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People v. Michael M.: New York Supreme Court Allows Suppression Hearing in a Child Sexual Abuse Case to Determine Whether a Child's Testimony Has Been Rendered Unreliable by a Suggestive Interview

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People v. Michael M.: New York Supreme Court allows suppression hearing in a child sexual abuse case to determine whether a child's testimony has been rendered unreliable by a suggestive interview

The prevalence of child sexual abuse has increased dramatically in recent years.[1] Heightened public awareness of this problem has brought the number of prosecutions for child sexual abuse to an all-time high.[2] Among the many controversies surrounding child sexual abuse trials is the issue of the child victim's suggestibility and the extent to which suggestive interview procedures can render a child's testimony unreliable.[3] Courts grappling with this problem have tried to strike a balance between the child's right to testify and the defendant's interest in avoiding false

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[1] *See* Meridith F. Sopher, *"The Best of All Possible Worlds": Balancing Victims' and Defendants' Rights in the Child Sexual Abuse Case*, 63 FORDHAM L. REV. 633, 634 (1994) (noting 200% increase in child molestation cases reported to authorities in last 10 years); *see also* John R. Christiansen, *The Testimony of Child Witnesses: Fact, Fantasy, and the Influence of Pretrial Interviews*, 62 WASH. L. REV. 705, 705-06 (1987) (discussing increase in reports of sexual abuse and difficulty in obtaining accurate statistics on number of cases reported nationwide); Michael E. Lamb, *The Investigation of Child Sexual Abuse: An International, Interdisciplinary Consensus Statement*, 28 FAM. L.Q. 151, 152 (1994). The most recent statistics indicate that in the United States there were a half million cases of sexual abuse reported in 1992, compared with 325,000 cases reported in 1985. *Id.* at 152. This finding suggests that in 1992 approximately 0.7% of the children in the United States were reported victims of sexual abuse. *Id.*

[2] *See* Diana Younts, Note, *Evaluating and Admitting Expert Opinion Testimony in Child Sexual Abuse Prosecutions*, 41 DUKE L.J. 691, 693-94 (1991) (noting growing awareness of child sexual abuse and concurrent increase in number of reported cases and prosecutions); Christiansen, *supra* note 1, at 705 (attributing stark increase in reports and prosecutions of crimes against children, in part, to tougher laws requiring professionals to report suspected incidents of abuse).

[3] *See* Jean Montoya, *Something Not So Funny Happened on the Way to Conviction: The Pretrial Interrogation of Child Witnesses*, 35 ARIZ. L. REV. 927, 927-40 (1993) (discussing controversy surrounding children's suggestibility and recent trials shedding light on problem); *see also* Gail S. Goodman & Vicki S. Helgeson, *Child Sexual Assault: Children's Memory and the Law*, 40 U. MIAMI L. REV. 181, 194-205 (1985) (noting how investigative and courtroom practices can be improved to maximize child's ability to accurately recount incident). Research indicates that children can be more suggestible than adults and that asking children suggestive and misleading questions can lead to inaccurate answers. *Id.* at 187-88. If questioned properly, however, children can provide accurate testimony. *Id.* at 190; *see* JOHN E.B. MYERS, LEGAL ISSUES IN CHILD ABUSE AND NEGLECT 67-83 (Jon R. Conte ed., 1992) [hereinafter LEGAL ISSUES] (discussing legal implications of children's suggestibility and proper interview techniques); *see also* THE SUGGESTIBILITY OF CHILDREN'S RECOLLECTIONS (John Doris ed., 1991) (compiling leading authorities discussing psychological and legal aspects of suggestibility of children and credibility of child witnesses).

allegations.[4] Many courts have held that a pretrial suppression hearing is improper to determine whether the child's potential testimony has been influenced by suggestion, and instead have relied on traditional safeguards of credibility.[5] For example, one New York court which refused to grant the defendant's motion for such a pretrial hearing[6] reasoned that the issue is a question for the jury to decide.[7] Recently, however, in *People v. Michael M.*,[8] the New York Supreme Court, Kings County, held that a pretrial suppression hearing is proper in a child sexual abuse case to determine whether, and to what extent, the child's testimony was the product of a suggestive interview procedure.[9]

The defendant in *Michael M.* was indicted on charges of sexually abusing his half-sister, Brenda M.[10] Brenda's father reported the suspected abuse and had Brenda examined by a physician.[11] During the

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[4] *See* People of Guam v. McGravey, 14 F.3d 1344, 1349 (9th Cir. 1994) (recognizing that courts must "exercise great care in trying to assure that justice is done" in child sexual abuse cases); State v. Michaels, 642 A.2d 1372, 1380 (N.J. 1994) (deeming pretrial hearing on issue of suggestibility necessary to ensure defendant's right to fair trial); People v. Hudy, 73 N.Y.2d 40, 58, 535 N.E.2d 250, 260, 538 N.Y.S.2d 197, 207 (1988) (finding that defendant improperly denied right to examine investigators about manner in which child witnesses were questioned).

