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Catherine Tinker

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CHILD ABUSE: A PRACTITIONER'S GUIDE TO THE TRIAL OF CHILD ABUSE CASES IN CRIMINAL COURT

*CATHERINE TINKER**

Tonya, age two, was brought into the emergency room of a local hospital with second, third and fourth degree burns on her feet and buttocks.[1] *Her grandmother told the doctor she noticed something wrong with the child when she removed her shoes and socks and saw the skin peeling off her feet. The mother first said her three-year-old had scalded the girl in the tub; later she blamed the child herself for turning on the hot water and sitting in it. Finally she tried to accuse the grand-*

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* Senior Staff Attorney/Pro Se Law Clerk for the U.S. District Court for the Southern District of New York; former Assistant District Attorney, Child Abuse Unit, Sex Crimes and Special Victims Bureau, Kings County District Attorney's Office, Brooklyn, New York (1984-86); and County Attorney, Webster County, Iowa (1983-84). The views represented in this article are those of the author and not of any organization or agency, private or governmental. Thanks are due to Louise Squeglia, Esq., who began the work of the Kings County District Attorney's office with abused children and who trained the author; Kerry Baron, Esq., who read a draft of this article; and the Honorable Amy Juviler of the Criminal Court, City of New York, Kings County, whose innovations in dealing with child witnesses are exemplary.

1. This example is based on People v. Sims, 110 A.D. 2d 214, 219, 494 N.Y.S. 2d 114, 118 (1985). The defendant had previously pleaded guilty to attempted manslaughter in connection with the death of her first born. This prior conviction was successfully introduced at trial by Assistant D.A. Louise Squeglia to negate a defense of accident or mistake.

Throughout this article, actual cases based on the author's experience will be used to illustrate the types of trial problems encountered in child abuse cases. Where possible, case citations are provided.

Most child abuse cases are tried in lower state courts and are not reported, absent an appealable issue. In *Sims*, the use of defendant's prior conviction and her history of beating her children were raised on appeal and the conviction affirmed. The majority of cases of physical child abuse by a parent or parent substitute (perhaps as high as 90% in the author's experience) result in plea bargains to reduced charges. These cases never go to trial and are never reported. Grand jury minutes remain sealed and cannot be ordered from court reporters. Transcripts of preliminary hearings, pretrial hearings, the plea itself, and sentencing proceedings in cases which never go to trial, as well as trial transcripts for those cases which do go to trial, can be obtained by contacting the district attorney's office for the relevant jurisdiction to get docket numbers and case names.

mother who brought the child to the hospital.

The doctor's diagnosis showed the burns were so called "stocking" or "glove" burns,[2] *caused in this case by intentionally holding the child horizontal and lowering her feet and buttocks into scalding water, and holding her there for at least thirty seconds. There were no splash burns or burns on the top of the girl's feet, as there might have been in case of an accident; nor was it likely that any child could intentionally sit down in the tub long enough for 150 degree water to reach a depth of several inches.*

The hospital reported the incident to the state's central registry of child abuse, and child protective service workers immediately became involved with the family. Based upon investigation by specially trained police detectives, in coordination with the local prosecutor, Tonya's mother was arrested and charged with felony assault and endangering the welfare of the child.[3] *The district attorney sought an indictment for felony assault because of the seriousness of the injuries to the child, the medical evidence concerning the causation and time of the injuries, and the exclusive opportunity the mother had to inflict*

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2. "Stocking" or "glove" burns refer to a smooth line of demarcation on a burned arm or leg which looks like it is covered with a sock or glove where it was dipped into hot water. The length of time the skin must be submerged to produce such burns depends on the temperature of the water.

Belts, electric cords, broomsticks, and boiling water may meet the legal definitions of "dangerous instruments" or weapons and satisfy one element of felonious assault in many states. The prosecutor may feel hard pressed to prove the other elements of a felony with circumstantial evidence and inconclusive medical testimony as to whether the child will recover physically or be permanently harmed by the parental abuse. Another difficulty in establishing "permanent injury" is that unlike adults, children's soft bones and tissues and newborns' unformed skulls may recover from brutal trauma in astonishing ways. Although developmental damage is likely to have occurred, it will only be ascertainable as the child matures. For these reasons, a separate crime of felony child abuse, with elements of proof reflecting the actual situation, may be needed.

3. Traditional state statutes on assault and homicide are not written with the young victim of child abuse in mind. For example, definitions of "serious physical injury" and "permanent disfigurement or impairment" typically applied to state felony charges may be highly relevant in deciding which adult to charge in a bar fight or street brawl and with what degree of crime. Hesitation to seek felony prosecutions in such cases cannot apply in cases of child abuse, where the parties are never equal in size, experience, authority, or knowledge of means of escape. As a result of the heavy burden of proof of all elements of felony assault, more physical child abuse cases are prosecuted as misdemeanors (similarly, more first-degree murder cases are prosecuted as manslaughter due to the difficulty of establishing specific intent and premeditation) than as felonies, despite the brutality of the attack on the infant victim.

the injuries on the child. At trial, the prosecutor proved beyond a reasonable doubt by the use of circumstantial evidence that the mother had intentionally inflicted the wounds on her child. The defendant was sentenced to seven and a half to fifteen years in prison.

I. Introduction

Criminal abuse of children involving torture, excessive beating, intentional burning, and other physical assaults often occurs as part of an escalating pattern of violence which may culminate in the death of the child.[4] In the majority of cases, the perpetrator of these crimes against children is the child's own parent, the parent's live-in boyfriend or girlfriend, or the child's babysitter.[5] There will be deep scars, both physical and emotional, which the surviving victim will bear for life; in addition, the lengthy process of investigation and trial of the abusive adult may become, in effect, a second assault on the child.[6]

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4. The subject of this article is physical, not sexual abuse of children. Much of the trial technique discussion in this article, however, applies equally to both types of cases.

For a sense of public awareness of both problem areas, see *inter alia*, Rondon, *Kidability: Taking Action Against Child Sexual Abuse*, CHILDREN TODAY, July-Aug. 1986, at 22; Tavris, *The Truth About Sexual Abuse*, VOGUE, May 1986, at 164; *Helping Molested Children*, U.S. NEWS & WORLD REPORT, Mar. 10, 1986, at 109; *Detroit Mom Accused of High Seas Murder Admits Killing Baby, FBI Says*, JET, Aug. 25, 1986, at 18; O'Neil, *I Abused My Child*, LADIES HOME. J., Feb. 1986, at 22; Zigler and Rubin, *Why Child Abuse Occurs*, PARENTS, Nov. 1985, at 102; Heckler, *Child Abuse Alert*, HARPER'S BAZAAR, July 1984, at 172.

One difference in the investigation or trial of sexual abuse cases as opposed to physical abuse cases is the use of anatomically correct dolls to assist child victims in describing what happened. Other evidentiary differences in some states in sexual abuse cases may be special corroboration requirements or the availability of more liberal hearsay exceptions involving child witnesses/victims; *see* discussion *infra*.

5. 87.1% of prosecutions for child abuse involved a parent or parent substitute and over 90% of reported child abuse cases occurred in the home. People v. Love, 391 N.W. 2d 738 (Mich. 1986)(citing United States v. Allery, 526 F. 2d 1362, 1366 (8th Cir. 1975)).

6. *In re* Tara H., 129 Misc. 2d 508, 494 N.Y.S. 2d 953 (N.Y. Fam. Ct. 1985). The trauma of the courtroom for the child victim has been termed a "secondary victimization," although the child's participation in the judicial process may not be so damaging as some think. Rogers, *Child Sexual Abuse and the Courts: Preliminary Findings*, in SOCIAL WORK AND CHILD SEXUAL ABUSE 145, 146-147 (J. Conte and D. Shore eds. 1982). *See also* Parker, *The Rights of Child Witnesses: Is the Court a Protector or Perpetrator?*, 17 NEW ENG. L. REV. 643, 651 (1982). The psychological resilience as well as the physical survival of battered children should never be underestimated; their premature exposure to the dark side of life may prepare them for survival in the adult world in ways we do not fully understand and in ways their more sheltered classmates may never

This article is a practitioner's guide to the trial of physical child abuse cases, addressing issues of constitutional law and criminal procedure as they arise in the course of the investigation and trial of a case. Innovative legislative efforts on both state and federal levels to minimize the trauma of the courtroom for child witnesses may suggest techniques for judges and trial attorneys even in the states where the legislature has not enacted certain reforms.[7] The trial of a child abuse case, as this article describes, involves social policy decisions concerning the changing role of the family, children's rights, and the increased responsibilities of government. These concerns are reflected in efforts to change the rules of evidence and criminal procedure in the limited context of child abuse trials, a trend which acknowledges the special needs of young children in the court system while protecting a criminal defendant's right to a fair trial.[8]

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learn. The child victim must be acknowledged as strong enough to have stayed alive and must be given the chance to enjoy some parts of childhood again. *See* Newman, *Abused Children Learn to Play Again*, MS., Dec. 1986, at 24. Interestingly, recent research suggests extending the psychiatric diagnosis of "post-traumatic stress disorder" to child victims of abuse (this diagnosis has most often been applied to Viet Nam War veterans). *Terror's Children: Mending Mental Wounds*, N.Y. Times, Feb. 24, 1987, at C1, col. 1, and C12, col. 2.

