SJC-08359

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

.

COMMONWEALTH

Appellee

v.

WILLIAM FRANGIPANE

Appellant

.

Decided - March 20, 2001.

BRIEF OF THE LEADERSHIP COUNCIL AS AMICUS CURIAE IN SUPPORT OF APPELLEE'S PETITION FOR REHEARING

Leadership Council for Mental Health, Justice, & the Media (the Leadership Council) is a nonprofit scientific and professional organization consisting of internationally recognized researchers and scholars within the scientific and legal communities. Its goal is to provide professionals, officers of the court, and policy makers with the latest and most accurate scientific information on issues that may affect the public health and the safety of society's most vulnerable members, especially children who are victims of crime.

To this end, the Leadership Council regularly provides Amicus Briefs, hosts conferences and contributes to the scientific literature.

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Leadership Council for Mental Health, Justice, & the Media (the Leadership Council) is a nonprofit scientific and professional organization consisting of internationally recognized researchers and scholars within the scientific and legal communities. Its goal is to provide professionals, officers of the court, and policy makers with the latest and most accurate scientific information on issues that may affect the safety of society's most vulnerable members, especially children who are victims of crime. As part of its mission, the Leadership Council disseminates high quality scientific and medical research concerning the prevalence and consequences of child abuse and other forms of interpersonal violence in the general population. The Leadership Council also supports peer-reviewed research, hosts conferences and awards significant advances in the study of trauma.

Amicus have an interest in this Court's recognition of traumatic amnesia as a well documented symptom affecting a substantial number of people who suffer traumatic events.

INTRODUCTION

The Leadership Council for Mental Health, Justice and the Media supports the Commonwealth's Petition for Rehearing, not in an effort to reinstate Appellant's conviction or as a criticism of the Court's holding regarding the proper scope of specific expert testimony, but merely to correct erroneous information regarding the state of the science in the area of trauma and memory. The Leadership Council is particularly concerned with the final paragraph of the Court's decision where it states that expert testimony on the issue of "dissociative memory loss or recovered memory" should be subject to a preliminary hearing pursuant to Commonwealth v. Lanigan, 419 Mass. 15, 25-27 (1994) before such testimony may be admitted.

The Court appears to have concluded that a Lanigan hearing is necessary, because, as noted in footnote 11, "[T]he subject of 'recovered memory,' particularly of childhood sexual abuse, is highly controversial." In fact, as set forth in more detail below, the subject is not at all controversial in a scientific sense (though it is certainly the focus of debate in a popular cultural/political context).

Declaring that memory loss and subsequent recovery of traumatic events is not generally accepted by the professional community will discourage therapists from seeking to identify and diagnose it in their patients and from pursuing effective treatment. It will also impede access to justice to an entire class of citizens and make it more difficult to uncover and prosecute perpetrators of child abuse. This Brief is filed to explain why Lanigan hearings are not necessary prior to admitting testimony on dissociative memory loss and recovery from an otherwise qualified expert.

ARGUMENT

A Lanigan Hearing Should Not Be Required Before A Qualified Expert Is Permitted to Testify About "Dissociative Memory Loss or Recovered Memory" Because:

A. A Wealth of Scientific Literature Documents the Reality of These Phenomena

Some label the phenomenon of "dissociative memory loss" – a process whereby the mind avoids conscious acknowledgment of traumatic experiences – as *dissociative amnesia*. Others use terms such as *repression*, *dissociative state*, *traumatic amnesia*, *psychogenic shock*, or *motivated forgetting*. Semantics aside, there is near-universal scientific acceptance of the fact that child sexual abuse is seriously under-reported[1] and that the mind is capable of avoiding

[1] For example, when interviewed about sexual abuse following detection of a sexually transmitted disease, only 43% of children verbally indicated having been abused. Lawson & Chaffin, False Negatives in Sexual Abuse Disclosure Interviews, 7 J. Interpers. Violence 532-542 (1992).

Williams interviewed women with medically documented histories of child sexual abuse. Of 129 women interviewed, only 62% reported having been abused 17 years later, despite their willingness to

conscious recall of traumatic experiences and of recovering memory of these experiences at a later time.

The most comprehensive review of the scientific literature on dissociative amnesia has

Table 1

Traumatic Amnesia Among Survivors of Physical Abuse, Rape, War, Accidents, and Disaster: Percent of Sample*

SOURCE	SAMPLE SIZE	No A	F + P	P	F	SAMPLE
Physical Abuse						
Elliott & Briere, 1995	485	75	25	15	10	general census
Elliott & Fox, 1994	484	73	27	10	17	undergraduates
Femina et al., 1990	69	26/8†				9-year prospective
Fish & Scott, 1999	423		21		10	counseling psychologists
Golding et al., 1996	613		21			undergraduates
Melchert, 1996	553		21		11	college students
Robins, 1966	524/71	78†				prospective study on delinquency
Widom & Shepard, 1996	110		40			prospective study
Rape						
Elliott & Briere, 1995	485	77	23	10	13	general census
Combat						
Elliott & Briere, 1995	485	61	39	23	16	combat
Sargant & Slater, 1941	1000	85.6	14.4			WWII consecutive cases
POW						
Wagenaar & Groeneweg, 1990	78					Camp Erika
Car Accident						
Elliott & Briere, 1995	485	92	8	4	4	general census
Disaster						
Dollinger, 1985	33		3			child lightening victims
Eriksson & Lundin, 1996	53		29¶			m/s Estonia disaster
McFarlane, 1988	469	100	57§			Australian bushfire
Wilkinson, 1983	102	27‡				Hyatt skywalk collapse

No A = percentage of subjects who experienced no amnesia; F + P = percentage of subjects who experienced either full or partial amnesia; P = partial amnesia; F = full amnesia

*Adapted from Table 7.4 in Brown et al. (1998); † denied abuse; ‡ memory disturbance (intrusive memory or amnesia); § failed to report injury at 11 months; ¶ "dissociative amnesia"