[5] *See* State v. Moore, 433 N.W.2d 895, 900 (Minn. Ct. App. 1988) (stating that responsibility of weighing credibility of child witness in child sexual abuse case is that of jury); Felix v. State, 849 P.2d 220, 235 (Nev. 1993) (noting extent to which child victim's testimony has been tainted by suggestion goes to weight not admissibility); People v. Alvarez, 159 Misc. 2d 963, 964-65, 607 N.Y.S.2d 573, 574 (Sup. Ct. Richmond County 1993) (finding suppression hearing improper in child sexual abuse case); State v. Wortman, No. 94-1931-CR, 1995 Wisc. App. LEXIS 80 (Wis. Ct. App. Jan. 24, 1995), *review denied*, 531 N.W.2d 329 (Wis. 1995) (determining that effect of suggestive questioning on child's testimony is question for jury).

[6] *See, e.g.*, People v. Alvarez, 159 Misc. 2d 963, 964, 607 N.Y.S.2d 573, 574 (refusing, "in the absence of any controlling precedent," to hold pretrial suppression hearing to make threshold determination regarding suggestiveness of interviewing procedures and reliability of child's testimony).

[7] *Id.* at 965, 607 N.Y.S.2d at 574. In determining that the issue of suggestibility of the child's testimony was a question of fact for the jury, the court noted that the interviewers could be called as witnesses by the defense to shed light on the interviewing process. *Id.* It would also be proper for expert testimony to be presented regarding the likelihood of confabulation by the child. *Id.* The court determined that these safeguards would be adequate to elicit the truth, without the need for a pretrial hearing. *Id.*

[8] 162 Misc. 2d 803, 618 N.Y.S.2d 171 (Sup. Ct. Kings County 1994).

[9] *Id.*; *see infra* notes 22-24 and accompanying text.

[10] *Michael M.*, 162 Misc. 2d at 805, 618 N.Y.S.2d at 174. Specifically, the defendant was charged with rape in the first degree, N.Y. PENAL LAW § 130.35 (McKinney 1989), sexual abuse in the first degree, N.Y. PENAL LAW § 130.65 (McKinney 1989), incest, N.Y. PENAL LAW § 255.25 (McKinney 1989), and endangering the welfare of a child, N.Y. PENAL LAW § 260.10 (McKinney 1989 & Supp. 1995). *Michael M.*, 162 Misc. 2d at 805, 618 N.Y.S.2d at 174.

[11] *Michael M.*, 162 Misc. 2d at 805, 618 N.Y.S.2d at 174-75. At the time of defendant's arrest, Brenda's mother, natural father, and her mother's boyfriend were also arrested on similar charges of the sexual abuse of both Brenda M. and Michael M., the defendant. *Id.* The arrests

examination, the physician asked Brenda if she knew why she had been brought to his clinic.[12] When Brenda responded "no," the physician informed her that she was there as a result of suspected abuse by her step-brother.[13] The physician then asked Brenda whether her step-brother had in fact touched her; she responded "yes."[14] As a result of this exchange, the defendant moved for a pretrial hearing to determine whether Brenda's potential testimony, accusing him of sexually abusing her, should be suppressed due to the physician's "suggestive" interview with Brenda.[15]

Justice Kreindler determined that the court has the inherent power to grant the defendant's motion, even though suggestive questioning of a witness by a civilian physician is not listed in section 710 of the Criminal Procedure Law as a ground for suppression.[16] The court compared suggestive questioning of a child to cases involving testimony rendered unreliable by hypnosis or suggestive identification procedures where the witness' potential testimony may be suppressed as a result of the suggestive procedures used.[17]

In granting the defendant's motion, the court relied on psychological studies indicating the suggestibility of children and, ultimately, on the New

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arose during a "hotly-contested" custody and visitation dispute between Brenda's parents. *Id.* at 805, 618 N.Y.S.2d at 174. The court noted this fact in determining that the child, Brenda M., may have been influenced by suggestion. *Id.* at 810, 618 N.Y.S.2d at 178. *But see* 1 JOHN E.B. MYERS, EVIDENCE IN CHILD ABUSE AND NEGLECT CASES 226 (2d ed. 1992) [hereinafter EVIDENCE] (noting that although fabricated allegations of sexual abuse occur in custody disputes, "there is no convincing evidence that a substantial portion of the allegations are fabricated").

[12] *Michael M.*, 162 Misc. 2d at 806, 618 N.Y.S.2d at 175.

