CHILD WITNESS TESTIMONY

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I. BACKGROUND HISTORY:

A. In North America, approximately 100,000 children serve as witnesses in the justice system each year (Bruck, Ceci, and Hembrooke 1998). Children may serve as witnesses in a variety of settings to include:

1. Eye witness to crime
2. Eye witness to accident or other event relevant to civil litigation
3. Victim of physical or sexual abuse
4. Defendant in juvenile delinquency or criminal case

B. Salem Witch Trials-In a 3 month period during 1692, 20 people were hanged in part due to the testimony of a group of girls called the "circle girls" who ranged from ages 5-12. These girls testified that they had observed the accused engage in acts of witchcraft or wizardry such as flying on broom sticks or turning themselves into dogs or cats. Several years later some of these witnesses publicly recanted their accusations (Ceci and Bruck 1993) (Ceci SJ, Ross DF, and Toglia MP 1987).

II. FACTORS TO CONSIDER IN CHILD WITNESS TESTIMONY

A. **Reliability**-reflects the accuracy of a child's statements. Factors to consider in assessing the reliability of a child's testimony include assessments of **memory** and **suggestibility**.

B. **Memory**:

1. Reporting a memory requires:

   a. Encoding the experience-i.e. creating the memory
   b. Storing the memory
   c. Retrieving the memory

2. **KEY POINT**: Types of memory errors:

   a. Errors of omission-failure to recall or endorse an event that actually occurred.

   b. **Errors of commission**-endorsement of having experienced something that did not occur. Errors of commission can be due to:

      1) Lying

2) Initial memory trace has been changed. (i.e. through interviews, suggestions, etc)

3) Source-Misattribution Error

a) Children have been shown to have difficulty distinguishing between actual and imagined events, that is, actions they performed and actions they imagined performing (Foley et. al, 1989).

b) Source monitoring errors have been found to be more frequent when potential memory sources are similar to each other (Lindsay and Johnson 1989).

3. **Recognition memory**-the least complex form of memory-the present comparison of a single stimulus as the one previously seen.

   a. Children as young as age **3** are very reliable for such single stimulus tasks as basic identification of objects.
   b. Children older than **4 and ½** have close to adult-level recognition memory performance.
   c. Children as young as **6** can probably recognize the face of a familiar figure as well as an adult (Perlmutter Myers 1974).

4. **Recall memory**-Reconstructing what a person saw or experienced.

   a. Younger children recall less than older children, but their recall is not less accurate. **Omission errors are more common in preschoolers** but commission errors are generally rare and do not differ with age.

   b. Young children are unreliable witnesses when asked to make complex cognitive judgments involving relativity or comparison. Mastery of time and distance increases with age. Most children have mastered concepts involving speed and distance by age 11 though time concepts are generally mastered later (Sielger and Richards 1979).

   c. Other factors to consider with preschool children (Fivush 1993):

      1) Pre-school children can recall accurate details about personally experienced events over extended periods of time.

      2) Preschool children probably do not recall as much information as older children and adults.

      3) Preschool children may focus on, and therefore recall, different aspects of an event than do older children or adults.

4) Younger children appear to need more social support to recall information when compared with older children and adults.

5) Younger children are more inconsistent in what they recall in different interviews than older children and adults, although in general the information recalled is correct.

III. SUGGESTIBILITY

A. Definition: "the degree to which children's encoding, storage, retrieval, and reporting of events can be influenced by a range of social and psychological factors." (Ceci and Bruck 1993).

B. McMartin pre-school alleged abuse case

1. The mother of a two and a half year old boy who had suffered rectal bleeding reported to the police in Manhattan Beach, California, that she thought her child had been sexually molested by the staff of the preschool. The mother also told the police that her son had seen a live baby beheaded, been forced to drink blood, and had seen Raymond Buckey fly through the air. The boy was unable to identify Mr. Buckey from police photos.
2. The founder of the school and six teachers were indicted on a total of 117 separate charges of sexual abuse and exploitations.
3. Seven teachers at the McMartin Preschool were accused of kidnapping children and flying them in a helicopter to an isolated farm, where animals were tortured and the children were forced to engage in group sex.
4. Raymond Buckey served 5 years in jail before the jury began to deliberate his guilt. Eventually he was found not guilty.
5. Over 15 million dollars was spent investigating and trying this case.