[illegible] of four different types of measurements of abuse including careful questioning, only 64% of the women and 42% of the men with documented histories of sexual abuse reported having been abused. Widom & Morris, Accuracy of Adult Recollections of Childhood Victimization. Part 2: Childhood Sexual Abuse, 9 Psychol. Assess. 34-46 (1997).

been conducted by Brown, Scheflin and Hammond in their book, M*emory, Trauma Treatment, and the Law*. (New York: Norton, 1998) (setting the standard in the field after receiving the American Psychiatric Association's 1999 prestigious Manfred S. Guttmacher Award for best book in law and forensic psychiatry). The authors reviewed 43 studies relevant to the subject of traumatic memory and found that every study that examined the question of dissociative amnesia in traumatized populations demonstrated that a substantial minority partially or completely forget the traumatic event experienced, and later recover memories of the event. Moreover, these studies demonstrate that dissociative amnesia can occur after any type of traumatic event (see Table 1), and that studies show that a period of either partial or full amnesia is reported by between 30 and 90% of adult victims of childhood sexual abuse (see Table 2).

Table 2

Amnesia for Childhood Sexual Abuse: Percent of Sample*

SOURCE	N	F	P	F+P	No A	IC	Rx	c/nc	r/nr	SAMPLE
Clinical Studies										
Albach et al., in press	97e 65c			35 1	65 99		100	c	nr	Women with hx of CSA Normal controls
Briere & Conte, 1993	450			59	41			c	r	In tx for CSA
Cameron, 1994	60	42	23	65	35		100	c	nr	Women in rx with hx of CSA
Chu et al. 1999	74	34	26	60	41	89†	28			Women in inpatient tx
Draijer, 1990	1,054			57						National survey
Ensink, 1992	100	29	28	57	43		100	c	nr	Incest & rx groups (high DID)
Gold et al., 1994	105	30	40	70	30			c	nr	Intake interview in rx
Herman & Schatzow, 1987	53	28	36	64	36	74	100	c	nr	Outpatient Rx
Loftus et al., 1994	105	19	12	31	69			c	nr	Women in drug tx
Roe & Schwartz, 1996	52			77	23	44	68 32	c	nr	Women in inpatient tx
Pomerantz, in progress	26	50	42.5	92.5	7.5			c	nr	Women in outpatient tx

Table 2

Nonclinical Samples										
Belicki et al., 1994	68			55	45			nc	nr	College undergraduates
Bernet at el., 1993	624	36			64		30	nc	nr	College undergraduates
Elliott & Briere, 1995	505	20	22	42	58		7 13	nc	nr	General population
Elliott & Fox, 1994	484	30	14	44	56		19	nc	nr	College undergraduates
Golding et al., 1996	613	13						nc	nr	College undergraduates
Grassian & Holtzen, 1996	42	19	28	47	53			nc	nr	Triggered by Father Porter disclosure
Feldman-Summers & Pope, 1994	330			40	60	47	56	nc	r	Psychologists
Fish & Scott, 1999	423	17	38	55	45		44	nc	r	Counselors
Golding, 1995	663	14						nc	r	Telephone survey
Kristiansen et al., 1995	113	25	26	51	49	61	93	nc	nr	Community sample, women
Melchert, 1996	553	18			82			nc	r	College undergraduates
Polusny & Follette, 1996	223			30 39	70 61			nc	nr	Psychologists
Roesler & Wind, 1994	228	28			72					Triggered by M. Van Derbur disclosure
Van der Kolk & Fisler, 1995	36			42	58	75		nc	nr	Volunteers, terrible life experiences
Westerhof et al., in press	500	22	17	39	61	69	68	nc	r	Psychologists
Prospective Studies										
Burgess et al. 1995	22	14	27	41	59	100	0	c	nr	Daycare CSA
Widom & Morris, 1997	1,114	37			63	100		nc	nr	Court-substantiated abuse and/or neglect
Williams, 1994	129	38			62	100	0	nc	nr	Women with medically documented CSA
Other Studies										
Goodman et al., 1995	1,652	4.5	45	50	50			c	nr	Ritual abuse allegations
Kluft, 1997	19	68			32	100	100	c	nr	DID pts in tx; confirmed abuse
Detailed Case Reports										
Duggal & Stroufe, 1998	1					100				Subject of a prospective study
Martinez-Taboaz, 1996	2					100				DID pts in tx; confirmed abuse

Table 2

Viederman, 1995	1	100	Woman in rx

* Adapted from Table 7.7 in Brown et al. (1998).

KEY:

F = full amnesia/no memory for a significant period of time
P = partial amnesia
F+P = combined percentage of full and partial amnesia
No A = no amnesia; continuous memory
IC = percentage of sample for which some sort of independent corroboration existed
Rx = percentage of sample where memory recovery was associated with (but not necessarily caused by) therapy
c/nc = clinical vs. nonclinical sample
r/nr = random vs. nonrandom sampling
rx = therapy
Tx = treatment
e = experimental group
c = control group
CSA = childhood sexual abuse
DID = dissociative identity disorder
† = Percentage of participants with full amnesia who obtained independent corroboration.

To date, over 68 studies have been published that document dissociative amnesia after childhood sexual abuse. Brown, Scheflin, & Whitfield, Recovered Memories: The Current Weight of the Evidence in Science and in the Courts, 27 *J. Psychiatry & L.* 5-156 (1999). In fact, no study that has looked for evidence of traumatic or dissociative amnesia after child sexual abuse has failed to find it. *Id* at 126. Taken as a whole, especially considering the range of populations studied and experimental designs utilized, the empirical research reviewed by Brown et al. constitute an irrebuttable conclusion as the reality of these phenomena.

The reality of traumatic amnesia is further supported by investigations of memory and attention in carefully controlled laboratory settings. For example, a study recently published in the prestigious journal *Nature* demonstrated that people have executive control processes that can prevent unwanted declarative memories from entering awareness. Anderson & Green, Suppressing Unwanted Memories by Executive Control, 410 *Nature* 366-369 (2001, March 15). *See als*o Davis, Repression and the Inaccessibility of Affective Memories, 52 *J. Personality & Soc. Psychol.* 585-93 (1987). (Reviews laboratory research demonstrating that some individuals display limited accessibility to personal, real-life affective memories. The effect is particularly pronounced for experiences involving fear or embarrassment.)