7. For example, training of attorneys in interviewing child witnesses and in recognizing the symptoms of abused children is widely advocated. Such training at present is generally on-the-job, if at all, in busy district or county attorneys' offices. A few prosecutors, such as District Attorney Elizabeth Holtzman in Brooklyn, New York, insist on training programs for assistant district attorneys featuring child psychiatrists, emergency room physicians, and social workers, and other experts in child development and behavior. While few bar associations or trial attorneys' organizations offer continuing legal education programs specifically on the trial of child abuse cases, a growing number of interdisciplinary panels and workshops involving lawyers are being presented nationwide, frequently at conferences of social workers, therapists, or law enforcement officers.

8. These conflicting concerns regarding child abuse have been well articulated in reference to the trial of child sexual abuse cases.

> "Child sexual cases create significant conflicts among the interests of the defendant, the state, and the child. The defendant's rights to presence, representation by counsel, and due process must be weighed against the state's interests in protecting the child's welfare, ensuring accuracy in the fact-finding process, and convicting guilty sexual abuse offenders. These interests of the defendant and the state, in turn, are at odds with the need to minimize the psychological trauma suffered by the child during the criminal trial process."

Note, *Defendants' Rights in Child Witness Competency Hearings: Establishing Constitutional Procedures for Sexual Abuse Cases*, 69 MINN. L. REV. 1377, 1380 (1985).

Growing Concern Leads To Prosecutions

The interests of society in protecting innocent children from physical or sexual abuse by adults responsible for the child's care have been aroused publicly since the early 1960's, when child protective legislation was enacted by every state,[9] including the establishment of "hot lines" or other child abuse reporting mechanisms and mandatory reporting from doctors, nurses, and teachers.[10] Twenty years later, states have expanded and refined their procedures to provide for immediate investigation, generally within 24 hours, of any report of suspected child abuse, to coordinate child protective services with the medical and legal services required in abuse situations,[11] and to mandate reporting from an even wider pool of informants.[12]

Physicians required to report suspected cases of child abuse are specifically immune from suit for civil damages for any alleged violation of the physician-patient privilege involved in the reporting or diagnosis of suspected child abuse, even if that diagnosis is later proven wrong.[13] A few unsuccessful cases have

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9. Bowers v. Maryland, 283 Md. 115, 389 A.2d 341 (1978) (citing Paulsen, Parker & Adelman, *Child Reporting Laws - Some Legislative History*, 34 GEO. WASH. L. REV. 482 (1966); FONTANA, SOMEWHERE A CHILD IS CRYING at 4 (1976); Kempe, Silverman, Steele, Droegenmueller & Silver, *The Battered Child Syndrome*, 181 J. AM. MED. A. 17 (1962).

10. *See, e.g.*, Contemporary Studies Project, *Iowa Professionals and the Child Reporting Statute—A Case of Success*, 65 IOWA L. REV. 1273 (1980).

11. *See* N.Y. Child Abuse Prevention Act of 1985, §§ 676, 677 (McKinney 1985), discussed *infra*.

12. *See, e.g.*, N.Y. SOC. SERV. LAW §§ 413, 420 (McKinney 1983 & Supp. 1987), which requires police officers, assistant district attorneys, physicians, dentists, nurses, social workers, day care and school officials to report suspected child abuse, Under § 420, willful failure to report a case subjects one to a class A misdemeanor. Under § 420(2), a mandated reporter who "knowingly and willfully fails" to report "shall be civilly liable for the damages proximately caused by such failure."

13. Since the passage in 1974 of the Federal Child Abuse Prevention and Treatment Act, 42 U.S.C. §§5101-5106, states must provide immunity for reporters of suspected child abuse in order to qualify for federal funds, as specifically required by section 5103(b)(2). "[A]ll fifty states, the District of Columbia, and four American territories have similar statutes with very similar immunity provisions." Harris v. City of Montgomery, 435 So.2d 1207, 1213 (Alabama 1983). *See also* State v. Odenbrett, 349 N.W.2d 265 (Minn. 1984); State v. Howland, 125 N.H. 497, 484 A.2d 1076 (1984) (defendant not immunized from prosecution for the underlying abuse itself simply by calling in a report of abuse; the caller is merely immunized from prosecution on charges of failing to report suspected abuse); Goldade v. State, 674 P.2d 721 (Wyo. 1983). These cases do not address the possibility of a state court claim for civil damages brought by the alleged abuser after acquittal on criminal charges if the mandated reporter knew the charges to be false or unfounded yet maliciously reported suspected abuse.

been brought in federal court seeking civil damages for alleged constitutional violations relating to child abuse investigations and reporting, including fourth amendment violative searches and seizures and failure of government to protect a child after a report of abuse.[14]

II. The Initial Interview

The prosecutor's initial interview with the child victim of alleged abuses[15] is an opportunity to gauge the seriousness of the case and the likelihood of success at trial. The attorney should prepare for the interview by reviewing the child's medical and social history,[16] and by monitoring the progress of the parallel

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14. For example, representatives of a deceased abused child sought unsuccessfully to hold state or local government officials liable for failure to protect the child from further abuse or death once a report of suspected abuse was made to the state child abuse registry. Jensen v. Conrad, 747 F.2d 185, 194 (4th Cir. 1984), *cert. denied*, 105 S.Ct. 1754 (1985).

See Note, *Defining the Scope of the Due Process Right to Protection: The Fourth Circuit Considers Child Abuse and Good Faith Immunity*, 70 CORNELL L. REV. 940 (1985) (discussion of *Jensen v. Conrad*). *But see* Sorichetti v. City of New York, 65 N.Y.2d 461, 482 N.E.2d 70, 492 N.Y.S.2d 591 (1985) (police department failed to act to protect child after mother reported father's threat to harm child during weekend visitation in violation of court order of protection, despite officers telling mother they would help her; child, who was severely mutilated by father before police acted, was awarded two million dollars in damages in light of "special relationship" of police to child under these facts).

Federal court challenges to the constitutionality of investigations of alleged child abuse as violative of the fourth amendment or the right to privacy have been defeated. Salman v. Armstrong, 802 F.2d 199 (6th Cir. 1986) (decided on *Younger* abstention grounds); DeSpain v. Johnson, 731 F.2d 1171 (5th Cir. 1984).

15. The defense attorney will not interview the child, in most cases, until cross-examination at trial, since the allegedly abused child is generally removed from the custody of the abusive adult and protected by a court order of protection.

The prosecutor will meet the child victim only after the doctors, social workers, child protective services investigators, policy officers and others have interviewed the child. The assistant district attorney needs to know immediately what happened during the parallel social work involvement with the child and the family and what medical treatment was received by the child.

16. Child abuse cases, perhaps more than any other type of crime, routinely involve extensive contact between the victim and therapists, doctors, social workers, and agencies. Upon observing signs of suspected child abuse, one should report it to the state central registry of child abuse cases. Next, make sure the child has proper medical attention. Finally, remove the child from the dangerous environment by restricting the suspected abuser's access or placing the child into foster care. The prosecutor may be notified during any of the aforementioned stages. Increasingly sophisticated state reporting systems collect better information and help agencies coordinate investigations with po-

case in Family Court.[17]

The interview will impact on the child's life in a way that few attorneys, accustomed to routine interviews and evaluations of potential witnesses for trial, may consider.[18] The potential for damage to a delicate and already wounded child is tremendous, and may increase each time the child is forced to repeat his or her story about how a loved adult abused him or her.[19] The dynamics of the interview process must be understood in order to tailor the questions in a fashion appropriate to the age and physical or mental condition of the child victim, as suggested in

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lice departments and district attorneys' offices. Specially trained investigators and detectives may be effective. In order to avoid tragedy, the prosecutor must be aware of the progress of the child's case in Family Court, the hospital, the social services agency, and any other place where people may be making decisions about the child. *See, e.g.*, *2-Year-Old's Skull Fracture is Traced to Bureaucratic Errors*, N.Y. Times, Mar. 15, 1987, § 1, at 43, col. 1.