C. **KEY POINT**: The "McMartin" factors-forms of suggestion noted when reviewing the McMartin preschool interviews (Garven et al 1998).

1. ***Suggestive/leading questions***-consists of introducing new information into an interview when the child has not already provided that information in the same interview. For example, "Did he touch you on the bottom?" would be a highly suggestive question in a sexual abuse interview if the child had not already mentioned inappropriate touching.

2. ***Asked-and-Answered***-This technique consists of asking the child a question that she or he has already unambiguously answered in the immediately preceding portion of the interview. Repetition of a question would not be considered "Asked-and-Answered" if the interviewer is

simply reflecting back the child's statement, without trying to elicit a new answer.

Two types of questions may appear in this format:

a. Open-ended: "Tell me what happened."

b. Forced-choice: Examples: "Did he touch you on your private parts, yes or no?" or "Did he kiss you on your mouth or on your privates?

3. ***Inviting Speculation*** (using guided imagery)-Consists of asking the child to offer opinions or speculations about past events, or framing the child's task during the interview as using imagination (e.g. "pretending") or solving a mystery (e.g. "figuring something out"). Children may be urged to speculate: "Let's figure out what happened," "What do you think happened?" or "Let's pretend and see what might have happened."

4. ***"Other People"***-The technique of *Other People* consists of telling the child that the interviewer has already received information from another person regarding the topics of the interview.

5. ***Positive and Negative Consequences*** (i.e. selective reinforcement)-

   The interviewing technique of *Positive Consequences* consists of giving, promising, or implying praise, approval, agreement, or other rewards to a child or indicating that the child will demonstrate desirable qualities (e.g. helpfulness, intelligence) by making a statement. A compliment to the child at the beginning of the interview (such as "What pretty eyes you have") would not be considered Positive Consequences, because such a compliment is not conditional on the child's saying or doing anything.

   The technique of *Negative Consequences* consists of criticizing or disagreeing with a child's statement or otherwise indicating that the statement is incomplete, inadequate or disappointing.

D. Studies examining effects of "McMartin" or suggestibility factors on children:

1. Researchers (Garven et al 1998) evaluated effects of **social influence and reinforcement** on children's immediate reports of an event they witnessed. 66 children in five different day care centers attended a special story time led by a male graduate student introduced as Manny Morales.

   a. Manny wore a large silly hat and after introducing himself told a story about the Hunchback of Notre Dame in an engaging way, then placed a sticker on the back of a child's hand and handed out a napkin and cupcake to each child with much fanfare, calling attention to the fact

that the napkins had designs from the story. He then said goodbye and left and the entire process took approximately 20 minutes.

b. One week after Manny's story time, children were interviewed individually on videotape and audiotape and children were assigned to either 1) the social incentive condition which incorporated the techniques from the McMartin interviews; or 2) the suggestive control condition, which used suggestive questions alone.

c. 36 children interviewed with McMartin techniques made **58% false accusations**, compared with 17% of 30 children interviewed with suggestive questions. Social influence and reinforcement appeared to be more powerful determinants of children's answers than simple suggestive questions.

d. When exposed to such techniques for **only 4.5 minutes**, children in this study showed **error rates close to 60%.**

e. Children in the social incentive condition answered "yes" with less prompting as the interview proceeded.