[13] *Id.*

[14] *Id.* During his examination, the physician noted in Brenda's medical record, "I . . . told her she was brought in because the police suspected she was touched on her vagina by her 16-year-old brother Michael. I then asked her, 'did Michael touch you down there?' To which Brenda answered 'yes.'" *Id.* The court found that the interview was "suggestive" because "[i]n asking the question in this manner, the doctor suggested both the nature of the abuse and the person responsible." *Id.* at 811, 618 N.Y.S.2d at 178.

[15] *Michael M.*, 162 Misc. 2d at 804-05, 618 N.Y.S.2d at 174.

[16] *Id.* at 807, 618 N.Y.S.2d at 175-76. The court found the power of a trial court to grant a motion *in limine*, though not specifically stated in procedural rules or statutes, inherent in the power of a trial court to admit or exclude evidence. *Id.* at 806, 618 N.Y.S.2d at 175. Also inherent in the power of the court are decisions as to how and when such evidence should be admitted. *Id.*

[17] *Michael M.*, 162 Misc. 2d at 808, 618 N.Y.S.2d at 176-77. The court reasoned that "[i]f a child witness is prone to the same sort of suggestion to which a person under hypnosis, or a person making an identification, is subject, a defendant [in a child sexual abuse case] should have the same . . . right to suppress testimony rendered unreliable by the suggestion." *Id.* at 808, 618 N.Y.S.2d at 177.

Jersey Supreme Court's decision in *State v. Michaels*.[18] The court in *Michael M.* concluded that, although the oath and cross-examination are generally sufficient tests of reliability to allow admission of in-court non-hearsay testimony of a witness,[19] testimony regarding eyewitness identification and testimony resulting from hypnosis are exceptions to the general rule.[20] Reasoning that a person is prone to suggestion when identifying someone,[21] or when under hypnosis,[22] the court stated that suggestive procedures render such testimony unreliable.[23] The court determined that, since a child witness is prone to the same sort of suggestion, a suppression hearing may be warranted in such cases.[24]

The court's findings prompted it to conclude that in appropriate cases courts should hold a hearing to determine whether a witness was "subject to unduly suggestive or coercive questioning."[25] The standard set by the court requires the criminal defendant in a sexual abuse case to allege "sufficient facts" to warrant a pretrial hearing on suggestibility.[26] Since

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[18] 642 A.2d 1372, 1379 (N.J. 1994); *see Michael M.*, 162 Misc. 2d at 810, 618 N.Y.S.2d at 177. The court in *Michael M.* relied exclusively on three sources and the determination of the New Jersey Supreme Court in finding that "there is sufficient consensus among experts to conclude that highly suggestive questioning techniques can distort a child's recollection of events, undermining the reliability of the statements and subsequent testimony concerning such events." *Id.* (citing *Michaels*, 642 A.2d at 1379); *cf.* Sopher, *supra* note 1, at 656 (noting that court in *Michaels* acknowledged that literature concerning interviewing of children and suggestibility was "overwhelming," yet "attempted to summarize the research in five pages and thus relied heavily on a few sources"). In *Michaels*, a nursery school teacher was convicted, largely as a result of the children's testimony, on 115 counts of sexual abuse against children who had been entrusted to her care. *Michaels*, 642 A.2d at 1375. She was subsequently sentenced to 47 years in prison. *Id.* In 1993 a New Jersey appellate court reversed Michael's conviction due, in part, to interrogations of the child accusers that were "highly improper." *Id.* at 1375-76. The court stipulated that in the event of a retrial, a pretrial hearing would be necessary to assess the credibility of the children's statements and their admissibility. *Id.*

[19] *Michael M.*, 162 Misc. 2d at 808, 618 N.Y.S.2d at 176 (citing People v. Brensic, 70 N.Y.2d 9, 14, 509 N.E.2d 1226, 1228, 517 N.Y.S.2d 120, 122 (1987)).

[20] *Id.* (citing People v. Hughes, 59 N.Y.2d 523, 535, 453 N.E.2d 484, 489, 466 N.Y.S.2d 255, 260 (1983); People v. Adams, 53 N.Y.2d 241, 249-51, 423 N.E.2d 379, 383, 440 N.Y.S.2d 902, 905-06(1981)).

[21] *Id.* (citing United States v. Wade, 388 U.S. 218 (1967)).

[22] *Id.* (citing *Hughes*, 59 N.Y.2d at 535, 453 N.E.2d at 489, 466 N.Y.S.2d at 260).

[23] *Id.*

[24] *Michael M.*, 162 Misc. 2d at 808, 618 N.Y.S.2d at 177.

[25] *Id.* at 810, 618 N.Y.S.2d at 178.