17. The removal of the child from the home is a temporary child protective measure which may lead to permanent loss of parental rights only where those rights are voluntarily surrendered by the parent or, in extreme cases, upon order of the Family or Juvenile Court. The state department of social services or bureau of child welfare will proceed in Family or Juvenile Court (without the involvement of the prosecutor handling the criminal court case) to temporarily remove the child from the abusive home, place the child in appropriate foster care, or recommend return of the child to the home with appropriate counselling, therapy and other support services for the child and entire family.

State Family Court or Juvenile Court acts generally outline the procedures for removal of a child from the home where the child is abused or neglected and provide for eventual termination of parental rights if the family cannot be reunited to the satisfaction of the court. *See, e.g.*, N.Y. JUD. LAW Fam. Ct. Act §§ 1011-1074 (McKinney 1983 & Supp. 1987); *see also* Deutsch, *Testimony by Children in Child-Abuse, Neglect Cases*, N.Y.L.J., Apr. 11, 1985, at 1, col. 3. Termination of parental rights is an infrequent finding in most states and one which generally requires lengthy periods of temporary placement of the child in foster case and conditions (such as counseling or vocational training or parenting classes) which the abusive parent has flagrantly ignored.

Proceedings in family or juvenile court are civil, not criminal in nature, therefore the burden of proof, the rules of evidence, and the possible sentences are different from the criminal court trial on the same underlying incident of child abuse. The exclusionary rule, for example, is not applied in family court child abuse cases. *In re* Diane P., 110 A.D.2d 354, 494 N.Y.S.2d 881 (1985); *In re* Cassandra R., 132 Misc. 2d 546, 504 N.Y.S.2d 602 (Fam. Ct. Onondaga Co. 1986). Criminal court and family court proceedings generally run concurrently, although a disposition may be reached in family court long before the criminal case goes to trial.

18. The trial of a child abuse case is likely to affect the trial attorney as well; the emotional impact of the abused child is powerful. Attorneys as well as police detectives and social workers who specialize in abuse cases need to be aware of the "burn-out" factor in dealing with abuse over several years and develop stress-reduction techniques to use at the office and at home. Wall Street J., Nov. 19, 1986, at 1.

19. *See supra* note 6.

this section of the article, and in order to conduct the interview under conditions which minimize the fear and tension for the child.[20]

The attorney should learn to recognize signs of the "battered child syndrome."[21] Frequently abused children are often described by their parents as "troublemakers"; they are unable to concentrate, disruptive at school, or provoke any number of other complaints. The attorney meeting the alleged victim of child abuse for the first time should expect anything from a shy, withdrawn, almost comatose child to a wildly energetic child who propels himself from one end of the office to the other, scooting in and out amongst desks and into other offices. Trained interviewers will recognize the pain—psychic and physical—these children are suffering and anticipate such behavior rather than be startled by it. The child should be given a chance to ask questions. Even though severely battered, the child will frequently express love for the abusive parent[22] and be afraid of hurting or displeasing the parent. Such fear may be highly realistic in light of threats from the parent or other siblings who are not themselves singled out as targets of the parent's rage or frustration. At the start of the interview itself, the attorney must tell the child exactly who she or he is, which side he or she represents, and what the purpose of the interview is. Explanations about the legal process are important for the child, as for any other witness coming to court for the first time. The office and

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20. One of the recommendations of the California Attorney General's Commission on the Enforcement of Child Abuse Laws, cited by United States Senator Alan Cranston in testimony in support of proposed S. 140, is that local law enforcement agencies should have specially trained police officers and assistant district attorneys trained in interviewing child witnesses and recognizing symptoms of abused children. *Children's Justice Act, 1985: Hearings on S. 140 Before the Subcomm. on Children, Family, Drugs, and Alcoholism of the Senate Comm. on Labor and Human Resources*, 98th Cong., 2nd Sess. (May 2, 1985) (statement of Alan Cranston, Senator from California).

21. *See, e.g.*, THE BATTERED CHILD (R.E. Helfer and C.H. Kempe eds. 1974); MANAGEMENT OF THE PHYSICALLY AND EMOTIONALLY ABUSED (C.G. Warner and G.R. Braen eds. 1982); M. STRAUS, R. GELLES, AND S. STEINMETZ, BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY (1980). *See also* discussion *infra* of the use of expert witnesses on the battered child syndrome in the grand jury and at trial.

22. The defense mechanism known as "identification with the aggressor" by psychiatrists, as well as the child's predictable love for the adult upon whom he is dependent appear to operate even in situations which are dangerous to the child's physical safety. Frequently the child thinks the adult's violent behavior is normal or the child may feel responsible for provoking the adult attacks or guilty about the adult's problems.

courtroom may be particularly intimidating for the small child.

The setting of the initial interview in the prosecutor's office can be humanized for the child by providing child-sized furniture, toys, dolls, games, and coloring books. If the child is attached to a certain toy while waiting for the interview to begin, his play may continue while the attorney establishes rapport with the child, chatting about television or school. The attorney may use hints from the child's play to frame questions using the child's point of reference and vocabulary.[23]

The attorney must gauge the child's testamentary capacity as well as elicit the facts about the alleged abuse. Questioning a child should be done carefully and extremely literally.[24] The child's narrative may be encouraged by asking chronological questions, breaking the day down into concrete events and helpng the child remember each detail leading up to the actual abuse.[25] As in all interviews, the attorney should strike a balance between an open-ended interview which gives the child encouragement to speak openly and truthfully about what happened in an atmosphere where the child feels safe, and a time-efficient interview geared toward the eventual trial of the case.[26]

23. For example, if the child is observed battering a doll with his fist or threatening horrible tortures he's going to inflict on the doll, this may be an indication of what he experiences at home. Such actions could be the basis of questions that will get the attorney to the root of the problem faster. Depending on age and developmental stage, a child's attention span may be short, especially when the he or she is reluctant to discuss the topic.

24. No one should put words in the child's mouth, but questions should be specific enough for the child to answer. For example, asking "what did your father do to you?" may elicit a response about some time they went shopping or the surprising question "when can I see daddy again?" instead of anything about the cause of the child's injuries. Rephrasing the question as "I want you to tell me what happened yesterday with you and your daddy before you went to the hospital" gives the child the exact frame of reference desired. Of course, the attorney should not cut off a child's digressions too quickly, as the child may be describing a prior incident of abuse or abuse by someone other than the suspected parent. Developing a sense of timing with children's short attention span is important in getting answers to the most important questions. The questions should be asked directly, precisely, and in a manner consistent with the child's age and developmental stage.

25. For example, asking the child details about the day he went to the hospital might start with what time he got up, who was in the house then, whether he had any breakfast, what he did next, etc.

26. Counsellors and child therapists recommend a series of interviews of the child spread over several weeks or longer; the specific requirements of the criminal law and procedure and the demands of a busy trial calendar cannot often accommodate that ideal scheme. The trial attorney can plan to spend more time with a child witness than

The attorney should tell the child that there is no wrong or right answer, only the truth about what happened. It is important to let the child know that he or she is not to blame for being the victim of abuse, and that he or she will be protected from further abuse by the adult.[27] The child, even if only five or six years old, may have been cooking, shopping, and taking care of the family in place of the adult abuser; that child must now be given permission to be a child again and be told that the adult is responsible for whatever happens next.[28]

III. Pre-Trial Procedures

Testamentary Capacity of a Child Witness

Scene: Judge's chambers. *Present*: Child victim of alleged abuse, judge, defense attorney, prosecutor, child's foster parent, and social worker. *Purpose*: a hearing to determine the testamentary capacity of the child for purposes of swearing her in before testifying to the grand jury or at trial.

Nicole is a bright-eyed five-year-old with a fresh scar on her upper eyelid. She was hospitalized for a laceration to the upper eyelid which required six stitches, and a fresh bump on the back of her head. Old scars were observed on her back and buttocks, and she may have permanent loss of sight in her eye

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with an adult and to conduct the interview in a considerably different manner than usual.

27. Depending on the age of the child, it is appropriate to discuss the criminal law, the elements of a crime, and the possible sentences a judge may consider for the child's parent or other adult if they are convicted of a crime. If alternatives to incarceration are available, such as counselling, supervised probation, drug or alcohol abuse therapy, etc., it is important to discuss these options with the child. Although the child's feelings toward the abuser may be ambivalent, the child should not feel guilty for "putting daddy in jail" and should know that help may be available for the parent's problems.

