

No. A10-1951

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STATE OF MINNESOTA  
IN SUPREME COURT

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John Doe 76C,

Respondent,

vs.

Archdiocese of St. Paul and Minneapolis and Diocese of Winona,

Appellants.

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**AMICUS CURIAE FALSE MEMORY SYNDROME FOUNDATION BRIEF**

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## IDENTITY AND INTEREST OF AMICUS CURIAE

The False Memory Syndrome Foundation (hereinafter “FMS Foundation” or “Foundation”) is a 501(c)3 institution located at 1955 Locust Street, Philadelphia, Pennsylvania<sup>1</sup>. It is a non-profit group founded in 1992 to promote and sponsor competent scientific and medical research of False Memory Syndrome and to disseminate the results to the public, professional community, and families that contact the Foundation. The FMS Foundation documents cases in which adults “recover” allegedly “repressed” memories and accuse their parents or others of sexually abusing them when they were children. The FMS Foundation Scientific and Professional Advisory Board is comprised of prominent researchers and clinicians from the fields of psychiatry, psychology, social work, law, and education.<sup>2</sup>

The FMS Foundation deplores child abuse and agrees that society must support real victims of abuse. The FMS Foundation is particularly concerned about the proliferation of false allegations and their ability to discredit legitimate charges of childhood sexual abuse.

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<sup>1</sup> Pursuant to Minn. R. Civ. P. 129.03, the amici state that no counsel for any party in this action authored this brief in whole or part. Nor has anyone made a monetary contribution for its preparation or submission. Michael J. Ford and Cally R. Kjellberg, Quinlivan & Hughes, P.A., authored this brief at the request of and on behalf of the False Memory Syndrome Foundation.

<sup>2</sup> A list of the FMS Foundation Scientific and Professional Advisory Board members is attached hereto as Exhibit 1.

## INTRODUCTION

The FMS Foundation is concerned with the question of whether expert testimony regarding “repressed memory” should be admissible under Minnesota’s Frye-Mack standard.

Despite popular misconceptions, there is little empirical support for the assumed prevalence of repression or even for the theory of repression itself.<sup>3</sup> The notion that memories can be involuntarily lost to consciousness and later accurately retrieved is, at present, an unproven hypothesis. For several decades, memory research has shown that memories associated with strong emotion are better recalled.<sup>4</sup> In addition, the “repressed/recovered memory” claim seems counter-intuitive. If our ancestors had amnesia for something as traumatic as a lion attack, they would likely not have survived long.

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<sup>3</sup> See e.g., McNally, R.J. (2005), Debunking myths about trauma and memory. *Canadian Journal of Psychiatry*, 50 (13), 817-22; Clancy, S.A. & McNally, R.J. (2005-6), Who needs repression? Normal memory processes can explain “forgetting” of childhood sexual abuse. *Scientific Review of Mental Health Practice*, 4(2), 66-73; Brainerd, C.J. and Reyna, V.F. (2005), *The Science of False Memory*, Oxford Psychology Series #38. Oxford University Press; McGaugh, J.L. (2003), *Memory and emotion: The making of lasting memories*. New York: Columbia University Press; Frankel, F.H. (1993), Adult reconstruction of childhood events in the multiple personality literature. *American Journal of Psychiatry*, 150 (6), 954-58; Holmes, D. (1990), The evidence for repression: An examination of sixty years of research. In J. Singer (ed.), *Repression and Dissociation*. Chicago: University of Chicago Press; Lindsay, D.S. & Read, J.D. (1995), ‘Memory work’ and recovered memories of childhood sexual abuse: Scientific evidence and public, professional, and personal issues. *Psychology, Public Policy, and the Law*, 1 (4), 846-908; Lindsay, D.S. & Read, J.D. (1994), Psychotherapy and memories of childhood sexual abuse: A cognitive perspective. *Applied Cognitive Psychology*, 8 (4), 281-338; McNally, R.J. (2003). *Remembering Trauma*. Cambridge, MA: Harvard University Press; Pendergrast, M. (1996), *Victims of Memory*. Hinesburg, VT: Upper Access Books; Pope, H.G. & Hudson, J.I. (1995), Can memories of childhood sexual abuse be repressed? *Psychological Medicine*, 25, 121-26; Pope, H.G. et al. (1999), Attitudes toward DSM-IV dissociative disorders diagnoses among board-certified American psychiatrists. *American Journal of Psychiatry*, 156 (2), 321-23; Tillman, J.G., Nash, M.R. & Lerner, P.M. (1994), Does trauma cause dissociative pathology? In S. Lynn and J. Rhue (eds.), *Dissociation: Clinical, Theoretical and Research Perspectives*. New York: Guilford Press, 395-414.

<sup>4</sup> McGaugh, J. (2003).

Arguments about the mental mechanisms that might be responsible for repression are premature, or even irrelevant, until there is agreement in the scientific community that the phenomenon exists. There is, however, a long history of research and scientific data supporting the premise that human memory is highly suggestible and malleable.<sup>5</sup>

The topic of “repressed and recovered memories” remains in bitter dispute.<sup>6</sup> As recently as 2003, Harvard psychology professor Richard McNally described the debate as “the most divisive issue facing psychology today.”<sup>7</sup>

Because of the lack of general acceptance by the scientific community for the theory of repression and the impossibility of determining truthfulness of a specific repressed memory allegation without objective corroboration, repressed memory claims present special equitable and evidentiary problems for the courts.

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<sup>5</sup> See, e.g., Loftus, E. (2005), Planting misinformation in the human mind: A 30-year investigation of the malleability of memory. *Learning & Memory*, 12, 361-66; Loftus, E. (1993), The reality of repressed memories. *American Psychologist*, 48 (5), 518-537.