[26] *Id.* at 811, 618 N.Y.S.2d at 178. The court, reasoning from the requirements of New York Criminal Procedure Law § 710.60, stated that in order to determine whether a defendant has alleged "sufficient facts" to merit a hearing, the court will look to the motion papers, the context of the case, and the defendant's access to information. *Id.* (citing People v. Mendoza, 82 N.Y.2d 415, 426, 624 N.E.2d 1017, 1021, 604 N.Y.S.2d 922, 926(1993)).

some degree of suggestion is likely to enter the interviewing process,[27] the burden created by the court in *Michael M.* will not be difficult to meet.[28]

Studies on the suggestibility of children indicate that, although children are more prone to suggestion than adults, they are able to give accurate accounts when questioned properly.[29] There is, however, wide disagreement among experts on the extent to which children are suggestible and the degree and manner in which specific types of questions can affect a child's testimony.[30] These studies generally agree that open-ended questions or spontaneous accounts by children themselves provide the most reliable answers.[31]

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[27] *See infra* note 33 and accompanying text.

[28] The standard established in *Michaels*, and followed by *Michael M.*, requires the defendant initially to allege sufficient facts to warrant a hearing. *Michael M.*, 162 Misc. 2d at 811, 618 N.Y.S.2d at 178. The court in *Michael M.* held that the defendant did not have to allege specific facts to support a suppression hearing since a defendant often lacks access to information regarding witness interviews. *Id.* The defendant then has the ultimate burden of proof on the issue of suggestibility, and if the defendant meets this burden, the burden shifts to the prosecution to show by clear and convincing evidence that the potential testimony has not been tainted by suggestive questioning. *Id.* at 812, 618 N.Y.S.2d at 179.

[29] Goodman & Helgeson, *supra* note 3, at 187-90. Suggestibility depends on many factors including cognitive, social, emotional, and situational factors. LEGAL ISSUES, *supra* note 3, at 68. Children are more suggestible with respect to peripheral details of events than key aspects and are more likely to adopt an adult's interpretation when asked to interpret ambiguous events. *Id.* Suggestibility can be reduced by instructing children to pay close attention to questions and to relay only what they actually remember. *Id.* at 69. Children should be told that questions may be "difficult or tricky," and to answer only those questions that they understand. *Id.* In addition, children should be reminded that the interviewer does not know what happened, and they should be assured that "I don't know" is an appropriate response. *Id.*; *see* LUCY S. MCGOUGH, CHILD WITNESSES: FRAGILE VOICES IN THE AMERICAN LEGAL SYSTEM 52-57 (1994) (discussing suggestibility and proper interview techniques); NANCY WALKER PERRY & LAWRENCE S. WRIGHTSMAN, THE CHILD WITNESS: LEGAL ISSUES AND DILEMMAS 117-30 (Michelle R. Starika ed., 1991) (discussing suggestibility and maximizing children's memory through proper interviewing); THE SUGGESTIBILITY OF CHILDREN'S RECOLLECTIONS, *supra* note 3; Younts, *supra* note 2, at 720-32 (discussing studies on children's suggestibility and problems associated with suggestive interviewing).

[30] Younts, *supra* note 2, at 721. A major difficulty with interpreting the studies on children's suggestibility is that researchers "have failed to reach a consensus on the key issue." *Id.* Some researchers conclude that children are not overly susceptible to suggestion, while others argue that children "have difficulty distinguishing reality from fantasy." *Id.*; LEGAL ISSUES, *supra* note 3, at 68 ("Overall, psychological studies do not converge on a simple relation between age and suggestibility."); Lamb, *supra* note 1, at 160 (calling for further research on degree to which suggestibility can affect children's accounts and effective interviewing strategies).

[31] Goodman & Helgeson, *supra* note 3, at 196-98. Interviewers should begin with open-ended questions and proceed to more specific questions as the interview progresses. *Id.* at 197. It is also important that interviewers not convey an attitude of surprise or disbelief, which may hinder communication with the child. *Id.* at 197-98; Lamb, *supra* note 1, at 155. The most reliable information comes from open-ended questions designed to elicit "free narrative accounts" of children's experiences. *Id.*

Two main problems arise in this context. First, due to the nature of the crime, child victims of sexual abuse are unlikely to give spontaneous accounts; it is often necessary to use leading questions to elicit the incidents of abuse.[32] Second, regardless of whether children are initially interviewed by police investigators or mental health professionals, it is likely that some degree of suggestion will enter the interview process.[33] These realities significantly increase the likelihood that a criminal defendant will be able to allege "sufficient facts" to establish a threshold showing that interview procedures used with a child accuser were suggestive.[34]

The court in *Michael M.*, in order to justify a suppression hearing, compared the suggestibility of children to suggestion that may result from hypnosis or lineup identification procedures.[35] The court, however, failed to recognize that the nature of sexual abuse differentiates it from cases involving suggestion by hypnosis or lineup identification.[36] Hypnosis clearly differs because it is a scientific process through which a person is purposely induced into a subconscious state.[37] The type of suggestion that

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[32] *See* 1 EVIDENCE, *supra* note 11, at 230 (discussing necessity of leading questions). Many sexually abused children are threatened into silence. The twin forces of embarrassment and fear of disclosure combine to justify occasional use of mildly suggestive questions during interviews. LEGAL ISSUES, *supra* note 3, at 71; Sopher, *supra* note 1, at 646 (noting necessity of leading questions due to fact that children are assaulted in secret and often threatened or bribed not to disclose abuse).

