

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
FILE NO. 2008-SC-129 & 2008-SC-876-DG

FILED
MAY 19 2009
SUPREME COURT CLERK

DAVID LAKE

APPELLANT

V.

Appeal from Knox Circuit Court
Hon. Roderick Messer, Judge
Case No. 93-CR-00177

COMMONWEALTH OF KENTUCKY

APPELLEE

BRIEF FOR APPELLEE/ CROSS APPELLANT

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2009, a true and accurate copy of this Brief for Appellee/Cross Appellant was served by first class mail, postage prepaid to Hon. Roderick Messer, Judge, Courthouse, 101 South Main Street, P.O. Box 5189, London, Kentucky 40745; Hon. Danny Evans, Commonwealth Attorney, 105 East 4th Street, London, Kentucky 40741 and Hon. Jack Conway, Attorney General, 1024 Capital Center Drive, 3rd Floor, Frankfort, Kentucky 40601. I also certify that the record was returned to the Supreme Court of Kentucky.

Gail Robinson

INTRODUCTION

This case involves the RCr 11.42/CR 60.02 motion filed by David Lake challenging his 1994 conviction for murder. This Court remanded this case for an evidentiary hearing on that motion and the trial court denied the motion. The Court of Appeals issued an opinion granting relief on one issue to Lake, and the Commonwealth moved for discretionary review which this Court granted. Lake then filed a cross motion for discretionary review on the issues the Court of Appeals had not reached, and this Court granted that motion.

STATEMENT CONCERNING ORAL ARGUMENT

David Lake believes that oral argument would be beneficial in this case because of the novelty and/or complexity of the issues.

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COUNTERSTATEMENT OF THE CASE

COMMONWEALTH'S STATEMENT OF THE CASE

David Lake¹, appellee/cross appellant, does not accept the Commonwealth's Statement of the Case. What the Commonwealth has done is to refer chronologically to the motions filed by David Lake and the rulings on those motions, cherry picking pieces of information from those motions and rulings, occasionally editorializing about something² and then summarizing selected testimony at the evidentiary hearing, not including Gloria Golden's (Brief for the Commonwealth, hereinafter BC 1-6). The Commonwealth does not include anything concerning what occurred at the trial. Instead, the Commonwealth includes topics apparently chosen to attempt to damage the credibility of Lake's post-conviction claims and even his counsel.

For example, the Commonwealth expends considerable effort expounding on the claim that trial counsel was paid \$1000 by the victim's father to compromise his defense of David Lake (BC 1-2). This is puzzling since that allegation was not raised as a ground of relief in the Court of Appeals and was only mentioned in passing as a possible reason for Abner's abysmal performance at trial.

The Commonwealth also refers to Abner's testimony about Jerry Johnson, one of David Lake's attorneys at the evidentiary hearing, allegedly asking him to tailor his testimony to help David and Johnson's reference to a witness who could contradict Abner who was not called (BC 6). How that is relevant to any issue before this Court is never explained. Certainly Abner was obviously hostile to David Lake and did not attempt to be helpful to him at the evidentiary hearing.

¹ To avoid confusion appellee/cross appellant David Lake will be referred to by name throughout this Brief.

² Lake "supported the claims with affidavits repeating inadmissible hearsay..." (BC 1).

David Lake will outline what occurred at the trial followed by a summary of the direct appeal and the RCr 11.42 proceedings and concluding with a thorough summary of the testimony at the evidentiary hearing.

THE TRIAL

David Lake was indicted for the murder of Christopher Golden on about October 3, 1993 (Transcript of Record, hereinafter TR I 1). David was 17 years old at the time he was charged with murder. He was transferred to circuit court following an October 19, 1993 hearing where his attorney stipulated to the transfer and he did not speak (TR ³ 150-160).

No pretrial motions were filed, and the trial began on May 15, 1994 (Transcript of Evidence, hereinafter TE I). Defense counsel Troy Abner moved for a continuance due to an absent eyewitness, Dale Smith, whom he described as the only person at the scene besides David Lake and one other person (TE I 2). The Commonwealth noted the absence of a "Rule 9 affidavit" and the court overruled the motion (TE I 3-4). A fairly extensive voir dire by the court and the prosecutor ensued (TE I 6-30). Defense counsel asked only one question – was there anyone who could not listen to the evidence and render a judgment based solely on that (TE I 30).

The prosecutor made an appropriate opening statement (TE I 32-37) followed by the defense giving a five line opening statement (TE I 38). Dr. Robert Hoskins was called as the first witness (TE I 39). He saw Chris Golden at Knox County Hospital on October 3, 1993; Chris's face was swollen, he had lacerations to the eye and he was agitated, delirious, yelling and fighting (TE I 42-4). The doctor wanted to transport Chris

³ This Volume of TR has no Volume #.

to another hospital but he had heard a couple of hours earlier it was too foggy to fly (TE I 45). Dr. Hoskins sutured above Chris's eye and learned he was diabetic and his blood sugar was very high (TE I 45-6). The doctor admitted him to the ICU and diagnosed acidosis from blood loss and physical activity as well as a skull fracture (TE I 47-9). Chris's blood pressure and pulse were low and he used a defibrillator but pronounced Chris dead after an hour of efforts (TE I 51-2). The doctor stated that Chris had the worst facial and cranial injuries he had seen (TE I 53).

Defense counsel very briefly cross-examined the doctor who stated Chris said he wanted to go home and said nothing about what had happened (TE I 56-7). The doctor could smell alcohol and thought the laceration was from a hard object that struck across Chris's eye (TE I 57-8).

The Commonwealth called Vesta Golden, Chris's mother, who lived in North Carolina (TE I 58). Chris was eighteen when he died and had lived with her but had been back in Knox County with his father Troy for about three weeks (TE I 59-60). Ms. Golden went to the hospital about 3:00 a.m. and saw her son who looked very bad (TE I 61-2). A ten minute break took place after the witness broke down. Ms. Golden said Chris told her he wanted to go home and said "Jake Lake, David Lake and Dale", and "they got my money" (TE I 62). She described her son as a "bad diabetic" (TE I 65). On cross-examination Ms. Golden said Chris did not mention Gloria, his father's fiancée, much (TE I 66). Of the people her son mentioned at the hospital she knew only David Lake (TE I 67-8). David and her son were friends when they were small; Ms. Golden volunteered that her son mentioned on the phone that he thought David burned his

camper but had no way of proving it and said in a letter that he was scared of something (TE I 67-8).