28. For a description of the non-functional abusive adult who allows a small child to assume the role of parent in the household, as well as other insights into the abusive parent, *see* C.C. Herbruck, Breaking the Cycle of Child Abuse (1979) (written about a group called Parents Anonymous). Studies show many abusers come from abusive homes and that there is a strong possibility that battered children will grow up to abuse their own or others' children. *See* L. Walker, The Battered Woman (1979) (children, as well as women, are usually battered in violent homes; in the typical situation of escalating domestic violence either the man beats both the woman and the children or the woman beats the children after she is beaten by the man); and Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 Wash. L. Rev. 267 (1985) ("child abuse is highly correlated with all forms of violent crime and mental illness," *id.* at 298).

as a result of the injury. The doctor diagnosed the cause of the injury as trauma with a blunt object, inconsistent with the parents' story of an accident or fall because of the location of the laceration inside the protective bony orbit of the eye.

Nicole told her teacher she fell. The teacher did not believe her and called the case in to the state central registry of child abuse. The social services investigator on the home visit arranged for Nicole to be examined at the hospital emergency room, where the child told doctors and nurses that her daddy kicked her in the head with his boot. Nicole's father was subsequently arrested for felony assault and endangering the welfare of a child. At the time of his arrest, he was wearing steel-toed work boots.

At the hearing, Nicole is extremely active, sliding down in her seat, climbing over the arm of the chair, chatting to her new foster mother and the prosecutor. The judge, seated at the conference table with everyone else, asks Nicole about her favorite television programs and about school. Then she begins to question Nicole about the difference between the truth and a lie. Nicole answers thoughtfully and seems to understand both the importance of what she is being asked and the meaning of an oath in court. When asked if she ever told a lie, Nicole admits she told her mother she'd cleaned up her room when she hadn't. As the judge probes further into the child's perception of the truth, Nicole slouches further down in her chair, finally slipping off completely onto the floor. Unperturbed, the judge continues to address questions under the conference table until Nicole pops up again in her chair.

Considering the extremely young age of the child, the judge decides to extend the inquiry further than usual in making a determination of the swearability of the child as a witness. She asks the social worker and the foster mother to recount what Nicole told them about the cause of her injuries and their opinion of the child's sense of reality and general truthfulness. Their accounts are consistent with what Nicole said at the hospital and what she told the prosecutor.

Finally the judge explains to the little girl what will happen next with the case in court, including the possibility that she will have to take an oath and testify at trial against her father, who will be present in the courtroom. Asked if she will

do that, the little girl shrugs her shoulders and nods yes. The judge then asks her some more questions about what an oath means and what happens to people who tell lies, particularly in court.

The judge asks both attorneys if they have questions concerning the proceeding. The prosecutor asks for an extension of the temporary order of protection which was issued at arraignment to prohibit the father from seeing his daughter. The judge inquires of the social worker what the plans are for visitation. Assured that only supervised visitation at the social service agency will be permitted, the judge issues the order of protection. The judge will announce her decision concerning whether the child understands the nature of the oath and possesses the requisite testamentary capacity to be sworn and give testimony.[29]

Jury Presentations and Defense Motions to Dismiss the Indictment

The child victim's testimony may be the only direct evidence at trial; all other evidence is likely to be circumstantial. If the prosecution intends to rely on the child's testimony at trial, the child must testify before the grand jury or at the preliminary hearing as well.[30] In some states, the child's testimony may be recorded on videotape and the tape played to the grand jury.[31]

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29. Before the judge ruled on the swearability of the child, the father pleaded guilty to a reduced charge of misdemeanor assault. During allocution of the plea, the defendant maintained that he lost his temper when the baby was crying and thought Nicole slammed the baby's fingers in the door. Angry, he kicked Nicole in the head, causing the laceration over her eye, and causing her to fall backward, where she hit the back of her head on a pipe. The defendant was sentenced to probation, with the condition that he present proof to the court by a certain date of his attendance at counselling sessions. He was warned that failure to comply with the conditions of his probation would result in reopening the case.

30. Some states, such as New York, require every felony to be charged by grand jury indictment; other states, such as Iowa, permit a felony to be charged either by grand jury indictment or by a prosecutor's information. In Iowa, after the prosecutor's information is filed, a preliminary hearing on the evidence to support the instrument may be requested by the defense. Many of the techniques described for the grand jury presentation are equally applicable to a preliminary hearing.

31. The trauma to the child witness may be reduced by videotaping the child's testimony and replaying the tape at the grand jury and for trial preparation instead of making the child repeat his or her testimony several times in front of new sets of people. If the videotape is played to the grand jury in lieu of live testimony from the child, the

Whether the child is testifying live or on videotape, the prosecutor must indicate on the record before the grand jurors that the child was deemed capable of being sworn by a judge; and the child must take the oath.[32]

Some twenty states have no special requirements for hearing testimony from child witnesses.[33] In many other states, a child under a given age (generally ten or fourteen) may not testify at a criminal trial without some precautions to ensure the reliability of the testimony, most commonly by judicial examination of the child's ability to understand the nature and purpose of an oath.[34] This inquiry by a judge is necessarily informal and need not be on the record or conducted in the presence of the defendant or his counsel.[35]

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grand jurors must be given the opportunity to formulate additional questions for the child. If the questions are material and relevant and have not been answered by any other witness or through physical evidence, the prosecutor must bring the child before the grand jurors to answer the questions. If there has been careful preparation before interviewing the child on videotape, however, and adequate circumstantial evidence is presented, the grand jurors probably will not have to recall the child for questions. In addition to assault or homicide charges, crimes such as endangering the welfare of a child or the equivalent statute based on the tender age of the victim should be charged. *See, e.g.*, N.Y. PENAL LAW §260.10 (McKinney 1983). Evidence of the child's age must then be presented to the grand jury, usually in the form of hospital records or the parent's testimony. It should not be necessary to recall the child for such evidence. *See, e.g.*, People v. Anderson, 99 A.D.2d 560, 470 N.Y.S.2d 946 (1984).

32. People v. Vasquez, 119 Misc.2d 896, 464 N.Y.S.2d 685 (Sup. Ct. N.Y. Co. 1983).

33. States permitting anyone to testify include Arizona, Arkansas, Colorado, Delaware, Florida, Maryland, Michigan, Mississippi, Nebraska, Nevada, New Jersey, New Mexico, North Dakota, Oklahoma, Pennsylvania, South Dakota, Washington, Wisconsin, and Wyoming, following the Federal Rules of Evidence, Rule 601.

34. The common law presumption of competency to testify applied to children over age fourteen. It is a rebuttable presumption that a child under the given age cannot give sworn testimony. *See, e.g.*, People v. Smith, 104 A.D.2d 160, 481 N.Y.S.2d 879, (1984). Statutorily, six states presume competency at age ten; one state, New York, uses age twelve; two states use age fourteen; five other states say a "child" must understand the oath to testify; and twelve states specify that every witness, regardless of age, must understand the oath. In practice, some five year olds may be swearable; eight to ten year olds usually are swearable and may be excellent witnesses at trial; eleven to fourteen year olds are almost always swearable and able to testify with relatively few problems.

35. The preliminary examination by the presiding justice as to the competency of a witness of tender years is not evidence in the action. It is not addressed to any issue, and is for the consideration of the court only, not of the jury. It is usually an informal conversation upon indifferent subjects, designed to put the child at ease so that he will talk naturally. His intelligence and ability to tell the truth are tested by noting his answers and his general appearance.

People v. Johnson, 185 N.Y. 219, 77 N.E. 1164, 1167 (1906) (such examination need not be on the record); State v. Richey, 107 Ariz. 552, 490 P.2d 558 (1971) (defendant need

The testimony of any child who is found to be capable of taking the oath by a judge shall be given the same weight as the testimony of any adult witness.[36] Nor is the examination by the judge required to be in any set form or length as long as it is clear from the record that such an examination occurred and the judge found sufficient reason for his or her determination that the child possessed the requisite testamentary capacity.[37]

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not be present). *But see* Kentucky v. Stincer, *cert. granted*, No. 86-572, 55 U.S.L.W. 3411 (Dec. 8, 1986).