[33] Goodman & Helgeson, *supra* note 3, at 192. The police, who usually conduct the first interview of a child victim of sexual assault, are often untrained in proper methods of questioning children. *Id.* Even mental health professionals may lack proper interviewing skills and are often unaware of the legal implications of their method of questioning the child. *Id.* at 193; *see* DEBRA WHITCOMB, NATIONAL INSTITUTE OF JUSTICE, WHEN THE VICTIM IS A CHILD 33-42 (2nd ed. 1992) (discussing interview techniques used to improve children's accounts). The use of anatomically correct dolls, leading questions, and videotaped interviews have been employed as means of aiding communications between children and interviewers. *Id.* These techniques, however, are hotly debated due to a lack of consensus on their effectiveness and ability to eliminate suggestion during the interview process. *Id.*

[34] *See* Goodman & Helgeson, *supra* note 3, at 187-88. A dilemma exists because although it may be necessary to use leading questions in order to obtain sufficient information to prosecute an offender, such questions may elicit inaccurate responses which can potentially be attacked by the offender. *Id.*

[35] People v. Michael M., 162 Misc. 2d 803, 808, 618 N.Y.S.2d 171, 176-77 (Sup. Ct. Kings County 1994).

[36] *See infra* notes 37-39 and accompanying text.

[37] 1 PAUL C. GIANNELLI & EDWARD J. IMWINKELRIED, SCIENTIFIC EVIDENCE 332 (2d ed. 1993). Hypnosis has "been defined as 'a special psychological state with certain physiological attributes, resembling sleep only superficially and marked by a functioning of the individual at a level of awareness other than the ordinary conscious state.'" 1 *id.* at 332-33 (quoting 6 ENCYCLOPEDIA BRITANNICA 133 (15th ed. 1989)). Hypnosis usually involves "establishing rapport between the hypnotist and the subject; inducing a passiveness that makes the subject receptive to suggestion, often by engendering eye fatigue through the focusing on a close object;

enters into a lineup identification is more comparable to the suggestive questioning of child victims since in both cases the identity of the perpetrator may be inadvertently suggested during the procedure.[38] The uniqueness of child sex abuse, however, requires that different standards be used in making evidentiary determinations because, by its nature, child sexual abuse is a "secret crime."[39] In a typical child sexual abuse case, the child is the only witness and little or no corroborative evidence exists. In addition, medical evidence is often insufficient to identify a specific perpetrator and many forms of sexual abuse do not produce physical evidence.[40] The child's testimony is, therefore, often the most critical

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and inducing a trance-like state through a series of suggestions." 1 *id.* at 333. Hypnotically-induced statements made outside the courtroom are inadmissible hearsay. 1 *id.* at 334; *see also* People v. Hughes, 59 N.Y.2d 523, 542-44, 453 N.E.2d 484, 488-90, 466 N.Y.S.2d 255, 264-65 (1983) (stating that hypnosis is not generally accepted as reliable in scientific community and, therefore, posthypnotic recall is inadmissible), *cert. denied*, 492 U.S. 908 (1989). The New York Court of Appeals, in distinguishing hypnosis from other forms of refreshing recollection, stated:

> What distinguishes hypnosis is the fact that suggestion is an essential and inseparable part of the process which alters a witness's consciousness and makes him more prone to suggestion and to recall events inaccurately than he would in a normal state of consciousness. In fact, it is a scientific process and the recollections it generates must be considered as scientific results. Certainly a layman could not assess those results without expert guidance and might be unduly impressed by the witness's enhanced recollection if he mistakenly viewed them as the result of normal recall.

Id. at 543, 453 N.E.2d at 494, 466 N.Y.S.2d at 265. Courts take several different approaches to admitting hypnotically-induced statements. 1 GIANNELLI & IMWINKELRIED, *supra*, at 37. Some courts refuse to allow hypnosis at all, some courts allow the hypnotized witness to testify, and other courts allow the hypnotized witness to testify only if certain procedural safeguards are satisfied. 1 *id.* Most courts allow a witness to testify concerning their prehypnotic recollections. 1 *id.* at 342. Admissibility of such statements is determined at an out-of-court hearing in which reliability is established. 1 *id.* at 344; *see* State *ex rel.* Collins v. Superior Court, 644 P.2d 1266, 1295 (Ariz. 1982) (allowing witness to testify to matters recalled and related prior to hypnosis); *Hughes*, 59 N.Y.2d at 546-48, 453 N.E.2d at 496, 466 N.Y.S.2d at 267; Commonwealth v. Kater, 447 N.E.2d 1190, 1197 (Mass. 1983) (allowing prehypnotic testimony).

