COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

MIDDLESEX COUNTY

SUPREME JUDICIAL COURT NO. DAR-_____

APPEALS COURT NO. 2007-P-0886

COMMONWEALTH,
Respondent

v.

PAUL R. SHANLEY,
Petitioner

APPLICATION FOR DIRECT APPELLATE REVIEW

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INTRODUCTION AND REQUEST FOR DIRECT APPELLATE REVIEW

It is extraordinary, by any reasonable measure, when the deprivation of liberty hangs upon images in the mind of a complainant, inexplicably absent for approximately 20 years, their appearance indisputably informed by, and consistent with, images and narratives being widely portrayed in a media frenzy. Add that in the solitude of his private journal the complainant at bar initially declared unequivocal uncertainty, and thereby confirmed his own inability, to decipher whether the images in his mind were just thoughts that he was thinking, or "memories" of actual events. Add that the evidence at trial did not corroborate what the complainant would over time adopt with confidence to be "memories." In fact, the evidence established fundamental and irresolvable conflict.

The defendant respectfully approaches the Supreme Judicial Court for two reasons. *First*, this case places squarely before the Court for the first time, with an adequate scientific, evidentiary record, and with the support of among the most prominent and accomplished scientists in the world, the question of whether the "repressed memory" hypothesis is supported by scientific evidence, thereby permitting admissibility pursuant to *Commonwealth v. Lanigan*, 419 Mass. 15 (1994). It was the theory of "repressed memory" that formed the very core of this case, and provided a basis for assertions that would

have otherwise defied common sense and expected circumstance.

No appellate court in this Commonwealth has to date considered a scientific, evidentiary record to determine whether "repressed memory" is generally accepted in the scientific community, or whether the "repressed memory" hypothesis has been subjected to adequate study utilizing valid scientific methodology with established error rates, controls and standardization. Indeed, the only case to directly touch upon the issue in *dicta* was *Commonwealth v. Frangipane*, 433 Mass. 527 (2001)("We need not reach … reliability of the Commonwealth's proffered expert opinion testimony on the subject of dissociative memory loss and recovered memory") -- a case that has caused confusion and uncertainty below.[1]

In Frangipane, it appears this Honorable Court conducted a review of certain scientific articles submitted on appeal, without an evidentiary record below, causing it to recite in its original opinion, in *dicta*, that the admissibility and reliability of "repressed memory" was an open question, and a *Lanigan* hearing would likely be

[1] Both parties agreed that a *Lanigan* hearing was necessary on the "repressed memory" question, and the judge himself pointed out that *Frangipane's* comments on the subject were *dicta* only. *E.g.,* Tr. 10/1/2004 at 8-9 ("And [*Frangipane]* is dicta. It is not an issue that was decided on the record provided"). Interestingly, the judge then wrote a *nunc pro tunc* decision a year after trial contradicting his earlier ruling, a contradiction he refused to acknowledge in his decision on the defendant's motion for a new trial.

required if the issue arose prior to a retrial. *Commonwealth v. Frangipane, supra* (referencing research and stating a *Lanigan* hearing is likely required in original decision, attached hereto in the Addendum at 45)(Addendum hereinafter cited by page as "*Add.__*"). Subsequent to that opinion, the Court received a post-decision, demonstrably inaccurate amicus brief from the Leadership Council (*Add.* 52) and, without input from the defense or additional briefing, modified its *dicta* to, as demonstrated herein, incorrectly state that the scientific issues revolve around the mechanisms of memory, not the validity of "repressed memory" itself. (See language of *amended decision*, attached at *Add.* 54.) The Court nonetheless retained in its amended decision the references to research supporting the initial *dicta* that scientific validity was an open question and that a *Lanigan* hearing was likely necessary, as well as language indicating that the Court was not reaching the issue (*Add.* 45, 51, 54).[2]

Where *Frangipane* was reversed on grounds other than "repressed memory"; where statements concerning the validity of "repressed memory" were *dicta* arising in a case that had no evidentiary record addressed to the status of the science; where nearly 12 years have now passed since

[2] The original opinion, without the amended language, is still the only opinion available today in major legal databases such as Lexis, Loislaw, Versus Law, Find Law, among others. The original opinion is provided herein (*Add.* 45-51), as is the amended language (*Add.* 54).

the trial in *Franigpane* and nearly 8 years have passed since this Court's decision; where since the time of *Frangipane* compelling, scientific evidence has further undermined acceptance of "repressed memory," resolution of the "repressed memory" question remains unresolved.[3]

The issue of admitting "repressed memory" evidence is central to the convictions at bar and the appeal that now follows. This issue is a complex question of first impression in the Commonwealth and should not be considered and determined by an intermediate court. Further, the issues at bar arise in an extraordinary case of unfortunate public interest and extensive media attention that literally spanned the country and the globe. As such, the firmest voice of justice and reason is required.

Second, this case involves two related issues of first impression surrounding the applicable statute of limitations, G.L. c. 277, § 63. The first concerns a matter of statutory interpretation and the trial judge's instruction to the jury. All agree the applicable statute directs that the limitations period "shall not commence" until the complainant turns sixteen. All agree that the statute provides for tolling if the defendant was not "usually and publicly a resident." The defendant contends that it was error to construe the "usually and publicly a

[3] A list of cases in Massachusetts that are susceptible to being mistakenly referenced as concerning "repressed memory," and why those references would clearly be incorrect, is provided in the Addendum (*Add*. 43-44).

resident" tolling provision as applying to a time period before the alleged victim turned sixteen, i.e., before the statute commenced. The reason for this is simple under either of two reasonable interpretations of the statute: either the statute has not commenced ("shall not commence until the victim has reached the age of sixteen"), and therefore cannot be tolled; or, if the "shall not commence" provision is interpreted as tolling by operation of law, the same time period obviously cannot be counted twice, i.e., tolled twice, on account of two rationales (under sixteen and not usually and publicly a resident).

In his ruling denying the defendant's motion for a new trial, the judge avoided interpreting the statute and confronting his erroneous instruction. He did so by asserting that the defendant had not met a burden of production, despite the fact that the statute of limitation issue was raised by the defendant in a pleading, there was agreement between the parties that the indictments were outside the limitation period unless the Commonwealth could prove tolling at trial, and the evidence was contested at trial both via a stipulation of facts and vigorous questioning. This Court has not to date squarely addressed what the burden of production is when a defendant raises the statute of limitation in a criminal case. Indeed, appellate cases have utilized language implying differing burdens for different affirmative defenses, and have used language that seems to indicate, contrary to the judge's

ruling at bar, that pleading a statute of limitations defense before trial is sufficient to avoid waiver.

