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2017 10 2 - 5 PM 3: 44

**IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

**COMMONWEALTH OF THE
NORTHERN MARIANA ISLANDS,**

Plaintiff,

v.

**JOSEPH SEMAN EPINA,
DOB: 02/13/1974**

Defendant.

) **CRIMINAL CASE NO. 16-0040**
)
) **ORDER FOR PRETRIAL MEMORY**
) **TAINT EVIDENTIARY HEARING TO**
) **DETERMINE WHETHER THE**
) **ALLEGED CHILD VICTIM'S MEMORY**
) **REMAINS SUFFICIENTLY RELIABLE**
) **PURSUANT TO COMMONWEALTH**
) **RULE OF EVIDENCE 602 AFTER BEING**
) **SUBJECTED TO SUGGESTIVE AND**
) **COERCIVE INTERVIEW TECHNIQUES**

I. INTRODUCTION

This matter came before the Court on May 8, 2017 and August 30, 2017 in Courtroom 220A on the Defendant's Motion to Exclude Testimony of the alleged minor victim, V.R. The Defendant, Joseph Seman Epina, was present and represented by Assistant Public Defender Cindy Nesbit. The Commonwealth was represented by Assistant Attorney General Elizabeth Weintraub. On May 8, 2017 the Defendant called one witness, Dr. Wendy Bourg, who testified via Skype. The Commonwealth called no witnesses.

Based on a review of the filings, oral arguments, and applicable law, the Court makes the following order.

II. BACKGROUND

This matter stems from the Defendant's alleged sexual abuse of the minor V.R. on or about March 12, 2016. The Defendant is charged with sexual abuse of a minor in the first degree pursuant

1 to 6 CMC § 1306(a)(1); assault and battery pursuant to 6 CMC § 1202(a); and disturbing the peace
2 pursuant to 6 CMC § 3101(a).¹

3 The Defendant moves to exclude the testimony of V.R., the then-twelve-year-old alleged
4 victim. The Defendant argues that the questioning techniques used by the Commonwealth during
5 investigation interviews resulted in inaccurate reporting by V.R. and irreparably tainted her memory
6 of the events surrounding this case. The Defendant argues that V.R. was subjected to numerous
7 leading questions and improper interview techniques, which pressured V.R. to give the answer she
8 believed the interviewer wanted to hear rather than the truth and which in effect erased V.R.'s
9 independent memory. The Defendant also argues that the Department of Public Safety ("DPS")
10 unfairly prejudiced the Defendant when it failed to have established guidelines for interviewing
11 children and failed to document every interaction the alleged victim had with other persons, either
12 by video or audio recording, on the day of her spontaneous reporting.

13 The Commonwealth opposes the motion, arguing the Defendant failed to show that V.R.'s
14 testimony was in fact tainted and wholly unreliable or that any unfair prejudice exists. Without such
15 a showing, evidence should be presented to the jury as the triers of fact and assessors of credibility.

16 The Court heard expert testimony on May 8, 2017 on the subject of memory contamination
17 and regarding the investigation interview process used with V.R. in this case. Allegedly, V.R., the
18 then-twelve-year-old alleged victim, reported the alleged abuse to a teacher within three days of its
19 occurrence. The Division of Youth Services ("DYS") and DPS responded to V.R.'s school the day
20 the allegations were reported and interviewed V.R. at the school. V.R. was then taken for a medical
21 examination on the same day. No video or audio recordings were made of the investigation that
22 day; a DPS officer only took notes. In the DPS officer's notes of V.R.'s interview, the DPS officer

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24 ¹ Disturbing the peace, though a misdemeanor, will still be decided by the jury because, as of August, 22, 2017, when a jury is impaneled it decides all charges – including misdemeanor charges. PL 20-12.

1 listed several leading questions that were asked of V.R. V.R. corrected the assertions of several of
2 these leading questions. No evidence was presented to show that DPS failed to follow set
3 procedures during this interview or that such procedures for interviewing children exist within the
4 CNMI. The parties made final arguments on this motion on August 30, 2017.

