miller are you able to give an opinion, and
13 this isn't something I would ask you in front of the jury
14 if you're allowed to testify, but are you able to give an
15 opinion as to what any common myths surrounding sex
16 assault on children specifically related to outcry --
17 delayed outcry and issues of that nature? Do you have
18 any basis of knowledge of what any common myths are or
19 what common perceptions are?

20 A Yeah. I -- I could speak to some of those
21 issues, and that would be related to the same sources
22 that I gave before.

23 Q Very well. What are your -- what is your
24 opinion or what is your understanding of some of the
25 common myths surrounding sex assault on children and

1 outcries -- delayed outcries, et cetera?

2 MR. LOZOW: Judge, I object to this line of
3 questioning. What do we care about common myths? I
4 don't think it has anything to do with a Shreck hearing
5 or what the Court has to decide.

6 THE COURT: I think it has to do with the
7 helpfulness portion of the relevancy prong, so the
8 objection is overruled.

9 Q (By Mr. Suazo) You can answer the question.

10 A Myths related to children's delay in outcry and
11 gradual disclosure?

12 Q Yes.

13 A Is that what you were asking me about? A -- a
14 lot -- in general I think one of the most predominant
15 myths about children is that when they are sexually
16 assaulted they will tell someone immediately. And that
17 is probably the most commonly held belief by the majority
18 of people who aren't familiar with the issue. So the
19 question that people often have is if a child was
20 sexually abused and they understood there was something
21 about this, even if they didn't understand it to be
22 totally wrong, why wouldn't they tell someone
23 immediately. That children in general would. They would
24 seek someone out.

25 And in fact the research shows and my

1 professional experience shows that children much more
2 often delay in their outcry than tell immediately. My
3 experience is that when they tell immediately, it tends
4 to be a child who has had a single encounter with someone
5 or also a younger child who may have a relationship with
6 a parent and not understand the implications. However,
7 if the child has an ongoing relationship with the
8 offender, this impacts their disclosure tremendously.
9 And they much more often than not delay in their outcry
10 for a number of reasons. I don't know if you want me to
11 go into those at that -- at this point.

12 Q No, at this point we're asking more about the
13 -- I'm asking more about what common myths are --

14 A Okay.

15 Q -- as opposed to what your opinions are.

16 A I can --

17 Q Now, you did mention two prongs, if you will,
18 regarding your understanding and what you base your
19 opinions on regarding the myths. You said experience,
20 which you've just described, and you also said your
21 research. Can you describe or tell us what -- are there
22 any treatises, texts, articles, that you rely on that you
23 find persuasive regarding the issue of myths surrounding
24 sex assault on children?

25 A You know, I have a list of them in my CV. I

1 probably couldn't recite them for you right now just
2 because that is not coming to my mind, but I do have a
3 number of sources that I have used that I would refer
4 back to. Not probably as much for myths, because I think
5 they have sustained over the years what -- what the
6 common perception is around myths around sexual abuse, so
7 that's very familiar to me.

8 However, I certainly use a number of texts
9 around treatment and other issues. But I would have to
10 refer to that and also you know, I do try to kind of keep
11 abreast of other information in general just so that I
12 feel that I'm -- I'm familiar with the most recent
13 research. Unfortunately I couldn't cite it for you right
14 now, but if you needed me to give citations, I'm sure I
15 could dig them up if necessary.

16 I -- I wanted to just speak to one other issue
17 around the myths around gradual disclosure, if you will,
18 'cause I didn't cover that issue, or --

19 MR. LOZOW: Judge I would prefer that the
20 witness answer the questions and not offer up anything
21 she thinks the Prosecutor missed, and I object to this
22 narrative --

23 THE COURT: The narrative objection is
24 sustained.

25 THE WITNESS: Okay.

1 Q (By Mr. Suazo) Well, Ms. Miller, we talked
2 about the myths of gradual delay and -- I'm sorry, of a
3 delayed outcry. Are there myths also surrounding a
4 gradual delay?

5 A Yes. I think there are a number of common
6 myths that people hold around that so that here is a
7 child who delays an outcry and then at the time they
8 would outcry people often believe they would tell the
9 entire story. That they wouldn't give one piece of it,
10 in fact giving more later. And so people are often
11 confused by that piece feeling that if a child has been
12 able to share one portion of this information why in fact
13 wouldn't they tell it all at once? And I think that is a
14 very commonly held myth around children's disclosure
15 particularly related to gradual disclosure.

16 MR. SUAZO: Thank you. I have nothing further.

17 THE COURT: Thank you. Cross-examine.

18 CROSS-EXAMINATION

19 BY MR. LOZOW:

20 Q Ms. Miller, I have just a few questions in
21 light of your direct testimony. You have never written
22 or published anything in this area; is that correct?

23 A I have not.

24 Q And you've not done any research papers in this
25 area; is that correct?

1 A That's correct.

2 Q So basically what -- what I'm hearing is that
3 your testimony in large measure is based upon your own
4 anecdotal experience; is that correct?

5 A In measure, yes, along with the other things
6 that I cited.

7 Q Now, when you say the other things you've
8 cited, myths as I understand it are simply your concept
9 about what the public may have about preconceived notions
10 in this area; is that right?

11 A That is not correct. The -- the myths that I
12 am citing are often cited in a number of texts that
13 people's belief systems around why children disclose, why
14 they don't disclose, this kind of thing. I've seen it in
15 a number of sources.

16 Q Well, I've looked at four of the texts that you
17 list.

18 A Mm-hmm.

19 Q They include true and false allegations of
20 child -- child sexual abuse, which is on your resume;
21 understanding and assessing child sexual maltreatment;
22 critical issues in child abuse; and a Post Traumatic
23 Stress Disorder treatise that you made reference to. So
24 first I wanna ask you, would you agree with me that there
25 is almost -- there is very little scientifically accepted

1 literature about and concerning adolescent reporting of
2 child abuse as compared to child reporting of child
3 abuse?