2. The "Sam Stone Study" (Leichtman and Ceci 1995)

a. The purpose of this study was to determine whether pairing the induction of stereotypes in a child's mind with repeated misleading suggestions would affect both the accuracy and the credibility of a child's testimony.

b. To accomplish this, a mythical character named "Sam Stone" visited nursery schools for 2 minutes. Children were randomly assigned to one of four groups, each composed of 40-50 preschool children.

c. After Sam Stone's 2-minute visit to their classroom, control group children were interviewed four times over the next 10 weeks, using nonsuggestive techniques about Sam Stone's visit ("Tell me what happened"). During the fifth and final interview, these children were first asked for a free narrative ("Tell me everything that happened the day Sam Stone visited your classroom"), and then they were probed about two nonevents involving a book and a teddy bear (e.g. "did Sam Stone rip a book?" Did he spill anything on a teddy bear?")

d. These control group children did very well, correctly recalling most of what actually transpired during Sam Stone's visit and refraining from answering the misleading probe questions incorrectly. None of the older (ages 5 and 6) preschool children said they had seen Sam Stone do anything to the book or the teddy bear.

e. A second group of preschool children was given a stereotype about Sam Stone before he came into their classroom. For a month before his visit, these children were told once a week of something clumsy Sam had done. After the same 2-minute visit, these children were interviewed (nonsuggestively) four times over the subsequent 10 weeks about Sam's visit; the fifth interview was the final one. Of these children, 42% of younger ones said Sam Stone did these things, and 19% claimed they saw him do them. But only 11% of these 3 to 4 year olds maintained their false claims when gently challenged ("Tell me what he really did, OK?").

f. A third group was not given a stereotype about Sam Stone's being clumsy, but this group was interviewed four times over 10 weeks in a highly suggestive manner ("Do you remember that time Sam Stone visited your classroom and ripped that book" Did he do it on purpose or was it an accident?) During the 5th and final interview, 52% of the younger children and 38% of the older children claimed that Sam Stone either ripped the book or hurt the teddy bear. Even when gently challenged, 10% of the youngest preschool children continued to insist that they actually had observed Sam Stone doing this.

g. The final group of children was given a stereotype about Sam Stone's clumsiness before he visited their classroom plus they were interviewed in a highly suggestive manner during the 10 weeks. During the final interview, 72% of the younger children stated that Sam had done things to the book and teddy bear. This figure dropped to 44% when they were asked whether they had seen Sam do these things. Even after being challenged, 20% of the younger preschool children and 11% of the older ones maintained that they saw Sam do these things.

3. Bruck and colleagues study on leading questions and physical examination (Bruck 1995)

a. 3 year olds were repeatedly asked strongly suggestive questions about a doctor touching their anogenital regions, such as "Show me on the doll how Dr. F. touched your genitals."

b. Among girls whom the doctor did not touch, fully 50% falsely claimed the doctor had inserted objects into their anogenital cavities.

c. After a third exposure in a period of a week to an anatomically correct doll, one three year old child reported that the pediatrician had strangled her with a rope, inserted a stick into her vagina, and hammered an earscope into her anus.

4. Summary points (Bruck and Ceci 2013)

   a. Preschoolers' reports are often very accurate.
   b. When children are questioned by a biased interviewer, there is a nontrivial risk that these circumstances can the child's report, rendering it unreliable.
   c. The first interview with a child provides the most reliable testimony.
   d. Suggestive interviewing techniques can result in false beliefs.
   e. The detrimental effects of suggestive interviewing are long-lasting.
   f. Children's false reports can be persuasive.
   g. In order to obtain full information about the degree of bias and suggestiveness of interviews, it is crucial to obtain electronic recording of the full interview.

IV. CREDIBILITY

A. Believability of witness testimony. This is not synonymous with reliability.

B. "Sam Stone" credibility study (Leichtman and Ceci 1995):

1. Pre-school children (ages 3-4 and 5-6) were exposed to a mythical character named Sam Stone who visited the nursery school for 2 minutes.

2. Various groups of children were later interviewed using different techniques including non-suggestive and suggestive questions (Did Sam Stone rip a book?), giving suggestive information about Sam before he visited and repeated interviewing about Sam during the month after the visit.

2. 1000 researchers were shown videotapes of the final interviews and asked to judge which events had actually transpired as well as to rate each child's credibility.

3. As a rule, the least accurate children were considered to be the most accurate by experts despite the confidence of the professionals in their judgment.