Pursuant to Mass. R. App. P. 11, Paul Shanley respectfully requests direct appellate review.

STATEMENT OF PRIOR PROCEEDINGS

Repressed Memory. On August 16, 2004, defense counsel filed a "preliminary" motion and supporting memorandum of law to preclude the Commonwealth from presenting expert testimony on the subject of "repressed memory." *Defendant's Preliminary Motion to Preclude the Commonwealth's Proposed Expert Testimony Regarding Repressed Memory and To Suppress the Testimony of Complainants* (hereinafter "*Def. Mot. To Preclude*"). In these submissions, defense counsel asserted, *inter alia,* that "the theory is not generally accepted in the relevant scientific community," *Def. Mot. To Preclude,* 5-9; that "most [ ] peer review and publication has resulted in rejection of the theory," (pp. 9-10); and that "[n]either error rates nor any controls or standardization exists as to that theory," (p. 11).

The Commonwealth called a clinician, Dr. Daniel Brown, a well known proponent of "repressed memory," as an expert witness. Dr. Brown testified for the Commonwealth over a period of three (3) days on October 1, 7 and 21, 2004. The

Commonwealth's expert, Dr. Chu, another clinician, also testified briefly.[4]

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[4] For a sampling of these clinicians' assertions that were relied upon and credited by the judge below, and which form appellate grounds for clear error and subsequent challenge by world renowned scientists, *see e.g.*: Tr. 10/1/2004, "Science" advances not by designing studies that meet the scientific community's standards for verification, but rather by collecting information from an undefined variety of perspectives over time which "gives us results we can rely upon"; Tr. 10/7/2004 at 24, a study showing that college students can actively interfere with their ability to memorize one side of a word pair provides evidence that experienced trauma can be completely repressed; Tr. 10/7/2004, "there's not a substantial body of literature" rejecting "repressed memory"; Tr. 10/21/2004 at 141, 144, there is a different "mechanism" for repression, one may repeatedly be abused and immediately forget before the next abuse occurs days later, the memories are compartmentalized, not necessarily in the same compartments, and inaccessible to explicit memory; Tr. 12/20/2004 at 27, suggestibility testing is not necessary even in a forensic context, because a good clinician can evaluate whether a complainant's story is "reasonable" and therefore "legitimate": "I mean, I think if you're a reasonable clinician, you can get a pretty good sense of how things hang together, and again, whether it seems consistent with what you already know"; Tr. 12/20/2004 at 69, inconsistency even after "recovering" memory, with further ongoing claims of forgetting and remembering, are further proof of legitimacy: "I mean, in my opinion, the fact that he remembered it, and seemed to be fairly clear about that memory, even if he subsequently did not remember it, leads me overall to believe that it probably occurred"; Tr. 8/88, when subjects answered affirmatively to the question, "was there ever a time that you … couldn't remember something at all and then later remembered it," the Commonwealth's expert "consider[ed] that, you know, [to be] pretty serious amnesia"; Tr. 8/88, if a subject answered that there was a time "that she remembered something incompletely and later recovered more memory about it back" this was confirmed evidence of "partial amnesia"; Tr. 8/89, the truth of a patient's self report is determined by "trying to establish a reasonable and

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Notwithstanding defense counsel's repeated assertions over a period of six months that "repressed memory" evidence was inadmissible, that he would be calling witnesses to testify, his vocalized agreement with the government that an evidentiary hearing was required to determine whether expert testimony on "repressed memory" was admissible at trial (Tr. 8/20/2004 at 6), and representations to his client that he would be calling experts and presenting evidence (*Aff. of Paul R. Shanley*, p. 3), defense counsel failed to call a single expert witness or present any affirmative evidence. Not a single study was submitted to address the credibility of the Commonwealth's experts' assertions, whether "repressed memory" is generally accepted in the scientific community as a valid and proven phenomenon, whether it has been subjected to adequate testing, whether error rates or standardization can be applied, among others.

Having failed to present any evidence, the court provided defense counsel until December 31, 2004 to provide "any additional written materials, including affidavits, which he offers in support of his *Lanigan* motion." *Id.* at 106. Unknown to his client, defense counsel presented

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believable personal narrative of somebody's life," "Does it all hang together? Does it all fall into place?"; Tr. 8/101, there is no way to know the true number of people who repress memory, because "there are patients who report no amnesia, and I don't know whether they, in fact, have no amnesia or they just haven't yet remembered something that they forgot").

nothing, and repeatedly missed deadlines set by the court. Further attempts by defense counsel to acquire discovery just days before trial was to begin were rejected by the Court on grounds that defense counsel had failed to abide by the judge's orders. *Court Order, dated 1/12/05.*

The motion to preclude expert testimony on "repressed memory" was denied orally at the commencement of trial. Approximately one year after the trial on March 31, 2006, a written decision was issued by the trial judge *nunc pro tunc* based upon the incorrect and misleading testimony of the Commonwealth's experts.

Confronted with the extraordinary lapses recited above, post-conviction counsel filed a motion for a new trial on grounds that trial counsel was ineffective in his failure to present available, overwhelming evidence that "repressed memory" is not generally accepted or admissible. The motion for a new trial was accompanied by comprehensive affidavits from among the most prominent experts in the world -- Dr. Harrison Pope of Harvard's McLean Hospital, memory researcher Dr. Elizabeth Loftus, and Dr. R. Christopher Barden -- together with extensive scientific studies demonstrating that the "repressed memory" hypothesis has not been accepted by the scientific community. These defense experts established that the Commonwealth's witnesses had, *inter alia*, failed to adhere to basic principles of the scientific method, misdefined the scientific community, relied upon data that was

scientifically invalid, inaccurately represented general acceptance in the scientific community, and misrepresented the details and conclusions of several studies.

