

I. INVESTIGATIVE STRATEGIES

- a. IDENTIFY POSSIBLE MOTIVES FOR THE ALLEGATION FROM CLIENT AND FAMILY MEMBER INTERVIEWS
- b. VICTIM'S GOALS
 - i. I WANT TO LIVE WITH MOM
 - ii. LESS STRICT HOUSEHOLD
 - iii. AGE - IT'S TIME FOR A CHANGE
- c. NO PERCEIVED DOWNSIDE FOR VICTIM - LOTS OF POSITIVE ATTENTION
- d. COMBATING "KIDS DON'T LIE ABOUT SEXUAL ABUSE"
 - i. PREPARE FOR EXPERT -- JENSEN TESTIMONY
 - ii. SEE STATE V. JENSEN 141 Wis.2d 333, 415 N.W.2d 519 (1987), STATE V. MADAY 179 Wis.2d 346, 507 N.W. 356, and STATE V. RIZZO 250 Wis.2d 407 (2002)
 - iii. WHERE THE STATE PUTS THE BEHAVIOR OF THE VICTIM INTO ISSUE AND REQUESTS TO PRESENT TESTIMONY FROM EXPERTS THAT THE VICTIM'S BEHAVIORS WERE CONSISTENT WITH BEHAVIOR OF OTHER VICTIMS OF SEXUAL ABUSE, FUNDAMENTAL FAIRNESS REQUIRES THAT THE DEFENDANT BE GIVEN THE OPPORTUNITY TO PRESENT RELEVANT EVIDENCE TO COUNTER SUCH ASSERTIONS BY DISCOVERY OF THE PSYCHOLOGICAL CONDITION OF THE VICTIM.
 - iv. SOCIAL SCIENCE RESEARCH IS ALL OVER THE BOARD

II. AREAS FOR INVESTIGATION

- a. ANALYZE DISCOVERY
 - i. THE POLICE INVESTIGATIONS: DOUBLE CHECK POLICE WORK. BE SUSPICIOUS WHERE POLICE REPORTS DO NOT REFLECT VERIFICATION OF SOMETHING VERIFIABLE
 - ii. A GRAIN OF TRUTH
- b. OBTAIN VIDEO AND AUDIO TAPES OF INTERVIEWS FOR COMPARISON
- c. LOOK FOR OTHER LEGAL VENUES TO OBTAIN INFORMATION
 - i. CHIPS

- ii. DIVORCE PROCEEDINGS
- iii. DEPOSITIONS
- d. DEVELOP ADDRESS HISTORY, FAMILY SCHEDULES, RELATIVES, ETC. (IS THERE A CATAclySMIC EVENT?)
- e. OBTAIN FAMILY PHOTOS AND VIDEOS OF KEY TIMES AND DATES
- f. IDENTIFY KEY VICTIM RELATIONSHIPS
 - i. BOYFRIENDS/GIRLFRIENDS (CURRENT AND FORMER)
 - ii. NEIGHBORS
 - iii. PARENTS
 - iv. CLASSMATES
 - v. EXTRACURRICULAR
- g. PREVIOUS ALLEGATIONS AND FALSE STATEMENTS TO TEACHERS, POLICE, FRIENDS, ETC.
- h. OBTAIN MEDICAL RECORDS
 - i. PARENT CAN SIGN MEDICAL RELEASE
 - ii. VICTIM'S PARENT(S) MAY NOT BELIEVE THAT THE ALLEGATIONS ARE TRUE - THIS CAN CHANGE, SO GET THE RELEASE SIGNED RIGHT AWAY
 - iii. BE PREPARED TO CHALLENGE STATE'S EXPERT
 - iv. SHIFFRA AND GREEN SHOWINGS

1. THE STANDARD

The appropriate test to be applied when a defendant seeks an *in camera* inspection of psychiatric records was articulated in State v. Shiffra, 175 Wis.2d 600, 499 N.W.2d 719 (Ct.App. 1993); and State v. Green, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298. In Green, supra, the Supreme Court affirmed the reasoning in Shiffra, supra, and clarified the threshold the defendant must satisfy to be entitled to an *in camera* review. Id at 34.

According to the Court in Green, supra, a defendant must set forth a specific factual basis demonstrating a reasonable

likelihood that the records contain relevant information that is necessary for a determination of guilt or innocence, and that it is not merely cumulative to other evidence available to the defendant. Information is necessary for a determination of guilt or innocence if it tends to create a reasonable doubt, which may not otherwise exist.