Gloria Partin, age 20, was the next witness (TE I 69). Ms. Partin had lived with Troy Golden for three years; she had known Chris Golden her whole life and David Lake is her first cousin (TE I 70). She and Chris went to a funeral about 5:30 or 6:00 on the day in question (TE I 71). Troy had dropped them off and was supposed to pick them up (TE I 71). However, Gloria ran into her aunt Nicki and Nicki's boyfriend, Bobby Blankenship, at the funeral and she and Chris went with them to Belva David Lake's (TE I 71-2). Gloria left Troy a note saying she was going to Corbin; she admitted lying to Troy "always" (TE I 73). At Belva's Chester Jones, David Lake, Dale Smith, Belva and Willie McNair were present (TE I 73). Billy Lake, Pop Alford and John Stamper came later (TE I 73).

Gloria said those present were drinking beer and liquor (TE I 74). Chris, David and Jack Lake went outside and were squealing tires (TE I 74). The state police came and afterward Chris and David were running in and out of the house (TE I 75-6). Gloria said she went to sleep on a loveseat for a couple of hours and Chris woke her up and was joking with her (TE I 76-7). The witness agreed she'd given a complete statement to Ancil Hall on October 3, 1993 and began reading that statement (TE I 76-7). She related that David and Jack were in the house with Chris when he woke her up (TE I 77). She went to the bathroom while David, Jack, Chris and Dale Smith went outside; about fifteen minutes later all but Chris came back (TE I 78). Jack and David had lots of blood on them. She asked David where Chris was and he said Chris sucker-punched him and David kicked his ass (TE I 79). She described the guys as laughing (TE I 79). Gloria said she found Chris behind the garage moaning and bloody and called 911 (TE I 79-80). The witness said David Lake told her not to call (TE I 80). Gloria left in a car with

Chester and Billy and went to another house to watch for the ambulance; she returned to the house about an hour later and saw Belva and Willie passed out (TE I 81-2).

During a brief cross-examination, Gloria said she did not drink much liquor, **did not use drugs and was not intoxicated that night and described herself and Chris as "just good friends" (TE I 82-5). She also denied seeing Jack Lake with anything in his hand when she drove off with Chester and Billy after the assault (TE I 83).** The witness denied stepping between Chris and Jack David Lake who were arguing about her a week before (TE I 85). Gloria also denied her child was Chris's and **denied a relationship with Jack Lake (TE I 85-6).**

Jack Lake, Jr., age 16 and David Lake's first cousin, was the next witness (TE I 87-8). He was at the David Lake residence on that night and saw David, Lake and Chris in a truck and getting beer; they were also smoking marijuana and "piddling" in the garage (TE I 90-1). After Trooper Gary Martin came and told David and Chris to get back in the house he, David, Chris and Dale Smith went to the garage (TE I 92-3). The witness said he heard a thud and saw Chris on the ground (TE I 93). Then David allegedly kicked Chris in the ribs and head (TE I 93). Jack saw Chris getting up so he went and kicked him in the ribs five or six more times (TE I 94). Then David allegedly stomped Chris and punched him in the head (TE I 94-5). According to Jack, David told him earlier in the day he and Chris might fight before the night was out (TE I 97). David did not say why but Jack said Chris was supposed to have stolen pot off David (TE I 97). David supposedly said to Chris while stomping him "I'll learn you to steal my pot, you son-of-a-bitch" (TE I 98). The witness also claimed to have seen David put a pipe on the car hood (TE I 99). He said he told David Lake to stop and a few minutes later Gloria and Belva came down (TE I 99). Belva told him to leave and he did but he came back later and David told him he had hit Chris with a shovel (TE I 100-1). David supposedly told him to tell the police it was self defense (TE I 102). Jack first told the police he was not there but that was not true (TE I 102-3).

A very brief cross-examination ensued with Jack Lake denying any promises had been made to him, denying he hid the pipe and his bloody clothes and denying any relationship with Gloria (TE I 103-5).

Gary Martin, state trooper, testified that he went to the David Lake house October 2, 1993 around midnight because of a hotrodding complaint (TE I 106-7). He took a beer from David's hand and poured it out; he told Belva they would go to jail if he found them drinking again (TE I 107-8). Trooper Martin returned at about 3:00 a.m. and the residence was deserted (TE I 109). He went to the garage and saw Chris on the ground, and David came from a wooded area (TE I 109). Chris was semi-conscious and mumbling and an ambulance transported him (TE I 112). David was wearing different clothes than the first time he saw him and said Chris was in a fight with Emmett Myers (TE I 113-14). The trooper found a vice grip pliers with wet blood in the back of the truck and David had dry spots of blood and scratches on the knuckles of his right hand (TE I 114-15). The trooper went to the hospital to try to talk to Chris but could not understand him (TE I 115-16). He heard later that morning that Chris had died and had had no idea his injuries were that serious (TE I 116).

Martin returned to the scene and talked to Belva, Chester, Dale Smith and Willie McDarris (TE I 117-18). He then located David and Jack and took them to the police department (TE I 127). Upon searching Belva's house he found shirts David and Jack had worn which he kept as exhibits to be tested as well as Jack's already washed pants (TE I 130-1). Martin identified blood spots on Jack's shirt (TE I 130). Martin presented the case against David and Jack to the grand jury but no indictment was returned against Jack (TE I 137).

Trooper Mike Smith testified he went to the Lake residence to execute a search warrant and found David Lake hiding in the weeds nearby (TE I 141-2). Then Lucy Winkle, forensic serologist, testified that she found human blood on the vice grips; the type was consistent with Chris Golden's blood but not with David's or Jack's (TE I 146-

9). On a suspension bar she found human blood consistent with Chris's and Jack's but not David's (TE I 150). David Lake's "Button Your Shorts" t-shirt had a spot consistent with his own blood type and another consistent with Chris's and another t-shirt of his had blood consistent with Chris's (TE I 151-2). Lucy Davis of the KSP Lab then examined the items for possible DNA testing (TE II 156-7). There was insufficient blood on David's "Button Your Shorts" shirt to do DNA typing (TE II 159). On David's other shirt she performed DNA analysis and matched the blood to Chris; it did not match David or Jack (TE II 159-60).

