

ILLEGAL PROCEDURE

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A CRIMINAL DEFENSE ATTORNEY'S VIEW OF FALSE CHILD SEXUAL ASSAULT ALLEGATIONS

By Paul G. Stuckle

"Our Prisons Are Full of Innocent Persons"

THE SPECIAL NATURE OF SEXUAL ASSAULT ALLEGATIONS

Public hysteria regarding child molestation has changed the rules of the criminal justice system. Child physical and sexual abuse cases must be defended in an entirely different manner than the normal criminal case. In theory the constitutional rights of the defendant are still in place, however in reality those rights do not apply. The truth is: *The accused is presumed to be guilty.*

There is merely an appearance of constitutional rights for the accused in a child abuse case. The judge will still inform the jury that it must presume the defendant to be innocent and require the state to prove guilt beyond a reasonable doubt. However in reality, once a false allegation is made, the defendant must both prove himself innocent and that something "did not happen".

Our criminal justice system states that if the jury has a "reasonable doubt" then it must find the defendant "not guilty". This theory simply does not apply to child sexual assault cases. The jury must be convinced they are not letting a child molester off and back into the community. *The jury must absolutely believe in the innocence of the defendant.* The state does not have to prove guilt, but simply make the accusation. Once the accusation is made, the defendant must prove innocence beyond a reasonable doubt. Failing that, the jury will not take a chance the defendant may be a child molester, and will convict.

How Did We Come to This?

The media, legislature and the "child saving industry" has created a national child molestation hysteria. Through their well funded efforts, the general public is convinced a child molester lurks behind every tree, waiting for the golden opportunity to snatch a child. In addition, not satisfied with just terrifying the public, these forces have created a perception that child abuse is rampantly occurring behind the closed doors of our neighbors and friends.

Many politicians seek and maintain their positions by running campaigns aimed at the voter's emotional desire to protect children. An effective way to follow this campaign promise is to enact laws that eliminate basic rights of criminal defendants charged with any form of child abuse.

ELIMINATION OF CONSTITUTIONAL RIGHTS

Prosecutors and the child saving industry have convinced the legislature that merely creating hysteria is not enough to insure conviction for those accused. In addition, rights originally created in our constitution to protect the criminal defendants must be eliminated.

All across our nation, state legislatures have supported child advocacy special interest groups. *The following illustrates how constitutional rights have been taken away in child sexual assault trials:*

1. No Right to Confront Your Accuser:

Criminal law codes have been rewritten to where in many cases, the child accuser does not have to appear in court and face the accused. Instead, the state can offer the child's testimony through a video tape made by agents of the prosecution.

2. "Hearsay Evidence":

"Hearsay" evidence is when a witness testifies about something they do not personally know, but were told by someone else. Hearsay is considered unreliable and is normally inadmissible as evidence against an accused. In child abuse cases however, hearsay evidence is admitted as evidence of guilt. A so called "outcry" witness can testify as to what a child supposedly said to them regarding the alleged abuse.

3. "Syndrome Evidence" Is Admissible Against the Accused:

In most states, the prosecution can have an expert witness testify that the child is suffering from "Child Sexual Abuse Accommodation Syndrome"(CSAAS). This psychological "mumble jumble" is an unscientific theory of supposed traits of abused children. The psychologist who came up with this syndrome many years ago has since indicated that this theory is not reliable evidence in a court of law. Prosecutors do not care! This junk science makes its appearance in courtrooms across the country daily.

With syndrome evidence, the state replaces its lack of real proof with speculation. CSAAS theorizes that because an alleged victim is supposedly demonstrating certain behavioral patterns that he / she must have actually been abused. Unfortunately, a big problem with this and other syndromes is that the character traits offered to show abuse are also common for non-abused children. If the child has been crying, he / she must have been abused. If the child has nightmares, he / she must have been abused. If the child is withdrawn, he /she must have been abused. If the child is outgoing, he /she must have been abused. If the child is happy around the accused, its because the child enjoyed the abuse. The list of factors goes on forever. But to a jury, when an expert witness is connecting typical childhood behavior with indicators of abuse, the testimony is extremely damaging to the falsely accused.

4. Convictions Without Physical Evidence:

Our prisons are full of persons who have been convicted of child molestation without any physical evidence ever introduced against them at trial. In other words, the typical evidence in which the state offers to convict a defendant, such as body fluids, blood, semen, hair, DNA, are not introduced at trial to link the accused to a crime.

Medical nurses and employees whose livelihoods depend upon their contracts with child advocacy centers will give opinions that a child was abused. Failure to give the right opinion will mean the contract is not renewed. These opinions from medical “experts” will say the findings are “consistent with” sexual abuse. Of course, “consistent with” is not a true medical diagnosis. This testimony, as demonstrated by a competent defense attorney will reveal the findings given as “consistent with abuse” are just as “inconsistent with abuse”.