5 At the May 8, 2017 hearing, the Defendant presented expert testimony from Dr. Wendy
6 Bourg, an expert in child psychology, memory science, and forensic interviewing, about memory
7 contamination/memory taint.² Dr. Bourg gave extensive testimony about how and when a child's
8 memory may become tainted. Memory contamination can result when a child alters his or her
9 answers to questions to conform to what the child believes the questioner wants to hear or when a
10 person of authority tells the child what to remember. When a child's memory is contaminated or
11 tainted, his or her memory of the events is altered and the child may not be able to identify the truth
12 from the altered memory. Dr. Bourg testified that certain methods of interviewing increase the
13 chances of a child's memory being tainted. These methods include the use of suggestive questions,
14 questioning done in a non-neutral environment, and questioning done by persons of authority.
15 According to Dr. Bourg, when interviewing children the best practice to avoid memory
16 contamination is to hold the interview in a child-friendly, neutral environment; to record or
17 document the interview verbatim; to establish ground rules, such as letting the child know he or she
18 can correct the interviewer and asking the child to tell the truth; and to ask non-suggestive/non-
19 leading questions. Failure to follow the suggested best practices also increases the likelihood of
20 memory contamination.

21 Dr. Bourg also testified that certain factors decrease the likelihood of memory taint. As a
22 child increases in age the risk of memory contamination decreases. Very young children are highly
23 susceptible to memory contamination, but by age twelve children are almost as resistant to memory

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² For the purposes of this order, the Court uses memory contamination and memory taint interchangeably.

1 contamination as adults. Also, memories begin to fade after weeks, making contamination easier, so
2 the shorter the time between a child's report of the event and the event itself, the more resistant the
3 child is to memory contamination. Spontaneous or unprompted statements are also less likely to be
4 tainted than those made in response to leading questions. Dr. Bourg testified that she could not say
5 whether V.R.'s memory was in fact tainted, but could say that the circumstances which lead to
6 memory contamination were present in this case.

7 **III. LEGAL STANDARD**

8 Under the Commonwealth Rules of Evidence, generally, "[e]very person is competent to be
9 a witness unless [the Commonwealth Rules of Evidence] provide otherwise." NMI R. Evid. 601.
10 However, Commonwealth Rule of Evidence 602 (hereafter "Rule 602") provides:

11 A witness may not testify to a matter unless evidence is introduced sufficient to
12 support a finding that the witness has personal knowledge of the matter. Evidence
13 to prove personal knowledge may, but need not, consist of the witness' own
14 testimony. This rule is subject to the provisions of Rule 703, relating to opinion
15 testimony by expert witnesses.

16 Courts must decide preliminary questions regarding the admissibility of evidence and
17 conduct hearings on preliminary questions outside the presence of the jury when the defendant in a
18 criminal case requests or when justice requires. NMI R. Evid. 104 (a), (c) (hereafter "Rule 104").

19 **IV. DISCUSSION**

20 Issues of alleged memory taint are a matter of first impression within the CNMI.
21 Accordingly, to properly rule on the Defendant's motion, the Court must determine (a) what
22 "memory taint" is; (b) whether, and in what circumstances, a specific inquiry into alleged memory
23 taint and its effects upon the child's memory is appropriate; (c) whether any evidence shows
24 memory taint is at issue in this case; and (d) if inquiry is appropriate, what method of inquiry into
the issue of memory taint should be used.