An extensive record demonstrating that "repressed memory" is not generally accepted was further supplemented by allegations (since the time of the defendant's convictions) before a Federal Judge against the Commonwealth's expert at bar (Dr. Brown), for having provided false and misleading testimony (nearly identical to his testimony at bar). These accusations ultimately resulting in the Federal Court vacating a $1.75 million dollar verdict in favor an alleged victim of abuse who "recovered memory." An additional, recent example of a court rejecting Dr. Brown's "repressed memory" testimony as misleading was also provided.[5]

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[5] *See Exhibit 2 attached to Paul R. Shanley's Limited R. 30 Reply to Commonwealth's Opposition to Motion for New Trial,* Federal Court's Order vacating a $1.75 million judgment after Dr. Brown's testimony was challenged post-verdict on grounds of misrepresenting the science to the Federal Court; *Exhibit 3*, Order of the Marion Superior Court dated Dec. 31, 2007 at ¶ 4, striking, among others, multiple portions of Dr. Brown's affidavit pursuant to claims that his affidavit suffered from "flawed reasoning and definitional deception," and thereafter granting summary judgment for defendant. *See also, e.g.,* The Free Republic, *Expert Witness Testimony May Have Torpedoed 1.7 Million Award,*http://www.freerepublic.com/focus/f-news/1955209/posts ("Court papers suggest a $1.75 million jury award in a sexual abuse lawsuit was vacated by a judge because of questions raised about a key witness' credibility"); The Siox City Journal, Lincoln Nebraska (AP) (2008), *Judge tosses $1.75 million judgment for priest's daughter.*

The Commonwealth presented no evidence during Rule 30 proceedings to rebut defense assertions, and merely drafted an opposing brief. Nor did either of the Commonwealth's experts come forward in affidavit form to rebut defense expert assertions of misrepresentation supported by exhibits submitted under oath.

On November 26, 2008, the judge below denied the defendant's motion for a new trial, concluding in general terms that "repressed memory" is a generally accepted and proven phenomenon. That denial will be the subject of a request to consolidate with the defendant's direct appeal, now pending in the Appeals Court.

Statute of Limitation. The Indecent Assault & Battery charges in this case are governed by G.L. c. 277, § 63. The indictments allege that the offenses occurred on diverse dates between September 1, 1983 and October 5, 1986 (Tr. 10/219). As applied to the alleged offenses, § 63 provided for a six (6) year limitation period to commence when the offenses allegedly occurred. G.L. c. 277, § 63, as amended by St. 1985, § 123. Effective February 8, 1988, the statute of limitation was amended to provide, in relevant part, that:

> if a victim of the crime … is under the age of sixteen at the time such crime is committed, the period of limitation for prosecution shall not commence until the victim has reached the age of sixteen ….

G.L. c. 277, §63 as amended by St. 1987, § 490, approved Nov. 10, 1987. (Emphasis added.)[6] There is no dispute that the amendment applies to the alleged offenses here at issue because they would not have been time-barred under the earlier version of the statute as of the date of the amendment. Commonwealth v. Bargeron, 402 Mass. 589, 592-594 (1988); Commonwealth v. Martin, 47 Mass. App. Ct. 240, 242 (1999). (A subsequent 1996 amendment to the statute has no bearing on this case.) As such, the limitations period did not commence until September 9, 1993, the date of the complainant's sixteenth (16th) birthday. This resulted in an expiration of the limitations period on September 9, 1999 (six years after commencement), 1015 days prior to the date of the indictments (June 20, 2002). Prosecution for indecent assault and battery was therefore foreclosed unless the Commonwealth could toll the statute by

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[6] The statute read, in pertinent part, as follows:

> …. An indictment for any other crime [indecent assault and battery] shall be found and filed within six years after such crime has been committed; but any period during which the defendant is not usually and publicly a resident within the Commonwealth shall be excluded in determining the time limited.
>
> Notwithstanding the foregoing provisions, if the victim of a crime set forth in section thirteen B … of chapter two-hundred and sixty-five … is under the age of sixteen at the time such crime is committed, the period of limitation for prosecution shall not commence until the victim has reached the age of sixteen or the violation is reported to a law enforcement agency, whichever occurs earlier.

demonstrating that Paul Shanley had not been "usually and publicly" a resident for 1015 days.

The defendant filed a motion to dismiss the indictments as time barred prior to trial. Confronted with the defendant's motion, the Commonwealth agreed that the indictments were time barred unless the Commonwealth could prove, beyond a reasonable doubt, that the statute was tolled at trial for the required 1015 days (Tr. 7/1/2004 at 7-8). At trial a stipulation was entered into between the parties concerning the defendant's presence in the Commonwealth for a period of time, and the Commonwealth's evidence in support of tolling was otherwise vigorously challenged through cross-examination (Tr. 4/120-155, 171).

The Commonwealth's proposed jury instruction properly referenced its burden to prove the tolling of approximately three (3) years (1015 days), but erroneously directed that the Defendant's absence from the Commonwealth during the seven (7) years between October 5, 1986 and September 9, 1993 -- when the limitation period had not even started due to the alleged victim's age (or, if one would prefer, was already "tolled by operation of law") -- could be counted toward the 1015 days:

> You may consider <u>any time</u> in which the Commonwealth has met its burden of showing the defendant was not 'usually and publicly a resident' of the Commonwealth. <u>This includes any time between October 5, 1986 (the last date of the offense) and September 9, 1993 ([the Complainant's] sixteenth birthday)</u> ….

Comm.'s Supp. Request for Jury Instr., 3. (Emphasis added.)

The Commonwealth's instruction was adopted by the court in its entirety (Tr. 10/219-222).

During R. 30 proceedings, the defendant challenged this instruction as clearly erroneous on grounds that it permitted the jury to apply the tolling provision of § 63 ("not usually and publicly a resident") to a time when the statute was not running (before the alleged victim turned sixteen), and therefore could not be tolled; or, if one prefers, when the statute was already tolled by operation of law due to the alleged victim age (under sixteen), and therefore permitted the jury to toll the same time period twice. The defendant asserted that the "not usually and publicly a resident" tolling provision applied to the "six years" of running time, referenced in the exact same sentence of the statute. (See statute, n.6, *supra*).

The judge refused to interpret the statute or evaluate his instruction during R. 30 proceedings, asserting that the defendant was not entitled to the statute of limitation instruction the judge gave, i.e., the defendant waived it, notwithstanding the fact that the limitations defense was raised in a pleading, the Commonwealth agreed the indictments were outside of the limitation period without tolling, and the Commonwealth agreed that it had the burden to prove tolling at trial.[7]

[7] Ironically, the judge appears to believe that principles of waiver only apply to the defendant. The judge did not consider that the Commonwealth waived its post-conviction
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Procedural history. Trial in this matter occurred between January 25 and February 7, 2005 before Neel, J., and a jury. The jury returned verdicts of guilt on two counts of Statutory Rape of a Child and two counts of Indecent Assault and Battery on a Child Under 14. A finding of not guilty was entered on an additional charge of Statutory Rape after the Commonwealth presented its case.

A timely notice of appeal was filed on March 4, 2005. The case was entered in the Appeals Court on June 5, 2007 and subsequently stayed on October 16, 2007. Rule 30 proceedings ensued in the trial court until a decision was issued on November 26, 2008.