L.C. McCloud, M.D., a forensic pathologist, next testified that he examined Chris Golden's body and found his death was due to multiple blunt force and traumatic injuries to the skull, brain, ribs, spleen and kidney (TE II 163-7). He was unable to determine which blows caused the death (TE II 169). Defense counsel made a general directed verdict motion which was overruled (TE II 170-1). Jack Lake was recalled (TE II 172). He agreed that he did not see anything in David's hands and Chris was no closer to the motorcycle than eight feet when he turned (TE II 172). The Commonwealth then had him repeat that David told him he hit Chris with a shovel and he added that David picked up a bar and said he had hit Chris with it (TE II 174).

David Lake then testified (TE II 175). He described an argument between Chris and Jack about 5-7 days before Chris's death (TE II 177). Chris was upset because he was aware Gloria was fooling around with Jack (TE II 177). Gloria jerked up a club and Chris struck Gloria (TE II 179). Lake said he and Chris had been close since seventh grade (TE II 180). On the night in question Chris asked Jack if he was fooling around with Gloria, there was an argument and Jack hit Chris on the head with vice grips (TE II 183). Jack then got a shovel and hit Chris everywhere; David hollered at Jack to stop, and Dale went to get Chester (TE II 184-5). Chester and Gloria came and he told Gloria to call for an ambulance and hung around with Chris, even lifting him up and checking his heart (TE II 185). David said he called again for an ambulance and told them Chris

was a diabetic and he hung out a light (TE II 185-6). On cross David Lake said he did not recall telling Trooper Martin that Emmett Myers did it (TE II 186). He said he hid in the weeds since he was afraid of police who had guns on him (TE II 188). As far as Jack, he said he did not tell on him since Jack is his first cousin and was only fifteen at the time (TE II 190-1). David denied any part in Chris's beating (TE II 191-2).

A discussion of instructions ensued with defense counsel objecting to anything but a murder instruction and the court stating it would also instruct on manslaughter first degree which it did (TE II 194-5). **The defense urged the jury to consider that Jack rather than David killed Chris and discussed Jack's motive to hurt Chris (TE II 198-203). The Commonwealth noted nothing supported the defense claim of a love triangle except David's testimony (TE II 205).** The prosecutor asked for an intentional murder conviction (TE II 213). The jury obliged (TE II 214-15). Following the penalty phase the defense waived closing argument (TE II 223). The Commonwealth argued for more than twenty years (TE II 223-5). The jury recommended twenty years (TE II 226). David filed a pro se motion for new trial on June 18, 1994 (TR I 41-8). He urged his trial attorney had represented him ineffectively. The court entered final judgment sentencing David Lake to twenty years for murder on July 6, 1994 (TR I 49-51).

DIRECT APPEAL

David Lake appealed his conviction to this Court which affirmed in an unpublished opinion dated August 24, 1995 (TR 54-8; Appendix, hereinafter A, 20-24). Four issues including certain allegations of ineffective assistance of counsel were addressed.⁴ This Court rejected all of those issues (A 20-24).

⁴ David Lake urged that he was denied effective assistance of counsel because trial counsel failed to prepare adequately, subpoena appropriate witnesses, effectively cross-examine, move for a change of venue or move to dismiss the indictment when David was in jail unindicted more than sixty (60) days (A 22-23).

RCr 11.42 MOTION

On November 15, 1995 David Lake filed a pro se RCr 11.42 Motion and requested appointment of counsel (TR 74-79). He also moved for an evidentiary hearing and tendered numerous affidavits and a memorandum of law (TR 19-73). DPA was appointed and eventually private counsel Mark Stanziano entered his appearance (TR 94-5, 102-3). An amended RCr 11.42/CR 60.02 motion was filed on June 30, 1998 with counsel alleging that Mr. Abner waived the juvenile transfer hearing without Lake's consent and that Gloria committed perjury (TR 133-149). On August 18, 1998 the Court entered an Order overruling the motion without conducting a hearing (TR 194-200). While the Court of Appeals affirmed that decision (TR 1 of 1 31-9), this Court on September 19, 2002, reversed and remanded for an evidentiary hearing (TR 1 of 1 49-50).

THE EVIDENTIARY HEARING

The first witness at the March 11, 2004 hearing was Troy Allen Abner (Tape 1; 3/11/04; 11:11:12). Abner currently ran a florist; his license to practice law was suspended in '95 -'97 for failure to complete CLE (Tape 1; 3/11/04; 11:44:07). Abner had been arrested for DUI on at least a couple of occasions as well as possession of marijuana (Tape 1; 3/11/04; 11:44:44). He claimed his use of alcohol and marijuana at the time of David Lake's trial was not excessive (Tape 1; 3/11/04; 11:46:12). This was Abner's first murder trial and he believed he had at least one other case which went to a jury (Tape 1; 3/11/04; 11:15:31). Abner was representing David Lake's brother William in a rape case but did not think there was a conflict of interest (Tape 1; 3/11/04; 11:21:16). He believed he needed an expert to assist him with interpreting medical reports but claimed the family did not provide money (Tape 1; 3/11/04; 11:19:45; 11:41:33). As far as why he did not ask the court for expert funds, Abner said he did not think that was necessary since he did research on his own (Tape 1; 3/11/04; 11:43:21). Abner did state that he asked David whether he should remove himself from the case but

David wanted him to stay on (Tape 1; 3/11/04; 11:5:29). He explained he is distantly related to David and David knew him his entire life (Tape 1; 3/11/04; 11:52:13).

With respect to the continuance motion that did not comply with RCr 9.04, Abner said he thought he knew the rule but was not sure why he did not follow it (Tape 1; 3/11/04; 11:14:19; 11:37:20). As far as trial preparation, he said he went to the scene the next day and interviewed people there (Tape 1; 3/11/04; 11:23:35; 11:32:31). He had talked to David about eight o'clock that morning (Tape 1; 3/11/04; 11:26:44). Abner said he did not call any of the witnesses he had interviewed because they all said they knew nothing and were drunk or drugged (Tape 1; 3/11/04; 11:24:48). His client William ("Billy") Lake was allegedly on the run in Florida and said he knew nothing (Tape 1; 3/11/04; 11:30:35). Abner denied telling anyone the trial would not go forward that day (Tape 1; 3/11/04; 11:35:30; 11:49:52). He obtained discovery through "open file" (Tape 1; 3/11/04; 11:37:55). His planned defense was to seek "involuntary manslaughter" which he believed David Lake's testimony would support (Tape 1; 3/11/04; 12:12:52). He could not recall why he failed to submit a reckless homicide instruction (Tape 1; 3/11/04; 12:14:15).