[33] *See* EDWARD J. IMWINKELRIED ET AL., COURTROOM CRIMINAL EVIDENCE 928-29 (2d ed. 1993). A lineup increases the likelihood of unreliability in eyewitness identification because it suggests that the guilty person is among those in the lineup. *Id.* The witness may feel pressured by the belief that the police "expect" or "require" her to pick out the right person. Therefore, the witness may be inclined to pick out the person closest to her recollections of the criminal, rather than admitting that she is not sure if she recognizes the perpetrator. *Id.* Another danger is that police officers might inadvertently suggest who the suspect is. *Id.* Defense attacks on eyewitness identification testimony are common, *id.* at 930, and are similar to attacks on the testimony of child victims because the possibility of suggesting the identity of the perpetrator is inherent in both. The Supreme Court has refused to adopt a "per se" rule excluding evidence of suggestive identification procedures, *see* Manson v. Brathwaite, 432 U.S. 98, 110-14 (1977), but objections to its admissibility are numerous. *See* IMWINKELRIED, *supra*, at 927-46.

[39] *See infra* note 41.

[40] See 1 EVIDENCE, *supra* note 11, at 218-19; Lamb, *supra* note 1, at 152-53; Sopher, *supra* note 1, at 635-36.

evidence.[41] In cases involving hypnosis or lineup identification, however, it is much more likely that other physical or testimonial evidence exists; therefore, suppression of a suggestive procedure is not fatal to the prosecution's case.[42]

It is submitted that the decision in *Michael M.* takes the issue of suggestibility one step too far. Safeguards to ensure the veracity of a child witness's testimony are inherent in a criminal trial.[43] A threshold showing of the child's competence, requiring that the judge determine that the child knows the difference between a truth and a lie, must be established before

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[41] The Supreme Court recognized that "[c]hild abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim." Pennsylvania v. Ritchie, 480 U.S. 39, 60 (1987); Lisa R. Askowitz, Comment, *Restricting the Admissibility of Expert Testimony in Child Sexual Abuse Prosecutions: Pennsylvania Takes It to the Extreme*, 47 U. MIAMI L. REV. 201, 201-03 (1992). Prosecutors face "unique" problems in child sexual abuse cases. *Id.* at 202-03. "The prosecution's case is severely hampered if the court finds the child to be too young to be a witness or incompetent to testify." *Id.* at 202.

[42] In cases where the defendant has been identified in a lineup, witnesses may make an independent in-court identification of the defendant, regardless of suggestive lineup procedures. *See* People v. Adams, 53 N.Y.2d 241, 252, 423 N.E.2d 379, 384, 440 N.Y.S.2d 902, 907 (1981) (finding identification procedure unnecessarily suggestive but harmless error due to fact that defendant was properly identified at trial by 5 eyewitnesses to crime); People v. Matthews, 199 A.D.2d 59, 604 N.Y.S.2d 951 (1st Dep't 1993) (finding independent in-court identification of defendant sufficient to render any suggestion in identification procedure harmless), *appeal denied*, 82 N.Y.2d 927, 632 N.E.2d 489, 610 N.Y.S.2d 179 (1994); *In re* Michael J., 117 A.D.2d 602, 603, 498 N.Y.S.2d 68, 69 (2d Dep't 1986) (finding error regarding pretrial identification harmless in light of independent identification and other evidence directly linking defendant to crime); People v. Brown, 125 A.D.2d 321, 321, 509 N.Y.S.2d 57, 58 (2d Dep't 1986) (holding that although identification was suggestive, suppression was unwarranted due to independent bases for in-court identification); People v. Watkins, 121 A.D.2d 583, 584, 503 N.Y.S.2d 439, 441 (2d Dep't) (finding any error in identification procedure harmless when there is independent basis for identification and overwhelming evidence of defendant's guilt), *appeal denied*, 68 N.Y.2d 918, 501 N.E.2d 613, 508 N.Y.S.2d 1040 (1986).