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1 A. *Contaminated Memory/Memory Taint: Definition*

2 Memory taint is the implanting of false or distorted memories into a person by interview
3 techniques which are so unduly suggestive and/or coercive that they infect the memory of the
4 person. *Commonwealth v. Delbridge*, 578 Pa. 641, 655 (2003) (citing Julie Jablonski, *Assessing the*
5 *Future of Taint Hearings*, 33 Suff. J. Trial & App. Adv., 49, 50 (1998)). Effectively, these tactics
6 may either diminish the credibility of the witness or contaminate the witness' memory to such an
7 extent that the witness no longer has personal knowledge of the events in question. *Compare State*
8 *of Montana v. Gardener*, 2003 MT 338, 442 (2003) ("Whether the interview techniques were
9 flawed or improper goes to the weight and not the admissibility of the statements."), *with State v.*
10 *Huss*, 506 N.W.2d 290 (Minn. 1993) (holding that the child lacked a present memory to testify after
11 suggestive interviews with a therapist). With this understanding of what memory taint is and how it
12 affects the testimony of witnesses, the Court turns to how to properly address concerns of memory
13 taint.

14 B. *Addressing Memory Taint Issues in the CNMI*

15 The Defendant argues that when addressing issues of alleged memory taint, the Court
16 should follow the practice of an increasing number of jurisdictions that require a special memory
17 taint hearing. The Commonwealth contends that no special inquiry is needed because the existing
18 procedures under the rules of evidence, such as competency hearings and credibility objections,
19 properly address any concerns surrounding the child's memory.

20 Since issues of alleged memory taint are a matter of first impression within the CNMI, the
21 Court looks to what has become common law and/or the persuasive case law of the CNMI and
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1 other jurisdictions. 7 CMC § 3401.³ Looking to other jurisdictions, there is a split among courts on
2 the handling of allegations of memory taint.

3 A few jurisdictions expressly reject specific inquiry into memory taint, holding that issues
4 surrounding a child's memory are adequately addressed by normal procedures for competency
5 hearings and objections to credibility. *Delbridge*, 578 Pa. at 655-664 (2003) (highlighting that three
6 jurisdictions have implicitly or explicitly rejected the idea of exploring memory taint) (citing cases
7 from Alaska, Kentucky, and Ohio). The Commonwealth asks the court to follow these jurisdictions.

8 However, an increasing number of jurisdictions not only inquire specifically into the issue
9 of alleged memory taint, but do so in pretrial hearings. *See, e.g., State v. Michaels*, 136 N.J. 299,
10 320-321 (N.J. 1994) (pretrial taint hearing ordered to determine whether the child's memory
11 remains sufficiently reliable after the child is subjected to suggestive or coercive interrogation
12 tactics); *Delbridge*, 578 Pa. at 655-664 (trial court must determine if a child has an independent
13 memory of the actual event at a pretrial competency hearing).⁴ The Defendant asks the Court to
14 follow these jurisdictions.

15 Underlying the decision to inquire into the issue of memory taint before trial is the
16 recognition that young children are particularly susceptible to suggestive interview techniques, and
17 that the use of such techniques can undermine the reliability of a child's account of actual events.

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³ "In all proceedings, the rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed as generally understood and applied in the United States, shall be the rules of decision in the courts of the Commonwealth, in the absence of written law or local customary law to the contrary; provided, that no person shall be subject to criminal prosecution except under the written law of the Commonwealth." 7 CMC § 3401.

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⁴ *See generally, English v. State*, 982 P.2d 139 (Wyo. 1999) (pretrial competency hearing used to determine if child possessed an independent recollection); *Fischbach v. State*, No. 245, 1995, 1996 LEXIS 80 (Del. Mar. 15, 1996) (suggestive interview of a sexual assault victim may cause victim's memory to be irreparably tainted); *People v. Michael M.*, 618 N.Y.S. 2d 171 (N.Y. 1994) (memory taint should be explored at competency hearing); *Felix v. State*, 849 P.2d 220 (Nev. 1993) (reversible error for trial court to fail to determine if child's memory was unreliable due to memory contamination); *State v. Superior Court, Pima County*, 149 Ariz. 397, 403 (Ariz. Ct. App. 1986) (case remanded for hearing on reliability of child's statements).