36. People v. Palladino, 237 N.Y.S.2d 266 (Westchester County Ct. 1962).

37. People v. Nisoff, 36 N.Y.2d 560, 369 N.Y.S.2d 686, 330 N.E.2d 63 (1975) (child answered questions about the oath meaning "to swear to tell the truth;" the child was a top student, she was "able to articulate the difference between right and wrong, she was aware of the fact that telling a lie was wrong and lying was a sin for which she would be punished by both God and her parents." *Id.* at 640); People v. Parks, 41 N.Y.2d 36, 390 N.Y.S.2d 848, 359 N.E.2d 358 (1976) (list of factors which the judge may consider during examination of the child witness, noting that "the question of witness competency is a matter of law to be determined by the court, and it is the traditional and exclusive province of the jury to determine whether the witness' testimony should be credited and, if so, what weight it should be accorded." *Id.* at 367). *See* People v. Bokeno, 107 A.D.2d 1051, 486 N.Y.S.2d 108 (1985) (discussion of the sufficiency of an examination of a child's understanding of the oath); and People v. Rowell, 88 A.D.2d 647, 450 N.Y.S.2d 216 (1982), *rev'd on other grounds*, 59 N.Y.2d 727, 463 N.Y.S.2d 426, 450 N.E.2d 232 (1983). *But see* People v. Ranum, 506 N.Y.S.2d 105 (App. Div. 1986) (rev'd for failure to conduct a *voir dire* of two eleven-year-old witnesses sufficient to demonstrate that the children understood the nature of an oath or the penalties for not telling the truth before swearing them as witnesses).

> We, the trial judges, sitting not only as judges but also as jurors, had the opportunity and duty to observe this child while she was on the stand and in the courtroom, and by all the perceptive facilities of the human mind and sensibility which we respectively may possess did evaluate, study and appraise this child. She could not be sworn, and had an apparent disinclination and distaste for the subject matter of the inquiry as well as resentment for the matters which the child so apparently would have preferred to have totally put out of mind in healing forgetfulness. Once she had mentioned any relevant fact she resisted any and all efforts to get repetition or particulars by simply stating, "I forgot," not only an effective defense mechanism but also a tactic which made direct examination and cross examination most difficult. That which we know as "the judicial process" has, in the case of very young children, definite blocks and limitations in getting at the full and whole truth, but it should be noted that all children are not so uncooperative. Very young children are not infrequently the most wholly truthful and credible of witnesses, blessed as they so often are by a widelensed observation of all that happened, unshuttered and untinted by interests, training, preconceived ideas or prejudices, as well as total recall of all they have observed; almost perfect powers of perception and recollection not too frequently found in their elders. We have here no such "little movie camera mind" in this child, as is sometimes encountered in the very young witness. But until such future times as a more perfect science of getting at the whole and full truth is

Pinpointing the time of occurrence of each incident of abuse is essential for charging purposes in order to permit the grand jury to return a true bill.[38] Where a true bill is returned, the defense may move during discovery for a bill of particulars; if the indictment is sufficiently narrowed by the bill of particulars to amplify the facts as they develop during the preparation of the case, it will survive judicial scrutiny.[39]

The purpose of requiring specificity of dates and times of

> proved and accepted, the judicial process as we know it will be confronted by its own limitations in dealing with the testimony of the very young child. The recounting of a most unpleasant personal experience in the over-impressive solemnity of the formalism of the Court can be for the very young quite a horrendous experience. Alas, we judges in black robes are most strange, awesome creatures to some of the young witnesses, and our courts are a far cry from the familiar secure and happy haunts of children. The child's as yet not-too-developed powers of expression, articulation and narration are paralyzed and choked by its embarrassment at finding itself the central point of inquiry by strange men in a very strange place.

People v. Price, 33 Misc.2d 476, 226 N.Y.S.2d 460 (1962).

Children are excellent witnesses who answer questions literally and who notice details adults often miss, according to recent research on the abilities of child witnesses. Johnson & Foley, *Differentiating Fact From Fantasy: The Reliability of Children's Memory*, 40 J. Soc. Issues 33-50 (1984); *Studies of Children as Witnesses Find Surprising Accuracy*, N.Y. Times, Nov. 6, 1984. *See also* Jones, *Can a Three-Year-Old Child be a Witness to Her Sexual Assault and Attempted Murder*, 10 Child Abuse and Neglect 253 (1986); Melton, *Children's Competency to Testify*, 5 Law & Hum. Behav. 73, 76-77 (1981).

38. Where the child is unavailable to testify through death or inability to be sworn, or where there have been a series of abuses over the past several years of the child's life, it is necessary to isolate the time of each alleged incident in order to charge each crime separately. Many young children, even if sworn as witnesses, have difficulty thinking in a chronological adult-time sense and may not be able to tell exactly when the abuse occurred. Re-interviewing the child on this point may be necessary to establish the elements of the crimes charged.

39. People v. Morris, 61 N.Y.2d 290, 461 N.E.2d 1256, 473 N.Y.S.2d 769 (1984) (the indictment charging the crime occurred "on or about or during" a period of one month was upheld. The test is whether the time period was unreasonably vague and whether the prosecutor intentionally failed to disclose information or to investigate the case with due diligence); People v. Cassiliano, 103 A.D.2d 806, 477 N.Y.S.2d 435 (1985); *leave den'd*, 63 N.Y.2d 704 (1985), *cert. den'd* 105 S.Ct. 1176 (a period of nineteen months held too vague); People v. Faux, 99 A.D.2d 654, 472 N.Y.S.2d 230 (1984) ("on or about and during" one month of one unspecified year during a four-year period held insufficient and indictment dismissed); People v. Willette, 109 A.D.2d 112, 490 N.Y.S.2d 290 (1985) ("June 1983 and July 1983" in indictment, narrowed by bill of particulars to "in the late evening or early morning hours" upheld as sufficient as to specificity of time charged). Note that the defense must renew the motion to dismiss after the bill of particulars is filed to preserve the issue of lack of specificty of dates in the charging instrument on appeal.

the crimes charged in the indictment is to provide adequate notice to the defendant to enable him or her to prepare a defense, to locate alibi witnesses, and to avoid double jeopardy.[40] Procedurally the defense will move to inspect the grand jury minutes and to dismiss the indictment.[41] The defense may renew the argument in a motion to dismiss at the close of the people's case or object to the indictment in a post-conviction challenge on the grounds that the indictment was factually insufficient.[42]

Two final issues are relevant to establishing every element of the crime during the grand jury presentation or the preliminary hearing: whether one spouse may testify against the other spouse in a case of child abuse;[43] and whether there must be independent corroboration of the child's testimony.[44] The exception to the spousal exclusion rule applied in cases of domestic violence, where there is unlikely to be any eyewitness other than the victim,[45] has been interpreted to extend to cases of child

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40. *See* U.S. CONST. amend. VI and related provisions of state constitutions, *e.g.* N.Y. CONST. art. I, § 6 (McKinney 1982), and relevant sections of state criminal procedure, *e.g.* N.Y. CRIM. PROC. LAW §§210.45, 200.50 (McKinney 1980). *See also* State v. Fahy, 201 Kan. 366, 440 P.2d 566 (1968).

41. People v. Curtis, 76 Misc.2d 128, 130, 350 N.Y.S.2d 315, 319 (Sup. Ct. N.Y. Co. 1973).

42. People v. Pelchat, 62 N.Y.2d 97, 464 N.E.2d 447, 476 N.Y.S.2d 79 (1984)(facts insufficient to support indictment);People v. Barlow, 88 A.D.2d 668, 451 N.Y.S.2d 254 (1982)(indictment not factually insufficient).

43. *See* Parnas, *Judicial Response to Intra-Family Violence*, MINN. L. REV. 585, 597-98 (1970); *see also* Note, *Developments in the Law of Privileged Communications*, 98 HARV. L. REV. 1450, 1536 (1985) for an analysis of familial privileges in general. "During the last fifteen years alone, at least eleven states have passed laws rendering the marital privilege unapplicable in cases of charged child abuse and neglect." United States v. Allery, 526 F.2d 1362, 1367 (8th Cir. 1975). *See, e.g.*, IOWA CODE ANN. §235A.8 (West 1965).

44. The traditional corroboration requirement in certain crimes, *e.g.*, N.Y.PENAL LAW §§130.15, 115.15 (criminal facilitation), 165.65 (criminal possession of stolen property), 210.50 (perjury), and 255.30 (adultery and incest) (McKinney 1980), is due to the nature of the crime and can be differentiated from the corroboration required of the victim of child abuse (like the corroboration required of the testimony of an accomplice), where the requirement is due to the nature of the witness. *People v. Curtis*, 76 Misc.2d 128, 350 N.Y.S.2d 315 (Westchester County Ct. 1962). *But see* People v. Palladino, 237 N.Y.S.2d 266 (Westchester Co. Ct., 1962) (sworn testimony given same weight as any other sworn witness). Note that corroboration in sex offenses is no longer required in many states, except where lack of consent arises solely from the young age of the victim. *See, e.g.*, N.Y. PENAL LAW §130.16 (McKinney 1985).