The defendant's request must be fact-specific. "...A defendant must set forth a fact-specific evidentiary showing, describing as precisely as possible, the information sought from the records and how it is relevant to and supports his or her particular defense. ... The mere contention that the victim had been involved in counseling related to prior sexual assaults, or the current sexual assault is insufficient. Munoz, 2000 Wis.2d at 399. Further, a defendant must undertake a reasonable investigation into the victim's background in counseling through other means first before the records will be made available. From this investigation, the defendant, when seeking an *in camera* review, must then make a sufficient evidentiary showing that is not based on mere speculation or conjecture as to what information is in the records. ...A defendant must show more than a mere possibility that the records will contain evidence that may be helpful or useful to the defense. Munoz, 2000 Wis.2d at 397-398." Green, *supra*, 253 Wis.2d at 380-381.

Please note that in close cases, the Court is directed to err on the side of providing an *in camera* review. "Therefore, in cases where it is a close call, the circuit court should generally provide an *in camera* review." Id at 382.

v. IS THIS A JENSEN/MAYDAY/RIZZO CIRCUMSTANCE?

1. WHERE THE STATE SEEKS TO INTRODUCE JENSEN EVIDENCE, THERE ARE SEVEN FACTORS FOR THE CIRCUIT COURT IN DETERMINING WHETHER OR NOT TO GRANT THE DEFENDANT'S REQUEST FOR AN EXAMINATION OF THE VICTIM BY THE DEFENDANT'S EXPERT:

The Court [Mayday] identified seven factors for circuit courts to consider in determine whether to grant the defendant's request:

(1) the nature of the examination required and the intrusiveness inherent in that examination;

(2) the victim's age;

(3) the resulting physical or emotional effects of the examination on the victim;

(4) the probative value of the examination to the issue before the court;

(5) the remoteness in time of the examination to the alleged criminal action;

(6) the evidence already available for the defendant's use; and

(7) whether, based on the testimony of the defendant's named expert, a personal interview with the victim is essential before the expert can form an opinion, to a reasonable degree of psychological or psychiatric abuse.

Maday, 179 Wis. 2d at 360 citing State v. Delaney 187 W. Va. 212, 417 S.E.2d 903. determination in light of these factors. Id. at 362.

State v. Rizzo 241 Wis. 2d at 424. See Exhibit A.

2. RIZZO CLARIFIES MADAY TO SUGGEST THAT THE DEFENSE'S ABILITY TO GET AN INDEPENDENT EXAMINATION IS NOT DEPENDENT UPON WHETHER OR NOT THE EXPERT WAS A "HIRED EXPERT:"

The rationale in Maday was one of basic fairness. If one side is to introduce testimony by a psychological expert who has examined the victim, the other side must also be able to request such an opportunity in order to level the playing field. Maday 179 Wis.2d at 357. A jury will generally give the opinion of a psychological expert who has examined a party greater weight than the opinion of an expert who has not. The State's position suggests that the key fact in Maday was that its experts were the prototypical "hired guns." However, in Maday, the key fact was that the psychological experts had personally interviewed and examined the complainant.

Id. at 429-430.

vi. MANDATORY REPORTERS?

1. SEC. 48.981(2) WIS. STATS.
2. DID THE VICTIM SEE A MANDATORY REPORTER AS DEFINED BY SEC. 48.981(2) WIS. STATS., FOLLOWING THE ALLEGED ASSAULT?

3. THIS MAY BE PARTICULARLY IMPORTANT IF THE STATE IS SEEKING JENSEN TESTIMONY.

- i. CELL PHONE RECORDS
- j. ARRESTING OFFICER - ANY TRAINING DEALING WITH CHILD ABUSE SEXUAL ABUSE?
- k. SCHOOL RECORDS OF VICTIM
 - i. PARENT CAN SIGN RELEASE

III. WITNESS INTERVIEWS

- a. IDENTIFY WITNESSES IN CONCENTRIC CIRCLES OF INFLUENCE - WORK FROM OUTSIDE INWARD
- b. ASSURE EACH WITNESS THAT CASE IS GOING TO TRIAL
- c. DEVELOP HISTORY OF DISCLOSURE: WHO DID THE VICTIM TELL AND WHEN?
- d. ANY AVOIDANCE BEHAVIOR?
- e. ANY MENTION OF ALLEGATIONS - WHAT HAS HE OR SHE SAID ABOUT THE DEFENDANT TO FRIENDS?