4 A I think that in my experience very often the --
5 the research that has been done is often combined, but
6 around the older children and their disclosure later they
7 might be somewhat less.

8 Q Well, when you say somewhat less, can you give
9 the Court one learned treatise, one statistical study, or
10 one recognized scientific authority that has been
11 published that statistically talks about these principles
12 that you're going to testify about for an adolescent?
13 And I'm talking about a 13- or 14-year-old adolescent.

14 A I could produce that for you. Not right now
15 but I could produce it for you. And I don't know that
16 it's specific to a younger child or an older child. I
17 think in general the -- the research that I'm thinking of
18 and the cit -- the citation that I'd come with would not
19 necessarily be specifically to an adolescent or
20 specifically to a child. Generally a lot of what's been
21 looked at is over time when do children disclose, why do
22 they delay --

23 Q Let me -- let me interrupt you with your
24 permission. What I asked you for was whether or not
25 there was any such literature that you could point to

1 that has scientific acceptability in your area --

2 A I would say --

3 Q -- that talks -- wait, wait -- that talks about
4 adolescent reporting. Whether it be delay, you know,
5 kind of delayed disclosure, when the outcry -- is there
6 an accepted literature in that area, a scientific study
7 that you can point the Court to?

8 A I can't at this moment.

9 Q All right. Is there something on your resume,
10 because I've looked through the articles cited on your
11 resume, and I tell you in good faith that the literature
12 that I've read suggests that there's very little
13 statistical work done with regard to adolescents.

14 A Well, I could -- I know that I have read and
15 researched things related to adolescents, but I would go
16 back to my statement which says that I don't know if I
17 can give you an adolescent study, but I could produce
18 something that would be related to children in general.

19 Q Now --

20 A I think I'm trying to understand why it would
21 be so different for an adolescent versus a 10-year-old.

22 Q Well, what I'm telling you is that almost the
23 -- the heavy majority of work that's been done in this
24 area by people with substantially more educational
25 background than you in the area, and substantially more

1 publishing work in the area predominantly relates to
2 young children and issues surrounding young children,
3 four, five, six, and seven years old and their reporting
4 phenomena. And -- and the heavy -- the vast majority of
5 literature is in that area, is it not?

6 A I would agree with that to some extent, yes.

7 Q And -- and in the treatises that you list, I
8 would suggest again that 95 percent of the literature
9 that you have provided as a basis for this has to do with
10 child -- children four, five, six, seven, infant type
11 children and their reporting qualities, characteristics
12 and -- and habits, so to speak.

13 A I'm not sure of that age range specific to what
14 I've listed. I'd have to cross-reference that myself,
15 but I certainly have seen literature related to older
16 children.

17 Q Well, you haven't gone back to that -- to kind
18 of buttress your opinions for this case, have you?

19 A For this specific question that you're
20 asking --

21 Q Yes.

22 A -- me? No.

23 Q And you haven't gone back to that at all
24 relative to the facts of this case, correct?

25 A My understanding in part is that I'm also gonna

1 speak to my experience, which I've had tremendous
2 experience with adolescents.

3 Q Well, but Ms. Miller, answer my question if you
4 would. With regard to this case, you have not gone back
5 to any studies, statistical, concerning adolescents to
6 relate your various opinions to the facts of this case.
7 You don't know the facts of this case, do you?

8 A I do know the facts of this case.

9 Q Well, who's told you the facts?

10 A Mr. Suazo and I have discussed the facts of
11 this case.

12 Q Well, so what you know about the facts are
13 based upon Mr. Suazo's account of the facts. You've not
14 interviewed the victim; is that correct?

15 A I have not interviewed the victim.

16 Q And you don't plan on doing any opining at all
17 about the victim in this case; is that correct?

18 A Not to my knowledge, but I am familiar with the
19 forensic interview.

20 Q What forensic interview?

21 A Is that not what I read?

22 Q Wait a second -- you -- respond to the
23 question. What forensic interview are you --

24 A The interview that the detective conducted with
25 the victim.

1 Q And that is on a video?

2 A No, that is a transcript.

3 Q Of a videotape, correct? Did you know it was a
4 video transcript?

5 A I don't know if it was a video transcript.

6 Q Did you know any of the facts leading up to
7 that particular interview in terms of the process that
8 was used, what information the detective had, what
9 background he had about the victim. What background he
10 had about the victim's family, none of those things were
11 brought to your attention; is that correct?

12 A As far as what information the detective had
13 related to the victim?

14 Q Right.

15 A Some very general things I was aware of.

16 Q All right. Now, coming to kind of your
17 conclusions now, you have no basis upon which to offer an
18 opinion about the underpinnings of the facts and the
19 truth of the facts in this case; is that correct?

20 A I wouldn't say I have no basis. I -- you're
21 asking me to cite something right now, and I don't have
22 it with me now.

23 Q No, no, no. I'm talking about the facts of
24 this case. Your testimony in terms of the facts and data
25 have nothing to do with this case, isn't that --

1 MR. SUAZO: Your Honor, I object to relevance
2 for this issue. Ms. Miller is not gonna testify about
3 the facts of this case. She is going to give general
4 information as was submitted in our notice of --

5 MR. LOZOW: All right. Very well.

6 THE COURT: Sustained.

7 Q (By Mr. Lozow) All right. Now, the facts and
8 data that you depend upon for these general principles
9 that you're gonna talk about, as -- as I understand it
10 related purely to your anecdotal experience, your own
11 experience as a social worker. Which for the most part
12 has been as a child advocate from the moment you started
13 doing this work, right?

14 A I would agree with the fact that the work that
15 I have done, yeah, has been an advocate for children but
16 as far as my testimony being solely based on anecdotal
17 evidence, no.