Instead of physical and medical evidence, the falsely accused are convicted upon theories, inferences, and speculation. Prosecutors secure convictions by manipulating the juries fear of releasing a child molester back into the community. This fear will be combined with hearsay, expert witness “syndrome evidence”, misleading medical testimony, and the biased opinions of child advocacy investigators. To support this speculation, a biased child protective services caseworker will produce a video taped interview of the child. This biased interviewer will use leading, suggestive, and coached questions to easily obtain an “admission” from a child. Many times the child does not make a statement that abuse occurred, but merely agrees with the adult authority figure who informs the child of the abuse.

After an outcry, it is easy to find witnesses who can place the accused in circumstances in which he was alone with the alleged victim.

5. Independent Facts Which Lead To An Allegation:

The situations that create false allegations depending upon circumstances, for example:

- A. False allegations have been made by mothers who desire to gain the upper hand in a custody battle.
- B. Teen age children have alleged abuse to get the disciplinarian father out of the house.
- C. School age children will fabricate abuse after observing "Good Touch, Bad Touch" type films at school.
- D. Children know more about sex than our society is willing to recognize. They are bombarded with sexual overtones through the movies, magazines and advertisements.
- E. Some children make false allegations for attention.
- F. Some children make false allegations after hearing about real sexual abuses that have occurred to friends or classmates.

Summary : Recipe for conviction:

1. "Outcry" from a child, interpreted as abuse;
2. Reporting of the outcry by a person required by law to report any suspicion of child abuse, or someone with a hidden agenda or motive;
3. A biased investigation by employees of the child saving industry;
4. A biased medical report by a "nurse" contracted by the child saving industry;
5. Syndrome evidence from an "expert" witness;
6. Circumstantial evidence of the accused's opportunity to be alone with the child.
7. Motive or other variables leading to an accusation.

TYPICAL WRONG REACTION BY THE FALSELY ACCUSED

What should you do once an allegation has been made?

"I'm innocent. This is crazy. If I talk to them and explain it will go away." This is the initial feeling of the wrongfully accused. They have done nothing wrong and therefore there should be no adverse consequences. Those in authority will quickly recognize their innocence, the mistake, the overreaction, and it will all go away.

For the self proclaimed child savers though, no mistakes are ever made. "Of course the accused will deny it. Who among us would admit to being a child molester? Children do not lie. Adults lie. Molesters lie. You are lying." This is the mind-set of those who will prosecute you. Child protective services caseworkers and prosecutors believe the case is over once the child makes an outcry of abuse and that outcry is subsequently substantiated during the videotaped interview. No other evidence is necessary for them to submit the case to a grand jury. No physical evidence of abuse. No medical evidence of abuse. Nothing.

Now they may try to get such evidence. However, in their minds a failure to obtain it does not undermine their conviction that abuse has occurred. Hymen still intact? Well the hymen does not have to be broken in order for abuse to occur, or for digital penetration. Lack of semen? Well, of course, this offense occurred over the course of years and the child did not make an outcry immediately after the incident. Lack of substantiating witnesses? No matter, molesters work behind closed doors, in private, when no one else is around to witness. Lack of criminal record for the accused? The accused is a child molester, he is interested in secretly abusing children, not in committing adult crimes. Has the accused pass a polygraph test? Those are not admissible because a savvy adult can manipulate such tests.

Rule No. 1: Nothing an accused can say or do will convince a child saver (Child Protective Service, child advocacy prosecutor, police investigator) that the abuse did not occur. NOTHING!

Rule No. 2: Talking to Child Protective Services or the police investigator, or anyone without an attorney present is the single worst thing a wrongfully accused person can do.

Rule No. 3: In most cases an experienced attorney will not allow you to talk to Child Protective Services or the police or give a statement. The attorney knows whatever you say will be used against you.

The violation of the above three rules by those falsely accused is commonplace. An innocent person believes sanity will intervene at some point, and decides to cooperate fully with the police and Child Protective Services. The accused gives written statements and videotaped statements to CPS and the police. In addition, the accused talk on the phone to detectives and caseworkers. They talk in the investigators offices without knowing whether they are being recorded. They often talk themselves into a corner that is extremely difficult to ever get out of.

Unfortunately, Child Protective Services and the police are not interested in conducting a fair and thorough investigation. The accused who walks into the child advocacy center without an experienced attorney to “tell their side of things” or “clear this all up” is doing exactly what the authorities want. The child savers know what they are doing. At this meeting they will obtain real or implied admissions and circumstances presenting opportunity for abuse coming from the accused’s own mouth.