On cross the Commonwealth asked if he received \$1000 from Troy Golden which he described as a "blatant lie" (Tape 1; 3/11/04; 12:15:36). He reiterated that he was not given money for an expert (Tape 1; 3/11/04; 12:16:05). As far as his file, he said it was destroyed in a fire (Tape 1; 3/11/04; 12:24:46). He thought David Lake would testify he and Chris were fooling around wrestling and Chris hit his head on a motorcycle but instead David implicated Jack as the sole perpetrator (Tape 1; 3/11/04; 12:26:15).

Chester Jones testified he was at the David Lake house and Gloria passed out and came to several times (Tape 1; 3/11/04; 12:37:53). **Jones testified he knew both Chris and Jack Lake had a sexual relationship with Gloria because he had seen them together sexually** (Tape 1; 3/11/04; 12:38:51). Jones said everyone including Chris was drinking (Tape 1; 3/11/04; 12:39:31). **He saw Jack Lake waiving a stick or pipe when**

he drove down the road (Tape 1; 3/11/04; 12:40:09). **The witness testified that Abner never asked him what he knew and he asked Abner if he needed him at trial but got no answer** (Tape 1; 3/11/04; 12:41:56; 12:51:11).

Arvil Lake, David's father, testified that Abner was "kinda family" and was paid to handle cases (Tape 1; 3/11/04; 13:51:58). Mr. Lake gave Abner \$1500 to hire a doctor to explain the autopsy (Tape 1; 3/11/04; 13:53:20). Abner told him the expert was supposed to be at trial but did not show (Tape 1; 3/11/04; 13:58:52). Mr. Lake affirmed his 1995 affidavit⁵ that Gloria said Troy threatened her and her child so she would testify (Tape 1; 3/11/04; 13:55:17). Gloria also told him she was with Troy when he paid Abner \$1000 not to defend Lake properly (Tape 1; 3/11/04; 13:56:56). Mr. Lake explained that David did not want another attorney since he thought he would walk out and go home (Tape 1; 3/11/04; 14:02:22).

Belva Lake then testified (Tape 1; 3/11/04; 14:09:22). She affirmed her statements in her 1995 affidavit that Gloria said Troy threatened to kill her and her child if she did not testify and that Gloria said she was with Troy when he paid Abner \$1000 not to defend David properly (Tape 1; 3/11/04; 14:10:07). **Ms. Lake added that Gloria told her about her sexual relationships with Chris and Jack** (Tape 1; 3/11/04; 14:11:51). **Nicki Donaldson, David Lake's aunt, testified that Gloria told her of her sexual relationships with Chris and Jack and Troy's threats to her and her child if she did not testify** (Tape 1; 3/11/04; 14:20:47). Gloria also told her she was with Troy when he paid Abner \$1000 and she herself saw Troy give Abner an envelope he described as another payment for throwing David Lake's case (Tape 1; 3/11/04; 14:22:04). **Ms. Donaldson talked with Abner the day of trial and asked to be called**

⁵ Counsel for Lake at the evidentiary hearing asked several witnesses about the contents of their 1995 affidavits at the 2004 evidentiary hearing concerning events in 1993 and 1994, leading the trial court to claim the witnesses "seemed that they were testifying from a script" in its October 19, 2006 order (Appendix to Brief for Commonwealth at 26), a position repeated by the Commonwealth in its Brief (BC 5). However, refreshing the memory of a witness with an earlier affidavit is certainly appropriate. See KRE 612.

to testify about Gloria's relationship with Jack and Chris as well as Chris and Gloria taking a large amount of pills on the way from the funeral home (Tape 1; 3/11/04; 14:24:22).

William David Lake testified that he was at Belva's house and heard David hollering that Chris and Jack were fighting (Tape 1; 3/11/04; 14:30:21). He ran to the garage and saw Jack hit Chris with a pipe and kick him several times while David yelled for help (Tape 1; 3/11/04; 14:31:04). William told Abner this more than once and told him he would appear in court to testify (Tape 1; 3/11/04; 14:32:02). William said he also told Trooper Martin this account of events (Tape 1; 3/11/04; 14:45:14).

Gloria Golden testified next (Tape No. 2; 3/11/04; 14:58:40). Gloria said she was threatened by Troy after Chris was killed and had to go to a shelter (Tape No. 2; 3/11/04; 15:01:12). **Her husband Troy was abusive to her and bitched at her that she would be in jail if she did not say certain things** (Tape No. 2; 3/11/04; 15:03:09). **The night in question she was drinking, smoking pot and taking valium** (Tape No. 2; 3/11/04; 15:01:47). **Gloria admitted she and Chris had a relationship off and on before she married his father** (Tape No. 2; 3/11/04; 15:04:42). **Jack pursued her but she said no; Jack's actions caused problems between Jack and Chris** (Tape No. 2; 3/11/04; 15:04:42). Gloria heard about Troy giving money to Abner but did not see it pass (Tape No. 2; 3/11/04; 15:05:35). On cross Gloria said there was blood on David and Jack but described Jack as "drenched" (Tape No. 2; 3/11/04; 15:13:18). Moreover, **Jack Lake told her she would be next if she testified; he specifically said he would kill her and her daughter** (Tape No. 2; 3/11/04; 15:17:32). **And she saw Jack with a pole or stick when she and Chester and William left in a vehicle** (Tape No. 2; 3/11/04; 15:17:59).

David Lake testified that Abner spoke to him briefly at the police station (Tape No. 2; 3/11/04; 15:23:49). He next saw Abner at the hearing where he was transferred to adult court; Abner did not speak with him before the hearing and, when David asked what he was doing, the lawyer claimed to have everything under control (Tape No. 2;

3/11/04; 15:24:14). David Lake communicated with Abner through his father and heard the trial was to be continued (Tape No. 2; 3/11/04; 15:23:36). The day of trial Abner told him he was being forced to trial, gave him five xanax and told him he would be found not guilty (Tape No. 2; 3/11/04; 15:27:18). David Lake said there had been no discussion of the Commonwealth's evidence or their defense and he thought an expert was to be hired (Tape No. 2; 3/11/04; 15:28:34). David Lake trusted Abner since he had gotten him out of other trouble (Tape No. 2; 3/11/04; 15:30:37).