V. SELF DISCLOSURE-a child's ability and willingness to report their victimization

A. Research indicates that many child victims delay disclosing for significant periods of time (Kulkofsky and London 2009; Alaggia 2010).

B. The disclosure process varies depending on the children's ages the severity and frequency of abuse, the parents' expected reactions, the suspects'

identities, and the strategies they had used to foster secrecy (Hershkowitz et al 2007).

C. In a study by Bottoms et al (2002) the investigators examined children's reports of events they had witnessed but were motivated to conceal. The study involved 48 3-6 year old children participating in a standardized play session with their mother. Half of the children were told by an experimenter not to play with certain toys, but did so at the urging of their mother who told their children to keep the play secret. The other half were not restricted from playing with the toys and were not told by the mothers to keep the play secret. **Results indicated that older children (5-6 year old range vs. 3-4 year old range) who were instructed to keep events secret withheld more information than did older children not told to keep events secret.** Younger children's reports were not significantly affected by the secret manipulations.

D. Arata (1998) found an inverse relationship between disclosure and severity of abuse. Subjects reporting contact sexual abuse were significantly less likely to disclose than those reporting noncontact sexual abuse.

E. Child Sexual Abuse Accommodation Syndrome (Summit 1983) is a non empirically validated stage-based model of disclosure. This proposed syndrome is comprised of five components: a. secrecy; b. helplessness; c entrapment and accommodation; d. delayed, unconvincing disclosure; and e. retraction.

F. Although the London et al (2009) review of the literature concluded that children often delay abuse disclosure, they also found that among valid abuse cases undergoing forensic evaluations, denial and recantation are not common.

VI. <u>COMPETENCY TO TESTIFY</u> (Testimonial Competence)-the capacity to form reliable testimony.

A. History:

1. Under English common law, children younger than 7 were not allowed to testify.

2. **Rule 601** of the Federal Rules of Evidence-(1979) abolished the special requirement that children be shown to be competent to testify. Provides that "Every person is competent to be a witness except as otherwise provided in these rules."

B. **KEY POINT**: In general, criteria to determine child's competence to testify involves (Nurcombe and Partlett, 1994):

1. Did the child have the capacity to register the event or events accurately?
2. Can the child accurately recall and recount the event or events in question?
3. Can the child distinguish falsehood from truth, fantasy from reality?
4. Does the child appreciate his or her duty to speak the truth?

Limitations on "truth-lie" tests (Walker 2002):

- Children who "pass" so-called truth-lie tests are not necessarily more accurate or less suggestible than same-age peers who fail.
- There is no evidence that standard truth-lie tests encourage children to filter out inaccurate information.

VII. SIXTH AMENDMENT AND RIGHT TO CONFRONT WITNESS (Grearson 2004)

A. **Confrontation Clause** of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him." The Confrontation Clause clearly prohibits the use of ex parte affidavits but is not an absolute right regarding face to face confrontation.

B. Important cases involving confrontation of child witnesses:

1. *People v. Stritzinger,* California Supreme Court, 1983

a. During a 15 month period, Mr. Stritzinger allegedly engaged in various acts of fondling, mutual masturbation, and oral copulation with his 13 year old stepdaughter Sarah.

b. Sarah was taken to counseling by her mother and revealed to her counselor Dr. Walker that she had engaged in sexual activities with her stepfather. Dr. Walker reported this to CPS that afternoon and CPS notified the sheriff. Dr. Walker subsequently learned additional information from the stepfather himself. The sheriff contacted Dr. Walker asking for **additional** information she had gathered from the stepfather and after he assured Dr. Walker that the information was no longer privileged, she revealed the information.

c. At the criminal trial, Sarah did not testify because it "would jeopardize her mental health" though her testimony from the preliminary hearing was admitted into evidence. The defendant was convicted on one count of lewd and lascivious conduct.

d. Issue: The defendant appealed his conviction alleged that his **Sixth Amendment right to confront witnesses against** him and psychotherapist-patient privilege had been violated.