The Child Protective Service investigator will start off by asking questions that appear to be innocuous but are intentional set up questions. The investigator may ask an alleged perpetrator if they have ever given their child a bath or changed a diaper. The accused will answer “Yes” as that is a normal parental function. Then the investigator will move in for the kill. The next questions will focus on other instances in which the alleged perpetrator has touched the genital areas of the child. For example, the investigator may ask if you have ever touched your child’s bottom or genital area. If the accused says “No”, the next question will be whether you have ever wiped your child’s bottom after changing a diaper. This will be followed by whether you have ever applied medicine or a lotion for diaper rash. After the accused says “Yes”, the investigator will become more aggressive. “Are you now are admitting to touching your child’s genital area?”. The accused, knowing that any contact was done without sexual intent and solely for personal hygiene reasons is confused. The accused may say, “No, not in the manner that you are describing”. The investigator will follow up by saying, “ Are you now denying touching your child’s genital area?” The follow up questions will be to establish opportunity for abuse, such as: “Are you ever alone with your child? Have you given baths while alone with the child? “ Applied medication to your child without any one else around ? What about the date of the allegation, isn’t it true that you were alone with your child at that time?”

The falsely accused now will face an official investigative report which will read like this:

‘Alleged perpetrator at first denied any sexual contact with child, but then after questioning admitted such contact. When this inconsistency was pointed out by the investigator, the perpetrator attempted to limit admission of contact by stating that same was done “only while giving baths and applying medications”. Investigator finds alleged perpetrators answers to be inconsistent, evasive, and untruthful.’

A knowledgeable attorney can provide the accused with an appearance of cooperation with authorities without providing evidence against yourself. **The investigators cannot twist your words and dictate their interpretation of what you said if you have not talked to them!!** The attorney can assist you in making the decision of whether to meet with child protective services or the police. In most situations, the attorney knows that the arrest and charge decision has already been made and that a meeting will not change the forthcoming prosecution.

Finding the Right Criminal Defense Attorney

Very few attorneys specialize in fighting false allegations. Many lawyers represent clients with child abuse and child sexual assault charges. These lawyers will handle such cases in addition to a general criminal defense practice. Child Sexual Assault cases are different than the typical criminal charge and must be handled differently !

The falsely accused must have an attorney that does more than mere representation. The attorney must actually defend the falsely accused. Incredibly, many times an attorney will take the case and concern themselves with a disposition that meets with the satisfaction of the prosecution and judge. ***The prosecutor and judge are the enemy in child abuse cases!***

Consider the following in hiring the right attorney:

1. Length of Practice and Experience.

A false allegation case can only be defended successfully by an attorney with significant trial experience and specifically with child sexual assault cases. The falsely accused are not in a position to have inexperienced counsel.

Unfortunately, the police, Child Protective Services, and the public will consider you to be guilty. For the falsely accused it is important to act immediately. ***The falsely accused must prove their innocence !*** An attorney who does not begin an all out defense at the very beginning is wasting valuable time and compromising your future.

It is a false allegation. This needs to be vocalized and acted upon. The charge is false. The allegations are untrue. Scream it until someone hears. And if your attorney does not hear, then fire him/her and hire someone else.

There is no “home field advantage” in sexual assault cases. Do not shy away from a good attorney who is located in a different county from where you are being charged. Judges do not get re-elected if the public views them as being soft on a child sexual assault charge. It makes no difference how well a local attorney knows the judge, that will not be of any assistance with this type of charge. An “outsider” who does not care about making the judge or prosecutor happy, but just wants to defend you and win is much better than a local name.

Your attorney does not have to be board certified in criminal law. Board certification usually means that the attorney practices criminal law in general. For a child abuse or child sexual assault allegation, the best is an attorney who specializes primarily in those cases to the exclusion of other cases.

2. Reject Plea Bargains.

A false allegation of child sexual assault must be beaten through either a dismissal or an acquittal (not guilty finding) at trial. There is no victory in a plea bargain with these cases. The innocent persons life will be destroyed by pleading guilty. At no time in dealing with a false allegation should there ever be an admission of guilt. A plea bargain may seem an easy way out, but it will ruin the life of the falsely accused forever.

Deferred Adjudication, successfully served will not result in a conviction for the defendant. However, the lack of a formal conviction really is meaningless. Whether the accused receives deferred, straight probation, or is released on parole, he will still have to register as a sex offender. Registration is by nature, public, and will result in the nature of the charges being made known to anyone. Registration results in the loss of employment and the inability to secure future meaningful employment.

Community Supervision for sex offenders also requires sex offender treatment courses. In these courses the offender is required to admit that not only the actual charge is true, but also any additional charges or allegations made in police or Child Protective Service reports are true. It matters not that the charge is exaggerated, untrue, or only partially true. It matters not that the extraneous other charges did not occur. Failure to admit that everything alleged is true will result in a revocation of community supervision and placement in the penitentiary.