On cross David Lake said he testified at trial as Abner instructed and what Billy David Lake had described as happening that night was true (Tape No. 2; 3/11/04; 15:33:42). He had scratches on his hands since he was a mechanic and blood on his shirt since he was with Chris awaiting an ambulance (Tape No. 2; 3/11/04; 15:35:10). With emotion he talked about Chris as his best friend (Tape No. 2; 3/11/04; 15:36:07). David Lake also admitted giving a false statement to protect Jack who was only fifteen (Tape No. 2; 3/11/04; 15:37:50). The Commonwealth then called Troy Golden who denied paying Abner money to throw David Lake's defense (Tape No. 2; 3/11/04; 15:40:25).

Following briefs by the parties the court denied the motion as "successive" (TR I of I 138-9). Following an appeal to the Court of Appeals the case was remanded to the trial court for a decision on the merits. That court again denied relief on October 19, 2006 (Appendix to Brief for the Commonwealth, pp. 15-42). This appeal results.

ARGUMENTS

I.

LAKE'S CONVICTION MUST BE VACATED BECAUSE HE DID NOT WAIVE HIS RIGHT TO TRANSFER PROCEEDINGS IN JUVENILE COURT AND HIS ATTORNEY'S ATTEMPT TO STIPULATE TO THE TRANSFER WAS INEFFECTIVE.

A. ABSENCE OF WAIVER OF TRANSFER HEARING BY DAVID LAKE

The Commonwealth clearly misunderstands the claim on which David Lake prevailed in the Court of Appeals. The Commonwealth urges that the basis of its motion for discretionary review to this Court was a belief that the Court of Appeals had changed the requirement of a showing of prejudice from a claim of ineffective assistance of counsel, and the Argument heading states that the Court of Appeals erroneously vacated and remanded “on the claim of ineffective assistance of counsel at the transfer hearing without any demonstration of prejudice” (BC 7). In fact, the Court of Appeals reversed and remanded **not** on the issue of ineffective assistance of counsel with respect to counsel's stipulation at the transfer hearing but on the absence of any waiver of the right to a transfer hearing by David Lake. *Lake v. Commonwealth*⁶, The Court of Appeals reviewed the transcript of the hearing in Knox District Court (A 1-11), cited *Humphrey v. Commonwealth*,⁷ and explained in its conclusion:

In the case at hand, there is absolutely no evidence of a valid waiver of the statutory requirements of KRS 640.010(2). Lake neither signed any document purporting to waive his right to a transfer hearing, nor did the juvenile court conduct such a hearing. The record contains no evidence that Lake spoke a word in court the day of his scheduled transfer hearing. Neither does the judge engage in any explanation of Lake's rights. Rather, the juvenile court accepted defense counsel's stipulation of his client's

⁶ ___ S.W. 3d ___ (rendered January 25, 2008). Master Slip Opinion, hereinafter MSO, at 13-14.

⁷ 153 S.W.3d 854 (Ky. App. 2004) *disc. rev. denied* February 9, 2005.

appropriateness for transfer with very little questioning, and none of it directed at Lake.

KRS 600.010(2), which was originally enacted in 1986 with an effective date of July 1, 1987, states that it is the Commonwealth's policy to provide judicial procedures which protect the rights of all parties. Further, "all parties are assured prompt and fair hearings. Unless otherwise provided, such protections belong to the child individually and may not be waived by any other party." KRS 600.020(2)(g). Consequently, the trial court erred in accepting a purported waiver from defense counsel when the right to a transfer hearing belonged solely to Lake and could only be waived by him. The reasoning of our previous decision in *Humphrey*, requires this Court to vacate Lake's conviction and remand the case to the juvenile court.

Lake v. Commonwealth, MSO at 12-13.

The Court did not address the ineffective assistance of counsel aspects of the claim.

The Commonwealth contends in this Court that the issue of the absence of any waiver of the juvenile transfer hearing by David Lake cannot be the subject of an RCr 11.42 motion because it could have been raised on direct appeal to this Court in 1995 and is barred from further consideration under "law of the case" (BC 8). This is the first time the Commonwealth has made that claim and it should be disregarded. In the Court of Appeals the Commonwealth basically ignored this issue and focused solely on whether defense counsel was ineffective for stipulating to the transfer (Brief for the Commonwealth filed June 4, 2007, pp. 11-13). The Commonwealth did contend that the Court of Appeals should not consider the transfer hearing claim because Lake did not cite to juvenile court records and a silent record must be presumed to support the action of the trial court (Brief for the Commonwealth in Court of Appeals at 11-12). However, the record was not silent since Lake referred to the transcript of the juvenile court hearing which had been furnished to the circuit court in 1998 with no objection to its authenticity having ever been raised. The Commonwealth then urged that Lake failed to show

prejudice from trial counsel's stipulation because there was no reasonable probability any judge would have decided not to transfer, and the issue is not jurisdictional, concluding with citation to *Strickland v. Washington, supra* (Brief for Commonwealth in the Court of Appeals at 12-13). The Commonwealth's belated claim that this issue cannot be pursued now since it was not raised on direct appeal must be rejected. *See Southers v. Commonwealth.*⁸

If this Court chooses to address the Commonwealth's claim, David Lake urges that he is not barred from pursuing this issue in the current proceeding by failing to raise it on direct appeal. The Commonwealth has cited *Schooley v. Commonwealth*⁹ for the proposition that a defective waiver hearing may be raised as grounds for relief on direct appeal (BC 8). *Schooley* involved a successive RCr 11.42 motion asserting the circuit court had not acquired jurisdiction over a defendant because the transfer order did not sufficiently delineate the reasons for transfer. *Id.* at 916-917. *Schooley*, who had pled guilty in circuit court, did not appeal from the denial of the previous 11.42 motion. *Id.* The Court of Appeals held that *Schooley's* RCr 11.42 motion was untimely since he had had "ample opportunity to challenge the validity of the transfer order by direct appeal or by the earlier motion under RCr 11.42". *Id.* at 918. Certainly *Schooley* does not hold that a person who fails to challenge an improper transfer from juvenile court on direct appeal can never do so via an RCr 11.42 motion. And *Humphrey v. Commonwealth, supra* involves an RCr 11.42 motion challenging the absence of a valid waiver of the juvenile transfer proceeding when there had been no prior direct appeal.