1 *State v. Kirschbaum*, 535 N.W.2d 462, 466 (Wis. App. Ct. 1995).⁵ The concern is that persons
2 conducting interviews with the child will, either inadvertently or purposefully, suggest facts and
3 promote fantasies the child will later “remember” and testify to as the truth. *Id.* at 466 (citing John
4 R. Christiansen, *The Testimony of Child Witnesses: Fact, Fantasy, and the Influence of Pretrial*
5 *Interviews*, 62 Wash. L. Rev. 705, 707 (1987)). This concern is supported by a wide consensus
6 among experts, scholars, and practitioners who have studied the issue. *See* Ashish S. Joshi, *Feature:*
7 *Taint Hearing: Scientific and Legal Underpinnings*, 34 *The Champion* 36, 36-38 (2010).

8 The bulk of persuasive authority, then, illustrates the need for specific inquiry into the issue
9 of memory taint. This inquiry focuses on whether a child’s memory has been so irreparably tainted
10 by suggestive or coercive interview tactics that the child has lost independent recollection of the
11 events, which is a prerequisite to testify under Rule 602. This inquiry need not be made in every
12 case, but is appropriate when a defendant makes an initial showing of some evidence that the child
13 has been subjected to suggestive or coercive interview tactics.

14 In this case, then, the Court must determine whether the Defendant has made an initial
15 showing that V.R.’s memory has been subjected to suggestive or coercive interview tactics that may
16 have tainted her memory.

17 *C. Initial Showing of Memory Taint in this Case*

18 The Defendant argues the alleged victim, V.R., was subjected to unduly suggestive interview
19 techniques that irreparably tainted V.R.’s independent recollection of events. The Commonwealth
20 argues V.R.’s memory has not been tainted, so no issue of memory taint exists in this case.

21 Memory taint occurs when a person is subjected to interview techniques which are so
22 suggestive and/or coercive that they infect that person’s memory and replace the existing memory.

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24 ⁵ *See also, e.g., Idaho v. Wright*, 497 U.S. 805, 812-813 (1990); *Maryland v. Craig*, 497 U.S. 836, 868 (1990) (Scalia, J., dissenting); *People v. Michael M.*, 618 N.Y.S.2d 171, 177 (N.Y.Sup.Ct.1994); *Territory of Guam v. McGravey*, 14 F.3d 1344, 1348-1349 (9th Cir.1994).

1 See *Delbridge*, 578 Pa. at 655 (citing Julie Jablonski, *Assessing the Future of Taint Hearings*, 33
2 Suff. J. Trial & App. Adv., 49, 50 (1998)). The Defendant's expert in child psychology, memory
3 science, and forensic interviewing, Dr. Bourg, testified that the use of leading questions,
4 questioning done in a non-neutral environment, like a school, failure to establish ground rules for
5 the interview with the child, failure to document answers verbatim, or questioning done by persons
6 of authority increase the risk that a child's memory could become tainted.

7 Here, Dr. Bourg testified that a DPS officer, who is a person of authority, questioned the
8 alleged child victim, which increases the risk of memory taint. The DPS officer also used leading
9 questions when interviewing V.R., failed to establish ground rules for the interview, and failed to
10 record her answers verbatim; again, increasing the risk of memory taint. Moreover, this interview
11 took place at V.R.'s school, which is not a neutral environment and further increased the risk of
12 memory taint. Though Dr. Bourg could not say whether V.R.'s memory was in fact tainted, she did
13 testify that the circumstances which lead to memory taint were present in this case.

14 Through Dr. Bourg's testimony,⁶ then, the Defendant has provided an initial showing that
15 V.R.'s testimony may be the product of suggestive and coercive interview techniques and may have
16 been tainted by these suggestive and coercive interview techniques. While the Commonwealth
17 points to certain factors that may decrease the likelihood of memory taint, the Commonwealth has
18 not firmly established that V.R.'s memory remains untainted.⁷ Memory taint therefore is at issue in
19 this case and the Court must make specific inquiry into the issue to determine whether the
20 testimony is admissible under Rule 602. The question now becomes what form this specific inquiry
21 should take.