45. Eyewitness and physical evidence are rare in most child abuse cases. Berliner, *The Child Witness: The Progress and Emerging Limitations*, 40 U. MIAMI L. REV. 167, 171 (1985). The typical case for the prosecution consists of 4-5 witnesses: the treating physician, the arresting officer, the social worker or teacher, the person who first ob-

abuse as well as of spouse-battering.[46]

Where the defendant denies the commission of the crime, an indictment must be dismissed if there was no evidence to corroborate the unsworn testimony of the child.[47] Even where the defendant confesses to the crime, cases have held the confession insufficient to convict without some corroborating evidence.[48] A confession may be corroborated by the testimony of a child and/or by medical testimony regarding the nature, age, and causation of the injuries; an unsworn child's testimony, conversely, may be corroborated by the defendant's confession or by circumstantial evidence regarding the injuries.[49]

Circumstantial evidence of the existence of symptoms of the so-called "battered child syndrome"[50] coupled with the exclusive opportunity of the defendant to have committed the acts of child abuse are sufficient to convict for assault or even for homi-

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served the injuries and brought the child to the hospital and perhaps the child victim. Medical records, photographs or x-rays of the injury, and the object (electric cord, belt, stick, etc.) used in the assault may be introduced into evidence. The typical defense case consists of the defendant testifying that it was an accident or that someone else must have done it, and one or two witnesses who saw the defendant with the child in good health.

46. United States v. Allery, 526 F.2d 1362 (8th Cir. 1975)(prosecution for attempted rape of defendant's daughter brought in federal court because alleged crime took place on Federal territory—an Indian reservation in North Dakota) ("rule that one spouse cannot testify against the other in a criminal case is subject to exception where the spouse commits a crime against the other spouse or against a child." FED. R. EVID. 501, FED. R. CRIM. P. 26, and 18 U.S.C.A. §1153 (West Supp. 1986).

47. People v. Zigles, 119 Misc. 2d 417, 463 N.Y.S.2d 352 (Suffolk County Ct. 1983).

48. People v. Price, 33 Misc. 2d 476, 226 N.Y.S.2d 460 (Ct. Spec. Sess. 1962)(prosecution for endangering the welfare of a child).

49. People v. Murray, 40 N.Y.2d 327, 353 N.E.2d 605 (1976), *cert. denied*, 430 U.S. 948 (1977) (corroboration of confession required to extent of proving the *corpus delicti*.

50. "Battered child syndrome," a recognized medical diagnosis, refers to the symptoms of abuse of a child which may go undetected at first. Indications are several severe or suspicious injuries to a child over a short period of a year or two, for which injuries the parent has no adequate explanation or insists they were accidents, and for which the parent may have taken the child to a different hospital each time. The term is attributed to Kempe in 1982 building on earlier work from the 1940's by Caffey and others on the problem of multiple limb fractures and chronic subdural hematoma in young children, as described by C. H. Wecht and G. M. Larkin, *The Battered Child Syndrome* in Warner &Braen, *supra* note 2, at 25.

See, e.g., State v. Tanner, 675 P.2d 539 (Utah 1983); State v. Boucher, 468 A.2d 1227 (R.I. 1983) (listing states which recognize the "battered child syndrome"); State v. Hall, 183 Mont. 511, 600 P.2d 1180 (Mont. 1979); State v. Bass, 385 N.W.2d 243 (Iowa 1986); Tevlin v. People, 715 P.2d 338 (Colo. 1986); and United States v. Azure, 801 F.2d 336 (8th Cir. 1986).

cide.[51] A suspicion of battered child syndrome may occur to a physician, social worker, or law enforcement officer who notices too many bruises in atypical locations for the child's age, spiral fractures, or other bone fractures which are unlikely to occur accidentally.[52] There are limits on what opinions an expert may express; for example, expert opinion testimony as to whether children in general tell the truth when reporting abuse has been held inadmissible.[53] A medical expert may give opinion testimony on the nature of the weapon used in an assault and the time of the assault based upon an examination of the shape, nature and age of the injuries sustained by the child victim.[54]

Pretrial Motions and Hearings

Pretrial defense motions generally attempt to limit or define before trial the scope of the evidence which will be admitted at trial, such as unconstitutionally obtained evidence which would taint the jury.[55] Pretrial hearings on suppression motions or mo-

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51. People v. Arca, 72 A.D.2d 205, 424 N.Y.S.2d 569 (1980)(affirming conviction for murder in the second degree of three-month-old infant by mother based on circumstantial evidence)(citing N.Y. CRIM. PROC. LAW § 460.50 (McKinney 1971)).

52. State v. Tanner, 675 P.2d at 56 (medical examiner testified that multiple bruises on child's chin were not consistent with a fall).

The angle, depth, and location of the laceration, bruise, or burn may reveal whether it could have been self-inflicted by the child, or whether it could only have been deliberately inflicted by an adult. Certain scars and bruises can be identified as caused by beating a child with particular objects, such as belt buckles. Whether scar tissue has formed or whether a bruise is blue, black, or greenish-brown in color indicates the age of the wound. More difficult to gauge is the likelihood that the injury will heal over time.

53. State v. Bass, 385 N.W.2d 243 (child abuse investigator improperly asked for his opinion of whether children truthfully report sexual abuse in general).

54. Straight welt marks on a child's back or the back of his thighs are indicative of a beating with a belt, whereas hooked welts are typical of a beating with an electrical cord doubled over several times. Other marks are typical of a beating with a broom handle or a two-by-four or some other blunt object, such as a large metal cooking spoon used to beat a child's head until the scalp splits open. *See* State v. Morton, 230 Kan. 525, 683 P.2d 928 (1982) (conflicting explanations given by defendant for infant's fractured skull include: "accidental" fall out of chair and trying to blame others; unwillingness of defendant to take child to hospital); State v. Hall, 183 Mont. 511, 600 P.2d 1180 (1979) (subdural hematoma and subsequent long spiral fracture of child's femur inconsistent with parent's explanation); People v. Kailey, 662 P.2d 168 (Colo. 1983) (whiplash-shaken infant syndrome, indicated by bruises on the head, a bulging fontanel, subdural bleeding and retinal hemorrhaging).

55. U.S. CONST. amends. IV, V, and XIV. Obviously raising the issue once the physical evidence has been admitted at trial is too late to prevent harm if the judge rules to suppress the evidence. As a strategic decision, the prosecution may serve notice of intent

tions in limine in child abuse cases most frequently relate to the voluntariness of statements made by the defendant to police officers,[56] physical evidence in the nature of the weapon used to beat the child or photographs and x-rays of the child's injuries,[57] out-of-court statements of the child concerning the abuse,[58] and evidence of defendant's prior convictions, particularly where there are prior incidents of child abuse.[59]

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to introduce certain evidence (such as photographs of demonstrative evidence or evidence of prior bad acts) with an offer of proof to give the court an opportunity to consider the admissibility of the evidence without the pressure of a jury waiting.

56. Every state's criminal law is well developed on the right to a hearing on the admissibility of defendant's statements to police officers; invariably, the issue is one of voluntariness in which the defendant claims the statement was coerced in one form or another and the prosecutor introduces testimony of the officer to show the defendant was advised of his Miranda rights before making statement and was not tortured to obtain the confession. *See, e.g.*, State v. Huntley, 15 N.Y.2d 72, 255 N.Y.S.2d 838, *on remand*, 46 Misc.2d 209, 259 N.Y.S.2d 369 (1965).

57. Autopsy photographs showing that a two-year-old's skull had several hematomas indicating at least six blows to the back of the head with a blunt instrument were admitted at trial, although the judge limited the number of photographs, eliminating ones which were repetitive or where the prejudicial effect of the photographs of the skull after the autopsy outweighed their probative value. The photographs were used during the testimony of the medical examiner. State v. McGinnis, No. 12560 (Dist. Ct. Webster Co. Iowa June 8, 1983) (trial of live-in boyfriend of mother of deceased child for first degree murder, where defense was that the child fell down the stairs and bumped her head while defendant was home alone with child; defendant was convicted of manslaughter and served sentence of only two and a half years).