⁸ 210 S.W. 3d 173, 174 (Ky. App. 2006).

⁹ 556 S.W.2d 912 (Ky. App. 1977).

The issue presented in *Schooley* was technical – the absence of a properly articulated statement of reasons for transfer. Contrastingly, the issue in this case is one of due process – the transfer of a juvenile to circuit court in the absence of the mandatory transfer hearing without any waiver of that hearing by the juvenile¹⁰. That very fundamental claim is cognizable through RCr 11.42.

The Commonwealth also cited to *Gross v. Commonwealth*¹¹ in support of its contention that this issue was not cognizable in an RCr 11.42 action and urged that *Humphrey* could not overrule *Gross*. The issues in *Gross v. Commonwealth*, are not at all comparable to this issue in this case. *Gross* filed a CR 60.02 motion challenging a conviction for which he had served the sentence years earlier on *Boykin v. Alabama*¹², grounds, and this Court held that was improper because the motion was not filed within a reasonable time and *Gross* was not entitled to the appointment of counsel. The Commonwealth's contention that Lake is urging a result which means *Humphrey* overruled *Gross* is simply puzzling.

Finally, citing *Commonwealth v. Thompson*¹³, the Commonwealth contends that Lake's claim must fail because there was not an adequate record presented to the Court (BC at 12). That contention lacks any merit. Lake's appointed counsel filed the transcript of the hearing where counsel attempted to stipulate his client's rights away with the amended RCr 11.42 motion (A 1-11). That is the relevant record and the adequacy of that record has never been challenged until now. There is not a "silent record"; there is a transcript which reveals no waiver by Lake.

¹⁰ The Commonwealth refers to the issue as "a defect in the waiver proceedings" (BC 8) but Lake disagrees with that description since there was no waiver proceeding.

¹¹ 648 S.W.2d 853 (Ky. 1983).

¹² 395 U.S. 238 (1969).

¹³ 697 S.W.2d 143 (Ky. 1985).

Commonwealth v. Thompson is not on point. In that case Thompson urged that the transfer order was invalid on its face for merely parroting the language of the transfer statute.¹⁴ Thompson further asserted that the witnesses whose testimony the trial court had cited in support of his order were not competent to testify concerning the topics of their testimony, and this Court noted nothing concerning that issue was in the record in that case.¹⁵ This Court then held that “when the complete record is not before the appellate court, that court must assume that the omitted record supports the decision of the trial court”.¹⁶ Lake has no quarrel with that holding but it is irrelevant to his case where there is no “omitted record”.

The transfer hearing on October 19, 1993 was brief (TR 150-160; A 1-10). The Judge offered to continue it but Mr. Abner wanted to proceed (TR 152-3). He stipulated to probable cause and to David’s appropriateness for “certification” (TR 155-6). **David Lake did not speak a word at the hearing.** *Humphrey v. Commonwealth*¹⁷, addresses this issue. In *Humphrey* the Court of Appeals held that, even when a child signed a “waiver of rights” form and there was a brief colloquy with the district court, that was insufficient to prove a voluntary, knowing and intelligent waiver¹⁸. In this case there was no written waiver and no colloquy with David Lake. David’s right to due process was violated contrary to the 6th and 14th Amendments, United States Constitution and Sections 2 and 11, Kentucky Constitution.

¹⁴ *Id.* at 144-145.

¹⁵ *Id.* at 145.

¹⁶ *Id.* at 145.

¹⁷ 153 S.W.3d 854 (Ky. App. 2004) *disc. rev. denied* February 9, 2005.

¹⁸ *Id.* at 859. *Humphrey* had asserted that a transfer hearing was mandatory and nonwaivable. However, the Court of Appeals did not agree with that position.

Lake asserts that the order transferring him to circuit court was void since there was no transfer hearing and no waiver of the hearing by him, and the circuit court never obtained jurisdiction over the case. Of course, exclusive jurisdiction over juvenile cases is vested in the juvenile session of district court. KRS 610.010. Jurisdiction can only be waived when the court complies with KRS 635.020. *See Bengel v. Commonwealth*,¹⁹ There was no such compliance in this case. The decision of the Court of Appeals vacating David Lake's conviction and remanding the case to juvenile court should be affirmed.

B. INEFFECTIVE ASSISTANCE OF COUNSEL REGARDING TRANSFER HEARING

Moreover, even if this Court rejects the decision of the Court of Appeals regarding the lack of waiver of the transfer hearing by appellant, Abner's actions with respect to the transfer hearing – stipulating to probable cause and to David Lake's fitness for waiver to circuit court – constitute ineffective assistance of counsel contrary to the 6th and 14th Amendments, United States Constitution and Section 11, Kentucky Constitution. This was a discretionary transfer. *See* KRS 635.020 (2). Although David Lake was charged with murder, he was clearly under the influence of intoxicants and likely involved in an altercation. Even if the court found probable cause that he committed the charged offense of murder, the crime was less serious because of those circumstances. And counsel could have argued that David Lake was not an appropriate candidate for transfer based on the factors the court must consider. *See* KRS 640.010(2). He had nothing to lose by doing so.

Perhaps there might have been a tactical reason for the stipulation if it had been part of a plea bargain for a particular deal in circuit court. But it was not. Instead, counsel waived his young client's right to a transfer hearing, which he had no right to do,

¹⁹ 314 S.W.2d 311, 313 (Ky. 1961).

for nothing in return. Courts have reversed cases on the grounds of ineffective assistance because of deficient performance at a transfer hearing. *See, e.g., State v. Bryant*²⁰, (failure to present evidence of rehabilitation constituted ineffective assistance of counsel under *Strickland*). Kentucky courts have held that “it is ineffective assistance of counsel to fail, without a reasonable basis, to present a defense which would compel a dismissal of the charges”. *Ivey v. Commonwealth*²¹. Likewise, it is ineffective to fail to challenge a transfer that could bar circuit court prosecution.