SHORT STATEMENT OF FACTS

Events leading to accusations. There is no dispute that the complainant grew up in a broken home, shuffled between divorced parents and family members, with allegations of violence by his father, an inability to reconcile with his mother after separation at age four, and drug use resulting in his banishment from the home for a time. (Tr. 4/226-231, 242-244, 255, 259-261; 6/72; 7/53-54, 56-57.) Despite this difficult family life, a bright spot in the memory of the complainant and his family was Paul Shanley, the priest of St. Jean's Parish in Newton where

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assertion of the defendant's waiver by failing to object to the statute of limitation instruction at trial and, indeed, strenuously urged the judge to adopt its own instruction.

the complainant attended CCD ("Confraternity of the Christian Doctrine") classes.

Through adulthood until the time of hearing that his childhood friend was alleging "recovered memories" of alleged abuse 20 years earlier, Paul Shanley was recalled by the complainant in the fondest of terms. When first reading what would turn into an ongoing media saga depicting allegations against Paul Shanley as fact in an unprecedented amount of media attention, the complainant's reaction was that he "remembered him," and, "That's weird, everyone liked him." (Tr. 5/154; see also testimony of the complainant's then-girlfriend (Tr. 7/103): "he remembered [Paul Shanley] was a good man.") The complainant's father remembered Paul Shanley as a "great guy" as well, and both the complainant and his father had happily attended Paul Shanley's going away party when he left St. Jean's Parish (Tr. 4/265).

After joining the Military as an adult, the complainant met a girlfriend in Massachusetts while on a brief trip from his base in Colorado (Tr. 5/147). Several months later, on January 31, 2002, the complainant received a telephone call from his girlfriend (Tr. 5/153). She told him that she had seen an article in the Boston Globe about Father Paul Shanley and alleged abuse, at which time the complainant recalled Paul Shanley with nothing but positive memories (see above paragraph; Tr. 5/154; 7/103). The complainant then started reading a lot of articles about

allegations against Paul Shanley and looking at newspaper photos of him (Tr. 5/252-253; 6/167-168).

Approximately 1½ weeks later on February 11, 2002, the complainant received another call from his girlfriend and was informed that his good friend from childhood and CCD classmate was alleging in the Boston Globe that he had "recovered memories" of abuse by Paul Shanley (Tr. 5/155). All within the succeeding period of 12 hours the complainant contacted his childhood friend by telephone, made contact with the Massachusetts personal injury attorney of his childhood friend, claimed to have himself "recovered memories" of abuse on that very day, appeared at the office of a military psychologist, and communicated his desire to acquire leave from the military so he could return to Massachusetts, meet with physicians retained by the personal injury attorney, and join a "recent class-action" against the Archdiocese of Boston. (Tr. 5/240, 159-160; 6/239, 247; 7/19, 25-27, 35, 45, 48, 52.) Approximately two days hence the complainant did in fact return to Massachusetts and would accomplish permanent leave from the military soon thereafter (Tr. 5/162, 206).

The Commonwealth would ultimately voluntarily dismiss criminal charges based upon allegations of the complainant's childhood friend. Those charges, wrought with substantial credibility problems, were dismissed along with charges based upon the allegations of two additional individuals, leaving only the allegations of the

complainant at bar. Each accuser was an acquaintance or friend of the other, and each had claimed to "recover memories" at approximately the same time, enabling participation in the lawsuit against the Archdiocese under the guidance of the same personal injury attorney.

The trial evidence: contradicted "memories." The complainant testified to "remembering," 20 years after-the-fact, that on Sundays, during the hour preceding the main mass of the day, Paul Shanley would come into the complainant's small CCD class of 6-12 students, take the complainant, deposit him in various areas of the church, and abuse him. (E.g., Tr. 5/163.)[8]

The Commonwealth called Ann Marie Rousseau, the CCD teacher who taught the complainant's CCD classes at the critical time period pertaining to the allegations. **She testified that Paul Shanley never pulled a student out of her small class**, flatly contradicting the complainant's "recovered memories." (Tr. 5/103.)

The Commonwealth also called Kathleen Bennett, another CCD teacher who taught the complainant during the critical time period. Ms. Bennett testified that Paul Shanley would stop by to check on the classroom when the head of CCD

[8] This accusation had evolved from a chorus in which the accusers, prior to their charges being dismissed due to credibility issues, alleged that Paul Shanley pulled three children out of class together, deposited them in different parts of the church, and then travelled from one to the other abusing them amidst extensive preparatory activity on church grounds and the imminent 10:00 a.m. mass.

classes was absent, but **he never took a child from the class, or left the class with a child** as the Complainant would testify was represented in his "recovered memories" (Tr. 4/220-221).

Four CCD students who attended classes with the complainant were also called by the Commonwealth. **All would contradict the complainant's "memories."** Three of the four testified that they never witnessed Paul Shanley taking any child from the class (Tr. 8/154, 165, 186-187, 199). The fourth, a 28 year old man living with his parents at the time of trial, testified that he only saw Paul Shanley come to the classroom 1-3 times over many years, and then agreed when asked whether during the first, second or third occasion when Paul Shanley came to the classroom, the complainant left with him (Tr. 8/166-167, 172). This recollection was not only isolated and contradicted by all other teachers and students who were called to testify by the Commonwealth, but his recollection of 1-3 visits contradicted the complainant's assertions of being repeatedly taken out of CCD class by Paul Shanley Sunday after Sunday over a period of years. His general power of memory also proved to be suspect: he did not have a memory of Verona Mazzei, the director of his CCD classes who would appear every morning at the "meet and greet" (Tr. 8/175); he could not remember any of his CCD teachers from kindergarten through the fourth grade (Tr. 8/177); he could

not even recall the time at which CCD classes started (Tr. 8/178).

The complainant testified at trial that he had become certain of his "recovered memories" that Paul Shanley would take him out of his CCD class for confession when he was in the second grade, week after week, and abuse him in the confessional adjacent to the main church floor (Tr. 5/176, 170-171). **Evidence at trial established that there was no confession for children in the second grade – it was prohibited until the 4th grade –** again contradicting the complainant's "recovered memories" (Tr. 5/81, 105).

The complainant testified to vague memories of being taken out of CCD class and brought to the open public bathroom, the pews, and the rectory, where abuse allegedly occurred, shortly before the 10:00 a.m. mass (Tr. 5/165, 167, 172, 176, 216; 6/216). Evidence established that there was a single bathroom for the entire church and all CCD classes (Tr. 5/68-70); that the area in the pews where abuse allegedly occurred was surrounded by a flurry of activity just feet away in the same room from volunteers, choir members, musicians, and the like (Tr. 5/94, 96, 87-111); and that the rectory was freely open to many staff and occupied by other priests (Tr. 4/198-204).