B. The Effects of Stress on Specific Brain Regions and Brain Chemistry Associated with Memory Are Well Accepted

In the instant case, the Court relies on a paper by Dr. Harrison Pope (H.G. Pope, Jr., The Scientific Status of Research on Repressed Memories, 1 *Modern Scientific Evidence: The Law and Science of Expert Testimony* 115, 121, Supp. 2000) to suggest that the results of studies by Bessell van der Kolk, M.D., involving neurotransmitters in memory, and neuroendocrine and imaging studies of trauma victims, are controversial. In fact, Dr. van der Kolk's work has been replicated and confirmed by numerous other scientists; whereas, Pope has no expertise in the area of neuropsychiatry. Dr. Pope's expertise in the area of memory recovery is based predominantly several selective reviews of the literature. *See* Pope & Hudson, Can Memories of Childhood Sexual Abuse be Repressed? 25 *Psychol. Med.* 426, 426 (1995); Pope, Hudson, Bodkin, & Oliva, Questionable Validity of Dissociative Amnesia in Trauma Victims, 172 *Br. J. Psychiatry* 210-215 (1998). Moreover, Pope has been criticized by his peers for ignoring relevant research that undermines his position. For in depth documentation of selective reporting and misreporting of data in Pope et al's 1998 review of 63 studies see Brown, Scheflin, & Whitfield, *J. Psychiatry & L.* (1999) at 18-30.[2] It should also be noted that Pope is a member of the False Memory

[2] For example, most of the studies Pope et al. reviewed did not report amnesia because they never assessed for it. Moreover, nine studies presented data in favor of traumatic amnesia but Pope et al. incorrectly reported the findings. Scheflin, & Whitfield, J Psychiatry & Law (1999) at 28.

Syndrome Foundation (FMSF), an activist organization that support and resources for parents accused of sexually abusing their children.[3]

In criticizing van der Kolk's work, Pope ignored numerous laboratory studies on both humans and animals that have shown that neuropeptides and neurotransmitters released during stress can modulate memory function, acting at the level of the hippocampus, amygdala, and other brain regions involved in memory. Much of the research in this area has been conducted by scientists employed by well-respected scientific organizations including the National Institutes of Health (NIH) (*see e.g.*, Putnam, & Trickett, Psychobiological Effects of Sexual Abuse: A Longitudinal Study, 821 *Ann. New York Acad. Sci.* 150-159, 1997) and The National Center for Post-Traumatic Stress Disorder, West Haven VA Medical Center, CT (s*ee e.g.*, Bremner, Krystal Southwick, & Charney, Functional Neuroanatomical Correlates of the Effects of Stress on Memory. 8 *J. Trauma. Stress*, 527-553, 1995; Bremner, Randall, Vermetten, Staib, Bronen, et al. Magnetic Resonance Imaging-Based Measurement of Hippocampal Volume in Posttraumatic Stress Disorder Related to Childhood Physical and Sexual Abuse: A Preliminary Report, 41 *Biol. Psychiatry* 23-32 1997). *See also* King, Mandansky, King, Fletcher, & Brewer, Early Sexual Abuse and Low Cortisol, 55 *Psychiatry Clin. Neurosci.* 71, 71 (2001) (noting that "post-traumatic stress disorder studies, particularly in early sexual abuse, have been associated with neuroendocrine dysfunction."); Stein, Koverola, Hanna, Torchia, & McClarty, Hippocampal Volume in Women Victimized by Childhood Sexual Abuse, 27 *Psychol. Med.* 951-959 (1997).

[3] Although, the FMSF's name suggests the existence of a medical "syndrome"; false memory syndrome has failed to be validated by research and has not been recognized by any major professional organization. Dallam, Crisis or Creation? A Systematic Examination of False Memory Claims, J. Child Sex. Abuse (in press); Hovdestad & Kristiansen, A Field Study of "False Memory Syndrome": Construct Validity and Incidence, 24 J. Psychol. & L. 299-338 (1996).

After reviewing literature on the effects of stress on the neurobiology of memory, Dr. J. Douglas Bremner, M.D., and his colleagues from the National Center for Post-Traumatic Stress Disorder, concluded that, "Alterations in memory in the form of dissociative amnesia are an important part of exposure to traumatic stressors, such as childhood abuse." Bremner, Krystal, Charney, Dennis & Southwick, Neural Mechanisms in Dissociative Amnesia for Childhood Abuse: Relevance to the Current Controversy Surrounding the "False Memory Syndrome," 153 *Am. J. Psychiatry* 71, 71 (1996).

C. Major Professional Associations Recognize the Phenomena of "Dissociative Memory Loss and Recovered Memory"

The *Diagnostic and Statistical Manual of Mental Disorders* (DSM-VI) recognizes memory problems to be a common feature of five post-traumatic conditions: *Post-Traumatic Stress Disorder, Dissociative Amnesia, Dissociative Fugue*, *Dissociative Disorder Not-Otherwise-Specified*, and *Dissociative Identity Disorder*. The term "dissociative amnesia" appears as follows in section 300.12:

> Dissociative amnesia is characterized by an inability to recall important personal information, usually of a traumatic or stressful nature, that is too extensive to be explained by ordinary forgetfulness.

American Psychiatric Association: *Diagnostic and Statistical Manual of Mental Disorders* (4th ed). Washington, DC: American Psychiatric Association Press, (1994).[4]

[4] Code No. 300.12 (Dissociative Amnesia [formerly Psychogenic Amnesia]). "The reported duration of the events for which there is amnesia may be minutes to years. . . . Some individuals with chronic amnesia may gradually begin to recall dissociated memories." Also, Code No. 300.14 (Dissociative Identity Disorder [formerly Multiple Personality Disorder]). "Individuals with this disorder experience frequent gaps in memory for personal history, both remote and recent. . . . There may be loss of memory not only for recurrent periods of time, but also an overall loss of biographical memory for some extended period of childhood." American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) (4th ed), at 478-9, 484-5.