18 Q Well, I -- I'm saying, you've previously
19 testified under oath that the -- the major part of your
20 testimony is based upon your own experience. Haven't you
21 said that under oath?

22 A Yes.

23 Q All right. So that's what you're telling the
24 Judge. Based upon your own experience with children; is
25 that correct?

1 A Again, I would say that that's what most of
2 it's based on, but there is a piece of it that is also
3 based on research.

4 Q All right. Now, and you told us a bit about
5 that. Now, let me ask you about this. The methods that
6 you rely upon again for the most part are based upon your
7 own experience with children, the methods that you are
8 going to opine about. And the methodology that you use
9 to arrive at these opinions are for the most part based
10 upon your own anecdotal experience with children; is that
11 right?

12 A The methods that I use to -- I'm -- I'm not
13 sure what the question is. As a clinician I don't use a
14 method to get a child to disclose.

15 Q Well, that -- you're not -- you're not testing
16 the veracity of a child when you talk to them.

17 A I am not.

18 Q No, you're not there to kind of confront the
19 child about his veracity; is that correct?

20 A That is not my role.

21 Q You -- you are there in kind of a support and
22 comforting therapeutic position and children come to you
23 alleging to be abused; is that correct?

24 A Correct.

25 MR. LOZOW: Just one moment, Judge.

1 THE COURT: Yes, sir.

2 Q (By Mr. Lozow) Now, is it true and would you
3 agree that you -- you attribute information to some
4 extent based upon your preexisting beliefs and ideas
5 about these principles; is that right?

6 A My interpretation of the children I work with?

7 Q Yes.

8 A Yes.

9 Q And in that regard, let me just ask you this,
10 do you have a sense -- are you familiar with the concept
11 of the Rosenthal Effect?

12 A No.

13 Q All right. The Rosenthal -- the Rosenthal
14 Effect, which is a rather accepted principle with regard
15 to both social work and clinical work with children talks
16 about your ability perhaps as a clinician being
17 influenced based upon your expectation. You're
18 unfamiliar with that term Rosenthal Effect?

19 A I'm not familiar with a reference to it, but
20 I'm certainly familiar with it as a concept in clinical
21 work, yes.

22 Q And -- and again, with regard to this
23 scientific principle, your opinions in large measure are
24 based upon your own expectations and personal experience
25 with children; is that right?

1 A I believe that it's something that clinicians
2 work with on a regular basis and need to be aware of, but
3 do I believe that I have a certain expectation of a
4 client when they walk through the door? I work very hard
5 not to. No, it's a very big piece of why I'm a good
6 clinician.

7 Q You've never testified for anybody other than
8 the Prosecution for the proponent of an allegation of
9 sexual assault; is that correct?

10 A I've testified as I listed in my CV regarding a
11 -- related to a domestic violence case, and then also to
12 some cases back in New York related to child sexual
13 abuse.

14 Q But --

15 A But yes.

16 Q So the answer to my question is that your
17 expectations with regard to your testimony each time have
18 been that an allegation of sexual abuse has a certain
19 personality to it; is that correct?

20 A I don't understand that --

21 Q Well, that --

22 A -- question.

23 Q -- that a -- that a -- a child victim has a
24 certain kind of set of predispositions in terms of
25 reporting issues or delayed reporting, those are all

1 expectations you have for every child that you see; is
2 that right?

3 A I would say that those are the contexts where I
4 look at the case, but it's not an expectation that I
5 would have of any child. I look at them all differently.

6 Q Haven't you previously testified that you've
7 never had occasion to have a child who you personally saw
8 where you came to a conclusion that the child lied --

9 A Correct.

10 Q -- about -- all right. Never; is that right?

11 A The -- my role where I did my work especially
12 for the last nine and a half years, we had the majority
13 of the children, the cases that we had seen already had
14 evidence proving that there had been some sexual assault.
15 Additionally the number of kids where I didn't have it it
16 wasn't my role to try to test the veracity of their
17 claims.

18 Q Even in your opinions they're based in whole or
19 in part on the supposition that the children you've seen
20 have in fact been sexually abused; is that correct?

21 A Correct.

22 Q All right.

23 MR. LOZOW: For purposes of this hearing,
24 Judge, I have no further questions.

25 THE COURT: Thank you. Redirect?

1 MR. SUAZO: I have nothing, Your Honor. Thank
2 you.

3 THE COURT: Okay. Thank you very much,
4 Ms. Miller. You may step down now. People's next
5 witness?

6 MR. SUAZO: Your Honor the People have no
7 further witnesses.

8 THE COURT: Okay. Defense have any witnesses?

9 MR. LOZOW: No.

10 THE COURT: All right. Let's hear some
11 Shreck argument.

12 PEOPLE'S CLOSING ARGUMENT

13 BY MR. SUAZO:

14 Your Honor, as I stated in my response, the
15 Shreck case basically pointed the Court to what has
16 always been in existence, an analysis under Rule 702 and
17 also Rule 403. And combined with my response and the
18 testimony we just heard, I submit that the -- the
19 foundation has been laid for this Court to approve
20 Ms. Miller to testify as an expert witness. I know that
21 the Court has stated some concerns about some certain
22 issues.

23 I would like to remind the Court that testimony
24 by experts does not have to be scientific or technical.
25 It can also be other specialized knowledge. This is what

1 Ms. Miller will testify to. Her specialized knowledge,
2 her experience, and Your Honor, quite frankly the
3 Defense's cross-examination of Ms. Miller is just that.
4 Excellent cross-examination. I believe the foundation
5 has been laid to admit Suvi Miller's testimony, and I
6 believe that the Defense has some excellent cross-
7 examination questions. The jury should take those
8 questions and should determine whether or not to believe
9 Ms. Miller or not.