<sup>6</sup> See, Pexdek, K. & Bank, W. (eds.) (1996), *The Recovered Memory/False Memory Debate*. New York: Academic Press; Memon, A. & Young, M. (1997), Desperately seeking evidence: The recovered memory debate. *Legal & Criminological Psychology*, 2 (2), 131-54; Kristiansen, C.M., Haslip, S.J. & Kelly, K.D. (1997), Scientific and judicial illusions of objectivity in the recovered memory debate. *Feminism & Psychology*, 7 (1), 39-45; APA Working Group on Investigations of Memories of Childhood Abuse. (1998), Final conclusions of the American Psychological Association working group on the investigation of memories of childhood abuse. *Psychology, Public Policy, and Law*, 4, 933-40; MacMartin, C., & Yarmey, A.D. (1998). Repression, Dissociation, and the Recovered Memory Debate: Constructing Scientific Evidence and Expertise. *Expert Evidence*, 6, 203-26; Colangelo, J.J. (2007, April 1). Recovered memory debate revisited: Practice implications for mental health counselors. *Journal of Mental Health Counseling*, 29 (2), 93-120; MacMartin, C. & Yarmey, A.D. (1999), Rhetoric and the Recovered Memory Debate. *Canadian Psychology*, 40, 343-58.

<sup>7</sup> McNally, R.J. (2003), *Remembering Trauma*.

## ARGUMENT

Repressed and recovered memories are not a proven phenomenon. For that reason, there is no general acceptance of repressed and recovered memory in the relevant medical and scientific communities.

### **A. THE REPRESSED MEMORY PHENOMENON**

Questions about repression are separate from the fact that people may not remember being abused. Repression is a theory of why someone may not remember his abuse. A major assumption about repression has been that “repressed and recovered” memories did not operate in the same way as ordinary memories.

Inspired partly by the Freudian-based concept of repression (posited as a natural psychological defense mechanism that serves to keep painful and traumatic memories out of awareness) and partly by contemporary metaphors of the mind, a popularized interpretation of memory has emerged. In this commonly held but inaccurate view, memory is seen as a sort of video recorder on which all events are stored. Trauma, it is argued, often causes memories to be “repressed” until a significant event or therapy technique “triggers” release and the memory is revealed.

#### 1. Role of Popular Culture in Belief in Repressed/Recovered Memories

Popular culture has significantly propelled the belief in “repressed and recovered memories.” *The Three Faces of Eve* and the book and TV movie *Sybil* have been especially powerful influences in recent decades.<sup>8</sup> Diagnoses related to “repressed memories” skyrocketed after these books were published. In 1991, Roseanne Barr appeared on the cover of *People* magazine claiming that she repressed memories of her mother and father abusing her from the time

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<sup>8</sup> Schreiber, F.R. (1973), *Sybil*. New York: Warner Books.

she was an infant until she was 17 years old.<sup>9</sup> Just four months earlier, People magazine also reported a story about former Miss America Marilyn Van Derbur claiming to have repressed knowledge of sexual violation by her father until she was 24 years old.<sup>10</sup>

In 2007, Harvard Professor Harrison Pope and colleagues published research that strongly points to the literary/cultural influence on the very notion of repression.<sup>11</sup> Using electronic databases only recently available, they searched for examples of “repression” in the literature prior to 1800. If repression were a physiological phenomenon, there should be references to it in the literature just as there are for other diseases. The authors found no examples or references to repression prior to 1800.

## 2. Memory Researchers Agree that Memory is Malleable

Although the video recorder view of repressed and recovered memory is found in the popular media and self-help books, it is not consistent with research findings or with accepted theories of memory function. Memory researchers have described the brain’s capacity to construct and invent reality from the information it processes.<sup>12</sup> This research has shown that memory is a process that is constantly undergoing adjustment and reconstruction; it is malleable. A “memory” actually consists of fragments of the event, subsequent discussions and readings, other peoples’ recollections and suggestions, as well as present beliefs about the past. Memories of life events may be easily altered by outside factors. Memories can be changed by the passage of time, during

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<sup>9</sup> Barr, Rosanne, *A Star Cries Incest*, People, Oct. 7, 1991.

<sup>10</sup> Van Derbur, Marilyn, *The Darkest Secret*, June 10, 1991.

<sup>11</sup> Pope, H.G., Poliakoff, M.B., Parker, M.P., Boynes, M. & Hudson, J.I. (2007), Is dissociative amnesia a culture-bound syndrome? *Psychological Medicine*, 37, 225-33.

<sup>12</sup> See, Schacter, D. (2001), *The Seven Sins of Memory*. New York: Houghton Mifflin; Questions and answers about memories of childhood abuse. Washington D.C.: American Psychological Association; Bonanno, G.A. (1990), Remembering and psychotherapy. *Psychotherapy*, 27, 175; Loftus, E. (1993); Schacter, D. (Ed.) (1995), *Memory distortion: How minds, brains, and societies reconstruct the past*. Cambridge, MA: Harvard University Press.

retelling, or by current knowledge and/or expectations. The mind does not encode every detail of an event, but only a few salient features. “When we look back, we fill in the blanks based on what must have been.”<sup>13</sup>

In fact, Minnesota is all too familiar with the malleability of memory as evidenced by the infamous child sexual abuse investigations conducted in Jordan, Minnesota from 1983 to 1984.<sup>14</sup> There, repeated questioning and complete lack of corroborating evidence led to young children making claims of physical abuse, sexual abuse, satanic rituals, and homicides. After further investigation revealed the children were recalling false memories, the charges against the alleged perpetrators were dropped.<sup>15</sup>