Three points are important about this definition. First, it demonstrates that the concept of recovered memory is generally accepted in the relevant scientific community. Thus, those who argue against the mind's ability to dissociate and later recover memories are in the minority. Under the *two schools of thought* doctrine, the burden of proof is on the minority school of thought to demonstrate that it is respectable, not on the majority to prove that it is right.[5]

Second, the definition provides a mechanism to distinguish dissociative amnesia from ordinary forgetting. And third, the definition focuses on the functional aspect of the behavioral experience, not on the semantic issue of defining repression or dissociation, or on the theoretical model that accounts for the behavior.

Dissociative/traumatic amnesia is also recognized by the World Health Organization in their inclusion of this disorder in the *International Classification of Diseases,* 9th Revision (ICD-9);[6] by the U.S. Department of Health and Human Services and the National Center for Health Statistics in their inclusion of this disorder in the *International Classification of Diseases,* 9th Revision, Clinical Modification (ICD-9-CR) (the U.S. version of the ICD-9);[7] by the American Psychological Association in their report on the investigation of their Working Group on

5 Jones v Chidester, 531 Pa 31, 610 A 2nd 964 (1992).

6 Code Nos. 300.12 (Psychogenic amnesia; hysterical amnesia), 300.14 (Multiple personality; dissociative identity disorder), and 300.15 (Dissociative disorder or reaction, unspecified).

7 Code Nos. 300.12 (Psychogenic amnesia; hysterical amnesia), 300.14 (Multiple personality; dissociative identity disorder), and 300.15 (Dissociative disorder or reaction, unspecified). DHHS Publication No. (PHS) 94-1260.

Memories of Childhood Abuse;[8] and by the International Society for Traumatic Stress Studies (ISTSS) in their practice guidelines for the treatment of post-traumatic stress disorder (PTSD).[9]

For example, the American Psychological Association's 1996 *Final Report from the Working Group on Investigation of Memories of Childhood Abuse* acknowledged that "it is possible for memories of abuse that have been forgotten for a long time to be remembered." As the judge in a recent case noted:

> . . . even Dr. Loftus conceded upon cross-examination that the APA policy which she helped to create notes that "it is possible for memories of abuse that have been forgotten for a long time to be remembered . . ." The language of the APA report indicates that the challenge to recovered memories which is included therein concerns the mechanism by which the delayed recall occurs, rather than the fact of its occurrence . . . Furthermore, Dr. Loftus acknowledged that dissociation from a traumatic event is a recognized phenomenon.

State v. Walters, Nos. 93-S-2111-2112 (Superior Ct., Hillsborough Co., N.H. 1995), at 22-24.

Additionally, the American Medical Association, in its 1994 Report of the Council on Scientific Affairs considered the view that repressed memories do not exist to be "extreme" and cited studies showing that there are cases where amnesia for childhood sexual abuse exists but the "recovered memories proved to be correct." American Medical Association, Council on Scientific Affairs, *Memories of Childhood Abuse* (1994).

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[8] "Numbing and/or dissociative strategies used to cope with sexual abuse may interfere with or impair coding, storage, or retrieval of memory. . . . Our review of the literature on trauma and memory indicates, in turn, that the employment of such coping strategies may lead to impairments either in storage of memory for the event or capacity to retrieve memory for the event. . . . A numbing response by the child victim may also account for the phenomenon of delayed recall." Alpert, Brown, &Courtois, Symptomatic Clients and Memories of Childhood Abuse: What the Trauma and Child Sexual Abuse Literature Tell Us. In J.L. Alpert, L.S. Brown, S.J. Ceci, C.A. Courtois, E.F. Loftus, & P.A. Ornstein: Working Group on Investigation of Memories of Childhood Abuse: Final Report. American Psychological Association, 1996, p. 71-2.

[9] International Society for Traumatic Stress Studies: PTSD Treatment Guidelines, (http://www.istss.org/quick/INPATET4.html); in press for 1999 (NewYork: Guilford).

The most thoughtful report on recovered memories was issued by the British Psychological Society. British Psychological Society, *Report by the Working Group on Recovered Memories* (1995). After an investigation of the effect of trauma on memory, the Society concluded that "forgetting of certain kinds of trauma is often reported" for very different kinds of trauma ranging from war trauma to childhood sexual abuse. *Id*. at 14. The Report further concluded that the available evidence suggests that between one third and two thirds of abuse victims have periods of time when they "totally or partially forgot the abuse." *Id*. at 13.

The Kentucky Attorney General's Final Report of the Task Force on Child Sexual Abuse also recognized dissociative/traumatic amnesia and delayed recall:

> In reviewing this issue, the Task Force looked at research studies which revealed that up to 60% of child sexual abuse survivors report incomplete, or a total absence of, abuse-specific memories at some point after victimization. Research has also shown that this type of delayed recall is often associated with more violent and terrorizing cases of abuse.

Final Report of the Task Force on Child Sexual Abuse 10 (1995).

Summarizing, then, while there may be disagreement regarding the precise mechanism by which "dissociative memory loss and recovered memory" occurs, there is no scientific dispute that the phenomenon does, in fact, exist.

D. **The Fact that Scientists Disagree Over *How* the Mind Suppresses Traumatic Information in No Way Suggests that the Phenomenon Itself is Controversial or in Dispute**

Science is by its very nature inexact; however, imprecision does not, in and of itself, merit the type of scrutiny required by Lanigan. As noted by Erdelyi and Goldberg well before the recovered memory controversy had begun, "the key to the confusion [about memory repression] lies in a general failure to distinguish between the phenomenon itself and theories of the phenomenon, about which it is only natural to find differences." Erdelyi & Goldberg, Let's Not

Sweep Repression Under the Rug: Toward a Cognitive Psychology of Repression, *Functional Disorders of Memory*, 355, 360 (J.F. Kihlstrom & F.J. Evans, eds., 1979).