10 Your Honor, my position is that she meets the
11 requirements to testify before this jury. The Court also
12 asked -- or submitted a question about the relevancy
13 prong and whether or not this would assist the jury.
14 Ms. Miller is not gonna testify about that issue. I
15 asked her these questions to perhaps help the Court
16 determine whether or not a common juror would have any --
17 or if a common juror would be assisted by this testimony.
18 And I submit to the Court that it would. It is a common
19 misconception, I submit, and Ms. Miller supported about
20 some myths surrounding sexual assault on children.

21 THE COURT: Well, I have a question about that.
22 I thought that your offer of proof was sort of oddly
23 phrased. What you say is -- is -- and it's a little bit
24 -- the written offer of proof is a little bit different
25 than what we talked about earlier, and again, 'cause I'm

1 not sure whether that was on the record or not, let me
2 say that what I understood the offer of proof orally from
3 you to be was that -- and the reason that this is
4 relevant and the reason it would help the jury, the so
5 called fit question under Shreck is that -- is because
6 jurors have these commonly -- that people have these
7 commonly misheld beliefs about anybody who is sexually --
8 any child who is sexually assaulted would outcry right
9 away and that Ms. Miller would correct that common myth.
10 But in your written papers you say that actually what
11 she's gonna testify is why children delay in outcry. And
12 I didn't hear anything from the stand about why. Is
13 there -- I guess I need to ask, what's she gonna say
14 about that? Why children delay an outcry? Why children
15 make gradual disclosures.

16 MR. SUAZO: In addition to the response to the
17 Shreck hearing, I also submitted the notice of expert
18 witnesses anticipated testimony and opinions.

19 THE COURT: Right.

20 MR. SUAZO: And when I did make this
21 representations in chambers, I did not have my documents
22 in front of me. I was working at a disadvantage if you
23 will. Your Honor --

24 THE COURT: Yeah, I don't need --

25 MR. SUAZO: -- why --

1 THE COURT: I'm not splitting hairs or
2 anything. I just wanna know -- it seems to me it's a
3 different thing to say sometimes children outcry
4 immediately and sometimes they don't. That gives no
5 information to a jury that is helpful. But if she's
6 gonna testify about why sometimes children outcry and why
7 it is that sometimes children don't, then that may give
8 some information to the jury.

9 MR. SUAZO: And Your Honor --

10 THE COURT: What's she gonna say about that?

11 MR. SUAZO: -- I did not elicit from Ms. Miller
12 her actual opinions.

13 THE COURT: Right.

14 MR. SUAZO: I would point the Court and ask the
15 Court to look at my notice of her expert opinions where
16 she does talk about why. So obviously if she's gonna
17 discuss first, or -- she has to discuss first to lay a
18 foundation that yes, children do delay an outcry.

19 THE COURT: Yeah.

20 MR. SUAZO: Second, she then will explain why
21 that happens. And I believe what she will testify to is
22 what's listed in paragraph, six, seven, eight, and nine
23 of my notice of expert witness opinions and testimony.
24 And Your Honor there are quite -- quite frankly there are
25 some responses that do not fit this case on point. And

1 the reason is Ms. Miller is going to testify in general
2 terms to educate the jury around sexual assault on
3 children. I think it would be inappropriate for me to
4 have her testify about the facts of this case, as
5 Mr. Lozow pointed out. She did not interview this child.
6 This is again to educate the jury on the -- and to
7 correct their preconceived notions that may be incorrect.

8 In this case, Your Honor, it is extremely
9 relevant. As the Court probably knows this is a case
10 where the victim made an immediate outcry which was
11 gradual. Nine and a half years later she made a full
12 disclosure. That -- I believe a common juror is going to
13 think to themselves, this cannot be true. Why would she
14 report nine and a half years later? Ms. Miller is going
15 to testify not that that it's true or not, but that --
16 that sometimes happens or whatever her label she'll put
17 on it that happens.

18 THE COURT: And it sometimes doesn't.

19 MR. SUAZO: And sometimes doesn't. But exactly
20 -- that's exactly the point, Your Honor. I don't want
21 the jury to think that the fact that she made an outcry
22 nine and a half years late that it couldn't have
23 happened.

24 THE COURT: Right. And will -- what will
25 Ms. Miller say about what the criteria are for predicting

1 whether there will be an immediate outcry or a gradual
2 outcry? In other words the lie question? And is she
3 gonna say anything about that, or is she just gonna say
4 sometimes they do it right away and sometimes they don't?

5 MR. SUAZO: She is going to discuss as I stated
6 in my notice of expert opinions some of the reasons why
7 people outcry. She's not gonna give any predictions as
8 to when it will happen and when it will not. I think in
9 order to make that kind of prediction, I can't speak for
10 her, but I would think to make any kind of predictions of
11 that nature she would have had to have interviewed the
12 victim. And that's not her role in this case, that's not
13 what I'm asking her to testify to.

14 THE COURT: Let me ask you a question. I know
15 I overruled the objection and let her answer, but what's
16 her -- what's the foundation of her belief and your
17 belief for that matter that there are common myths about
18 -- about this that have to be corrected by this expert
19 testimony? And I ask this question with a great degree
20 of -- how can I say this -- humility. Because I think
21 all of us that are in this business get jaded with all of
22 this and it may be that there are common myths out there.
23 They don't seem common to me, but then again I'm in the
24 middle of this. And -- and I may not be the best person
25 to judge that.

1 MR. SUAZO: Well, as -- as Ms. Miller testified
2 to she gave the Court the answer that she would give.
3 But if the Court's asking me from a personal level on why
4 I believe it --

5 THE COURT: No, why does she believe it?

6 MR. SUAZO: She believes it based upon her
7 experience and the people she has treated and the people
8 she has spoken with. And I believe that's what she
9 testified to when I asked that question.