Knowledgeable witnesses testified that in the hour prior to Paul Shanley's 10:00 mass when the abuse allegedly occurred, "I would not say that there was any leisure time" for priests, or others (Tr. 5/89). Prior to the

commencement of that 10:00 a.m. mass, Paul Shanley would typically be upstairs, above the basement in which CCD classes were held, interacting with all of the people that assisted him in getting ready to say the mass (Tr. 5/93-94). Time would also be required for vesting before the mass began (Tr. 5/111). There was always a large complement of laypeople who were in and around the church. Children were going from or to their CCD classes, and were usually 40-50 in number (Tr. 5/94, 96). Parents of children were around, either because they attended the earlier mass or were going to be attending the 10:00 a.m. mass (Tr. 5/96). Others involved in preparations in and around the area included Eucharistic ministers, the "minister of the word," various choir members for the 10:00 a.m. mass, musicians such as those playing the guitars, occasional deacons, and money counters (Tr. 5/95). There was no restraint with respect to where anybody could go at any given time to accomplish their tasks (Tr. 5/96).

Throughout the entire trial, the Commonwealth produced no evidence that Paul Shanley was ever seen, at any time, alone with a child. The entire case was rooted in the complainant's testimony of his "recovered memories" -- testimony provided in ambiguous and evasive terms.

When questioned about how he knew that his thoughts were actually "memories," the complainant referred to general aspects of his past and personality. He concluded his thoughts were "memories" because he "always had trouble

with authority" (e.g., Tr. 5/257-258, 263-264); because during college he drank alcohol in excess (Tr. 6/54, 69); because he had a poor self image and took steroids in high school (Tr. 6/73-74, 78, 79-80). He had come to believe that the way he felt about himself growing up was Paul Shanley's fault (Tr. 6/74). The complainant had a dream of becoming a professional baseball player; he also believed that he did not accomplish his dream because of what Paul Shanley did to him, as represented in his "memories." (Tr. 6/85, 194).

STATEMENT OF ISSUES OF LAW RAISED BY THE APPEAL[9]

I. No appellate court in the Commonwealth has ever evaluated a scientific, evidentiary record addressed to the question of whether the "repressed memory" hypothesis is adequately supported by scientific evidence. No appellate court in the Commonwealth has ruled upon whether "repressed memory" is generally accepted in the scientific community, thereby permitting proper admission as evidence in a court of law pursuant to *Lanigan*.

This case presents an extensive scientific record developed during R. 30 proceedings, supported by the testimony of among the most accomplished and influential scientists in the world, including Dr. Harrison Pope of

[9] The issues presented in this Application for Direct Appellate Review are the central issues that undersigned counsel believes justify direct appellate review. There are additional issues that will be presented in this appeal.

Harvard's McLean Hospital, who according to the Institute for Scientific Information is one of the 37 most influential scientists in the world. Dr. Pope and the other experts who have submitted affidavits contend that the scientific record presented clearly establishes that the "repressed memory" hypothesis is not generally accepted by the relevant scientific community, is the subject of enormous controversy, and is not admissible under *Daubert/Lanigan*. Furthermore, these experts demonstrate through the record presented, in verifiable fashion, that the testimony presented by the Commonwealth and credited by the judge below violates basic principles of the scientific method, misdefines the relevant scientific community, relies upon data and studies that have substantial methodological failings, and in several instances misrepresents both the details and conclusions of the studies relied upon.

II. The judge below refused to engage in statutory interpretation and resolve a challenge to the statute of limitation instruction he gave at trial. He did so on grounds that, because the defendant "presented no evidence at trial," he was not entitled to the statute of limitation instruction the jury received.

This case presents the question: what are the precise requirements for a defendant to "raise" a statute of limitations defense? The case law in the Commonwealth is admittedly unclear and conflicting on this issue, due in

part to language used when discussing affirmative defenses and burdens of production generally. The weight of case law appears to indicate, however, that the act of "pleading" a statute of limitation defense before trial, also described in cases as raising the defense "in the Superior Court" or asserting the defense "at or before" trial, is sufficient.

The defendant believes this Court should rule that where a motion to dismiss was filed prior to trial, establishing (as the Commonwealth agreed) that the indecent assault and battery indictments were outside of the statute of limitations unless the Commonwealth could prove 1015 days of tolling at trial, this was in itself sufficient "evidence" at trial, as was the stipulation entered into at trial and vigorous cross-examination revealing gaps in the Commonwealth's tolling evidence. The defendant urges this Court to further determine that the judge's R. 30 decision that the limitations defense was not sufficiently raised at trial placed an unconstitutional burden of proof upon the defendant: the defendant demonstrated the indictments were outside of the limitation period without tolling, and it was the Commonwealth's burden to prove tolling at trial, not the defendant's burden to disprove it.

III. This case presents a question of statutory interpretation that is an issue of first impression in the Commonwealth. General Laws c. 277, §63, provides that "any period during which the defendant is not usually and publicly a resident within the Commonwealth shall be

excluded in determining the time limited." General Laws c. 277, §63 also provides in a subsequent paragraph that the limitations period "shall not commence until the victim has reached the age of sixteen…." This case presents the following question: where the Commonwealth must prove tolling under the "not usually and publicly a resident" provision, may that provision be applied to a time period during which the limitations period has "not commence[d]" as a result of the victim not having turned sixteen?

The defendant argues that it may not be so applied and the judge's instruction to the jury at bar was therefore error. The defendant urges this Court to find that where a limitations period has not yet commenced on account of the alleged victim's age (under sixteen), it cannot be tolled because, quite simply, a statute that has not commenced cannot be tolled. This interpretation is consistent with the structure of the statute and applying the "usually and publicly a resident" provision to the running limitation period of "six years" that appears in the same sentence. And if one wishes to interpret the "shall not commence until … sixteen" provision as a tolling provision by operation of law, then the same period of time cannot be counted twice, i.e., tolled twice, due to the defendant's absence on the one hand, and the age of the victim on the other hand.

ARGUMENT

I. A LARGE BODY OF EVIDENCE DEMONSTRATES THAT THE THEORY OF "REPRESSED MEMORY" HAS NOT BEEN ACCEPTED BY THE RELEVANT SCIENTIFIC COMMUNITY ON MULTIPLE GROUNDS, AND THAT THE JUDGE HAS WRONGLY CREDITED THE COMMONWEALTH'S EXPERTS WHO FAILED TO ADHERE TO THE SCIENTIFIC METHOD, MISDEFINED THE RELEVANT SCIENTIFIC COMMUNITY, RELIED UPON STUDIES WITH INVALID METHODOLOGICAL BASES, AND PROVIDED INACCURATE, MISLEADING TESTIMONY.