Even well established theories such as evolution are considered controversial by some critics. As Reidinger recently noted,

> Science is about uncertainty, probability, convergence; it's a peer-driven conversation–largely consensual--of tentative theories, imperfect proofs, criticisms and revisions. Even a well-established scientific theory such as evolution–a fact, for scientists–remains incomplete and subject to revision according to the discovery of new evidence.

Reidinger, They Blinded Me With Science! 82 *ABA J.* 58-62 (1996).

Likewise, scientists do not yet understand, much less agree on, how normal memories for ordinary events are formed, stored, or retrieved. *See e.g.,* Baddeley, Recent Developments in Working Memory, 8 *Curr. Opin. Neurobiol.* 234, 234 (1998) (reviews current research on working memory and concludes that recent brain imaging studies provide support for the view that memory is controlled by multiple separate systems in the brain, "with further fractionation being likely" with additional research).

However, the fact that scientists do not yet completely understand how the brain forms and retrieves normal memories, does not suggest that a Lanigan hearing should be required before an expert could testify about the process of ordinary forgetting. Simply put, a qualified expert could certainly testify that it is easier to recall information soon after an event occurs than years later – based merely on the passage of time – even though scientists do not understand exactly why this is so.

An appropriately qualified expert could also expect to testify about the existence of Alzheimer's disease and how it affects memory – despite the fact that they could never explain to a jury exactly how or why the disease process occurs in the brain. Similarly, the fact that "dissociative memory loss and recovered memory" cannot be fully explained by theoretical

models, in no way suggests that the phenomena themselves are not genuine or scientifically accepted. *See* Horowitz, Does Repression Exist? Yes. 10 *Harv. Mental Health Lett.* 4, 6 (1994).

E. The Law in State and Federal Courts Overwhelmingly Recognizes the Validity of "Dissociative Memory Loss and Recovered Memory"

Many state and federal courts have addressed the reliability of delayed memory and related issues involving the statute of limitations. The majority of reported cases recognize the existence of the phenomenon of dissociative/traumatic amnesia and the related experience of delayed recovery of traumatic memories. *See* The Evolving Law of Alleged Delayed Memories of Childhood Sexual Abuse, Judge Sol Gothard, J.D., M.S.W., A.C.S.W. (under review, submitted for publication).

Numerous courts have liberally applied the discovery rule to toll the statute of limitations in cases in which the plaintiff did not discover injuries and/or the causal relationship between those injuries and the long since ceased abuse until years after the abuse ended, even where the legislature has not enacted such a tolling provision. *See e.g.*, Farris v. Compton, 652 A.2d 49 (D.C. 1994); Herald v. Hood, 1993 WL 277541 (Oh. App. 9 Dist., Summit County, July 21, 1993), appeal dismissed, 639 N.E. 2d 109 (Oh. 1994), cert. denied, 115 S.Ct. 1363 (1995); McCollum v. D'Arcy, 638 A.2d 797 (N.H. 1994); Ault v. Jasko, 70 Ohio St. 3d 114, 637 N.E. 2d 870 (Ohio Sup. Ct. 1994); Other courts have issued similar rulings, Phillips v. Johnson, 231 Ill. App. 3d 890, 599 N.E. 2d 4, 174 Ill. Dec. 458 (Ill. App. 3 Dist., June 29, 1992); Petersen v. Bruen, 792 P.2d 18, 106 Nev. 271 (Nev. Sup. Ct., 1990), Doe v. Redeemer Lutheran Church, 555 N.W. 2d 325 (Minn. App. 1996); Sellery v. Cressey, 48 Cal.App.4th 538, 55 Cal. Rptr.2d 706 (Cal. App. 2 Dist. 1996); Evans v. Eckelman, (1990) 216 Cal.App.3d 1609, 265 Cal. Rptr.605; Marsha v. Gardner, (1991) 231 Cal.App.3d 265, 281 Cal. Rptr 473); Fager v. Hundt, 610 N.E.2d 246 (Ind. 1993); Leonard v. England, 445 S.E.2d 50 (N.C. App. 1994); Isley v. Capuchin

Province, 877 F.Supp. 1055 (E.D. Mich. 1995); Franklin v. Duncan, 844 F.Supp. 1435, 1438 (N.D. Cal. 1995).

In Texas, the Supreme Court implicitly upheld the applicability of the discovery rule to toll the statute of limitations in certain delayed memory cases, thus acknowledging the existence of the phenomenon of recovered memories and recognizing that dissociative/traumatic amnesia can render the memories of child sexual abuse "inherently undiscoverable." S.V. v. R.V., 933 S.W. 2d 1 (Tex. 1996).

In another recent case, Doe v. Roe, 191 Ariz. 313, 955 P.2d 951 (Ariz. 1998), relying on sound legal scholarship, the Arizona Supreme Court ruled that dissociative amnesia, popularly called "repressed memory," arising out of childhood sexual abuse, may trigger the state's discovery and "unsound mind" doctrines thereby tolling the statute of limitations. *See* Joy Lazo, Comment, True or False: Expert Testimony on Repressed Memory, 28 *Loyola of Los Angeles L. Rev.* 1345, 1381-82 (1995); Accord, Moriarty v. Sanctuary Church of God, 1999 S.C. App. Lexis 9 (Ct. App. S.C. Jan. 18, 1999). (Holding that the discovery rule is applicable in cases of repressed memory, this Court noted that, "the American Psychiatric Association, the major professional association for psychiatrists in America, recognizes the theory of repressed memories and believes it to be very common among people who have experienced severe trauma").