10 THE COURT: This -- this reminds me of one sort
11 of big question that I wanna ask you that I've been
12 struggling with. It seems odd to me that clinicians who
13 never ask themselves whether allegations are true or not
14 or rarely ask themselves, their role is to treat people.
15 And I think one of our juror -- prospective jurors in
16 fact who is a psychiatrist said this maybe more clearly
17 than anybody can. He just treats their pain. It -- and
18 -- and only at the margins maybe does it matter where the
19 pain comes from, whether it comes from true abuse or from
20 something else. So it -- it's -- how -- how can I say
21 this? I'm not being too articulate.

22 It seems odd to me that in a circumstance where
23 the only ultimately relevant inquiry is whether this
24 happened that the testimony of -- of an expert who
25 doesn't deal in that coin can have any importance. Do --

1 do you know what I'm saying?

2 MR. SUAZO: I think I understand the Court's
3 question. I think is the Court asking about the
4 reliability of what Ms. Miller is gonna testify to.

5 THE COURT: Yeah, I guess. And --

6 MR. SUAZO: And Your Honor, my --

7 THE COURT: -- and fit also. I think it goes
8 to fit.

9 MR. SUAZO: Regarding the reliability, I --
10 when I think of this and I think of calling a clinician
11 as an expert witness, her testimony, her opinions are
12 based upon actually treating children. The children that
13 she sees and the children that she treats are not coming
14 to her with any sort of motive. Where a forensic
15 interviewer or perhaps a detective or police officer may
16 talk to a child and the child -- who knows what the
17 reason was that a child does that. In the same sense
18 that the medical exception applies for hearsay, I would
19 submit that it's more reliable when it's given to a
20 clinician in the -- in the realm of therapy than it would
21 be for someone who's asking -- or a detective who's
22 asking where there may be a lot of other motives
23 involved.

24 THE COURT: Except the clinician doesn't pay
25 attention and doesn't really care at least at the

1 beginning whether the allegations are true or not. So it
2 might be the case that every single time there was a
3 delayed outcry, it was because the allegations were
4 false. And the clinician doesn't see any of that because
5 the clinician doesn't pay attention to truth --
6 truthfulness or the falsity of the outcry. So what
7 Ms. Miller is really trying to tell this jury is people
8 -- children who are really abused -- really abused, not
9 just complain of abuse -- children who are really abused
10 sometimes delay their outcry. And I'm just wondering on
11 what basis she could reach that conclusion since she has
12 no idea whether the people that come to her for treatment
13 have really been abused or not.

14 MR. SUAZO: Your Honor, the only way I can
15 answer that question is that she would answer based upon
16 her research which she did state, and primarily on her
17 experience. And I think those are relevant questions for
18 cross-examination from Mr. Lozow to ask her and explain
19 to the jury that her scope of knowledge is potentially
20 limited in that realm. However, I submit that I should
21 be allowed to put Ms. Miller on the stand and let
22 Mr. Lozow do the cross-examination so the jury can make
23 the determination on whether to believe what she
24 testified to or not believe it.

25 THE COURT: I do have some gate keeping role,

1 though, right?

2 MR. SUAZO: I agree, Your Honor.

3 THE COURT: And let me also say, 'cause this
4 may not be clear at all of you, I ask these questions --
5 these are not rhetorical questions, I haven't decided
6 this issue. I'm just expressing some things that are --
7 that have always been troubling to me about Shreck and
8 about some of these things we're called upon. I mean, if
9 it were up to me the jury gets to hear everything. I
10 think they're smart people, I think they do have
11 commonsense, I think the can tell junk science from non-
12 junk science. But the Supreme Court has said otherwise
13 and has given us a role in gate keeping. Anything else?

14 MR. SUAZO: No, Your Honor, simply to say that
15 I agree with the Court that there is a gate keeping
16 function which is why we have the rules and which is why
17 the Court is having this hearing. I submit that
18 Ms. Miller has met the foundational requirements and we
19 have met the foundational requirements to allow her
20 testimony.

21 THE COURT: Thank you, sir. Oh, you know one
22 thing before you step down, Mr. Suazo, this is another
23 non rhetorical question. Shreck does say, although it's
24 kind of been a pastoral return to Rule 702, Shreck does
25 talk about Daubert and Shreck does say that Daubert is

1 something we can be thinking about in determining
2 reliability. Is there anything you wanna say about all
3 those gagillion Daubert factors that none of us can
4 remember anymore in terms of this particular case?

5 MR. SUAZO: Not specifically, Your Honor. I
6 would just like to remind the Court again that this is
7 not scientific or technical knowledge that I'm offering.
8 This is the other generalized specialized knowledge, and
9 I think that does in some sense move it from that line of
10 questions -- or those lines of cases. I think it's
11 obviously persuasive and the Court should consider those
12 cases and determine whether or not I've met my
13 requirements in showing the foundation. But again, I
14 wanna highlight this is generalized -- general
15 specialized knowledge that she's gonna testify about.

16 THE COURT: Are you saying -- the Court -- of
17 course it still has to be reliable.

18 MR. SUAZO: Correct.

19 THE COURT: So, is it your position that the --
20 the Daubert factors never apply when you're -- when
21 you're in the sort of catchall category of 702, other
22 specialized knowledge? They apply only when we're
23 talking about scientific -- and -- and isn't this
24 scientific anyway?

25 MR. SUAZO: In a sense it is, Your Honor. I

1 believe it is scientific in a sense, but it's not
2 something we can measure, it's not -- we can't count ball
3 bearings. This is social science and it is I would
4 submit more generalized -- general specialized knowledge.
5 It is harder for us to get a social scientist on the
6 stand to give these types of numbers.