Most of us have had the experience of forgetting , or not thinking about, an event and then suddenly recalling it, perhaps while reminiscing with old friends, revisiting a place after many years, or looking at childhood photos. Most of us have remarked on the differences in how two people remember the same event or have been struck by differences between a remembered image and a photographic image. Both are examples of normal memory processes. In the first instance, an example of “cued memory,” the memory was forgotten, but not lost to conscious recall. The second example demonstrates what memory researchers call the reconstructive nature of memory. Such remembrances, which have been the subject of extensive research, are not considered evidence that “repression” or “dissociation” occurred.<sup>16</sup> In fact, from this perspective, because of the

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<sup>13</sup> Gleitman, H. (1993), Closing comments. Talk presented at Memory and Reality: Emerging Crisis, Valley Forge, PA, April 18.

<sup>14</sup> Jacob V. Lamar & Madeline Nash, Disturbing End of Nightmare, Time, Feb. 25, 1985.

<sup>15</sup> Bush v. Perpich, 370 N.W.2d 886 (Minn. 1985); Myers v. Morris, 810 F.2d 1437 (8th Cir. 1987).

<sup>16</sup> See, e.g., Kihlstrom, J.F. (1994), “Exhumed Memory,” in S.J. Lynn and N.P. Spanos (eds.), Truth in Memory, New York: Guilford Press.

circumstances under which “repressed memories” are recovered and recounted, it is generally believed they may be even more susceptible to reconstruction and confabulation.<sup>17</sup>

There is also a long history of research on the effect emotion has on the strength of recall. The evidence shows that strong emotions generally create unwanted and intrusive memories, as opposed to blocking them.<sup>18</sup> For example, studies of war veterans, Holocaust survivors and victims of natural disasters show that most often people suffer from hypermnesia, unbidden intrusive recollections—not amnesia.<sup>19</sup> Evidence from both field and lab studies indicates that under highly emotional situations, if anything, it is the memories for peripheral, rather than central details of the episode that may be lost. Rarely does the amnesia cover the entire event.<sup>20</sup>

There is no scientific evidence that memories, if they were to be repressed, would operate by a different set of rules so that they could be stored and later recalled in pristine form. Normal memory processes can explain why some people may forget traumatic experiences. In fact, many researchers believe that because of the way “recovered memories” develop, they may be even more susceptible to the influences that affect the reconstruction of the images we interpret as memory.

### 3. The Repressed Memory Debate

A number of distinguished scientific journals have responded to the controversy surrounding repressed memory by devoting entire issues to the subject and featuring peer-reviewed articles from

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<sup>17</sup> See, e.g., Loftus, E.F. (1993).

<sup>18</sup> See, Dittburner, T. and M.A. Persinger (1994), “Intensity of amnesia during hypnosis is positively correlated with estimated prevalence of sexual abuse and alien abductions.” *Perceptual and Motor Skills*, 77:3:1, 895-98; Horowitz, M. (1993), “Stress-response syndromes,” in J.P. Wilson, B. Raphael (eds.), *International Handbook of Traumatic Stress Syndromes*, New York: Plenum, pp. 49-60; Lindsay, D.S. and J.D. Read (1995), pp. 8-10.

<sup>19</sup> See, Pope, H.G. and J.I. Hudson (1995); Schacter, D.L. (1996), *Searching for Memory: The Brain, the Mind, and the Past*, New York: Basic Books.

<sup>20</sup> Christianson, S.A. (1992), “Emotional stress and eye witness memory: A critical review,” *Psychological Bulletin*, 112 (2), 284-309.

both proponents and critics of the theory.<sup>21</sup> The controversy surrounding the theory of repressed memory of childhood sexual abuse has grown into a heated debate which has divided the mental health community into two distinct camps.

#### 4. Statements from Mental Health Professional Organizations Urge Caution with Recovered Memories

Early in the memory debates, the mental health professional organizations issued statements urging caution when dealing with “repressed” memories. In June 1994, the American Medical Association issued a statement that reads: “The AMA considers recovered memories of childhood sexual abuse to be of uncertain authenticity, which should be subject to external verification. The use of recovered memories is fraught with problems of potential misapplication.”<sup>22</sup> Similarly, in December 1993, the Board of Trustees of the American Psychiatric Association approved a statement in response to “passionate debates” which they feared may have “obscured the recognition of a body of scientific evidence” in the treatment of child sexual abuse by noting: “It is not known how to distinguish, with complete accuracy, memories based on true events from those derived from other sources.”<sup>23</sup>

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<sup>21</sup> See, e.g., Frankel, F.H. and C.W. Perry, (eds.) (1994, October), “Editor’s note,” *The International Journal of Clinical and Experimental Hypnosis, Special Issues*; Mott, T., Jr. (ed.) (1994), “Editorial: The use of recovered memory outside of therapy,” *The American Journal of Clinical Hypnosis*, 36 (3); Nashel, H.M. (ed.) (1995, Fall), “Editor’s Page,” *Journal of Psychiatry and Law*; Fawcett, J. (ed.) (1995), “Editorial: A critical look at recovered memories,” *Psychiatric Annals* 25 (12); Mitchell, S.A. (ed.) (1996), Symposium on the “False Memory Controversy,” *Psychiatric Dialogues*, 6 (2); Green, B.L. (ed.) (1995), “Introduction to special issue on traumatic memory research,” *Journal of Traumatic Stress*, 8 (4); Banks, W.P. and K. Pezdek (ed.), “Editorial: The recovered memory/false memory debate,” *Consciousness and Cognition*, 3.