58. A child victim's out-of-court statements to doctors, social workers, or police officers (whether in the form of a videotape of the child making the statement or the testimony of the person to whom the statement was made) may be admissible as an exception to the hearsay rule, even where offered to prove the truth of the matter asserted therein. Various courts have found various theories for admitting the child's statements, although some courts require the traditional proof of unavailability of the witness at trial or various "indicia of reliability." *See* Ohio v. Roberts, 448 U.S. 56 (1980). *See also* Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 COLUM. L. REV. 1745 (1983); and Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806 (1985).

A child's statement to the so-called "outcry witness," a relative, friend, teacher or social worker to whom the victim talks about what happened, usually soon after the crime, is generally admissible in rape cases and, by analogy, to sex abuse and physical abuse cases, for the purpose of establishing that the report was made but not for the content of what the victim said. *See, e.g.*, People v. Mackley, 60 A.D.2d 791, 400 N.Y.S.2d 658 (1977).

59. If the defendant takes the stand, a prior conviction for child abuse may be fully explored during cross-examination after a pretrial hearing to determine if the probative value outweighs the prejudicial effect of the evidence. People v. Sandoval, 34 N.Y.2d 371, 314 N.E.2d 463, 357 N.Y.S.2d 849 (1974). The questions are designed "to reveal a disposition or willingness on . . . part [of defendant] to place self-interest ahead of principle

IV. TRIAL

Voir Dire

Exploring potential jurors' feelings about parents hitting children is essential during voir dire on a trial for physical abuse by a parent of his or her child.[60] Relevant state law definitions of "serious physical injury" or "dangerous instrument" or "intent" must be explored with jurors in the spirit of investigating attitudes and possible prejudices which would prevent a fair trial.[61] Jurors' responses to questions concerning the justification defense for parents claiming they were disciplining their child and their ability to consider the sworn testimony of a child against his or her own parent may reveal prejudices which would make a fair trial impossible and certainly will be pivotal to the outcome

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and society, proof that was relevant to suggest his readiness as a witness to do so again." People v. Duffy, 36 N.Y.2d 258, 262 (1975)(citing *Sandoval*). In practice, the defendant usually meets the burden of proof of prejudice and the prior conviction is inadmissible at trial.

The prior conviction (as well as prior incidents of child abuse which would normally be inadmissible as uncharged crimes) may be admissible at trial for the limited purpose of establishing motive or to disprove the defense of accident or mistake. People v. Molineux, 168 N.Y. 264 (1901). Recent cases permitting prior child abuse to be introduced at trial include *Sims*, *supra* note 1, at 118; United States v. Vega, 776 F.2d 791 (8th Cir. 1985); Smarr v. Virginia, 246 S.E.2d 892 (1978) (defendant claimed defense of accident at trial, but had appeared on television talk shows as an abusive parent talking about beating her children); State v. Johnson, 318 N.W.2d 417 (Iowa) *cert. denied sub nom.* Iowa v. Johnson, 459 U.S. 848 (1982); Payne v. State, 249 Ga. 354, 291 S.E.2d 226 (Georgia 1982). If the defendant takes the stand, testimony by the defendant at a prior trial may be used for cross-examination, as prior inconsistent statements to impeach the credibility of the witness.

60. In the trial of a mother for hitting her eight-year-old son over the head with a metal cooking spoon, causing a gash requiring six stiches to close and possibly causing permanent developmental damage to the boy's eyesight, one potential juror admitted disciplining her own five children by hitting them on the back or buttocks when they did something bad. Asked what she used to hit the children, she replied, "a metal cooking spoon." Recovering quickly, the prosecutor asked, "But did you ever hit them in the head or hit them so hard they ended up in the hospital?" Answering no, the juror was retained on the jury that ultimately convicted the defendant of assault and endangering the welfare of a child. People v. Santiago-Roman, No. 4K000993 (Crim. Ct. Kings Co. N.Y. 1985).

61. Misconceptions may become apparent as to what the law of the state defines as the crime of child abuse; the voir dire process of questioning an individual juror may correct those misconceptions and educate other potential jurors as well. Obviously, any trial lawyer will remind jurors that it is the judge who will instruct them on the law; it may be useful to inquire if anyone has a problem following the judge's instructions on the law if they happen to disagree with the law itself.

of the trial.[62]

The Courtroom

At whatever point the prosecutor anticipates using a child's testimony, it is essential to walk the child through the courtroom, letting the child sit in the witness box and see where the judge, the courtroom reporter, the lawyers, and the jury will be.[63] The prosecutor should also consider asking the judge to close the courtroom to persons who are not required to be present during the child's testimony.[64]

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62. General questions concerning jurors' own experiences with children, as parents, babysitters, teachers, relatives, etc., are crucial. Concentrating on questions about children the same age as the victim in the case on trial, the attorney for either side may need to know whether the potential juror has ever had responsibility for a child that age; if so, if the juror personally disciplined the child; how they disciplined the child; and whether they draw any distinctions between acceptable and unacceptable means or degrees of punishment of children.

Any schoolteachers on the panel, particularly grade school teachers, should be examined concerning physical punishment in the classroom and their ideas of what parents should be doing at home about discipline. Teachers should also be asked about their ability to differentiate the classroom from the courtroom when determining the credibility of a child's testimony. At school most teachers would want to hear from both sides before deciding a dispute between two children; in court, they may hear only from one side, the child victim, and be asked to decide what happened and whom to believe after hearing only one side. Jurors should be asked if they have any personal experience with abused children in any way, through friends or family or through personal exposure to the problem. Potential jurors should be given the opportunity to answer personal questions at the bench outside the hearing of the other potential jurors. *See* State of Oregon v. Middleton, 294 Ore. 427, 657 P.2d 1215, 1220 (1983). Many jurors now are aware of child abuse from the media. A number of public figures have recently revealed their own personal histories as victims of child abuse, and are helping others talk about the reality of the problem. *See, e.g.*, P. HAWKINS, MY FIGHT AGAINST CHILD ABUSE—A PERSONAL STORY AND A PUBLIC PLEA (1986); Angelou & Winfrey, *Angelou and Winfrey Reveal Common Bond as Child Rape Victims*, JET, May 26, 1986, at 38; C. CRAWFORD, MOMMIE DEAREST (1985). The trial judge will admonish the jurors that once selected, they should not read about or watch television on the subject of child abuse until the verdict is reached. *See* Gonzales v. State, 593 S.W.2d 288 (Tenn. 1980) (burden on state in child abuse trial to prove no prejudice resulted from broadcast of television special, "Sybil," on subject of child abuse on evening that jury was in recess during deliberations; case remanded for a new trial for a showing as to whether any juror saw the program and if so, whether they were influenced). *Id.* at 293.

63. Some court systems have children's centers where trained day care personnel or social workers help children play or snack while they are waiting to testify or waiting for an adult to finish in court and take them home.

64. Some twenty states permit the exclusion of spectators from the courtroom: Alabama, Alaska, Arizona, California, Florida, Georgia, Illinois, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Montana, New Hampshire, New York, North Caro-

Direct and Cross Examination of Witnesses[65]

The testimony of the child victim of abuse will be the only direct evidence in most child abuse trials, which presents problems for both the prosecution and defense.[66] The highly charged emotional impact of the facts alleged in the indictment and the cumulative effect of the expert medical and social services testimony regarding the nature and extent of the injuries to the child and the causation of those injuries will create a heightened context for the child's direct testimony about how the defendant scalded, beat, kicked, or otherwise abused him.[67]

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lina, North Dakota, South Dakota, Vermont, and Wisconsin (although in Wisconsin and California the exclusion of spectators applies only to the preliminary hearing). Other proposals to help the child victim survive the ordeal of testifying at trial against a parent or parent substitute have been introduced in many state legislatures, such as restricting adjournments or continuations of the trial, and methods to limit the child's exposure to the alleged abuser in court. Even absent a statute, any attorney or the judge sua sponte may simply ask spectators to leave during the child's testimony, or avoid multiple adjournments when a child is on the stand.

65. General trial techniques and strategies are not the subject of this article, which is intended to highlight those aspects of the investigation and trial unique to criminal cases of physical abuse of children. The investigatory and pre-trial stages of a criminal case have been emphasized here, since the disposition of cases depends on the careful resolution of legal and evidentiary issues at the early stages of the case, immediately following the report of suspected abuse. Techniques for opening and closing arguments in child abuse cases are similar to those in any other trial involving medical testimony, one witness, and circumstantial evidence. The litigator's personal style and sense of the jurors' reactions to the case and the witnesses, as in any other trial, will be the best guide in preparing opening statements and summations.