*See also State v. N.G.*²², where the court held as follows in a case where the juvenile had waived a transfer hearing:

The failure of defendant’s attorney to advise him and/or his mother of both the benefits of a voluntary waiver and the consequences of a waiver in this case constitutes a prima facie showing of the ineffective assistance of counsel. The attorney’s conduct “so undermined the proper function of the adversarial process that the hearing cannot be relied on as having produced a just result and that counsel’s performance has been so deficient as to create a reasonable probability that these deficiencies materially contributed to defendant’s waiver to adult court”. *State v. Ferguson, supra*, 255 N.J. Super. at 544, 605 A.2d 765, citing *State v. Fritz*, 105 N.J. 42, 58, 519 A.2d 336 (1987). The issue of ineffective assistance of counsel in this case calls into question whether or not the waiver was made knowingly, willingly and voluntarily. Since neither N.G. nor his mother knew the consequences of the waiver when it was made, the hearing cannot be said to have produced a just result. *Id.* at 978.

Addressing the ineffective assistance of counsel aspect of this claim, the Commonwealth delineates the proper standard for proving ineffective assistance of counsel and then focuses on lack of prejudice rather than absence of deficient performance (BC 8-18). In fact, the Commonwealth does not attempt to defend trial counsel’s decision to stipulate to his client’s transfer to circuit court. As far as prejudice, his position is that there was none since any district judge would have transferred the case

²⁰ 567 A.2d 212 (N.J. Super. Ct. App. Div. 1988) *rev’d in part on other grounds*, 569 A.2d 770 (N.J. 1989)

²¹ 655 S.W.2d 506, 512 (Ky. App. 1983)

²² 701 A.2d 976 (N.J. Super. L. 1997)

to circuit court under these circumstances (BC 11-13). But the Commonwealth bore the burden of proof of demonstrating that transfer was appropriate by substantial evidence. *See Stout v. Commonwealth*²³. Chris Golden unexpectedly died from injuries he received in an alcohol-fueled incident. David Lake was seventeen but he was not an incorrigible delinquent, and the court could have retained jurisdiction over him up until age nineteen. *See* KRS 635.090. There was prejudice to David from his attorney's inappropriate decision to stipulate to his transfer to circuit court. Abner's attempted waiver of his client's rights constituted deficient performance and David Lake was prejudiced since his case might have remained in juvenile court. Reversal is necessary.

II.

LAKE'S CONVICTION MUST BE VACATED BECAUSE OF THE ADMITTED PERJURY OF WITNESS GLORIA GOLDEN CONCERNING CRITICAL FACTS.

This issue is properly preserved for appellate review. It was included in the original pro se RCr 11.42 motion (TR 74-9) and re-affirmed in the amended RCr 11.42/CR 60.02 motion (TR 145-9). Moreover, the lower court rejected the claim in its initial order (TR 194-200). Gloria Golden unquestionably committed perjury at David Lake's trial. The Commonwealth acknowledged that fact in its post-hearing Brief (TR I of I 117). However, the Commonwealth simply urged that perjury "is not a ground for relief under RCr 11.42" (TR I of I 117).

David Lake asserts that perjured testimony deprives a defendant of due process and a fair trial contrary to the 6th and 14th Amendments, United States Constitution and Sections 2 and 11, Kentucky Constitution. Perjury must be a ground for relief under RCr 11.42. David Lake acknowledges the holding of *Commonwealth v. Basnight*,²⁴ which the

²³ 44 S.W.3rd 781, 788 (Ky. App. 2000).

²⁴ 770 S.W.2d 231, 237-238 (Ky. App. 1989)

Commonwealth has cited previously. The Court of Appeals, citing *Hendrickson v. Commonwealth*,²⁵ stated that perjured testimony is not a reason for relief under RCr 11.42. *Id.* Basnight argued that the rule in question had outlined its usefulness and should be abandoned, but that Court noted it was bound by decisions of this Court. *Id.*

Thirty-nine years have elapsed since *Hendrickson* was decided. The holding that perjured testimony is not constitutionally prohibited is simply wrong and should be reversed. Moreover, in *Commonwealth v. Spaulding*²⁶, this Court stated that, in an appropriate case, the introduction of perjured testimony can result in a due process violation contrary to the United States and Kentucky Constitutions and may constitute grounds for CR 60.02 relief. David Lake cited CR 60.02 in his supplemental RCr 11.42 motion (TR 145-9)²⁷. Relief on this compelling claim should be granted.

The key questions for the jury at David Lake's trial and the conflicting evidence relevant to those questions were the following:

1. What involvement, if any, did David have in the beating of Chris Golden?

A. Jack Lake testified that he kicked Chris in the head but claimed David kicked Chris in the head and ribs and that David admitted to Jack he hit Chris with a shovel and pipe (TE I 93-101; TE II 173-4).

B. David testified that Jack hit Chris on the head with a vice grips and all over with a shovel and he had no part in beating Chris (TE II 183-5, 191-2).

C. Gloria testified that, after Chris, David, Jack and Dale Smith went outside, they returned without Chris and Jack and David had lots of blood on them (TE I 79). Moreover, David said

²⁵ 450 S.W.2d 234 (Ky. 1970)

²⁶ 991 S.W.2d 651 (Ky. 1999)

²⁷ The citation was to CR 60.02(c) which deals with "perjury or falsified evidence". That ground must be asserted within one (1) year. However, CR 60.02(f) includes "any other reason of an extraordinary nature justifying relief" and that ground must be asserted "within a reasonable time". David Lake filed his pro se 11.42 motion which included the perjury claim in December 1995, only four months after his conviction was affirmed on direct appeal.

Chris sucker-punched him and that he kicked Chris's ass (TE I 79).

D. Trooper Martin testified David had changed his clothes and had dry spots of blood and scratches on his knuckles when he returned to the scene (TE I 113-115). David, who came out of the woods, said Emmett Myers had fought with Chris (TE I 114).

E. KSP lab witnesses testified the vice grips had blood consistent with Chris but not David or Jack on them (TE I 146-9) and the suspension bar had blood consistent with Chris and Jack but not David (TE I 150). David's T-shirts had a spot of blood consistent with his own type and others consistent with Chris's (TE I 151-2).

2. What motive did anyone present have for hurting Chris?

A. Jack Lake testified that David had said earlier he might fight Chris and that David said "I'll learn you to steal my pot, you SOB" while beating Chris (TE I 97-8). He denied any relationship with Gloria (TE I 104).