<sup>22</sup> American Medical Association: Report of the Council on Scientific Affairs, Memories of Childhood Sexual Abuse, C.S.A. Report 5-A-94.

<sup>23</sup> American Psychiatric Association, Board of Trustees (1993), “Statement on memories of sexual abuse,” which was approved by the Board of Trustees of the American Psychiatric Association on December 12, 1993.

## **B. REPRESSED MEMORIES: A REVIEW OF CURRENT SCIENTIFIC UNDERSTANDINGS**

“Repressed memory” claims rely on the assumption that an individual can selectively lose all recollection of sexual abuse trauma so that the overall autobiographical memory system is otherwise intact. In many instances, the alleged traumatic incidents are claimed to have been repeated over many years, often from infancy to adolescence and spanning several developmental phases. The theory further assumes that because of major trauma, such as sexual assault, it is common for an individual to experience complete absence of awareness or memory of the traumatic event until years, even decades later, when accurate recollections return. This memory recall process is posited to be an involuntary one, in which the individual has no conscious control over the timing or direction of the emerging memories. If this theory of repression were true, it would have significant consequences for our understanding of normal memory functions and the human response to stress.

Because of the potential repercussions of widespread memory loss of stressful life events, researchers from many areas have responded by considering the question from each of their own discipline’s perspectives and knowledge. For example, the theory questioned above has been widely questioned by experimental psychologists who study normal processes of recall and forgetting. Neurobiologists have yet to find evidence that, absent physical trauma to the brain, memories which were never encoded, or which were selectively lost, could subsequently be recalled.<sup>24</sup> Known mechanisms of memory distortion studied by academic psychologists are not believed to explain the unconscious memory loss hypothesis of “repression.”<sup>25</sup>

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<sup>24</sup> See, e.g., Weaver, C.A. (1996), “Memory: An owner’s manual,” *The Baylor Line*, Fall: 32-39.

<sup>25</sup> See, e.g., Kihlstrom, J.F. and J. Harackiewicz, (1982), “Suffering from Reminiscences: Exhumed memory, implicit memory, and the return of the repressed,” in M.A. Conway (ed.), *Recovered Memories and False Memories*.

Sociological understandings of the influence authority figures and groups may have on an individual's belief system have provided insight into the mechanism by which mental images may be taken to be actual memories.<sup>26</sup> A growing number of books and articles by philosophers of science have decried the misuse of science and over-reliance on anecdotal evidence in this area. Some have cited "repressed memories" as an example of "pseudoscience."<sup>27</sup> In short, the theory of "repression" has been widely critiqued by professionals in many related scientific disciplines, each concluding that the theory does not conform with well-established findings in their own area.

Most memory researchers are in agreement on this matter. In an Amicus filed by R.C. Barden, Ph.D., J.D. in the case of *Taus v. Loftus*,<sup>28</sup> more than 65 scientists and clinicians, a "Who's Who" in the world of psychiatry, psychology and cognitive science, agreed with the inclusion of the following clear statement:<sup>29</sup>

Decades of research and scientific debate have clarified over and over again, that the notion of traumatic events being somehow "repressed" and later accurately recovered is one of the most pernicious bits of folklore ever to infect psychology and psychiatry.

The signers represent the relevant scientific community for theoretical disputes if the issue is a claim of repressed and recovered memory.

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<sup>26</sup> See, e.g., Ofshe, R.J. (1992), "Inadvertent hypothesis during interrogation: False confession due to dissociative state," *The International Journal of Clinical and Experimental Hypothesis*, XL: 3.

<sup>27</sup> Sagan, C. (1996), *The Demon-Haunted World: Science as a Candle in the Dark*, New York: Random House. See also, Dawes, R.M. (1993b), "Cognitive bases of clinicians' overconfidence," paper presented at FMSF Conference "Memory and Reality: Emerging Crisis," April 16-18, 1993 in Philadelphia and to Nevada Psychological Association, May 22-24, 1993 in Squaw Valley, Nevada; Gardner, M. (1994), "The tragedies of false memories," *Skeptical Inquirer*, 18: 464-70.

<sup>28</sup> *Taus v. Loftus*, Case No, S133805, Supreme Court of California, Solano County, 2005.

<sup>29</sup> Barden, R.C. (2006) Amicus Curiae Brief of the National Committee of Scientists for Academic Liberty, for Defendants and Appellants, Elizabeth Loftus, et al. California Supreme Court.

Both scientists and the proponents of the belief in repression and recovered memories present studies that they claim support their conflicting positions. In fact, both sides frequently cite the same articles but reach different conclusions about them. This is a very confusing situation for non-scientists, including potential jurors.

#### 1. Necessary Criteria for Demonstration of Existence of Repression

Harrison Pope, M.D. and James Hudson, M.D. set out criteria that are necessary to confirm the hypothesis that repression can occur, that memories of childhood might be repressed and later recovered.<sup>30</sup> There is no conflict about these criteria. All four of the following criteria must be met:

- Evidence the abuse/traumatic event actually occurred.
- Evidence for “psychogenic” amnesia, i.e., that the abuse was actually forgotten and inaccessible for some period of time. This means that cases must be excluded that can be explained by victims trying not to think about events, pretending the events never occurred, or deriving secondary gain by claiming to have amnesia.
- Evidence the memory loss could not be explained by biological causes.
- Evidence the abuse was later remembered.

These criteria seem obvious to even a non-scientist, yet most of the studies used to support the notion of repression fail to meet them.