"In reality, the validity of a scientific theory is not always certain. The process of constant scientific testing, over time, validates certain theories and discredits others." *Canavan's Case*, 432 Mass. 304, 311 (2000). It is for this reason that an appellate court should refrain from ruling "as a matter of law [that] a certain scientific theory or method is reliable or unreliable[, because this] may freeze perceptions concerning the evidentiary usefulness of the theory or method without accounting for the evolving state of scientific knowledge." *Id.*

The proponent of expert testimony faced with a pretrial challenge is required to establish scientific validity and admissibility. *Commonwealth v. Vao Sok*, 425 Mass. 787, 796 (1997); *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 592, n.10 (1993). *Commonwealth v. Lanigan*, 419 Mass. 15, 26 (1994)(if an "expert's opinion lacks reliability, that opinion should not reach the trier of fact"). Validity or reliability of an expert's theory or process must be demonstrated "by establishing *general* acceptance in the scientific community or by showing that

the evidence is reliable or valid through alternative means." *Canavan's Case, supra*, at 310. *Commonwealth v. Lanigan, supra,* at 25 ("The overarching issue is 'the *scientific validity* …").

When assessing the admissibility of testimony addressed to the purported phenomenon of "repressed memory," a trial judge is required to consider how scientists would determine the phenomenon's validity. *Lanigan* requires a trial judge to assume the role of gatekeeper, a duty which mandates examination of the expert's testimony and methodology, determining admissibility by scrutinizing the scientific reliability of the opinion offered. *See id.* at 25-26. *Daubert* v. *Merrell Dow Pharms., supra*, at 590 n.9 ("reliability" in this context means not only consistency of results but also what scientists term "validity" or correspondence to reality).

1. **Overwhelming Evidence Proves That "Repressed Memory" Is A Hypothesized Phenomenon That Is Not Generally Accepted By The Scientific Community, Has Not Been Subjected To Adequate Study Utilizing Valid Scientific Methodology, And Has Been Subjected To Research So Flawed That It Is Without Error Rates, Controls Or Standardization.**

Dr. Harrison Pope, as documented by the Institute of Scientific Information and other sources, is one of the most influential and respected scientists in the world. *Affidavit of Harrison G. Pope, Jr., MD, MPH*, pp. 1-3, ¶¶ 2-5, Exh. 1 (hereinafter "*Aff. of H.G. Pope*"). Unlike the Commonwealth's expert, Dr. Pope is a scientist, educated and trained in the scientific method. He participates in

designing studies and carrying out research for testing hypotheses, he trains students considered to be among the most capable in the world, and he is readily familiar with the threshold of required agreement in the scientific community before a phenomenon is considered "generally accepted." *Aff. of H.G. Pope*, p. 6, ¶ 12.[10]

According to Dr. Pope and other scientists of the highest stature who submitted affidavits below, evidence that the theory of "repressed memory" is not generally accepted in the scientific community is overwhelming. Indeed, when the body available scientific literature is reviewed, "it would be impossible to assert that there is any 'general acceptance' of the 'repressed memory' hypothesis in the relevant scientific community; in fact, there is widespread and vociferous skepticism." *Aff. of H.G. Pope, p. 6, ¶ 11.* A large literature from the last 15 years comprised of prestigious peer reviewed scientific journals and writings of other internationally recognized scientists have seriously questioned or completely rejected the "repressed memory" hypothesis. *Aff. of H.G. Pope, pp. 5-6, 16-19, 27-31, ¶¶ 10-12, 38-43, 57-63, Exh. 2.* Studies of trauma victims overwhelmingly show no evidence of "repressed memory," as evidenced by a nonselective review of literature covering more than 11,000 victims, *Aff. of*

[10] For purposes of this submission, Dr. Pope's affidavit is utilized to convey the issues to the Court and is reproduced in the Addendum.

H.G. Pope, p. 17, ¶ 39 Exh. 14, 15, and an exhaustive review of the after affects of child sexual abuse covering 3369 victims, *Aff. of H.G. Pope p. 18, ¶ 40, Exh. 16.* "Adding up the more than 14,000 victims reported in more than 120 studies covered by the above reviews, it is inconceivable that 'repressed memory' could be a valid and accepted scientific theory, yet not be demonstrated in a single unequivocal case reported throughout this vast literature." *Aff. of H.G. Pope, p. 18, ¶ 41.*

Even when a broad survey of the scientific literature is narrowed to the opinions of actual psychiatrists, one cannot establish any general acceptance of "repressed memory." *Aff. of H.G. Pope, pp. 6-9, ¶¶ 13-18 Exh. 3* (survey of American psychiatrists demonstrating no general acceptance), *Exh. 4* (survey of Canadian psychiatrists demonstrating even greater skepticism of "repressed memory" than their American counterparts). To conclude otherwise would be to apply a standard of "general acceptance" that defies the threshold of acceptance required by the scientific community for other purported psychological phenomena. *Aff. of H.G. Pope,* pp. 6-9, ¶¶ 13-18.

2. <u>A Judge Has No Discretion To Disregard Scientific Principles And Valid Analysis When Reaching A Conclusion, Crediting Testimony And Representations That Have Been Shown To Be Incorrect And Misleading</u>.

The available record at bar objectively demonstrates that it was error for the judge below to conclude that

"repressed memory" is a generally accepted and valid phenomenon.

Scientific Method. As stated by Dr. Pope, *Aff. of H.G. Pope*, p. 11, ¶ 22:

> It is entirely contrary to the advancement of science and the scientific method to consider some hypothetical phenomenon valid until it is proven invalid. Rather it is the burden of those claiming the existence of "repressed memory" to show that the relevant scientific community considers it to be *valid*.

The judge has accepted and relied upon testimony at bar that is inconsistent with basic scientific principles. *See, e.g.,* Commonwealth's expert's representation of "general acceptance" despite enormous controversy, and pooling survey responses of "possibly valid" with responses of "valid" to assert acceptance. *Aff. of H.G. Pope*, pp. 8-9, ¶ 18 (it is scientific error to pool responses of "possibly" valid with responses of "valid"). *NH v. Bourgelais*, No. 02-S-2834, Rockingham, NH Sup. Ct. April 4, 2005 (rejecting the Commonwealth's expert in this case and finding that "possibly valid" responses merely indicate acceptance of a valid hypothesis not acceptance of the phenomenon itself). (See also n.4, *supra*, at 7, portraying the Commonwealth's experts' conceptions of "science.")