The prosecution will tempt the inexperienced defense attorney with offers of deferred adjudication and “treatment” instead of incarceration. Do not fall for this trap. Sex Offender probation has but one goal: to take all of the defendants money and then revoke him and send him to the penitentiary. The percentage of defendants who successfully make it through community supervision probation without being revoked is small. The reason it is so difficult to complete probation is the rules keep changing. Making community supervision more difficult for sex offenders is a favorite of the legislature. The changes politicians make offer the appearance of fighting child molestation. No lobby group exists for sex offenders and politicians can make community supervision success impossible.

A sexual assault conviction will mean that you will lose your children

3. Prepare a vigorous grand jury defense to avoid prosecution.

If an attorney says to wait and see if your are indicted; walk away immediately; the best time to get a dismissal is before a formal charge;

Many times the best method of winning a false allegation case is to defeat it before it officially starts. These charges are felonies and before the prosecutor can proceed, they must obtain a grand jury indictment. The grand jury is a screening panel of persons selected from the community to serve a six month term reviewing cases to determine if “probable cause” exists. If the grand jury finds probable cause, they will issue a “true bill” of indictment. The case then gets assigned to a trial court for disposition. If the grand jury issues a “no bill”, the case ends. The prosecutor has the right to present a case to another grand jury if one entered a “no bill”, however this is rare, and is usually only invoked in cases which have gathered media attention.

A falsely accused defendant has a golden opportunity to avoid an indictment by preparing evidence for the grand jury to review prior to its decision. The grand jury is controlled by the prosecution, and does not have to accept defensive evidence. It is customary, however, for the prosecutor to provide defensive evidence to the grand jury upon request.

The defense can provide the grand jury with information that might not be admissible at trial, such as polygraph results, character letters, and other forms of hearsay. The defense can also provide expert witness reports and affidavits explaining the unreliability and tainted evidence obtained by the prosecution. Defendants and defense witnesses can be made available to testify before the grand jury, but the decision whether or not they are allowed to testify is up to the grand jury. Defense counsel is not authorized to be in the grand jury room when evidence is presented, nor is counsel allowed to make oral argument. The defense attorney can be outside the grand jury chambers and can prepare witnesses to testify.

Here are some common examples of evidence to build a grand jury defense packet:

- A. Your Criminal History;
- B. Honorable Discharge and Military Records;
- C. Education Records;
- D. Polygraph Results;
- E. Polygraph Report;
- F. Psychological and Personality Testing of Client;
- G. A Factual Summary of the Defense Version of the Case;
- H. Sworn Statements That the Alleged Victim Has Made False Accusations in the Past;
- I. Legal Research and Case-law to Show Reason to Not Indict;
- J. Good Character Letters;
- K. Availability of Defendant and Others to Testify If Requested;
- L. Recantations from Alleged Victims When Available;
- M. Expert Witness Testimony and Affidavits Regarding the Tainted Evidence Which Comprises the Prosecutors Case;
- N. Test Results Showing the Accused Is Not a Child Molester or Pedophile.

If your attorney insists that pursuing a grand jury defense is a waste of time, fire him.

4. Prepare a vigorous defense for trial.

If the grand jury indicts, then the case must be prepared for trial. It is rare for the state to dismiss a case once they have a grand jury indictment.

Selection of the jury is critical for a child abuse or sexual assault case. Potential jurors come into the case with strong emotional feelings regarding any allegation of abuse to a child. Your attorney must overcome the strong emotions the jury panel has against child abuse and focus their attention on being fair and acknowledging that false allegations are made. The jury panel must see that the only thing worse than child abuse is being falsely labeled as a child molester.

In addition, the attorney must educate the jury panel on how false allegations could be made. The panel needs to understand how a child can be coached through leading and suggestive interviewing techniques into making statements about incidents that did not occur.

The attorney must be well skilled in cross examination techniques for the states witnesses. This includes being ready to show deficiencies in the states investigation through a preconceived assumption of guilt shared amongst Child Protective Service workers, police, and so called experts. Cross examination is a skill that can only be obtained through years of trial practice itself.

The attorney must also be prepared to offer strong defensive witnesses. Contrary to many criminal cases, the accused must testify in a child abuse case if the defense wants an acquittal. Until the jury hears it straight from the accused mouth that the abuse did not occur, it will convict.

CONCLUSION

It is hoped that this information will be of help to anyone who is ever facing the tremendous horror of a false accusation. With a good lawyer, and a strong fight, these accusations can be overcome. It is an uphill battle, with many bruises and bleeding along the way. But there is no other way than to fight like hell.

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