Moreover, the Massachusetts Legislature has enacted legislation effectively recognizing the existence of dissociative/traumatic amnesia and the presumptive reliability of recovered memories of childhood sexual abuse. Mass. Gen. Law. Ann. ch. 260, § 4C (West Supp. 1995). This legislation is in keeping with the trend among the majority of states that have enacted or amended legislation since the mid 1980s to extend the limitation period in recovered memory

cases. Alaska Stat. § 09.10.140 (1994); Ark. Code. Ann. § 16-56-130 (Michie Supp. 1995); Cal. Civ. Proc. Code § 340.1 (West Supp. 1996); Colo. Rev. Stat. Ann. §13-80-103.7 (West Supp. 1995); Conn. Gen. Stat. Ann. § 52-577(d) (West 1991); Fla. Stat. Ann. § 95.11(7) (1996); Ga. Code Ann. §. 9-3-33.1 (Michie Supp. 1995); Idaho Code § 6-1701- 6-1705 (1990); Ill. Ann. Stat. ch. 735, para. 513- 202.2 (Smith-Hurd 1992); Iowa Code Ann. § 614.8A (West Supp. 1995); Kan. Stat. Ann. §. 60-523 (1994); LSA-C.C. art. 3496.1 (West 1992); Me. Rev. Stat. Ann. tit.14 § 752-C (West Supp. 1995Minn. Stat. Ann. § 541.073 (West Supp. 1996); Mo. Ann. Stat. § 537.046 (Vernon Supp. 1996); Mont. Code Ann. § 27-2-216 (1995); 2 Nev. Rev. Stat. §. 11.215 (1993); N.J. Stat. Ann. 2A:61 B-1 (West Supp. 1995); N.M. Stat. Ann. § 37-1-30, as amended by Act of Apr. 5, 1995, 1995 N.M. Laws 626; Okla. Stat. Ann. tit.12 § 95 (West Supp. 1996); Or. Rev. Stat. § 12.117 (1995); R.I. Gen. Laws § 9-1-51 (Michie Supp. 1995); S.D. Codified Laws Ann. § 78-12 -25.1 (Michie Supp. 1995); Tex. Civ. Prac. & Rem. Code Ann. § 16.0045 (1997); Utah Code Ann. tit.12, § 23-522 (Michie Supp. 1995); Vt. Stat. Ann. tit.12 § 522 (Michie Supp. 1995); Va. Code Ann. § 8.01-249 (Michie Supp. 1995); Wash. Rev. Code Ann. § 4.16.340 (West Supp. 1996); Wisc. Stat. Ann. § 893.587 (1995-96); Wyo. Stat. § 1-3-105(b) (Michie Supp. 1995).

As for the reliability of expert testimony regarding the phenomenon of dissociative/traumatic amnesia and recovered memories, several courts have upheld the admissibility of such testimony after concluding that the phenomenon is valid and has gained general acceptance in the relevant scientific community. Isley v. Capuchin Province, 877 F.Supp. 1055, 1065 (E.D. Mich. 1995); Shazade v. Gregory, 923 F.Supp. 286 (D.Mass. 1996).

In Shazade, the Plaintiff brought suit alleging that the Defendant had sexually abused her on numerous occasions between 1940 and 1945. The action was initiated forty-seven years later

when, according to the Plaintiff, she began to recover memories of the abuse. The defendant admitted some of the abuse but disputed its nature and extent. In upholding the validity of the dissociative/traumatic amnesia phenomenon, the Court noted that it was not in a proper position to rule on the Plaintiff's credibility, *id*. at 290, but that it was appropriate to rule on the reliability of the scientific issues. Relying on the testimony of Bessel van der Kolk, M.D., who testified that the controversy surrounding recovered memories was "not a scientific controversy, but merely a political and forensic one," *id*. at 288, and also on the fact that the American Psychiatric Association recognizes the "theory of repressed memories and believes it to be very common among people who have experienced severe trauma," the court ruled that the Plaintiff was entitled to her day in Court and that the testimony regarding recovered memories was properly admissible.

Other cases involving recovered memories have proved successful and have been affirmed by appellate courts. *See* Hoult v. Hoult, 57 F.3d 1 (1st Cir. 1995) (plaintiff was abused from age four to age thirteen but did not recall the abuse until eleven years after it ended); Herald v. Hood, 1993 WL 277541 (Oh. App.9 Dist., Summit County, July 21, 1993), appeal dismissed, 639 N.E. 2d 109 (Oh. 1994), cert. denied, 115 S.Ct. 1363 (1995) (plaintiff was abused from age three to age fifteen but she did not recall the abuse until fifteen years after it ended); Van Housen v. Ipsen, 1992 WL 682159 (T.S. Cal. Jury) (San Mateo Cty. Super. Ct. Cal. 1992) (plaintiff was abused by her coach when she was thirteen years old. She filed suit fourteen years later when she recalled the abuse).

Although a few cases have been decided that favor the position that recovered memories are unreliable, it is worth noting the likelihood that uninformed justices were misled by erroneous information provided by only one side. For example, in Kelly v. Mercantonio, the

court received an amicus brief solely on the side of "false memory syndrome" proponents. The brief cited the writings of FMSF Board members (Loftus, Ofshe, Slovenko, Pope) and the research supporting the contrary position were largely absent. *See* 678 A.2d at 873, 879 n.7. *See also* Doe v. Maskell, *supra*, at 691-93 (relying heavily on the work of Ofshe, Loftus, Pope, etc.) These courts had little choice but to accept the often misleading, inaccurate, and incomplete presentation of information on the issue before them, which significantly diminishes the force of the courts' conclusions as legal precedent.