IV. PRELIMINARY HEARING - NEVER WAIVE THE PRELIMINARY HEARING

- a. PRESERVING TESTIMONY
- b. PINNING DOWN WITNESS AS TO A TIME

V. PRIOR SEXUAL BEHAVIOR OF VICTIM (PULIZZANO AND ITS PROGENY)

- a. PULIZZANO EVIDENCE:

In State v. Pulizzano, 155 Wis.2d 633, 456 N.W.2d 325 (1990), the Supreme Court held that the Rape Shield Law (Sec. 972.11 Wis. Stats.) may, in particular circumstances, violate a defendant's right to present a defense. The State may open the door through expert testimony. See State v. Dunlap 239 Wis.2d 423, 620 N.W.2d 398 (Ct. App. 2000).

- i. THE DEFENSE MUST MAKE A PRETRIAL OFFER AND ESTABLISH BY PRETRIAL RULING THE FOLLOWING:
 - 1. That the prior act clearly occurred;
 - 2. That the acts closely resembled those of the present case;

3. That the prior act is clearly relevant to a material issues;
4. That the evidence is necessary to a defendant's case; and,
5. That the probative value of the evidence outweighs its prejudicial effect.

Pullizzano at 656

If the court finds that the defendant has satisfied the above five requirements, the Court then must determine whether the State's interest in prohibiting the evidence nevertheless requires that the evidence be excluded. The Court should apply a strict scrutiny analysis. "There must be a compelling State interest to overcome the defendant's constitutional rights." Id at 653 cited in State v. Dotson, 219 Wis.2d 65, 83, 580 N.W.2d 181 (1998).

Such testimony is typically introduced to establish that the victim's acknowledgment of sexual behavior could have come from a source other than the alleged assault by the defendant. Such evidence may also be used to rebut Jensen testimony; and, in particular, that the victim was sexually acting out as a result of the alleged assault.

ii. DOES STATE V. DUNLAP 250 Wis.2d 466, 202 Wis.19 (2002) CHANGE THIS?

1. IN DUNLAP, THE COURT FOUND THAT THE DEFENDANT'S REQUEST TO INTRODUCE EVIDENCE OF A VICTIM'S PRIOR SEXUAL BEHAVIOR ("SEDUCTIVE BEHAVIOR, HUMMING THE FAMILY DOG, AND FREQUENT MASTURBATION") WAS NOT SUFFICIENTLY SIMILAR TO THE ALLEGATIONS MADE BY THE VICTIM.
2. FURTHERMORE, THE STATE HAD NOT OPENED THE DOOR TO SUCH TESTIMONY BY INTRODUCING JENSEN EVIDENCE.
3. THE COURT FOUND THAT THE TRIAL COURT PROPERLY EXCLUDED SUCH EVIDENCE UNDER THE RAPE SHIELD LAW, BUT IN SO DOING, MADE A STATEMENT WHICH AT LEAST ONE COURT HAS MISCONSTRUED:

Dunlap asked us to infer that these behaviors exhibited by Jaime could have been brought on by a previous act of sexual abuse, but Dunlap is unable to connect Jaime's behavior with any specific incident. **Furthermore, Dunlap cannot rule out the possibility**

that Jaime might have learned these behaviors from exposures to pornography or from having viewed sexual activity, rather than from having been previously sexually assaulted. Dunlap's inability to show a connection to any specific prior incident leads us to conclude that he has not meet the second prong of the Pulizzano test.

4. IN A RECENT UNPUBLISHED DECISION, STATE V. MARLYN J. J., THE COURT OF APPEALS RELIED UPON THE AFOREMENTIONED LANGUAGE. 2007 Wis. App. 130, 301 Wis.2d 747, Ct. App 2007 reviewed denied 302 Wis.2d 106 (2007).
5. THE COURT OF APPEALS PROPOSES THAT DUNLAP ADDS A NEW CONDITION TO THE BI-PART REQUIREMENTS OF PULLIZZANO.
6. SPECIFICALLY, THAT THE SOURCE OF SEXUAL KNOWLEDGE MUST BE SHOWN TO COME FROM A SPECIFIC ACT AND THAT IT DID NOT COME FROM VIEWING SEXUAL ACTIVITY OR PORNOGRAPHY.
7. IN DISCUSSING THIS CONCERN, THE COURT OF APPEALS STATED IN MARLYN J.J.:

We follow Dunlap, but question the part of that decision on which we rely. It is not apparent to us that the paragraph from Dunlap we quote above comports with the concern underlying Pulizzano. As we understand Pullizzano, the concern is that jurors might accept as true a young child's account of sexual assault because of the reasonable assumption that a young child would not know enough about sexual acts to fabricate an account of such acts. That concern is present here, where the alleged assaultive behavior involves fellatio and the reporting child is eight years old. If *knowledge* of fellatio is the concern, why does it matter how the child acquired the knowledge? Regardless, whether the child had prior knowledge of fellatio because she was the victim of a prior sexual assault by a different perpetrator or because she viewed pornography, or she acquired it from some other source, evidence demonstrating that the child had such knowledge effectively counteracts the "logical and weight inference that [the child] could not have gained the sexual knowledge [she] possessed unless the [alleged assault] occurred." See Pullizzano, 155 Wis. 2d. at 652.