7 Even if I was to provide the Court or ask as an
8 expert -- some testimony who has done some research and
9 done focus group meetings and other types of surveys, I
10 think the same objections and the same types of issues
11 would be raised by the Defense because it's not -- it's
12 not hard science. But to answer the Court's first
13 question about Daubert, I think the Court still needs to
14 take those issues and those factors into consideration.

15 THE COURT: Thanks. Appreciate it.

16 Mr. Lozow?

17 DEFENDANT'S CLOSING ARGUMENT

18 BY MR. LOZOW:

19 Judge, it seems to me that what the Prosecution
20 tries to do is kind of hoist a social worker's anecdotal
21 experience up to allow the jury to then conclude that --
22 and I think the Court hit it -- that kids who get abused
23 delay, and kids who get abused disclose over a period of
24 time, and sometimes they do it in bits and pieces. So
25 the underlying kind of premise behind everything she says

1 is, is that in trying to explain that as it relates to
2 this case is exactly what the Court hit on the head, and
3 that is she presumes obviously enough, that, you know, a
4 kid who delays and then reports is sexually abused. She
5 presumes that a kid who delays and then reports it in
6 bits and pieces was abused.

7 Now, it seems to me, and the Court's gate
8 keeper role here under Daubert and under Shreck has I
9 think a -- kind of a number of different factors. Peer
10 review, literature, statistical analysis, acceptance of
11 this principle with regard to kind of literature that is
12 dependent upon by people in the field. Those are some of
13 the Daubert general principles, and I think what the
14 Court asks is you know, do they apply to not junk science
15 but this less than scientific type expert testimony? And
16 I think Shreck and Daubert touch upon, you know, exactly
17 some of the criteria that the Court should use in this
18 case, because it's the most problematic type testimony
19 for I think issues that the Court is focused on. And
20 that is the reliability of the underlying data to
21 support.

22 She has to concede there is literally nothing
23 out there in the literature in this area that talks about
24 adolescents and disclosure issues concerning adolescents.
25 And not only could she not point to it, but she said she

1 hadn't looked to that body of literature even if it does
2 exist to talk about issues concerning an adolescent
3 disclosure issue, which is what this case is about. And
4 that's under their best theory in terms of whether or not
5 this crime was committed.

6 And then secondarily it's -- it's the question
7 of why does it help the jury? And here it is to dispel
8 common myths. Well, again, based on my experience, I
9 didn't hear anyone interestingly enough when questioned
10 on the record who kind of didn't get that sometimes kids
11 hold onto it, or that sometimes kids don't give it up
12 depending on their particular circumstances. All the
13 types --

14 THE COURT: You -- you mean the prospective
15 jurors, or who do you mean?

16 MR. LOZOW: I'm talking about people who were
17 under oath in your chambers --

18 THE COURT: The prospective jurors?

19 MR. LOZOW: Prospective jurors -- jurors. And
20 I didn't hear -- I mean, I heard a number of different
21 kind of common sense, anecdotal -- I don't know that myth
22 is the word but personal experience in people who said
23 well, you know, when I was a kid this happened, it didn't
24 come out until a later time, there were reasons I didn't
25 do it. This -- this person was puritanical.

1 You know, so the common myths are the myths
2 that the Prosecution worries about in terms of closing
3 argument. And I'm gonna get up and say, you know,
4 children never delay. Well -- or I'm gonna get up and
5 say well, you know, she should have disclosed this in the
6 first kind of, you know, go-round. And so they worry to
7 some extent about what they talk about in terms of common
8 myths. I will tell you that I think these are the common
9 myths that this very, very you know, child advocate
10 driven witness, who is almost a full time expert for the
11 People, is worried about in terms of putting on testimony
12 to explain what may not be common myths.

13 And I heard again no scientific underpinning
14 for the notion that these are common myths. That's an
15 interesting scientific principle, that you don't -- you
16 don't develop statistical research to show a factual
17 predicate which then allows for an opinion. You simply
18 say there's a myth out there, and therefore I can tell
19 you anecdotally in my experience with kids who I presume
20 are telling the truth that sometimes they don't report
21 and sometimes they do report. In fact, you know, what
22 she's gonna say for the most part I tell you based upon
23 some other testimony I've seen from her is that abused
24 kids delay, here's why. You know, abused kids kind of
25 give this information in whole or in part and here's why.

1 And then she's gonna use her personal experience and say
2 that's how it works with the kids I've got.

3 I think that's exactly the type of very, very -
4 - and I don't wanna go to weight issues here, I wanna go
5 to the kind of the heart of the testimony and that is I
6 don't think it has the indicia of reliability that 702
7 talks about, and it doesn't touch on any of the
8 Daubert principles. If you go through each of those
9 rather arcane principles, which at least the Court says
10 you should take into account, there is simply no
11 literature that she can depend upon to even talk about.
12 So if you discount the literature, then the only thing
13 she talks about is her own experience, which doesn't have
14 the criteria that talks about whether or not a child is
15 telling the truth. She doesn't do that part. It isn't
16 up to her to do it.

17 Now, the other interesting thing, and maybe
18 this is done all the time. I'm somewhat taken aback with
19 the notion that she also -- using the term forensic
20 interview called a video of this young woman a forensic
21 interview. The Court may see that video, but it is not
22 what I would perceive as a forensic interview. And it is
23 of a 25-year-old person -- or a 22-year-old person, so it
24 doesn't even resonate with regard to, you know, a child.

25 So, Your Honor, I think you focused on the

1 issues. This is exactly the type of speculative
2 testimony that doesn't aid the jury. I think it confuses
3 the jury. And in the absence of even, you know, kind of
4 generic general principles, Mr. Suazo backs up to kind of
5 find, you know, the type of testimony that's a little
6 better, you know, than the next person because they've
7 seen children, I don't think that's the type of testimony
8 that should be used in case of this import with this
9 significance and with regard to the nature of the charges
10 here.