Retrospective studies generally fail to meet the criteria because they usually lack independent objective evidence to show that abuse actually occurred. In 2006, Ghetti and colleagues demonstrated just how unreliable retrospective subjective judgment can be.<sup>31</sup> They studied self-reported amnesia in a population of people known through the legal system to have been abused. They found that if child sexual abuse was forgotten in childhood, it was also likely to be

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<sup>30</sup> Pope, H.G. and Hudson, J.I. (1995), 121-26.

<sup>31</sup> Ghetti, S., Edelstein, R.S., Goodman, G.S., Cordon, I.M., Quas, J.A., Alexander, K.W., Redlich, A.D. & Jones, D.P.J. (2006), What can subjective forgetting tell us about memory for childhood trauma? *Memory & Cognition*, 34 (5), 1011-25.

remembered in childhood, not in adulthood. They found no evidence of adult recovery of childhood sexual abuse memories and concluded: “The differences between subjective and objective memory underscore the risks of using subjective measures to assess lost memory of abuse.”<sup>32</sup>

There have been few prospective studies. The best known of these is the Linda Williams (1994)<sup>33</sup> study in which individuals known to have been abused were interviewed 17 years later to see what they remembered about the reported event. Although the researcher stated that 38% of the individuals did not mention the abuse incident, this is not proof of repression, as was widely claimed when the paper appeared.<sup>34</sup> For example, some of the subjects remembered past abuse, but not the particular incident the researcher had in mind. Some of the children in the study were too young to have had a memory of the event because of childhood amnesia, a robust psychological phenomenon. The researchers failed to determine whether the individuals really forgot or just did not want to talk about the event. Studies have consistently found that some people often do not want to talk about what a researcher may be asking.<sup>35</sup>

In 2003, cognitive psychologists Gail Goodman and colleagues<sup>36</sup> published a study that was similar to the Williams study. They excluded situations in which a child might have been too young at the time of the abuse to be expected to remember, and they included several interviews in order to try and determine if the person really forgot or just did not want to talk about it. They found that

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<sup>32</sup> *Id.* at 1011.

<sup>33</sup> Williams, L.M. (1994), Recall of childhood trauma: A prospective study of women’s memories of child sexual abuse. *Journal of Consulting & Clinical Psychology*, 62, 1167-76.

<sup>34</sup> Loftus, E., Garry, M. & Feldman, J. (1994), Remembering Sexual Abuse: What does it mean when 38% forget? *Journal of Consulting and Clinical Psychology*, 62 (6), 1177-81.

<sup>35</sup> Femina, D., Yeager, C., & Lewis, D.O. (1990), Child abuse: Adolescent records vs. adult recall. *Child Abuse & Neglect*, 14, 227-31.

<sup>36</sup> Goodman, G.S., Ghetti, S., Quas, J.A., Edelstein, R.S., Alexander, K.W. et al. (2003), A prospective study of memory for child sexual abuse: New findings relevant to the repressed-memory controversy. *Psychological Science*, 14, 113-18.

only 8% did not report abuse. The Goodman study certainly casts doubt on the claim that large numbers of people are unaware of past abuse.

It is not unusual to forget childhood sexual abuse, according to Harvard scientists Susan Clancy and Richard McNally.<sup>37</sup> Memories of childhood sexual assault can be forgotten in the same way that ordinary memories can. The notion of “repression” is not needed.

Memory researchers studying children who have experienced traumatic events or who have suffered maltreatment have found that the children remember the experience; and researchers have found no evidence of any special memory mechanisms as a response to the trauma. For example, in 2007, Porter and Peace<sup>38</sup> published a longitudinal investigation that concluded:

Trauma does seem to create scars on memory, resulting in remarkably vivid and consistent recollections over long periods. As much as people may wish to forget painful experiences, the details remain fully intact in their consciousness.<sup>39</sup>

Howe and colleagues<sup>40</sup> looked at many studies of maltreated children and concluded: “Studies conducted to date give us no reason to believe that a different set of memory development ‘laws’ pertain to those who have been abused and those who have not.” Sadly, most children remember it in the same manner as other things that happen to them. They may not wish to talk about what happened, however, when researchers ask.

Case histories suffer from the fact that only the author has access to the evidence. This means others cannot verify the facts. In the best-known example, psychiatrist David Corwin and

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<sup>37</sup> Clancy, S., McNally, R. (2005-06).

<sup>38</sup> Porter, S., Peace, K.A. (2007), The scars of memory: A prospective, longitudinal investigation of the consistency of traumatic and positive emotional memories in adulthood. *Psychological Science*, 18 (5), 435-40.

<sup>39</sup> *Id.* at 440.

<sup>40</sup> Howe, M.L., Cicchetti, D. & Toth, S.L. (2006), Children’s basic memory processes, stress, and maltreatment. *Development and Psychopathology*, 18, 759-69. (766)

colleague Erna Olafson<sup>41</sup> claimed to have documented the recovery of repressed memories in a patient referred to as “Jane Doe.” Using public records, memory researcher Elizabeth Loftus and psychologist Melvin Guyer<sup>42</sup> were able to track the identity of Jane Doe and gather additional information. Their conclusions were drastically different from those of the original writers. This example is illustrative of the tremendous caution that is necessary when considering case histories.

As evidence of the existence of repressed and recovered memories, proponents often cite the chart<sup>43</sup> of case studies of people who had experienced severe trauma from the work of psychologist Daniel Brown and colleagues. The original chart reviewed 43 studies Brown et al. claim related to the question of dissociative amnesia in traumatized populations and claims the studies showed a substantial minority partially or completely forgot the traumatic event and later recovered the memories of it. Brown expanded the chart to 68 studies in 1999.<sup>44</sup> What proponents neglect to mention is that in 2001 a scathing critique of these studies was published.<sup>45</sup> The critique presented examples of the misinterpretation of results, misleading statements, and errors in the Brown et al. paper.