22 ⁶ Dr. Bourg's testimony was beneficial for this case, as it was a matter of first impression within the CNMI. However,
23 the Court clarifies that expert testimony is not always necessary for a defendant to make an initial showing that a child's
statements may be the product of suggestive or coercive interview techniques.

24 ⁷ The Court notes that Dr. Bourg relied solely on the reports of other persons and no factual witnesses with first-hand
knowledge of the events has testified on this matter—leaving the Court unable to make a factual determination of
whether memory contamination has in fact taken place and irreparably tainted V.R.'s memory.

1 D. *Method of Inquiry: Considering the Need for Specific Inquiry into the Issue, the Timing of*
2 *the Inquiry, and the Appropriate Burden of Proof – Preponderance of the Evidence*

3 The Defendant argues for a *Michaels* hearing, which not only inquires into memory taint or
4 contamination, but shifts the burden to the government to show by clear and convincing evidence⁸
5 that the witness' memory remains sufficiently reliable for testimony before the jury. *Michaels*, 136
6 N.J. at 306-307. In a *Michaels* hearing, the government and defendant are each permitted to present
7 expert testimony with regard to suggestiveness or coerciveness of the interview and investigative
8 procedures and the government may introduce other independent indicia of reliability for the child's
9 testimony. *Id.* at 321-322. The Commonwealth counters that normal competency procedures
10 adequately address the issue, citing *People v. Michael M.*, 618 N.Y.S. 2d 171 (Sup. Ct. 1994). The
11 Court looks to the existing procedures of the CNMI to determine what procedures should be used
12 for the issue of memory taint.

13 Under Commonwealth Rule of Evidence 602, the proponent of the witness must establish
14 that the proposed witness has personal knowledge. Further, the Commonwealth Rules of Evidence
15 provide for preliminary issues of admissibility to be determined outside the presence of the jury
16 when requested by a criminal defendant or when justice requires. NMI R. Evid. 104.

17 Under the Commonwealth Rules of Evidence, the Commonwealth bears the burden to
18 establish that V.R. retains sufficient personal knowledge to testify. While this issue may be
19 addressed at a competency hearing, in a typical competency hearing the child is subjected to brief
20 questioning at trial, outside the presence of the jury, the Court and counsels *voir dire* the child, and
21 no other witnesses are called to testify on the issue. Such a *voir dire*-like questioning is problematic
22 for issues of memory taint because a person whose memory has been irreparably tainted may not

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24 ⁸ The burden to prove by clear and convincing evidence is higher than that of a preponderance of the evidence, but lower than beyond a reasonable doubt. *In Re Woodruff*, Civ. No. 13-0017 (NMI Super. Ct. Oct. 2, 2013) (Order Re. Contempt at 1) (citation omitted).

1 even realize his or her memory has been tainted. In addition, a typical child competency *voir dire* is
2 used to determine if the child understands the proceedings, not whether the child's memory is
3 tainted. This demonstrates that a typical child competency hearing does not adequately inquire into
4 the issue of memory taint.

5 Moreover, since a child whose memory has been tainted may not realize his or her memory
6 has been altered, questioning of the child alone would not uncover whether that child's memory
7 was irreparably tainted; as seen in many other jurisdictions, additional witnesses or other sources of
8 independent indicia of reliability are often necessary to resolve the issue. Permitting additional
9 witnesses on the issue is supported by the fact that, despite the normal bar to expert testimony about
10 a witness' credibility, many jurisdictions find expert testimony not only permissible on the issue,
11 but sometimes vital. *See, e.g., Michaels*, 136 N.J. at 321 ("Experts may thus be called to aid the jury
12 by explaining the coercive or suggestive propensities of the interviewing techniques employed");
13 *State v. Malarney*, 617 So.2d 739, 740 (Fla.Dist.Ct.App.1993) (reversible error to exclude
14 defendant's expert psychological testimony on unreasonably suggestive interviewing techniques
15 used with victim).⁹ Therefore, a normal competency hearing is insufficient for inquiry into issues of
16 memory taint.