e. The court held that the defendant's **Sixth Amendment rights were violated** by allowing Sarah not to testify based solely on the mother's testimony regarding the effect of her daughter's mental state and therefore Sarah's preliminary hearing testimony was erroneously admitted.

f. Dr. Walker was under no statutory obligation to report information learned from her interview with Mr. Stritzinger after she had already reported the alleged child abuse. The court noted:

   If a psychiatrist were compelled to go beyond an initial report to authorities, and provide details given to him by an adult patient, the candor and integrity of the doctor would require that he advise a patient in advance that he will violate his confidence. Under such circumstance, meaningful therapy could not occur.

2. *Coy v. Iowa*, US Supreme Court, 487, U.S. 1012, June 29, 1988

   a. Mr. Coy was arrested and charged with sexually assaulting two 13-year-old girls while they were camping out in the backyard of the house next door to him.

   b. In accordance with a 1985 Iowa statute, the trial court approved the use of a large screen to be placed between Mr. Coy and the witness stand during the girls' testimony in order for the girls not to have to see Mr. Coy. Mr. Coy was found subsequently found guilty.

   c. On appeal to the Iowa Supreme Court, Mr. Coy argued that the screen violated his Sixth Amendment Confrontation right and his 14th amendment right to due process since the procedure would make him appear guilty and thus erode the presumption of innocence.

   d. Regarding the 6th amendment claim, the Supreme Court stated, "it is difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter." The Court did not find an exception to the hearsay rule in this case. The Court did not rule on the 14th amendment claim as they found the 6th amendment had been violated.

   e. In a separate concurring opinion, Justices O'Connor and White hinted that "if a court makes a case-specific finding of necessity, as is required by a number of state statutes, our cases suggest that the

strictures of the Confrontation Clause may give way to the compelling state interest of protecting child witnesses."

3. *Maryland v. Craig*, United States Supreme Court, 497, U.S. 836 (June 27, 1990)

   a. Sandra Ann Craig was charged with first and second-degree sexual offenses, perverted sexual practice, and assault and battery against a 6-year-old girl who attended a kindergarten and pre kindergarten center owned and operated by Craig.

   b. The State sought to invoke a Maryland statutory procedure that permits a judge to receive, by one-way closed circuit television, the testimony of a child witness who is alleged to be a victim of child abuse. To invoke the procedure, the trial judge must first "determine that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate." This requirement was not described in the case of *Coy v. Iowa.*

   c. Expert testimony suggested that each child affected would have difficulty testifying in front of Mrs. Craig. They testified that one child "wouldn't be able to communicate effectively," another "would probably stop talking and. withdraw and curl up..."

   d. Mrs. Craig objected to the use of the one-way closed circuit TV procedure on Confrontation Clause grounds but the trial court accepted the procedure and convicted Craig of all counts.

   e. **KEY POINT:** The Supreme Court held that "if the State makes an adequate **showing of necessity**, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant."

   f. The Court held that the trial court must:

      1) Hear evidence and determine whether the use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child.
      2) Find that the child witness would be traumatized, not only by the courtroom generally, but by the presence of the defendant.

3) The emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*, i.e. more than "mere nervousness or excitement or some reluctance to testify."

Note: This case suggests a role for psychiatrists in testifying as to the effects on a child testifying in front of the accused.

VIII. HEARSAY AND CHILD WITNESS TESTIMONY

A. Federal Rules of Evidence **Rule 801** defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

B. Federal Rules of Evidence, **Rule 803** lists 23 exceptions regarding the allowing of hearsay statements into court that are **"presumptively reliable."** "Presumptively reliable" means that the circumstances surrounding the giving of some types of hearsay indicate such a high degree of trustworthiness that the declarant need not be produced in court to reiterate his or her out of court statement.

C. The two most common hearsay exceptions under rule 803 that have been previously applicable to child witness testimony include:

1. The **"Excited utterance" exception**-reliability is inferred based upon the assumption that when one is sufficiently startled to make a spontaneous statement, she or he is unlikely to have either the time or the presence of mind to fabricate.