Harvard Professor Harrison Pope and colleagues looked at the same and additional studies as did Brown et al. They performed a non-selective literature search for examples of studies

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<sup>41</sup> Corwin, D.L. & Olafson, E. (1997), Videotaped discovery of a reportedly unrecalable memory of child sexual abuse: Comparison with a childhood interview videotaped 11 years before. *Child Maltreatment*, 2, 91-112.

<sup>42</sup> Loftus, E. & Guyer, M. (2002a, May/June), Who abused Jane Doe? The hazards of the single case history: Part I. *Skeptical Inquirer*, 26, 24-32; Loftus, E.F. & Guyer, M. (2002b, July/August). Who abused Jane Doe? The hazards of the single case history: Part II. *Skeptical Inquirer*, 26, 37-40.

<sup>43</sup> Brown, D., Schefflin, A., & Hammond, C. (1998,. *Memory, Trauma Treatment and the Law*. New York: Norton.

<sup>44</sup> Brown, D., Schefflin, A., & Whitfield, C. (1999), Recovered memories: The current weight of the evidence in science and in the courts. *Journal of Psychiatry & Law*, 27, 5-156.

<sup>45</sup> Piper, A., Pope, H.G., Borowiecki, J.J. (2000), Custer’s last stand: Brown, Schefflin, and Whitfield’s latest attempt to salvage “dissociative amnesia.” *Journal of Psychiatry and Law*, 28 (2), 149-214.

between 1969 and 1999 where the investigators performed psychological assessments on groups of survivors of specific, historically documented traumatic events.<sup>46</sup> The studies assessed victims of all manner of traumatic events and included all of the studies listed in Brown et al. Pope's strikingly different results showed that none of the more than 11,000 victims in the studies were reported to have repressed the memory of the traumatic event.<sup>47</sup> The few survivors who exhibited some amnesia could be accounted for because of physical reasons such as loss of consciousness. Whereas Brown et al. assumed the term "memory disturbances" to mean amnesia, Pope explains this should not be interpreted as memory loss of the trauma. Disturbances of memory and concentration are ubiquitous in mood and anxiety disorders, regardless of whether the disorders occur in the wake of trauma. In other words, Brown et al. neglected to look for other reasons to explain why some people may have forgotten the traumatic experience.

None of the major professional organizations have provided scientific evidence that people routinely repress a memory in response to trauma only to recover it later. Indeed, as noted above, organizations urge caution when dealing with recovered memories. The fact that therapists and patients "report" examples of forgetting and then remembering childhood sexual abuse does not mean the phenomenon of repression exists. Ordinary memory processes can explain forgetting and remembering.

It is not unusual for people to forget all sorts of things, even past abuse, and then to remember them at a later time. For example, Harvard scientists Susan Clancy and Richard McNally

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<sup>46</sup> Pope, H.G., Oliva, P.S. & Hudson, J.I. (2002), Scientific status of research on repressed memories. In D.L. Faigman, D.H. Kaye, M.J. Saks & J. Sanders (Eds.) *Modern Scientific Evidence*. St. Paul, MN: West Group.

<sup>47</sup> Kendall-Tackett (1993) reviewed 45 studies of sexual abuse victims involving 3,369 total subjects. Although the review describes numerous psychological aftereffects attributed to sexual abuse, there is no mention of repressed memory for any of the 3,369 victims. Kendall-Tackett, K.A., Williams, L.M. & Finkelhor, D. (1993). The impact of sexual abuse on children: A review and synthesis of recent empirical studies. *Psychological Bulletin*, 13, 164-80.

have shown that some people may have the subjective experience of recovering a memory when what they are actually experiencing is a reinterpretation of a memory.<sup>48</sup> Young children may experience abuse but, because of their lack of knowledge, do not recognize it as an abusive experience at the time it occurs. In remembering it much later as an adult, they are able to reinterpret the experience and realize it was abuse. That is normal memory experience, and has nothing whatsoever to do with repression.

A study by John Doe 76C's expert Dalenberg<sup>49</sup> is informative of the serious problems with case studies. Dalenberg studied 17 women who were her patients, some of whom already had continuous memories of past abuse but also recovered some new memories of past abuse while they were in therapy. Their fathers were also interviewed and allegedly helped gather evidence to either support or refute their memories. Six raters evaluated the evidence of all parties. The conclusion was that about 75% of both the recovered and continuous memories were judged by the raters as very convincing or reasonably convincing. Since Dalenberg has not made her data available to other researchers, it is impossible to determine the integrity of this study.

A recently published study directly challenges the results of the Dalenberg study. Elke Geraerts and colleagues<sup>50</sup> studied 57 people who had allegedly recovered memories either in therapy or outside of therapy, and a group of 71 people with continuous memories of abuse. All of the subjects were systematically queried about possible corroborative evidence of the event. Later, two raters who did not know in which group the people belonged rated the evidence. The results showed that continuous memories and memories recovered outside of therapy had a higher

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<sup>48</sup> Clancy, S. & McNally, R. (2005-06).

<sup>49</sup> Dalenberg, C. (1996), Accuracy, timing and circumstances of disclosure in therapy of recovered and continuous memories of abuse. *Journal of Psychiatry & Law*, 24 (2), 229-75.

<sup>50</sup> Geraerts, E., Schooler, J.W., Merckelbach, H., Jelicic, M., Hauser, B.J.A., & Ambadar, Z. (2007), The reality of recovered memories: Corroborating continuous and discontinuous memories of childhood sexual abuse. *Psychological Science*, 18 (7), 564-68.

probability of being corroborated than those recovered in therapy. The corroboration rates found by Geraerts et al., however, were far lower than those claimed by Dalenberg. For the 16 people in the Geraerts' study who had recovered memories in therapy, no corroboration could be found, a startling contrast to the Dalenberg work.