See Exhibit B.

- iii. IF PULLIZZANO EVIDENCE IS REJECTED, FILE MOTION IN LIMINE RE: OPENING AND CLOSING STATEMENTS OF PROSECUTOR.
- iv. IN MARLYN J.J., AFTER FIGHTING SUCCESSFULLY TO KEEP THE VICTIM'S PRIOR SEXUALITY EXCLUDED, THE STATE THEN ARGUED THAT THE VICTIM COULD NOT KNOW ABOUT THESE THINGS IF SHE HAD NOT BEEN ASSAULTED.
- v. "WHAT DO CHILDREN KNOW ABOUT SEX FIRST SEMESTER OF FIRST GRADE?" SEE DISSENT BY DYKMAN.

1. SCR 20: 4.1(A) AND SCR 20: 8.4(C)

b. PRIOR UNTRUTHFUL ALLEGATIONS OF SEXUAL ASSAULT

- i. SEC. 972.11(2)(B)(3) WIS. STATS., EXCLUDED FROM THE RAPE SHIELD LAW PROTECTIONS, "EVIDENCE OF PRIOR UNTRUTHFUL ALLEGATIONS OF SEXUAL ASSAULT MADE BY THE COMPLAINING WITNESS."
- ii. SUCH EVIDENCE IS, AS A MATTER OF LOGIC, NOT SEXUAL CONDUCT AND, THEREFORE, SHOULD NOT BE EXCLUDED UNDER THE STATUTE. See Redmond v. Kingston, 240 Fed.3d 590 (2001).
- iii. THE DEFENDANT MUST SEEK A PRETRIAL RULING.
- iv. BEFORE ADMITTING EVIDENCE OF PRIOR UNTRUTHFUL ALLEGATIONS OF SEXUAL ASSAULT:

The court must make three determinations under Sec. 972.11(2)(b)(3) and Sec. 971.31(11):

- 1. Whether the proffered evidence first within Sec. 972.11(2)(b)(3);
- 2. Whether the evidence is material to a fact at issue in the case; and,
- 3. Whether the evidence is sufficient probative value to outweigh its inflammatory and prejudicial nature."

State v. Desantis, 155 Wis.2d 774, 785, 456 N.W.2d 600 (1990).

VI. SEC. 908.08 WIS. STATS, SEC. 972.11(2m) WIS. STATS., MARYLAND V. CRAIG, COY V. IOWA, AND STATE V. JAMES

a. SECTION 908.08: AUDIO VISUAL RECORDINGS OF STATEMENTS OF CHILDREN

(1) In any criminal trial or hearing, juvenile fact-finding hearing under s. 48.31 or 938.31 or revocation hearing under s. 302.113 (9) (am), 302.114 (9) (am), 304.06 (3), or 973.10 (2), the court or hearing examiner may admit into evidence the audiovisual recording of an oral statement of a child who is available to testify, as provided in this section.

(2) (a) Not less than 10 days before the trial or hearing, or such later time as the court or hearing examiner permits upon cause shown, the party offering the statement shall file with the court or hearing officer an offer of proof showing the caption of the case, the name and present age of the child who has given the statement, the date, time and place of the statement and the name and business address of the camera operator. That party shall give notice of the offer of proof to all other parties, including notice of reasonable opportunity for them to view the statement before the hearing under par. (b).

(b) Before the trial or hearing in which the statement is offered and upon notice to all parties, the court or hearing examiner shall conduct a hearing on the statement's admissibility. At or before the hearing, the court shall view the statement. At the hearing, the court or hearing examiner shall rule on objections to the statement's admissibility in whole or in part. If the trial is to be tried by a jury, the court shall enter an order for editing as provided in s. 885.44 (12).

(3) The court or hearing examiner shall admit the recording upon finding all of the following:

(a) That the trial or hearing in which the recording is offered will commence:

1. Before the child's 12th birthday; or

2. Before the child's 16th birthday and the interests of justice warrant its admission under sub. (4).

(b) That the recording is accurate and free from excision, alteration and visual or audio distortion.

(c) That the child's statement was made upon oath or affirmation or, if the child's developmental level is inappropriate for the administration of an oath or affirmation in the usual form, upon the child's understanding that false statements are punishable and of the importance of telling the truth.

(d) That the time, content and circumstances of the statement provide indicia of its trustworthiness.