66. Potential problem areas at trial include difficulties in eliciting the child's testimony, even though the child has recited the facts several times before entering the courtroom and taking the stand; challenges to the admissibility of the expert witness' testimony on the battered child syndrome or opinion evidence on the age and causation of the injuries to the child; the admissibility of prior convictions for child abuse or neglect or a history of abusive treatment of this child or others; and the admissibility of hearsay statements made by the child victim to police, social workers, doctors, or others. Even scheduling of witnesses for trial may become more complicated than in some other trials because of the demands on the time of doctors and other medical people and the desire to protect child witnesses from unnecessary trips to the courthouse and to limit the disruption of school schedules and placement efforts for the child.

67. The prosecution will be concerned about the ability of the child to withstand the pressure of the courtroom situation and speak as openly and consistently as the child did earlier in the investigation and pre-trial preparation, particularly if the child is extremely young or has trouble recalling chronological events. The defense will be concerned about the devastating effect the child's testimony will have on the jury and the need to make the defendant appear sympathetic to the jury or credible in his defense. Cross-examination by the defense of the child may attempt to show the child is confused or inaccurate or fantasizes so much that he does not know what is real and what is make-believe; the

One innovation in presenting the child's testimony, the use of closed circuit television[68] in the courtroom, has received much attention in the media but has not been used frequently.[69] The physical arrangement of the cameras allows the child to testify from a room with only the cameraperson, prosecutor, and a support person for the child present; the defense attorney may be allowed in the testimonial room or may watch the television screen in the courtroom with the defendant, the judge, and the jury.[70] The debate over the use of this technology concerns the potential infringement of the constitutional right to confront and cross-examine witnesses against the defendant and the definition of that right as a "face-to-face" meeting of the defendant with his accuser in the television age.[71]

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defense may also try to show the jury that the child's statements to law enforcement or medical witnesses were not spontaneous but were in response to leading questions put to a child eager to please the adults questioning him. Cross-examination of the defendant, should he or she testify, should highlight inconsistencies and cover-up attempts in the defendant's actions after the injuries occurred, and may include using prior testimony (Family Court transcripts may be obtained with an unsealing order from the criminal court) to impeach the credibility of the defendant.

68. Closed circuit television, as defined in the statutes in states permitting its use at trial, is live two-way television which permits the transmission of sound and picture from one room to another but which is not broadcast over any frequencies for public reception.

69. Only a few states, including Texas, Louisiana, New Jersey, Kentucky, and New York, permit closed circuit television in cases of child abuse. The Kentucky statute is being reviewed in Commonwealth v. Willis, 716 S.W.2d 224 (1986). In New York, the child must first be determined to be "vulnerable" at a separate hearing with expert testimony regarding the trauma to the child resulting from a courtroom confrontation with the child's abuser; this provision is only available in sexual abuse cases. N.Y. CRIM. PROC. LAW §§ 65.00-.30 (McKinney Supp. 1986). Under this standard, only the Bronx District Attorney's Office among the five D.A.'s offices in New York City has tried a case using closed circuit television since the law took effect on July 24, 1985. People v. Algarin, 129 Misc.2d 1016, 498 N.Y.S.2d 977 (1986).

70. State v. Sheppard, 196 N.J. Super. 448, 484 A.2d 1330 (N.J. Super. Law Div. 1984), permitted the child to testify through the use of video equipment with defense counsel present. Under the New York statute allowing live closed circuit television, the judge determines whether the defendant will be present in the testimonial room or in the courtroom. People v. Algarin, 129 Misc.2d at 1018, 998 N.Y.S.2d at 979 (CCTV allowed for testimony of young child concerning abuse in the PRACA day care center in the Bronx). Regarding the mechanics of such testimony, in a case of an adult kidnapping victim too traumatized to confront her abductor at trial, a videotaped deposition was arranged, with defense counsel present; defendant, who was listening and watching from another room, could summon counsel with a buzzer anytime he wished to confer. United States v. Benfield, 593 F.2d 815, 817 (8th Cir. 1979).

71. U.S. CONST. amend. VI; and state constitutions, *e.g.*, N.Y. CONST. art. I, § 6. In person confrontation in court as required under the constitution may be satisfied by the

Sentencing

Elvis, age ten, testified at trial that his mother beat him on the head with a metal cooking spoon, then locked him in the bathroom all night. She left the house the next morning with the other children, leaving him bleeding. Relatives found him and took him to the hospital. He also testified that she punished him when he was hungry by giving him bread with cigarette butts ground into it and hot sauce that burned his mouth when she forced him to eat it. Elvis's older brother took the stand for the defense, claiming Elvis had lied about their mother. The jury brought back a guilty verdict within thirty minutes.

Prior to sentencing, the judge conducted an extensive investigation of her own, telephoning the school and speaking to teachers and administrators about Elvis and the other five children still in the home in order to decide whether they too were in danger and should be removed. The judge decided there were overwhelming indications that a functional family unit existed, although the children assumed the role of taking care of their mother in many ways. The judge ordered immediate counselling for the mother and all the children; the placement of a homemaker or health aide in the home every afternoon to teach the mother basic nutrition and house-keeping skills; location of afterschool programs for the children remaining at home; the continuation of Elvis's placement with a loving and supportive foster mother; and a temporary restraining order to prevent any family members from interfering with Elvis. Since the defendant appeared to use her children as a crutch in dealing with her limited understanding of English, the judge ordered her to enroll in English classes immediately. Sentencing was adjourned for several months to allow the defendant's participation in these programs to be established and monitored. By the date of sentencing, the judge was satisfied that some progress was being made towards the independent functioning of the defendant as a responsible adult. Supervised probation

use of closed circuit television; actual physical meeting to satisfy the confrontation clause was rejected in *Algarin*, where the court found that "this literalistic reading of what our Constitution requires is without merit." People v. Algarin, 129 Misc.2d at 1021, 998 N.Y.S.2d at 981.

with the conditions established during the pre-sentence investigation was ordered. The foster mother indicated an interest in adopting Elvis, who had been with her approximately two years since the criminal assault occurred. Elvis was doing well in school, had gained weight, and was extremely outgoing and communicative in contrast to his appearance and behavior when first brought to court.[72]

V. CONCLUSION

The most important thing to remember for any attorney involved in the trial of a child abuse case, whether as judge, prosecutor, or defense attorney, is that the victim was a child. At a trial, eliciting or evaluating the testimony of a child witness requires sensitivity, awareness, and understanding.

Efforts to minimize the trauma for child witnesses in the criminal court, while protecting the defendant's right to a fair trial, include the following suggestions:

1. Coordination of investigation by social services, law enforcement and prosecution;
2. Use of a child advocate or support person for the child during pre-trial stages and at trial;
3. Prevention of repeat interviews where possible;
4. Establishment of special prosecutors and detectives assigned to Child Abuse Units in district attorney's offices and police departments;
5. Use of technology such as videotaped testimony for the

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72. These extraordinary measures were taken by Judge Amy Juviler in the case of People v. Santiago-Roman, No. 4K000993 (Crim. Ct. Kings Co. N.Y. 1985). Generally judges rely on the Bureau of Child Welfare recommendation and sentencing recommendations from the prosecutor and defense attorneys.

Once the jury returns a verdict of guilty, the pre-sentence investigation usually focuses on social workers' and psychologists' evaluations of the total family structure, the possible risks of abuse of other children remaining in the home, the educational history of each child, and future medical needs of the child victim. Any problems of substance abuse or complicating adult relationships involving the defendant which could affect the child must be evaluated for treatment needs and prognosis of success. Teachers, neighbors, priests, and others need to be interviewed; community resources such as afterschool programs and daycare need to be developed. The cooperation of the defendant is a critical element in the court's decision whether to allow supervised probation or whether to require jail time. Mitigating in favor of probation or lenient sentences, which shock advocates for children, is the frequency with which child abusers are first-time offenders, and the hesitancy of judges to jail persons after their first convictions.

grand jury and closed circuit television where possible at trial;

6. Evidentiary reforms geared to the special requirements of child witnesses;

7. Community education through media, schools, etc., including referral services for information and counselling of parents;

8. Child abuse prevention programs (fundable through surcharges on birth certificates, marriage licenses, or divorce decrees) demonstrating a greater concern of the entire society for the well being and safety of its children;

9. Adequate day care centers for children, home health visitor programs, and crisis intervention nurseries and hotlines.

The trial of child abuse cases calls for creativity in eliciting testimony; awareness of jurors' reactions to shocking evidence and young witnesses; and a willingness to become involved with medical experts, social workers, therapists, and educators in dealing with complex issues of family structure and the safety of a child.