2. The Body of Research on Memory Processes Does Not Support the Theory of “Repression.” No Scientific Study Has As Yet Documented Memory Loss of a Verified Event and Eliminated Other Plausible Explanations of Observation

Despite anecdotal claims of widespread occurrence of repression of childhood sexual abuse, comprehensive reviews<sup>51</sup> of the literature used to support the theory of repression reveal that, as yet, there is no experimental evidence to support the authenticity of such memories or event to confirm their very existence. David Holmes, Ph.D. Professor of Psychology at the University of Kansas, carefully examined studies offered as verification of the existence of repression in 1974 and again in 1990.<sup>52</sup> In the 1990 report, he concluded that, “[d]espite over sixty years of research involving numerous approaches by many thoughtful and clever investigators, at the present time there is no controlled laboratory evidence supporting the concept of repression.”<sup>53</sup>

In addition to anecdotal case reports, support for the theory of “repression” is most frequently drawn from three research studies (Herman and Schatzow, Briere and Conte, and Williams).<sup>54</sup> Although a casual reading of the studies may give the misleading impression there is

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<sup>51</sup> See, Frankel, F.H. (1993), 954-58; Holmes, D. (1990); Lindsay, D.S. and J.D. Read (1995), 846-908; Lindsay, D.S. and J.D. Read (1994), 281-338; Pope, H.G. and J.I. Hudson (1995), 121-26; Tillman, J.G., Nash, M.R., and Lerner, P.M. (1994), 395-414.

<sup>52</sup> Holmes, D. (1974), “Investigations of repression: Differential recall of material experimentally or naturally associated with ego threat,” *Psychological Bulletin*, 81, 632-53; Holmes, D. (1990).

<sup>53</sup> Holmes, D. (1990), concluded the evidence of repression most frequently offered by clinicians “consists of impressionistic case studies, and in view of the data concerning the reliability and validity of clinical judgments, those observations cannot be counted as anything more than unconfirmed clinical speculations—certainly not as ‘evidence’ for repression.” pp. 96-98.

<sup>54</sup> Herman, J.L. and E. Schatzow (1987), “Recovery and verification of memories of childhood sexual trauma,” *Psychoanalytic Psychology*, 4, 1-14; Briere, J. and J. Conte (1993), “Self-

scientific evidence to support the idea that complete repression of multiple abusive experiences extending over long periods is a common occurrence, when evaluated with even minimal scientific standards, the work does not support this position. For example, none of the studies take into account the fact that forgetting and non-reporting of significant life events occur for a variety of reasons unrelated to memory repression.<sup>55</sup> In spite of the fact that these studies have received strong negative reviews from the relevant scientific community,<sup>56</sup> misinterpretations of their limited findings have been cited over and over until they begin to carry the weight of accepted truth.

There is no reliable method to determine the accuracy of a “recovered repressed” memory by examining its content or characteristics. Clinical psychologist Michael Yapko points out that greater levels of certainty, emotionalism or detail about a memory do not necessarily indicate likelihood of accuracy.<sup>57</sup> This is the consensus of many of the country’s experts on memory, suggestibility and the treatment of abuse survivors.

Adults can have vivid memories, of which they are extremely confident, that are nevertheless wrong. Once those false memories have been established, they are not easily changed

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reported amnesia for abuse in adults molested as children,” *Journal of Traumatic Stress*, 6, 21-31; and Williams, L.M. (1994), 1167-76.

<sup>55</sup> See, Loftus, E. (1993); Pope, H.G. and Hudson, J.I. (1995).

<sup>56</sup> See, Crews, F. (1994), “The trauma-memory argument and recovered memory therapy,” in K. Pezdek and W.P. Banks (eds.), *The Recovered Memory/False Memory Debate*, San Diego: Academic Press; Kihlstrom, J.F. (1993), “The recovery of memory in the laboratory and clinic,” paper presented at the joint convention of the Rocky Mountain Psychological Association and the Western Psychological Association, Phoenix, Arizona, April 1993; Lindsay, D.S. and J.D. Read (1995); Loftus, E., Milo, E.M., and Paddock, J.R. (1995), “The accidental executioner: Why psychotherapy must be informed by science,” *The Counseling Psychologist*, 23 (2), 300-09; Loftus, E. and K. Ketcham (1994), *The Myth of Repressed Memory: False Memories, and Allegations of Sexual Abuse*, New York: St. Martin’s; Ofshe, R.J. and E. Watters (1994); Pope, H.G. and J.I. Hudson (1995); Tillman, J.G., et al. (1994).

<sup>57</sup> Yapko, M.D. (1994b). *Suggestions of Abuse: True and False Memories of Childhood Sexual Trauma*. New York: Simon & Schuster, pp. 160, 168.

by contrary evidence.<sup>58</sup> A person's level of confidence and conviction in a memory are not proof of its veracity.<sup>59</sup> Neither the clarity and volume of detail of a memory, nor its relative vagueness, are considered sufficient to judge its truthfulness;<sup>60</sup> nor is the inclusion of false or inconsistent statements considered conclusive proof of its falsity. Such inconsistencies, may, however, raise the problem of distinguishing which parts are true and which parts are false.

A jury charged with sorting through the testimony of a Plaintiff who claims repressed memory will not be assisted by even the best cross-examination, because even if Plaintiff's memories are false, he believes them with the same confidence as an accurate memory. If it is agreed that no expert, without external verification, can determine the verity of a repressed memory claim, how can a jury of lay persons be expected to reliably decide?