2. The **"Medical Diagnosis or Treatment Exception."**

a. Permits the admission of a patient's statements to a professional offering diagnosis or treatment.

b. Some courts refuse to extend coverage to include statements of emotional or psychological symptoms or feelings made to a clinical psychologist.

c. Reliability for the receipt of hearsay under this exception is based on the assumption that no one seeking a diagnosis or treatment of a medical condition is likely to lie or to mislead someone who can provide help.

d. As a general limitation, the cause of the injury or condition and especially the name of the alleged assailant are not permitted by the exception because the identity of the assailant is not information ordinarily needed to provide treatment.

e. If conducting a forensic interview, statements may not be allowed and not automatically deemed admissible.

D. *Crawford v. Washington,* United States Supreme Court, 2004

1. Facts: Michael Crawford stabbed a man who allegedly tried to rape his wife, Sylvia. During an interrogation with police officers, Mr. Crawford's wife made statements suggesting that her husband's actions were not in self-defense. She did not testify at trial because of Washington's marital privilege. At his trial, the State played for the jury Sylvia' s tape-recorded statement to the police describing the stabbing, even though he had no opportunity for cross-examination of his wife. After he was convicted, he appealed arguing that admitting the taped interrogation of his wife violated his Sixth Amendment rights to confront witnesses testifying against him. The Washington Supreme Court upheld the conviction and the case was appealed to the US Supreme Court.

2. Holding: "The State's use of Sylvia's statement violated the Confrontation Clause because, where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is confrontation."

3. *Crawford* applies when the following four elements occur:

   a. Criminal prosecution;
   b. The case involves "testimonial" evidence made by the victim/witness;
   c. The victim is unavailable to testify in court; and
   d. The defendant did not have a prior opportunity to cross-examine the victim/witness.

E. What does *Crawford* mean regarding the admissibility of child statements made outside of court?

1. The *Crawford* rule applies when a child is not available to testify. When children are available and testify at trial, *Crawford* does not bar admitting videotaped interviews or other admissible hearsay statements.

2. *Crawford* does apply to the admissibility of statements made by children who are not available to testify and whose out of court statements are determined to be "testimonial" in nature. Testimonial nature refers to the context in which the statements were elicited and the likelihood that such statements were for the purpose of gathering evidence against a defendant. Lower courts have held that statements made to police officers, investigating officers and child protective workers are testimonial in nature, and therefore may be excluded if the child is unavailable to testify.

Excited utterances to a parent (i.e. my bottom hurts) with a parent subsequently asking questions to determine a child's health status may be deemed non testimonial and potentially allowed into court.

3. Crawford does not appear to overrule the Court's holding in *Maryland v. Craig* which allowed a child to testify via closed-circuit testimony (rather than confront the defendant in the same room) if it is shown that this is necessary to protect the welfare of the child, if the presence of the defendant would traumatize the child, and if such traumatization is more than mere nervousness or reluctance to testify.

IX. MISCONCEPTIONS ABOUT CHILDHOOD SEXUAL ABUSE AND CHILD WITNESSES (Zajac et al 2013)

A. Misconception 1: The more detailed the testimony, the more accurate it is likely to be.

B. Misconception 2: Children easily differentiate something they heard from something they experienced.

C. Misconception 3: Experts can make valid assessments of the accuracy of children's reports.

X. CONSEQUENCES OF BAD INTERVIEWS (Wood and Garven 2000)

A. Innocent individuals can be falsely accused or convicted of crimes against children.

B. If the child has not been abused but makes false allegations, then he or she may suffer serious and unnecessary stress by being separated from parents or caretakers, or subjected to legal investigations.

C. Suggestive interviewing may have the counterproductive effect of lowering the child's credibility in the eyes of adults.

D. A true allegation of abuse may be contaminated by falsehood or inaccuracy.

E. Resources of child protective services, police, and the legal system may be drained by unsuccessful investigations and trials.