11 THE COURT: Thank you, sir. Anything else from
12 you, Mr. Suazo?

13 MR. SUAZO: Yes, Your Honor.

14 PEOPLE'S REBUTTAL ARGUMENT

15 BY MR. SUAZO:

16 First, I don't think that we can base our -- I
17 don't think the Court should base its determination on
18 whether jurors have any preconceived notions based upon
19 who we've already spoken with. As the Court knows, the
20 people we've spoken with were either victims of sexual
21 assault themselves or knew someone who did. So they have
22 a specialized knowledge, I would submit, over the types
23 of jurors that we're probably gonna end up with because
24 we excused a good number of those jurors that have talked
25 about these issues Mr. Lozow pointed out.

1 Your Honor, it's -- I don't know how we could
2 ask the jurors what their preconceived notions are. I'm
3 not sure what type of evidence I'm going to submit to
4 show the Court that these are preconceived notions. What
5 I can show to the Court are the cases that I did cite in
6 my response to the Shreck hearing. Those cases aren't
7 directly on point because the experts were not gonna
8 testify in the same exact way, however, the same
9 foundation had to be established by the Prosecution. It
10 had to be beneficial to the jury, the types of evidence
11 or types of testimony that the experts were going to
12 give.

13 And, Your Honor, I would submit that those
14 cases, the fact that those experts were allowed to
15 testify even though their testimony was not exactly the
16 same as Ms. Miller's, it was on the same topics, and I
17 submit the foundation had to be laid as far as what the
18 juror -- jury's misconceptions. That's all I have to
19 say. Andm Your Honor, I would ask the Court to allow Ms.
20 Miller to testify.

21 THE COURT: Thank you.

22 FINDINGS AND ORDER

23 BY THE COURT:

24 I guess I've already articulated in my
25 colloquy with one of you that I'm sort of a reluctant

1 gate keeper here. For the very reason that I -- I think
2 I mentioned I trust jurors. But for the additional
3 reason that I mistrust myself about my own ability to be
4 that gate keeper, to separate valuable and reliable
5 expert opinion from useless and unreliable expert
6 opinion. But Shreck has thrust all of us on the trial
7 bench into this role and it's one that I of course
8 accept.

9 There are two of these -- the two big prongs
10 under Shreck and under 702 is as I understand it
11 reliability and relevance. And Justice Rice directs us
12 to look at the totality of the circumstances and to
13 decide whether the proffered evidence is both reliable
14 and relevant. And of course under each of those big
15 prongs there are two sort of subprongs. And -- and let
16 me talk about the two that I don't have any problems
17 with.

18 One of the relevancy subprongs is a 403 really
19 analysis as Justice Rice talks about in Shreck. Is the
20 probative value of the evidence outweighed by the danger
21 of any unfair prejudice? Clearly not. I think that this
22 evidence has some probative value. I'll talk about the
23 quantity of that in a moment. But I don't see any unfair
24 prejudice. And so the 403 part of the relevance prong, I
25 -- I agree that the People have met that.

1 The -- the other subprong that I don't have any
2 problem with is the subprong on reliability about whether
3 the witness is qualified to give the opinions that she
4 has given. I know that she hasn't published, I know that
5 she is not an academic, but she's a clinician that has
6 probably seen more child -- has seen more children who
7 say they have been the victims of child abuse and sexual
8 child abuse than all of us put together. And I don't
9 have any qualms about Ms. Miller's -- Ms. Miller's
10 qualifications. I agree with Mr. Suazo, this isn't
11 exactly physics, so it's not scientific in that sense.
12 It's not even technical in that sense. It I guess comes
13 under the other specialized knowledge, and there's no
14 doubt in my mind and I find that the People have met
15 their burden of proving that Ms. Miller has the required
16 specialized knowledge to give the opinion that she has.

17 My two problems are with the other subprong --
18 prongs. And -- and let me talk first about so called
19 fit. And the fit inquiry is part of the relevancy prong,
20 and fit as I understand it is -- is -- is really the old
21 702 pre-Shreck question. Will this evidence be of
22 assistance to the jury? And I think what has happened in
23 this case is that Ms. Miller has set up a strawman about
24 common myths to convince me that this -- that her
25 testimony will be of some assistance to the jury to

1 destroy these common myths. The problem is there is no
2 evidence in this record about these common myths. She
3 has no foundation for the common myths. I didn't hear
4 her testify about any research, peer-reviewed or
5 otherwise. I didn't hear her testify in fact about
6 anything that I recall about why she thinks there are
7 common myths. I think she did testify that there are
8 text books that say there are common myths. I just don't
9 know -- and I agree with Mr. -- one thing that Mr. Suazo
10 says, I mean, I appreciate the problem of having to prove
11 the existence of a common myth to then set up the fit for
12 the expert testimony, and I -- and I also say this with
13 great humility because I think we're all in the middle of
14 this business that we're in the middle of, and -- and we
15 have to remember that regular people out there aren't
16 like us. They don't see these cases day after day.

17 But even when I try to -- even when I try to
18 adjust for that I just haven't heard any evidence that
19 these are real common myths, and they don't resonate with
20 me. I think all you need to be is a parent, all you need
21 to be is to know how children are to know that children
22 don't always tell their parents when bad things happen to
23 them. It doesn't take a rocket scientist or a clinician
24 to know that, and it just seems to me -- and I know I'm
25 getting sort of away from the evidence a little bit --

1 but it just seems to me that a part of the common
2 experience that these jurors bring to this case is that
3 we're all humans and we know how humans act. We know
4 ourselves that we don't always tell people when bad
5 things happen to us. Let alone when we're younger. So,
6 I guess I -- my conclusion is there is no evidence in
7 this record, at least no credible evidence in this record
8 from which I can conclude that there is a common myth
9 that children, especially 12- and 13-year-olds don't
10 immediately outcry. And so I'm having a problem with the
11 fit.