3. There Is No Reliable Internal Test to Determine the Accuracy of a "Recovered Repressed Memory," External Verification is Required.

Based on content analysis alone, it appears ill-advised to accept all "repressed memory" claims as historically accurate.<sup>61</sup> For example, "recovered memories" from early childhood have been specifically questioned because normal memory for very early childhood experiences is generally considered unavailable due to the immaturity of the child's brain. Most cognitive psychologists place the end of this "childhood amnesia" at between age two or four.<sup>62</sup> Children

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<sup>58</sup> Neisser, U. & Hersch, N. (1992). "Phantom flashbulbs: False recollections of hearing the news about the Challenger," in Winograd, E. and Neisser, U. (Eds), *Affect and Accuracy in Recall: Studies of Flashbulb Memories*. New York: Cambridge University Press, pp. 9-31.

<sup>59</sup> Loftus, E. and Ketcham, K. (1990), *Witness for the Defense: The Accused, the Eyewitness, and the Expert Who Puts Memory on Trial*, St. Martin's Press, New York, p. 208, note that, "When false memories are created by misinformation, the holders of these memories can describe these false creations in great detail and with great conviction."

<sup>60</sup> Yapko, M. (1994b), 80.

<sup>61</sup> See, Rogers, M.L. (1994), "Factors to consider in assessing complaints by adult litigants of childhood sexual abuse," *Behavioral Science and the Law*, 12, 279-98.

<sup>62</sup> See, Howe, M.L. and M.L. Courage (1993), "On resolving the enigma of infantile amnesia," *Psychological Bulletin*, 113, 305-26; Kihlstrom, J.F. and J. Harackiewicz (1982), "The earliest

slowly develop the ability to relate experiences in the form of autobiographical memory and store them in long-term memory.<sup>63</sup> Due to the immaturity of a child's neuro-development prior to age 7 or 8, a child may, especially over time, be unable to recall the origin of the memory of a given event. The child may have difficulty distinguishing recollection from something he or she imagined, dreamed, or had been told. Studies of this phenomenon, called "source amnesia" or "source monitoring" have shown that children and adults may confuse memories of actual childhood events with imagined childhood events especially as time goes on.<sup>64</sup>

Very few studies have sought objective corroboration of the object of recall; a necessary criteria if the images are to be considered "memories" of actual events. As Dr. John Kihlstrom<sup>65</sup> cautioned, "[I]ssues pertaining to corroboration, and the distinction between remembering abuse and believing that one was abused, should not be dismissed lightly."

### **C. APPLICATION OF THE EVIDENTIARY STANDARDS TO "REPRESSED MEMORY" THEORY**

As is clear from the Frye-Mack hearing transcripts and this brief, the theory of repressed memory is a hotly contested issue in the field of psychology. There is certainly no general acceptance of the repressed-memory theory. Despite decades of research and studies, the theory of repressed memory has yet to be proven. Without a valid test to prove its existence, the theory remains a divisive issue in the field of psychology.

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recollection: A new survey," *Journal of Personality*, 50, 134-48; Loftus, E. (1993); Nelson, K. (1993), "The psychological and social origins of autobiographical memory," *Psychological Science*, 4, 7-14.

<sup>63</sup> See, Kotre, J. (1995); *White Gloves: How We Create Ourselves through Memory*, New York: The Free Press.

<sup>64</sup> See, Lindsay, D.S. and J.D. Read (1994); for a review; Johnson, M.K., M.A. Foley, A.G. Suengas, and C.L. Raye (1988); "Phenomenal characteristics of memories for perceived and imagined autobiographical events," *Journal of Experimental Psychology: General*, 117, 371-76.

<sup>65</sup> Kihlstrom, J.F. and J. Harackiewicz, (1982).

The Minnesota Court of Appeals' conclusion that repressed-memory theory cannot be subjected to scientific testing is inaccurate. As explained above, repressed-memory theory can be adequately tested when all four criteria are met. Just because no scientific test has, as yet, sufficiently tested the theory of repressed-memory, does not mean that the Frye-Mack test should be disregarded.

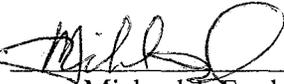
### CONCLUSION

When considering whether to admit scientific evidence and testimony, vigorous examination of the scientific validity of the theory upon which such evidence is based is critical in order to prevent the jury from being misled by unproven and unscientific methods. In summary, empirical data does not exist to support the assumed prevalence of repression as a common response to trauma, the mechanism by which repression is posited to operate, or even to verify the concept of repression itself. Furthermore, studies have shown that no intrinsic test exists that can determine the reliability of "recovered repressed memories." It has been well-documented that false memories can easily be implanted and are often accompanied by misleading affect and confidence. It is well accepted among professionals and professional organizations who have studied this issue that repressed memories of childhood sexual abuse should be subject to external verification.

After careful examination under either Frye-Mack or the "helpfulness" standard, the result is the same: the theory clearly fails to meet the criteria for admitting scientific evidence. To allow such evidence to proceed, in light of the serious consequences resulting from false allegations, contradicts public policy and compromises the integrity of our legal system.

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DATED: 10-26-11

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**CERTIFICATE OF COMPLIANCE WITH MINN. R. APP. 132.01**

The undersigned counsel for Amicus Curiae The False Memory Syndrome Foundation certifies That this Brief complies with the requirements of Minn. R. Civ. P. § 132.01 in that it is printed in proportionately spaced typeface utilizing Microsoft Word 2010 and contains 6,985 words, excluding Table of Contents and Table of Authorities.

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