17 However, to set a higher burden of proof upon the Commonwealth, one of clear and
18 convincing evidence, as is done in a *Michaels* hearing is not supported for the following reasons:

19 First, the threshold to exclude material witnesses is high, usually requiring a showing of
20 prejudice to the defendant that is tantamount to deprivation of a fair trial. *Commonwealth v.*

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22 ⁹ *See also, Michael M.*, 618 N.Y.S.2d at 177 ("In recognition of a child's suggestibility, many courts have allowed the
23 admission of expert testimony at trial on the effects of suggestive questioning"); *McGravey*, 14 F.3d at 1348-49
24 (although concluding that a jury instruction on the suggestibility of children was not required, recognized that
"[defendant] also could have, but did not, present expert testimony on the issue of ... the susceptibility of children to
suggestion"); *People v. Diefenderfer*, 784 P.2d 741, 753 (Colo.1989); *Timmons v. State*, 584 N.E.2d 1108, 1112-13
(Ind.1992); *State v. Erickson*, 454 N.W.2d 624, 626 (Minn.Ct.App.1990); *State v. Floody*, 481 N.W.2d 242, 248
(S.D.1992); *United States v. Geiss*, 30 M.J. 678, 681 (A.F.C.M.R.1990).

1 *Taitano*, 2017 MP 19 ¶ 50. This weighs against putting the higher burden of clear and convincing
2 evidence upon the Commonwealth as it relates to the testimony of an alleged victim, who is a
3 material witness and often the only factual witness.

4 Further, at its heart, a motion to exclude testimony of an alleged victim is more akin to a
5 motion to suppress—thus, the evidentiary hearing on memory taint is more similar to a suppression
6 hearing. In a typical motion to suppress evidence, a defendant makes an initial showing that the
7 evidence should not be admitted¹⁰ and the government must then show by a preponderance that the
8 evidence is still admissible.¹¹ This also weighs against using a clear and convincing evidence
9 standard in a memory taint evidentiary hearing.

10 According to CNMI precedent, as discussed above, the appropriate standard for motions to
11 exclude on the basis of memory taint is for the burden to be first on a defendant to make an initial
12 showing of memory taint. If a defendant is able to make this initial showing, the burden then shifts
13 to the government to show by a preponderance of evidence that the witness retains sufficient
14 personal knowledge.¹²

15 Further, as the Commonwealth Rules of Evidence (except that of privilege) are relaxed at
16 evidentiary hearings on the admissibility of evidence, the memory taint evidentiary hearing should
17 be done outside the presence of the jury. *See* NMI R. Evid. 104(a). Accordingly, a separate hearing,
18 outside the presence of the jury, is appropriate because inquiry into issues of memory taint may

19 ¹⁰ *See, e.g., Commonwealth v. Keleleman*, Crim. No. 14-0069 (NMI Super. Ct. Sept. 2, 2014) (Supplemental Order
20 Requiring Def. to File a Rule 8(a)(1) Affidavit at 2) (finding “a defendant who files a motion to suppress ‘bears the
burden of coming forward with at least an offer of proof or some minimal showing that his motion to suppress has some
factual basis’”) (Presiding Judge Naraja).

21 ¹¹ *See e.g., Commonwealth v. Cabrera*, 4 NMI 240, 253 (1995) (in motion to suppress a defendant’s statement the
22 government bears the burden to show a confession is voluntary or that a waiver was made voluntarily); *Commonwealth*
v. Castro, Crim. No. 10-0080 (NMI Super Ct. Sept. 3, 2010) (Order Granting Defs.’ Mot. to Suppress Evidence at 4)
(government bears burden to show evidence should not be suppressed because the search was within the open fields
doctrine) (citing *United States v. Johnson*, 256 F.3d 895, 901 (9th Cir. 2001)).