(e) That admission of the statement will not unfairly surprise any party or deprive any party of a fair opportunity to meet allegations made in the statement.

(4) In determining whether the interests of justice warrant the admission of an audiovisual recording of a statement of a child who is at least 12 years of age but younger than 16 years of age, among the factors which the court or hearing examiner may consider are any of the following:

(a) The child's chronological age, level of development and capacity to comprehend the significance of the events and to verbalize about them.

(b) The child's general physical and mental health.

(c) Whether the events about which the child's statement is made constituted criminal or antisocial conduct against the child or a person with whom the child had a close emotional relationship and, if the conduct constituted a battery or a sexual assault, its duration and the extent of physical or emotional injury thereby caused.

(d) The child's custodial situation and the attitude of other household members to the events about which the child's statement is made and to the underlying proceeding.

(e) The child's familial or emotional relationship to those involved in the underlying proceeding.

(f) The child's behavior at or reaction to previous interviews concerning the events involved.

(g) Whether the child blames himself or herself for the events involved or has ever been told by any person not to disclose them; whether the child's prior reports to associates or authorities of the events have been disbelieved or not acted upon; and the child's subjective belief regarding what consequences to himself or herself, or persons with whom the child has a close emotional relationship, will ensue from providing testimony.

(h) Whether the child manifests or has manifested symptoms associated with posttraumatic stress disorder or other mental disorders, including, without limitation, re-experiencing the events, fear of their repetition, withdrawal, regression, guilt, anxiety, stress, nightmares, enuresis, lack of self-esteem, mood changes, compulsive behaviors, school problems, delinquent or antisocial behavior, phobias or changes in interpersonal relationships.

(i) Whether admission of the recording would reduce the mental or emotional strain of testifying or reduce the number of times the child will be required to testify.

(5) (a) If the court or hearing examiner admits a recorded statement under this section, the party who has offered the statement into evidence may nonetheless call the child to testify immediately after the statement is shown to the trier of fact. Except as provided in par.

(b), if that party does not call the child, the court or hearing examiner, upon request by any other party, shall order that the child be produced immediately following the showing of the statement to the trier of fact for cross-examination.

(am) The testimony of a child under par. (a) may be taken in accordance with s. 972.11 (2m), if applicable.

(b) If a recorded statement under this section is shown at a preliminary examination under s. 970.03 and the party who offers the statement does not call the child to testify, the court may not order under par. (a) that the child be produced for cross-examination at the preliminary examination.

(6) Recorded oral statements of children under this section in the possession, custody or control of the state are discoverable under ss. 48.293 (3), 304.06 (3d), 971.23 (1) (e) and 973.10 (2g).

(7) At a trial or hearing under sub. (1), a court or a hearing examiner may also admit into evidence an audiovisual recording of an oral statement of a child that is hearsay and is admissible under this chapter as an exception to the hearsay rule.

History: 1985 a. 262; 1989 a. 31; 1993 a. 98; 1995 a. 77, 387; 1997 a. 319; 2001 a. 109; 2005 a. 42. Judicial Council Note, 1985: See the legislative purpose clause in Section 1 of this act.

Sub. (1) limits this hearsay exception to criminal trials and hearings in criminal, juvenile and probation or parole revocation cases at which the child is available to testify. Other exceptions may apply when the child is unavailable. See ss. 908.04 and 908.045, stats. Sub. (5) allows the proponent to call the child to testify and other parties to have the child called for cross-examination. The right of a criminal defendant to cross-examine the declarant at the trial or hearing in which the statement is admitted satisfies constitutional confrontation requirements. *California v. Green*, 399 U.S. 149, 166 and 167 (1970); *State v. Burns*, 112 Wis. 2d 131, 144, 332 N.W.2d 757 (1983). A defendant who exercises this right is not precluded from calling the child as a defense witness. Sub. (2) requires a pretrial offer of proof and a hearing at which the court or hearing examiner must rule upon objections to the admissibility of the statement in whole or in part. These objections may be based upon evidentiary grounds or upon the requirements of sub. (3). If the trial is to be to a jury, the videotape must be edited under one of the alternatives provided in s. 885.44 (12), stats.