Under the prevailing view, in cases where posthypnotic testimony is excluded, a witness is free to testify to matters recalled prior to hypnosis. 1 GIANNELLI & IMWINKELRIED, *supra* note 37, at 342; *see* People v. Tunstall, 63 N.Y.2d 1, 9, 468 N.E.2d 30, 35, 479 N.Y.S.2d 192, 196 (1984) (requiring hearing to determine admissibility of prehypnotic testimony); People v. Hughes, 59 N.Y.2d 542, 545, 453 N.E.2d 484, 495, 466 N.Y.S.2d 255, 266 (1983); People v. Perrino, 96 A.D.2d 952, 952, 466 N.Y.S.2d 408, 408 (2d Dep't 1983) (allowing witness to testify regarding prehypnotic recollection). These additional forms of evidence are unavailable to child victims of sexual abuse. The lack of evidence in child sexual abuse cases may also hinder the prosecution's case because jurors tend to doubt the credibility of child witnesses. JOHN E.B. MYERS, CHILD WITNESS LAW AND PRACTICE 451-52 (1987) [hereinafter CHILD WITNESS]. Jurors may be hesitant to find a person guilty or innocent solely on the basis of a child's testimony. *Id.* at 452. Studies indicate that jurors are more likely to believe a child witness if corroborating evidence exists. *Id.*

[43] *See infra* notes 44-47 and accompanying text.

the child is deemed fit to testify.[44] Cross-examination and impeachment are also available to the defendant and provide additional safeguards to assist a jury in making a determination of a witness's credibility.[45] In addition, some courts allow evidence to be presented on the possible effects of suggestion.[46] In many child sexual abuse cases these safeguards have

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[44] PERRY & WRIGHTSMAN, *supra* note 29, at 49-52; 1 EVIDENCE, *supra* note 11, at 59-65. A child must demonstrate certain characteristics, including "capacity to observe, sufficient intelligence, adequate memory, ability to communicate, awareness of the difference between truth and falsehood, and appreciation of the obligation to speak the truth in court." 1 *id.* at 60. A child of any age who possesses the required characteristics may be deemed competent to testify. 1 *id.* at 60-61. In New York, a child under 12 who is not competent to testify under oath, or a child over 12 who cannot understand the nature of an oath because of a mental disease or defect may give unsworn testimony in court. CPL § 60.20 (McKinney 1992). Unsworn testimony, however, is not a sufficient basis for conviction without independent corroboration. *Id.* Once the court has decided that the child is competent to testify, it is up to the trier of fact to determine the weight to be given to the child's testimony and whether or not the child is credible. PERRY & WRIGHTSMAN, *supra* note 29, at 54. *But see* Christiansen, *supra* note 1, at 715-20 (drawing distinction between competency and credibility, and supporting competency exam by which judge measures both elements).

[45] *See* 1 JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 19, at 78-83 (4th ed. 1992) (discussing right of cross-examination). "For two centuries, common law judges and lawyers have regarded the opportunity of cross-examination as an essential safeguard of the accuracy and completeness of testimony . . . ." 1 *id.* § 19, at 30; 1 EVIDENCE, *supra* note 11, at 378 (discussing purpose of impeachment). "The basic aim of all credibility rules [is] to admit evidence which better enables the trier of fact on the basis of his experience to determine whether it is reasonable to conclude that the witness is lying or telling the truth." 1 *id.* (quoting 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 607[02], at 607-24 (1987)). The adversarial system is based on the underlying theory that having each party present evidence and witnesses supporting their respective positions to a neutral fact-finder assures that "truth will be determined and justice achieved." Mary C. Hutton, *Child Sexual Abuse Cases: Reestablishing the Balance Within the Adversary System*, 20 U. MICH. J.L. REF. 491, 494 (1987). During cross-examination, a child witness may be questioned to determine if his or her testimony is the product of coaching, influence, or bias, and adults who interviewed the child may be examined regarding the procedures or questions used. 1 EVIDENCE, *supra* note 11, at 384; *see* People v. Hudy, 73 N.Y.2d 40, 58, 535 N.E.2d 250, 260, 538 N.Y.S.2d 197, 207 (1988) (finding that defendant was improperly denied right to cross-examine investigating police officers about manner in which child witnesses were questioned). Counsel may impeach the child witness with prior inconsistent statements or contradict the child's testimony by extrinsic evidence. CHILD WITNESS, *supra* note 42, at 182. The attorney may "spotlight inconsistencies" in the child's testimony in an effort to determine if the child is mistaken, fabricating, confused, highly suggestible, or lacking in knowledge of the facts. *Id.* at 183.