Scientific Community. "The informal observations of clinicians are useful in generating hypotheses, but they are not properly utilized for *testing* hypothesis." *Aff. of H.G. Pope, p. 8, ¶ 18.* The judge at bar accepted and relied upon a "scientific community" without boundary, consisting

of clinicians, experimental clinicians, hypnotherapists, nurses, social workers, and "experts" with nothing more than a high school degree. E.g., Tr. 10/1/2004 at 284-287, 10/7/2004 at 113-114, 121-122, 127. The judge accepted testimony premised upon the notion that scientific research is achieved in large part through "clinical observation" of patients with a whole variety of severe, undisclosed, psychiatric disorders (Tr. 10/1/2004 at 163, 192). The Commonwealth's expert described the scientific process as, "you look for patterns, you try to understand them and construct meaning" (Tr. 10/1/2004 at 72). The Commonwealth's expert identified his personal, secret "research data" by referring to the fact that he "takes very detailed notes of all of his sessions" (Tr. 10/1/2004 at 77). This defies well established scientific principles and invalidates the judge's conclusions at bar.[11]

Invalid, Unreliable Methodological Basis & Misleading Testimony. The Commonwealth's expert's opinions were grounded upon invalid methodological bases and were wrongly credited and accepted by the judge below. The vast majority of studies relied upon by Dr. Brown (74 of the 85

[11] *E.g.*, Use and abuse of mental health experts in child custody determinations. Behavioral Sciences & the Law, 7, 197-213 ("ultimate opinions should be limited to those conclusions with adequate empirical support."); Dawes, R.M., Faust, D., and Meehl, P.E. (1989). Clinical versus actuarial judgment. Science, 243, 1668-1674(clinicians may have considerable difficulties distinguishing valid and invalid variables and "clinical judgments based on interviews tend to be of low, or negligible, accuracy")

identified, Tr. 10/1/2004 at 203) in his presentation to the judge were retrospective, "do you remember if you forgot," studies that are "scientifically almost meaningless," and have suffered enormous criticism from the scientific community due to gross methodological failures. *Aff. of H.G. Pope,* pp. 19-22, ¶¶ 44-50. Such studies have graphically been shown to be misleading and without scientific value. *Aff. of H.G. Pope*, pp. 16-27, ¶¶ 38-56.

The Commonwealth's expert even went so far as to represent, and the judge accepted, that error rates -- an essential factor for acceptance under Daubert/Lanigan -- could be calculated to determine any inaccuracy in his purported studies. In fact, the studies relied upon are so severally flawed that no error rate, controls or standardization exists. *Aff. of Dr. H.G. Pope,* pp. 36-38, ¶¶ 75-76. Dr. Brown's testimony in this regard was misleading and scientifically meaningless.[12]

The judge below heard and credited the assertion that consensus statement by various medical and psychiatric groups were the equivalent of "peer reviewed," and constituted evidence of "general acceptance," as did inclusion of "dissociative amnesia" in the DSM-IV. (*E.g.*,

[12] Dr. Brown's inability to establish a valid error rate has, in part, resulted in the exclusion of his testimony in past cases. *E.g. New Hampshire v. Hungerford*, 697 A.2d 916 (N.H. 1997); *Rhode Island v. Quattrocchi*, No. P92-3759, 1999 WL 284882 (R.I. Super. Ct. Apr. 26, 1999); New *Hampshire v. Bourgelais*, No. 02-S-2834 line 3 (N.H. Super. Ct. April 4, 2005).

Tr. 10/1/2004 at 231-235). These assertions are demonstrably incorrect. Consensus statements provide no indication of "general acceptance"; all statements note the controversy; and "[n]o position statements from any medical or psychiatric organizations suggest scientific consensus…." *Aff. of H.G. Pope*, pp. 10-12, ¶¶ 21-24; Exh. 6-10. Furthermore, the DSM-IV is merely a dictionary of diagnoses, not a scientific study; it quotes no scientific study in its references, cites no scientific evidence from the scientific community, and merely proposes criteria for a concept that it acknowledges to be controversial. Moreover, there has been, in any event, a vast amount of study undermining "repressed memory" since the DSM-IV went to press. *Aff. of H.G. Pope*, pp. 12-15, ¶¶ 25-34; Exh. 11.

The judge below was further provided with verifiable evidence that the Commonwealth's expert, Dr. Brown, inaccurately represented multiple studies – their details and conclusions – ranging from the failure to disclose that the study's subjects were of an age rendering the results invalid, to representing conclusions that studies did not support, among many others. This evidence was supplemented with information pertaining to a pattern of similar misrepresentations and omissions in other courts. These included falsely representing the results of multiple studies, falsely representing the level of peer review, and

falsely representing general acceptance in the scientific community.[13]

As confirmed in a recent, prestigious article authored by Yacov Rofe of the Bar-Ilan University in Israel, a comprehensive review of memory studies from multiple disciplines leads to the conclusion that the "notion of repression cannot be used as a scientific psychological concept, as its empirical status precludes this possibility" (p. 76). The review further states that there are "numerous studies that consistently disprove the memory component of repression," and that a "court should rule that testimony based on the concept is not scientific and cannot be relevant or helpful to the finder of fact." (p. 75.) *Does Repression Exist? Memory, Pathogenic, Unconscious and Clinical Evidence*. American Psychological Association. Vol. 12, No. 1, 63-85 (2008).

II. THE DEFENDANT WAS ENTITLED TO A STATUTE OF LIMITATION JURY INSTRUCTION, AND THE INSTRUCTION GIVEN BY THE JUDGE WAS CLEAR ERROR UNDER A PROPER CONSTRUCTION OF THE STATUTE.

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[13] Indeed, after the motion for a new trial had been filed at bar, attorneys in a federal case sought access to certain grand jury materials at bar for the Federal Judge's review as part of their demonstration that Dr. Brown had engaged in an extensive pattern of misrepresentation. *See Request for Consent to Release Grand Jury Testimony*, filed by Robert F. Shaw, Jr. Prior to receiving a ruling from Judge Neel below, the federal court judgment was vacated. See n.5 at p. 10, *supra*.

The defendant raised the statute of limitation issue **via pleading** in a motion to dismiss, after which the Commonwealth agreed that the indictments were outside the limitations period unless the Commonwealth could prove tolling at trial of 1015 days (Tr. 7/1/2004 at 7-8). A stipulation was entered as evidence at trial regarding a period during which it was agreed the defendant was in the Commonwealth, and the Commonwealth's evidence of tolling under the "not usually and publicly a resident" provision was otherwise vigorously challenged through cross-examination (Tr. 4/120-155, 171).