Sub. (3) (a) limits the applicability of this hearsay exception to trials and hearings which commence prior to the child's 16th birthday. If the trial or hearing commences after the child's 12th birthday, the court or hearing examiner must also find that the interests of justice warrant admission of the statement. A non-exhaustive list of factors to be considered in making this determination is provided in sub. (4). Sub. (6) refers to the statutes making videotaped oral statements of children discoverable prior to trial or hearing. [85 Act 262]

Sub. (5) does not violate due process. *State v. Tarantino*, 157 Wis. 2d 199, 458 N.W.2d 582 (Ct. App. 1990). Interviewers need not extract the exact understanding that "false statements are punishable" in order to meet the requirement of sub. (3) (c) if the tape, assessed in its totality, satisfies the requirement. *State v. Jimmie R.R.* 2000 WI App 5, 232 Wis. 2d 138, 606 N.W.2d 196, 98-3046.

Sub. (7) permits the admission of a child's videotaped statement under any applicable hearsay exception regardless of whether the requirements of subsections (2) and (3) have been met. *State v. Snider*, 2003 WI App 172, 266 Wis. 2d 830, 668 N.W.2d 784, 02-1628. A defendant who introduces testimony from an unavailable declarant cannot later claim that he or she was harmed by an inability to cross-examine the declarant when prior inconsistent statements are introduced to impeach an out-of-court statement introduced by the defendant. *State v. Smith*, 2005 WI App 152, 284 Wis. 2d 798, 702 N.W.2d 850, 04-1077. This section does not violate the separation of powers doctrine by dictating the admissibility and order in which the court receives videotape evidence and in-court testimony. *State v. James*, 2005 WI App 188, 285 Wis. 2d 783, 703 N.W.2d 727, 04-2391. This section, dealing specifically with the admissibility and presentation of videotaped statements by child witnesses, controls over ss. 904.03 and 906.11, more general statutes regarding the court's authority to control the admission, order, and presentation of evidence. *State v. James*, 2005 WI App 188, 285 Wis. 2d 783, 703 N.W.2d 727, 04-2391. There is no conflict between subs. (3) (e) and (5) (a). Sub. (3) (e) asks the trial court to discern whether, given what it knows at the time it assesses admissibility, allowing a videotaped statement into evidence would deprive any party of a fair opportunity to meet allegations made in the statement. *State v. James*, 2005 WI App 188, 285 Wis. 2d 783, 703 N.W.2d 727, 04-2391. The recorded oral statement of a child who is available to testify, made admissible by this section, is the testimony of that child irrespective of whether that oral statement is sworn. Whether the child is sworn has no bearing on whether that evidence is testimony that must be taken down by the court reporter. *State v. Ruiz-Velez*, 2008 WI App 169, 314 Wis. 2d 724, 762 N.W.2d 449, 08-0175.

- b. SEC. 972.11(2m): EVIDENCE AND PRACTICE: CIVIL RULES APPLICABLE

(a) At a trial in any criminal prosecution, the court may, on its own motion or on the motion of any party, order that the testimony of any child witness be taken in a room other than the courtroom and simultaneously televised in the courtroom by means of closed-circuit audiovisual equipment if all of the following apply:

1. The court finds all of the following:
 - a. That the presence of the defendant during the taking of the child's testimony will result in the child suffering serious emotional distress such that the child cannot reasonably communicate.
 - b. That taking the testimony of the child in a room other than the courtroom and simultaneously televising the testimony in the courtroom by means of closed-circuit audiovisual equipment is necessary to minimize the trauma to the child of testifying in the courtroom setting and to provide a setting more amenable to securing the child witness's uninhibited, truthful testimony.
2. The trial in which the child may be called as a witness will commence:
 - a. Prior to the child's 12th birthday; or
 - b. Prior to the child's 16th birthday and, in addition to its finding under subd. 1., the court finds that the interests of justice warrant that the child's testimony be taken in a room other than the courtroom and simultaneously televised in the courtroom by means of closed-circuit audiovisual equipment.
- c. IF THE STATE SEEKS THE INTRODUCTION OF EVIDENCE IN SUPPORT OF THE TESTIMONY OF A CHILD BETWEEN THE AGES OF TWELVE AND SIXTEEN AT THE TIME OF THE TRIAL, IS THE DEFENSE NOT ENTITLED TO AN EXAMINATION OF ALL PSYCHOLOGICAL RECORDS AND A PSYCHOLOGICAL EXAMINATION OF THE VICTIM TO DETERMINE WHETHER "THE INTEREST OF JUSTICE" IN SEC. 908.08(4) REQUIRES THE PROCEDURES OUTLINED IN SEC. 908.08(4)(a), (b), (c), (f), (g), (h) and (i)?
 - i. THIS SEEMS TO REQUIRE BOTH ACCESS TO THE PSYCHOLOGICAL RECORDS AS WELL AS A PSYCHOLOGICAL INTERVIEW.
- d. MARYLAND V. CRAIG 497 U.S. 836, 110 S. Ct. 3157 (1990) See Exhibit C.