[46] *See* People v. Alvarez, 159 Misc. 2d 963, 965, 607 N.Y.S.2d 573, 574 (Sup. Ct. Richmond County 1993) (indicating that it would be proper at trial to show possibility of confabulation by expert testimony regarding possible effects of interviews with child witnesses). Traditionally, courts have uniformly rejected expert testimony on the credibility of a particular child. Hutton, *supra* note 45, at 520. Some courts today, however, allow testimony regarding the extent to which children as a group are suggestible. *Id.*; *see* LEGAL ISSUES, *supra* note 3, at 133-42 (discussing reasons for children's lack of credibility and use of expert testimony to rehabilitate children's credibility); *see, e.g.*, State v. Spigarolo, 556 A.2d 112, 123-24 (Conn.) (permitting

been found to be sufficient protections of the criminal defendant's rights.[47]

A preliminary determination of suggestibility will require a judge to assess the suggestibility of a child by psychological standards which are voluminous and largely unsettled.[48] It appears that this determination is better put before the jury where the child's credibility can be assessed in light of the facts and circumstances of the case, and where the traditional courtroom safeguards remain available to protect both the child's and the defendant's rights.[49]

The extent to which children are suggestible is an issue that must be considered in child sexual abuse cases where improper interviewing or questioning may have rendered the child's potential testimony unreliable.[50] While it is true that a child victim may be improperly or suggestively questioned,[51] without the child victim's testimony, many cases of child

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expert rebuttal testimony on issue of likelihood that child victims of sexual abuse will give inconsistent stories), *cert. denied*, 493 U.S. 933 (1989); State v. Myers, 359 N.W.2d 604, 609-10 (Minn. 1984) (allowing expert testimony regarding typical characteristics of sexually abused children on issue of credibility).

[47] *See* People of Guam v. McGravey, 14 F.3d 1344, 1349 (9th Cir. 1994) ("Such courtroom weapons as cross-examination, contradictory evidence, evidence that a witness has been influenced by others, and argument are the time-honored methods of educating a jury on issues of credibility."); State v. Moore, 433 N.W.2d 895, 900 (Minn. 1988) (stating credibility of children is question for jury); *Hudy*, 73 N.Y.2d at 58, 535 N.E.2d at 260, 538 N.Y.S.2d at 207 (finding that issue of suggestibility goes to heart of defendant's case before jury); State v. Wortman, No. 94-1931-CR, 1995 Wisc. App. Lexis 80, at *7 (Wis. Ct. App. Jan. 24, 1995) (stating whether suggestive questions affected child's testimony is for jury to decide), *review denied*, 531 N.W.2d 329 (Wis. 1995).

[48] *See* Sopher, *supra* note 1, at 656 (noting complexity of determining suggestibility); Christiansen, *supra* note 1, at 718 (discussing burden on judges, in conducting hearings to determine suggestibility of child victims, to become familiar with psychology of child memory and child development); Younts, *supra* note 2, at 721 (citing lack of consensus on issue of suggestibility as major problem); Lamb, *supra* note 1, at 160 (calling for greater research into suggestibility, interview techniques, and effects of questioning on children).

[49] McCormick, discussing child witnesses, has stated:

> Conceding the jury's deficiencies, the remedy of excluding such a witness, who may be the only person available who knows the facts, seems inept and primitive. Though the tribunal is unskilled [in assessing the child witness], and the testimony difficult to weigh, it is still better to let the evidence come in for what it is worth, with cautionary instructions.

1 STRONG ET AL., *supra* note 45, § 62, at 91; *cf.* Younts, *supra* note 2, at 735-38 (advocating pretrial determination of degree to which child's testimony is product of suggestion); Christiansen, *supra* note 1, at 715-18 (supporting pretrial determination of child's credibility); MCGOUGH, *supra* note 29, at 109-12 (encouraging voir dire of child on issue of suggestibility).

[50] *See* MCGOUGH, *supra* note 29, at 120-25 (discussing need to assess child witnesses' credibility and possibility of suggestion); Montoya, *supra* note 3, at 933-40 (discussing pretrial interrogation of children as cause for concern due to children's suggestibility).

[51] *See supra* notes 29-34 and accompanying text.

sexual abuse will not be prosecuted.[52] It is submitted that the New York court in *Michael M.*[53] has set a dangerous standard which rejects traditional tests of reliability, and requires judges to make credibility determinations that are proper questions for a jury. This standard has the potential of silencing child victims, whose testimony is often the only means of prosecuting a child sexual abuse case. It is submitted that, in fairness to both the child accuser and the defendant, the child should have the same right as other victims to put his or her case and all relevant evidence before the trier of fact.[54]

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[52] *See supra* notes 40-41 and accompanying text.

[53] People v. Michael M., 162 Misc. 2d 803, 618 N.Y.S.2d 171 (Sup. Ct. Kings County 1994).

[54] *See* 1 STRONG ET AL., *supra* note 45, § 184, at 772-73.

> The law of evidence presupposes that in judging the claims of litigants, it is important to discern the true state of affairs underlying the dispute. In pursuing this objective, it proceeds on the premise that the way to find the truth is to permit the parties to present to the court or jury all the evidence that bears on the issue to be decided . . . . unless there is some distinct ground for refusing to hear such evidence, it should be received.

1 *id.* § 184, at 772.