The trial judge has avoided construing G.L. c. 277, § 63 and confronting assertions of significant error in his jury instruction by asserting that the defendant was not entitled to the instruction provided at trial (*Add.* 74). While case law addressing the standard for adequately raising a limitations defense is admittedly imprecise, it appears that a statute of limitations defense cannot be grouped with other affirmative defenses and their associated burdens of producing evidence **at trial**.[14] Where,

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[14] *Commonwealth v. Steinberg,* 404 Mass. 602, 606 (1989) (treating limitations defense as "an affirmative defense that in this State a criminal defendant **must plead**," and stating defense can be raised "at **or before** trial"); Black's Law Dictionary (6th ed. 1992) ("Plead. To make, deliver or file any pleading"); *Commonwealth v. Barrett,* 418 Mass. 788, 792 (1994)(generally, failure by defendant **to assert** limitations period has expired waives that defense); *Commonwealth v. Purinton,* 32 Mass. App. Ct. 640, 647 (1992)(limitations defense waived because **not raised in**

Footnote continues to next page.

as here, the defendant pled the statute of limitations, demonstrated that the indictments were outside of the statute, and went into trial with agreement that the Commonwealth had a burden to prove tolling, it is improper to shift the burden back on the defendant to disprove the Commonwealth's chosen means of attempting to toll the statute. U.S. Const. Amend. 14; Mass. Const. art. 12. *E.g.*, *In re Winship*, 397 U.S. 358, 364 (1970); *Mullaney v. Wilbur*, 421 U.S. 684 (1975). Clear direction from this Court concerning the burden on a defendant to adequately raise a statute of limitation defense is needed.

In addition, the statutory construction issue at bar presents an issue of first impression. The statute provides that the limitation period "shall not commence" until the victim turns sixteen (see statute, n.6, *supra, at 12*). This Court should hold that § 63's tolling provision, "any period during which the defendant is not usually and publicly a resident within the Commonwealth shall be excluded in determining the time limit," G.L. c. 277, § 63, is referring to the period of running time -- "six years" (for purpose of this case) -- established in the very same

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Superior Court); *Commonwealth v. Bougas*, 59 Mass. App. Ct. 368, 373 (2003)(complete silence before and during trial was waiver). *But see Commonwealth v. Cabral*, 443 Mass. 171, 179 (2005)(relied upon by trial judge at bar and addressing affirmative defenses generally, stating there must be "evidence supporting such a defense" at trial); *Commonwealth v. Vives*, 447 Mass. 537, 541 (2006)(addressing non-limitations defense and indicating there is a burden of production at trial).

sentence (see statute n.6, *supra,* at 12). The reason for this is simple: A limitations period that has not even commenced, i.e., is inoperative by virtue of the fact that the victim has not reach sixteen years of age, cannot be tolled. Even if one wishes to place an interpretation on the Legislature's language allowing for the assertion that the limitations period was existing and active but "tolled" by operation of law until the complainant's sixteenth (16^{th}) birthday, the same period of time cannot be "tolled" twice, or double counted, by virtue of the Legislature's language on the one hand, and the defendant not being "usually and publicly" within the Commonwealth, on the other hand. This defies common sense and is absurd. *United States v. X-Citement Video*, 513 U.S. 64, 69 (1994) (in construing a statute, the Court will not assume the Legislature intended an absurd result); *Commonwealth v. Richards*, 426 Mass. 689, 690, 690 N.E.2d 419 (1998). It is elementary that "tolling" must relate to time that is running. The "exclusion" of time must relate to time that is being counted.

In light of the above proper construction of the statute, it was grave error for the judge to have directed the jury to consider whether the defendant was "usually and publicly a resident of the Commonwealth" for a period of seven years before the alleged victim turned 16 years of age. This permitted the jury to find tolling for the required amount of 1015 days and sustain the indictments without even reaching or considering evidence addressed to

whether the Defendant was "usually and publicly" a resident during the correct time period, i.e., when the statute was running.

STATEMENT OF REASONS WHY
DIRECT APPELLATE REVIEW IS APPROPRIATE

Were one restricted to reading the judge's decision in this case on "repressed memory," it would lead to the impression that the defense argued the scientific community must be unanimous on one side or other (*Add.* 66), or that because false memories exist, "repressed memory" cannot exist (*Add.* 68). Such arguments appear nowhere in the record below. The judge's decision barely mentions the scientific record presented, nor does he meaningfully address the explanatory testimony under oath from three experts, including Dr. Pope, a world renowned scientist, psychiatrist and clinician, whose testimony provides the central basis for describing proper scientific method and challenging general acceptance at bar. The judge's decision consists of reiterating a general conclusion without confronting the detailed points that were presented and preclude the basis for that conclusion.

A judge has no discretion to disregard scientific method, or overlook the methodological basis for the testimony he credits. Scientific method and the principles by which the advancement of science proceeds do not change from case to case, no matter the defendant's name.

This case squarely presents a scientific, evidentiary record on appeal, enabling a meaningful evaluation of the "repressed memory" hypothesis. This is an issue of first impression in the Commonwealth, and it is not only an issue of great importance to the defendant, but to the legal and scientific community. It is the Supreme Judicial Court that should speak.

This case further presents an issue of statutory interpretation that, the Commonwealth has agreed in its R. 30 submission, has never been addressed. It is an issue that remains relevant to the interpretation and application of G.L. c. 277, § 63 in its current amended form.

Even the grounds upon which the judge sought to avoid interpreting the statute presents the issue of what is required to adequately raise a statute of limitations defense. This is a distinct issue that provides this Court with an opportunity to clarify the law in an area that, the judge's decision below and a thorough review of cases make clear, is needed.

Respectfully submitted,
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December, 2008.

CERTIFICATION PURSUANT TO MASS. R. APP. P. 16(k)

I, Robert F. Shaw, Jr., hereby certify that the within Application for Direct Appellate Review complies with the rules of Court that pertain to the filing of said applications.

Robert F. Shaw, Jr.

ADDENDUM

[15] As indicated, *supra*, for purposes of this petition for direct review, only the Affidavit of Dr. Pope (not the additional two defense experts), is attached. The 61 exhibits in support of Dr. Pope's affidavit have not been reproduced due to the fact that undersigned counsel perceives the affidavit to adequately convey the issues for a determination concerning direct review. Should the Court desire to see the exhibits before making a determination concerning direct review, undersigned counsel will gladly assemble them without delay.