i. FACTS:

1. A MARYLAND STATUTE PERMITTED THE TRIAL JUDGE, BY ONE-WAY CLOSED CIRCUIT TELEVISION, TO VIEW THE TESTIMONY OF A CHILD WITNESS WHO WAS ALLEGED TO BE THE VICTIM OF CHILD ABUSE.
 2. UNDER THIS SCHEME, THE WITNESS, PROSECUTOR AND DEFENSE COUNSEL WITHDREW TO A SEPARATE ROOM WHILE THE JUDGE, JURY AND DEFENDANT REMAINED IN THE COURTROOM.
 3. THE WITNESS WAS THEN EXAMINED AND CROSS-EXAMINED IN A SEPARATE ROOM WHILE A VIDEO MONITOR RECORDED AND DISPLAYED THE WITNESS'S TESTIMONY TO THOSE IN THE COURTROOM.
 4. DURING THIS TIME THE WITNESS COULD NOT SEE THE DEFENDANT.
- ii. THE COURT UPHELD THAT PROCEDURE DESPITE THE PLAIN LANGUAGE OF THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION.
 - iii. FOR AN INTERESTING DISCUSSION, SEE JUDGE SCALIA'S DISSENT See Exhibit C.
 - iv. INTERESTINGLY, THE DECISION DOES NOT OVERTURN COY V. IOWA 47 U.S. 1012 (1988).
 - v. THE WISCONSIN PROCEDURE ALLOWS FOR ACTUAL DIRECT FACE-TO-FACE CONFRONTATION AND QUESTIONING AND, THEREFORE, WOULD SATISFY THE DEFENDANT'S SIXTH AMENDMENT CONFRONTATION RIGHT.

VII. NOW WE ARE STARTING THE TRIAL

a. MOTIONS IN LIMINE

- i. DON'T GET CAUGHT IN A MARLYN J.J. SITUATION.
- ii. THE STATE CANNOT HAVE IT BOTH WAYS, AND THE COURT WILL NOT ALLOW THEM TO DO THAT IF YOU ASK FOR A PROHIBITION IN ADVANCE

b. BE CAREFUL OF BOLSTERING BY THE PROSECUTOR

c. SEEK RULES ON THE ACTIVITIES OF THE VICTIM ADVOCATES

VIII. VOIR DIRE

- a. DO NOT RUN AWAY FROM THE SINGLE MOST IMPORTANT QUESTION IN THE CASE: DO YOU BELIEVE THAT A CHILD WOULD LIE ABOUT A SEXUAL ASSAULT?
- b. DO JURORS BELIEVE THAT CHILD SEXUAL ABUSE IS UNDER-REPORTED?
- c. DO JURORS BELIEVE THAT THE BURDEN OF PROOF IS DIFFERENT FOR CASES INVOLVING CHILDREN? EXAMPLE: IS IT OKAY IF THE TESTIMONY IS SO VAGUE, UNCLEAR, AND INCONSISTENT THAT THERE WOULD BE DOUBT, EXCEPT THAT THE “VICTIM” IS A CHILD?
 - i. YOU CANNOT ACCEPT THIS PREMISE - YOU MUST RID THE JURORS OF THIS PERCEPTION BEFORE THEY HEAR EVIDENCE
- d. DO JURORS OBJECT TO A DEFENSE ATTORNEY CROSS-EXAMINING A CHILD WITNESS?

IX. WHO IS THIS VICTIM?

- a. HE/SHE IS A LIAR...AND SHOULD BE TREATED AS SUCH WITHIN THE BOUNDARIES OF APPROPRIATE ADULT-CHILD INTERACTIONS
- b. COMPLEX QUESTIONS AND CHILDREN: DOES ASKING COMPLEX QUESTIONS HELP YOUR CLIENT? MAYBE NOT.
 - i. SEE “COMPLEX QUESTIONS ASKED BY DEFENSE LAWYERS BUT NOT PROSECUTORS PREDICTS CONVICTIONS IN CHILD-ABUSE TRIALS” BY ANGELA EVANS, KANG LEE, AND THOMAS D. LYON. EXHIBIT D
 - ii. YOU CAN BE FIRM WITH A YOUNG WITNESS, BUT YOU CANNOT BE SEEN AS ATTEMPTING TO USE YOUR AGE AND INTELLECT TO CONFUSE A WITNESS
 - iii. INSIST ON POINTING OUT INCONSISTENCIES WITH THE WITNESS, BUT DO IT CLEARLY, SO THAT JURORS THINK YOU ARE BEING FAIR
- c. WHAT ABOUT A CRYING WITNESS?
 - i. THIS IS PROBABLY LESS OF A CONCERN WITH AN OLDER CHILD, PARTICULARLY IN TODAY’S SOCIETY WHERE MANY ADOLESCENCE MALES AND FEMALES WERE BROUGHT UP MIMICKING RAP STARS
 - ii. WITH YOUNGER CHILD WITNESSES, HOWEVER, CRYING CAN BE A PROBLEM SINCE IT IS ASSOCIATED WITH