F. Massachusetts Courts Have Previously Recognized the Phenomena of "Dissociative Memory Loss and Recovered Memory"

In many Massachusetts decisions, this Court and the Appeals Court have implicitly or directly recognized the scientific validity of dissociative amnesia and recovered memories by acknowledging or discussing the phenomena without mention of the need for a Lanigan hearing. Indeed, while using different language to describe the condition, in several decisions – including two decided within only weeks of this case – the court effectively took judicial notice of the reliability of the science behind the dissociative process. *See* Phinney v. Morgan, 39 Mass. App. Ct. 202, 204-205, review denied, 421 Mass. 1104 (1995) (recognizing that "a child may repress all memory of [sexual] abuse"); Commonwealth v. Hudson, 417 Mass. at 539-543 (expert testimony on PTSD and rape trauma syndrome admissible); Commonwealth v. Mamay, 407 Mass. 412, 421-422 (1990) (rape and sexual assault syndrome evidence admissible); Adoption of Keefe, 49 Mass. App. Ct. 818, 823-824 (2000) (expert testimony about Munchausen Syndrome by Proxy properly admitted); Commonwealth v. Hall, 45 Mass. App. Ct. 146, 150, 153, review denied, 428 Mass. 1110 (1998) (murder defendant's expert testified that defendant suffered from dissociative amnesia, causing her to forget the stabbing). Evidence of battered woman syndrome is admissible by statute. G.L. c. 233, § 23F, *see* Commonwealth v. Goetzendanner, 42 Mass.

App. Ct. 637, 643-646, review denied, 425 Mass. 1105 (1997). Commonwealth v. Seabrooks, - - Mass. -- (March 12, 2001) (murder defendant introduces evidence of "acute stress disorder with a dissociative component"); Ross v. Garabedian, -- Mass. – (February 12, 2001) (expert in civil action attests to "unconscious coping or blocking mechanisms" the court recognized as "commonly found in victims of sexual which the victim's expert characterized as an aspect of post traumatic stress disorder"); Commonwealth v. Donohue, 430 Mass. 710, 716-717 (2000) (murder defendant claims insanity and presents expert testimony that he suffered from a dissociative disorder); Commonwealth v. Sheehan, 48 Mass. App. Ct. 916, 916 (2000) (rape defendant should have been able to introduce evidence that victim suffered from a dissociative disorder); Commonwealth v. Baldwin, 426 Mass. 105, 108 (1997) (murder defendant introduced expert psychiatric testimony that he suffered from a "dissociative reaction" and could not premeditate or conform conduct to the requirements of the law); Commonwealth v. Lake, 410 Mass. 47, 50 (1991) (defendant introduced evidence that he had been suffering a "long dissociative episode" when he committed the murder); Commonwealth v. Shelley, 381 Mass. 340, 343 (1980) (defendant introduced evidence of his "dissociative state" brought on by personality disorder); Commonwealth v. Mahdi, 388 Mass. 679, 687 (1983) (defendant introduced expert testimony that he was in a dissociational or fugue state at the time of the murder); Commonwealth v. Brown, 387 Mass. 220, 226 (1982) (defendant in insanity case introduced testimony that he suffered from a "dissociative reaction" at time of killing); Commonwealth v. Laliberty, 373 Mass. 238, 244 & n. 3 (1977) (expert testifies that murder defendant was in a "dissociative state" at the time of the crime).

G. Research Indicates that Recovered Memories and Continuous Memories are of Equal Accuracy

False memory proponents often argue that recovered memories of childhood trauma are inaccurate, although they can cite no research to directly support this assertion. In reality, the reliability of the information recalled after a period of forgetting has been documented in a number of these studies. For example, 19% of Father Porter's victims reported experiencing total amnesia for the abuse until widespread publicity prompted the recall of explicit memories. Porter subsequently confessed to the abuse. Grassian, S. & Holtzen, D. (1996), *Memory of Sexual Abuse by a Parish Priest*. Paper presented at Trauma and Memory: An International Research Conference, July 26-28, University of New Hampshire, Durham. *See also* Cheit, Consider This, Skeptics of Recovered Memory, 8 *Ethics & Behav.* 141-160 (1998) (documenting numerous cases of recovered memories verified by compelling corroboration).

Studies have also reported amnesia and memory recovery in adults whose childhood abuse was documented in hospital records. *See e.g.,* Burgess, Hartman & Baker, Memory Presentations of Childhood Sexual Abuse, 33 *J. Psychosoc. Nurs.* 9 (1995); Williams, Recall of Childhood Trauma: A Prospective Study of Women's Memories of Child Sexual Abuse, 62 *J. Consult. & Clin. Psych*. 1167-76 (1994).[10]

To evaluate the accuracy of the memories of sexual abuse, Williams compared the recollections obtained at the follow-up interview with the original medical records. Williams found that, "In general, the women with recovered memories had no more inconsistencies in their accounts than did the women who had always remembered." Williams, Recovered Memories of Abuse in Women with Documented Child Sexual Victimization Histories, 8 *J. Trauma. Stress* 649, 660 (1995). Further, "their retrospective reports were remarkably consistent with what had

[10] Even Elizabeth Loftus, outspoken advocate for defendants in cases involving traumatic memories, has opined that the Williams study validates the experience of child sexual abuse victims who report an inability to recall memories of the abuse until years after the abuse has ended. "Study Finds Traumatic Memories Can Be Recovered," *The Boston Globe*, January 26, 1995, Alison Bass.

been reported in the 1970s." *Id*. at 670. Only common dating errors and errors of minor detail were found. Williams concluded that:

> . . . this study does suggest that recovered memories of child sexual abuse reported by adults can be quite consistent with contemporaneous documentation of the abuse and should not be summarily dismissed by therapists, family members, judges, or the women themselves. *Id*.

While Williams' 1995 study addresses the accuracy of recovered memory in general, Dalenberg compared the accuracy of continuous and recovered memory within the same subjects. Dalenberg, Accuracy, Timing and Circumstances of Disclosure in Therapy of Recovered and Continuous Memories of Abuse, 24 *J. Psychiatry & L.* 229 (1996). The accuracy of the recovered memories and continuous memories of incest survivors were evaluated through the collection of physical evidence of the abuse and by interviewing family members. The alleged perpetrator used similar methods to collect evidence that supported his position. *Id* at 240-45. The overall evidence for each memory unit was then evaluated by a team of six independent raters, much akin to the way a jury decides about the totality of the evidence at hand. *Id*. at 244-45. About 75% of both the recovered and continuous memories were judged by the raters as either very convincing or reasonably certain. *Id.* at 245. In other words, Dalenberg's research demonstrated that the gist of both the continuous and recovered memories of abuse was generally accurate. More importantly, the accuracy ratings of the continuous memories and the recovered memories were not significantly different.