23 ¹² Analogous to a suppression hearing in which a defendant makes the motion to suppress, but the government has the
24 burden to show, typically by calling witnesses in an evidentiary hearing, that the defendant’s Constitutional rights were
not violated and the evidence should not be suppressed.

1 include the testimony of additional witnesses who may not necessarily be called as witnesses in the
2 case-in-chief¹³ and the evidentiary hearing may take an extended period of time.

3 To summarize, proper inquiry into the issue of memory taint in the CNMI requires more
4 than a typical competency hearing, but less than a *Michaels*¹⁴ hearing:

5 First, the defendant must make an initial showing that the witness' testimony may be the
6 result of suggestive or coercive interview techniques.

7 Second, if the defendant makes this showing, the Court shall hold an evidentiary hearing
8 under Rule 104 on the issue of memory taint to determine whether the witness retains personal
9 knowledge of the events.¹⁵ This memory taint evidentiary hearing should be held outside the
10 presence of the jury, the Commonwealth Rules of Evidence are relaxed, and may include calling
11 additional witnesses and presenting independent indicia of reliability.¹⁶

12 At the memory taint evidentiary hearing, the Commonwealth bears the burden to prove by a
13 preponderance of evidence that, notwithstanding allegations of exposure to suggestive and coercive
14 interview techniques, the witness retains personal knowledge of the events in question as required
15 by Rule 602.

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19 ¹³ For example, the memory taint evidentiary hearing may include testimony of a teacher, social worker, police officer,
20 or nurse who knew nothing of the facts underlying the case, but who observed the allegedly suggestive or coercive
interview in question or the alleged victim's interactions with other adults on the day of the interview.

21 ¹⁴ In a *Michaels* hearing, the government has the burden to show by clear and convincing evidence that the witness'
memory remains sufficiently reliable for testimony before the jury. *Michaels*, 136 N.J. at 306-307.

22 ¹⁵ The truth-seeking function of the court is "best served when factfinders [sic] rely on evidence introduced under oath."
Domingo v. Celis, 2016 MP 18 ¶ 12 (citing *Inos v. Inos*, 2015 MP 5 ¶ 10). Moreover, attorneys' arguments and
23 statements are not evidence. *Id.* The Court notes that Dr. Bourg relied solely on the reports of other persons and no
factual witnesses with first-hand knowledge of the events has testified on this matter—leaving the Court unable to
properly determine if memory contamination has in fact taken place and irreparably tainted V.R.'s memory.

24 ¹⁶ The Court notes that the exact timing of such an evidentiary hearing must be made on a case-by-case basis,
depending on a variety of considerations.

1 The Court therefore orders an evidentiary hearing on the issue of memory taint be held
2 pretrial in this case.¹⁷ At this hearing, the Commonwealth has the burden to show by a
3 preponderance of the evidence that V.R. retains sufficient personal knowledge to satisfy
4 Commonwealth Rule of Evidence 602 and be able to testify about the events.

5 **V. CONCLUSION**

6 For the reasons stated above, the Defendant's motion to exclude the testimony of V.R.
7 requires a pretrial memory taint evidentiary hearing to determine whether the alleged child victim's
8 memory remains sufficiently reliable under Commonwealth Rule of Evidence 602 after being
9 subjected to suggestive and coercive interview techniques.¹⁸

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11 **IT IS SO ORDERED** this 5th day of March, 2018.

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14 **JOSEPH N. CAMACHO, Associate Judge**

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23 ¹⁷ "A judge has broad discretion in determining whether to hold an evidentiary hearing." *Commonwealth v. Castro*,
2017 MP 20 ¶ 11 (citations and footnotes omitted).

24 ¹⁸ The Court will issue a separate order setting the evidentiary hearing schedule.