TRUTHFULNESS. JURORS EXPECT VICTIMS TO CRY AND APPEAR FRIGHTENED WHEN CONFRONTING THE DEFENDANT

- iii. SEE: "THE IMPACT OF CHILD WITNESS DEMEANOR ON PERCEIVED CREDIBILITY AND TRIAL OUTCOME IN SEXUAL ABUSE CASES" BY PAMELA C. REGAN AND SHERI J. BAKER. EXHIBIT E
- iv. SEE: "THE CRYING GAME: AN EXAMINATION OF HOW STEREOTYPES AFFECT WITNESS CREDIBILITY" BY AMY L. MELVILLE. EXHIBIT F
- v. SEE: "CREDIBILITY OF AN EMOTIONAL WITNESS: A STUDY OF RATINGS BY POLICE INVESTIGATORS." BY GURI C. BOLLINGO, ELLEN O. WESSEL, DAG E. EILBERTSEN, AND SVEIN MAGNUSSEN. EXHIBIT G
- vi. SEE: "THE EFFECT OF REPEATED QUESTIONING ON CHILDREN'S ACCURACY AND CONSISTENCY IN EYEWITNESS TESTIMONY" BY SARAH KRAHENHUL, MARK BLADES, AND CHRISTINE EISER. EXHIBIT H
- vii. SEE: "ASKED AND ANSWERED: QUESTIONING CHILDREN IN THE COURTROOM" BY RACHEL ZAJAC, JULIEN GROSS, AND HARLENE HAYNE. EXHIBIT I
- viii. SEE: "I DON'T THINK THAT IS WHAT *REALLY* HAPPENED: THE EFFECT OF CROSS-EXAMINATION ON THE ACCURACY OF CHILDREN'S REPORTS" BY RACHEL ZAJAC AND HARLENE HAYNE. EXHIBIT J

d. WHAT DO I DO WITH A CRYING WITNESS?

- i. REMIND JURORS THROUGH QUESTIONING THAT THE WITNESS DID NOT CRY WHEN THE PROSECUTOR ASKED ABOUT THE SAME THING (IF TRUE)
- ii. DO NOT ASK THE COURT TO TAKE A BREAK, SO THAT THE WITNESS MAY COMPOSE HIM/HERSELF
- iii. KEEP CONTROL OF THE SITUATION AND KEEP THE WITNESS FOCUSED ON YOU
- iv. CHANGE THE TOPIC TO SOMETHING MORE CONCRETE AND LESS EMOTIONAL
- v. ASKED DETAILED QUESTIONS REGARDING NON-EMOTIONAL FACTS UNTIL THE WITNESS GAINS COMPOSURE AND THEN GO RIGHT BACK TO THE ISSUE THAT YOU NEED TO GET TO

- vi. ASK QUESTIONS ABOUT EVENTS OUT OF ORDER
- vii. ASK HIM OR HER ABOUT SOMETHING THAT HE OR SHE TOLD THE PROSECUTOR IN DIRECT-EXAMINATION
- viii. ASK THE WITNESS TO PERFORM SOME PHYSICAL TASK
- ix. IF CRYING STARTS AS A RESULT OF IMPEACHMENT, PARTICULARLY WHERE IMPEACHMENT CONCERNS THE CLAIM THAT THE WITNESS DID THIS TO OBTAIN SOME REWARD OR AVOID SOME PUNISHMENT, LET HIM OR HER CRY
 - 1. CHILDREN ALSO CRY WHEN THEY ARE CAUGHT DOING SOMETHING WRONG -- THIS DOES NOT MAKE THEM VICTIMS
- e. DON'T BE AFRAID TO TAKE CHANCES
 - i. WE ARE OLDER AND SMARTER AND WE ARE ADULTS
 - ii. CONTINUE TO TREAT THE WITNESS AS A LIAR
 - iii. CONFRONT THE WITNESS WITH YOUR THEORY

X. CLOSING ARGUMENTS

- a. REMIND COURT OF BOLSTERING
- b. STAY STRONG - A LIE IS A LIE, EVEN IF A CHILD IS SAYING IT
- c. THE BURDEN OF PROOF IS NOT DIFFERENT IN CHILD SEX ABUSE CASES