PTSD associated with continuous and recovered memories has also been evaluated and found to be comparable, and magnitudes of physiologic responses (i.e., heart rate, skin conductance, and electromyograms) during personal abuse imagery has not been found to differ between those who recovered memories and those who had continuous memories. Orr, Lasko, Metzger, Berry, Ahern, & Pitman, Psychophysiologic Assessment of PTSD in Adult Females

Sexually Abused During Childhood, 821 *Psychobiology of Posttraumatic Stress Disorder. Annuals of the New York Academy of Sciences*, 491-493 (R. Yehuda & A.C. McFarlane, eds., 1997).

In sum, the available research indicates that continuous memories of abuse and spontaneously recovered memories of abuse are of similar accuracy. For example, after reviewing the literature, cognitive psychologists Lindsay and Read concluded:

> In our reading, scientific evidence has clear implications . . . . there are few grounds to doubt spontaneously recovered memories of common forms of CSA or recovered memories of details of never-forgotten abuse.

Lindsay & Read, "Memory work" and recovered memories of childhood sexual abuse: Scientific evidence and public, professional and personal issues. 1 *Psychol., Public Policy & L.* 846, 894 (1995).

As the trial court noted in State v. Walters, "[T]here is no evidence that [traumatic memory testimony] is inherently unreliable or even that it is less reliable than the typical memory evidence upon which the courts of this State must rely on a regular basis." State v. Walters, No. 93-S-2111, Mem. Op. at 2 (N.H. Super. Ct. Nov. 21, 1995). In fact, Scheflin and Brown have suggested that if courts require an evidentiary hearing on the issue of whether repressed memories are reliable, then they "must, consistent with the science, hold either that such memories are reliable or that all memory, repressed or otherwise, is unreliable." Scheflin & Brown, Repressed Memory or Dissociative Amnesia: What the Science Says, 24 *J. Psychiatry & L.* 143,183 (1996).

Even the group most critical of allowing recovered memory into the courtroom appears to agree on this point. For example, the False Memory Syndrome Foundation's Executive Director, Pamela Freyd, stated,

> The position of the Foundation has also been that whether they are continuous or recovered, some memories are true, some a mixture of fact and fantasy and some are false. The problem is to know the difference.

Freyd, False Memory Syndrome, 169 *Br. J. Psychol.* 794, 795 (1996).

CONCLUSION

The sexual abuse of children is a serious problem that is much more common than once thought. The fact that "dissociative memory loss and recovered memory" often results from traumatic experiences is also beyond dispute. The ability of humans to dissociate awareness from painful events and to keep the memory of these events out of consciousness has been repeatedly documented in the medical literature over the last hundred years. At last count, over 68 studies have documented the reality of recovering forgotten memories of child sexual abuse, and the DSM-IV recognizes memory problems to be a common feature of five post-traumatic conditions. In these circumstances, where the state of the science is both long-standing and well-settled, a Lanigan hearing should not be required before an otherwise qualified expert can testify to matters involving "dissociative memory loss or recovered memory."

The fact that debate exists over *how* the mind suppresses traumatic information and the scientific processes used to recollect childhood traumas, in no way suggests that the phenomenon itself is controversial or in dispute. As noted above, scientists do not yet completely understand how the mind forms, stores, or retrieves ordinary memory; therefore, it is not reasonable to expect that scientists will uniformly agree on how the brain handles memories for traumatic events. The fact that there exist scholarly differences of opinion on how the brain functions is not in and of itself a justification to exclude or even challenge the admissibility of otherwise legitimate and scientifically sound expert testimony.

Memory by its very nature is often fallible and inaccurate. Nonetheless, the frailties of the human condition must not become the foundation upon which certain people are denied access to justice, or used as an excuse to erect needless hurdles that make prosecution of serious crime more difficult. The law is designed to protect individuals from harm, particularly weak individuals such as children who cannot protect themselves. It would be ironic in the extreme for the law to rely on the fact that children are sometimes temporarily incapacitated by abuse, to deny them their fundamental right to seek redress of their grievances, or to limit their access to justice by requiring costly Lanigan hearings to determine the validity of expert testimony regarding the psychological effects of trauma on memory—especially here, where this Court has repeatedly accepted similar testimony in other contexts, where the science on the issue has been settled for many years, and where Lanigan-like hearings are not required on the issue in most courts around the country.

From a legal perspective, the central issue is how triers of fact can discriminate between veridical and mistaken memories. However, this is a question to be answered by the fact-finder based on a totality of the evidence, and can be informed, but not ultimately answered by science.

Unless this Court amends its decision to clarify that Lanigan hearings are not required to demonstrate the scientific validity of "dissociative memory loss or recovered memory," other cases involving expert testimony regarding psychological trauma, such as PTSD, dissociation, rape trauma syndrome and other stress-related disorders that affect memory, cognition, behavior or perception, will likewise be subject to challenge and appeal. In addition, the requirement for a Lanigan hearing in the present case may provide grounds for new trial motions in cases involving expert testimony on a variety of stress-related disorders in cases that have already been resolved on direct appeal. This decision may even open the door to arguments that Lanigan hearings are

required in all instances that expert testimony is proffered—even where no substantive scientific dispute exists over the existence of a particular phenomenon or scientific principle—but where competing explanatory theories are present (such as Alzheimer's disease).

For all the above reasons, the Leadership Council respectfully requests that this Court amend its decision in this matter to provide that a Lanigan hearing not be required on the question of the admissibility or reliability of appropriately credentialed expert testimony in the area of "dissociative memory loss or recovered memory."

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Respectfully Submitted,

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WENDY J. MURPHY, ESQ.
Brody, Hardoon, Perkins & Kesten
1 Exeter Plaza
Boston, MA 02116
(617) 880-7100
BBO #550455
Attorney for Amicus Curiae, the Leadership Council for Mental Health, Justice, & the Media

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