12 In the end after hearing everything that I've
13 heard, the arguments, the -- the testimony and reading
14 not only the response to the Shreck motion but also the
15 original notice of expert testimony that contains the
16 offers of proof, I am not satisfied that the People have
17 met the fit requirement. That is, I am not satisfied
18 that this testimony, even if I permit it would be of any
19 assistance to these jurors.

20 I was hoping to hear and to have Ms. Miller
21 answer the why question. Why is it that some children
22 outcry and some children don't? Does it have to do with
23 their relationship between the perpetrator? Does it have
24 to do with who they're outcrying to, who they're not
25 outcrying to? But I didn't hear any of that. And so I

1 -- I'm not sure what -- what she would say about why. My
2 understanding really of the offer of proof is that she is
3 just going to say that some do and some don't. And I
4 just don't think there's -- there's any evidence that
5 there is a common myth that everybody -- that nobody ever
6 delays that would make this useful to the jury.

7 That's a closer question for me. Less close is
8 the other reliability prong which is that are the
9 principles that the expert's relying on whether it's
10 scientific, technical, or other specialized knowledge,
11 are they reliable? Quite apart from the witness'
12 expertise, and the answer to me is that there's been no
13 showing. This hasn't even come close to a showing of
14 reliability.

15 The Shreck Court allows us to look at the
16 Daubert factors, and those factors are has the technique
17 been tested? No evidence of that. This witness has no
18 idea in either her -- well, let's talk about her own
19 clinical experience. This witness has no idea whether
20 there's a correlation between real sexual abuse and false
21 sexual abuse and the time of delay. No -- no -- and she
22 doesn't know that because she doesn't know whether the
23 people she sees have suffered sexual abuse or haven't.
24 She didn't testify except by saying yes, there's some
25 research that I relied on, I don't have it with me right

1 now. There's been no showing that quite apart from her
2 clinical experience whether there's any been -- been any
3 research peer reviewed or otherwise showing whether this
4 opinion has -- that she's about to -- or wants to give
5 has been tested or not.

6 As I mentioned in my colloquy with Counsel, for
7 all I know every single person who delays has not been
8 sexually abused, and every single person who doesn't has
9 been. Or vice versa. We have no idea. This is all just
10 anecdotal.

11 The other Daubert factor is -- well, whether
12 the -- the opinions been subject to peer review and
13 publication. Not that I know of. She cited some text
14 books. That's not -- I don't know if they're peer
15 reviewed. She certainly hasn't done any peer review
16 publication. Error rates. No evidence in this record at
17 all about error rates, about falsifiability about
18 verifiability, none of the things that we think we would
19 want if we're talking about either science or social
20 science. There -- there's still a scientific part of
21 social science. It can't just be an agglomeration of a
22 bunch of clinician's anecdotes, which I think is what
23 this is.

24 The existence of specialized literature dealing
25 with the opinion, there's certainly that I think.

1 Whether the views have been generally accepted. I don't
2 think there's been evidence of that in this record.
3 Again, there's just been sort of this very casual --
4 well, there's a bunch of books on it, I don't have them
5 with me right now.

6 The nonjudicial use to which the opinion is
7 used, that's really an interesting Daubert factor and for
8 me it's one of the most telling ones. Because when I'm
9 hearing a surgeon talk about a cardiovascular technique
10 that they use to actually treat people, that matters to
11 me. Because that technique then is not poisoned, or
12 potentially poisoned by the forensic aspects of this. I
13 didn't hear any evidence that this view that children
14 sometimes delay, children sometimes don't delay, children
15 sometimes gradually opine. Children -- what was the
16 third one, children sometimes out -- give outcries to
17 some people but not other kinds of people, sort of a
18 selective outcry, and the fourth one was perpetrators
19 sometimes groom the children. I didn't hear any evidence
20 that those conclusions are ever used to do anything
21 except prove cases in court. That is to say I heard no
22 evidence that there is any nonjudicial use to which these
23 opinions have been used.

24 I guess the last Daubert factor is frequencies
25 and error rates. Nothing at all about that. I guess in

1 the end I -- I think to permit this testimony -- and
2 again I say this with some reservations and also with
3 some reluctance because I do believe jurors under -- I
4 think jurors could see what this kind of testimony really
5 is, but -- but I'm called upon by Shreck to -- to do this
6 gate keeping.

7 And I think in the end to permit this testimony
8 is really to permit a different kind of common myth that
9 -- that the witness testified she was trying to overcome,
10 sort of a common clinical myth. That's all this is at
11 this point. So for all of those reasons, I find that
12 Ms. Miller's testimony is not to be admissible under the
13 totality of circumstances, under either 702 or Daubert.

14 Anything else for me before I stand down? I
15 know that we have this subpoena issue floating around
16 there, and I just haven't had time to look at it or think
17 about it. We'll take it up tomorrow morning.

18 MR. LOZOW: Very well.

19 THE COURT: Anything else from the People?

20 MR. SUAZO: No.

21 THE COURT: From Defense?

22 MR. LOZOW: No.

23 THE COURT: Thank you. I appreciate your time
24 staying so late. We're in recess.

25 (Whereupon these proceedings were concluded.)

TRANSCRIBER'S CERTIFICATION

STATE OF COLORADO)
) SS.
COUNTY OF BOULDER)

I, Maureen O'Toole, do hereby certify that I have listened to the CD recording of the foregoing; further that the foregoing transcript pages 1 through 50, were reduced to typewritten form from a CD recording of the proceedings held July 26, 2006, in the Denver District Court, in the matter of People of the State of Colorado v. Alexander Naroditsky; and that the foregoing is an accurate record of the proceedings as above transcribed in this matter on the date set forth.

DATED this 4th day of December, 2006.

Maureen O'Toole