B. David testified that Chris and Jack argued a week earlier because Chris learned Gloria was fooling around with Jack and that Chris asked Jack whether that was true before beating him (TE II 177, 183). David described Chris and him as "close" for many years (TE I 84-6).

C. Gloria claimed she and Chris were just friends, denied an argument the week before and denied a relationship with Jack (TE I 84-6).

D. Chris's mother Vesta testified Chris said at the hospital "Jake Lake, David Lake and Dale", and "they got my money" and that Chris mentioned to her he thought David had burned his camper but couldn't prove it (TE I 62, 67-8).

E. **In closing argument the prosecutor emphasized that nothing supported the defense claim of a love triangle but David's testimony (TE I 204-5).**

Certainly any reasonable juror would have struggled with the question of who killed Chris Golden. Was it Jack Lake, fifteen at the time? Was it David Lake, seventeen

at the time? Was it both of them? Jack admitted some involvement in the beating but shifted most of the blame to David and testified to an alleged motive – that David was upset over Chris stealing his pot. David denied involvement in the beating²⁸ and blamed Jack, saying Jack was jealous of Chris's involvement with Gloria. However, Gloria and Jack denied she had a relationship with Jack, and Gloria lied about her relationship with Chris. **If Gloria had admitted at trial what she admitted at the evidentiary hearing – that she had a sexual relationship with Chris, the son of her paramour whom she later married, that Jack pursued her and she rebuffed him and this caused problems between Jack and Chris (Tape No. 2; 3/11/04; 15:04:42, 15:14:08)²⁹, the jury would have had a drastically different picture of the events of October, 1993. David asserts that the possibility of acquittal would have been substantial because Jack had an obvious motive to beat up Chris and falsely implicate David.**

Gloria definitely lied at trial about three important subjects: her relationship with Chris, her intoxication and drug use that night and seeing Jack with a pipe after the beating. Gloria stated she and Chris were “just good friends”, specifically denied taking drugs and said she drank only a little that night, and denied seeing Jack with anything in his hand after the assault on Chris (TE I 82-6). At the evidentiary hearing Gloria admitted the relationship with Chris, admitted drinking, smoking pot and taking valium that night and being intoxicated and acknowledged seeing Jack with a pole or stick when she left with Chester and Billy in a vehicle (Tape No. 2; 3/11/04; 15:01:47-15:04:45, 15:17:59). Gloria also at minimum concealed essential information about her relationship with Jack³⁰ and his threats toward her at the trial. Gloria simply testified at trial that both Jack and David had lots of blood on them and she had no relationship with

²⁸ The Commonwealth will surely note that David falsely implicated Emmett Myers rather than Jack. However, David reasonably explained that he did not want to get Jack, his fifteen year old first cousin, in trouble (TE II 190-1).

²⁹ A transcript of excerpts of Gloria's testimony at the evidentiary hearing is included in the Appendix (A 12-19). David Lake urges this Court to review that transcript.

³⁰ Gloria may also have lied about that relationship since Belva Lake and Nicki Donaldson testified she had told them she did have a sexual relationship with Jack (Tape No. 1; 3/11/04; 11:11:51, 14:20:14:20:47).

Jack (TE I78-9, 85-6). At the hearing she testified that Jack pursued her and she rejected him and that Jack's actions caused problems between Jack and Chris (Tape No. 2; 3/11/04; 15:04:42). Gloria said both Jack and David had blood on them but Jack was "drenched" (Tape No. 2; 3/11/04; 15:13:18). **And she testified that Jack threatened to kill her and her daughter if she testified against him (Tape No. 2; 3/11/04; 15:17:32).** Of course, she was also being threatened by her paramour, the father of Chris Golden, to testify to particular things (Tape No. 2; 3/11/04; 15:03:09).

Gloria admittedly committed perjury at David Lake's trial. If she had testified truthfully, the jury would have found Jack, who was jealous of Chris because of his sexual relationship with Gloria and threatened to kill Gloria and her child if she testified against him, the most likely perpetrator against Chris. Instead, the jury was misled into thinking only David had a motive to assault Chris (one supplied by Jack) and that David's testimony about the love triangle and Jack's beating of Chris was false. This trial, which resulted in a young man being found guilty of murder of his friend and sentenced to twenty years in prison, was a travesty of justice fueled by Gloria's lies. Fundamental fairness requires that a new trial be granted.

III.

LAKE'S CONVICTION MUST BE VACATED BECAUSE OF INEFFECTIVE ASSISTANCE OF COUNSEL.

This issue is properly preserved for appellate review. It was included in the original pro se RCr 11.42 motion (TR 74- 9) and re-affirmed in the amended RCr 11.42/CR 60.02 motion (TR 145-9). The lower court rejected the claim in its original order and new order (Appendix to Brief for the Commonwealth, pages 15-49). David Lake asserts that trial counsel represented him ineffectively at trial contrary to the 6th and

14th Amendments, United States Constitution and Sections 2 and 11, Kentucky Constitution. His murder conviction should be vacated.

Ineffective assistance of counsel standard: A claim of ineffective assistance of counsel is a mixed question of law and fact that is reviewed *de novo* under the two-part *Strickland* test:³¹ 1) whether counsel's representation was deficient in that it "fell below an objective standard of reasonableness,³²" and, 2) whether the defendant was "prejudiced" by his attorney's substandard performance³³.

A. Deficient Performance: In assessing whether counsel's conduct was deficient, a court "must conduct an objective review of their performance, measured for 'reasonableness under prevailing professional norms,' which includes a context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time.'³⁴"

B. Prejudice: Prejudice under Strickland requires David Lake to "show that there is a reasonable probability that, but for counsels' unprofessional errors, the result of the proceedings would have been different.³⁵" "Reasonable probability" is defined as a "probability sufficient to undermine confidence in the outcome" of the proceeding³⁶. This is not an outcome determinative inquiry. Rather, "[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome³⁷." Thus, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case³⁸". Instead, the "touchstone" of the

³¹ *Strickland v. Washington*, 466 U.S. 668 (1984); see *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1986) (adopting *Strickland*).

³² *Strickland*, 466 U.S. at 687-88; accord, *Gall*, 702, 702 S.W.2d at 39.

³³ *Strickland*, 466 U.S. at 692; *Gall*, 702 S.W.2d at 39.

³⁴ *Wiggins v. Smith*, 539 U.S. 510, 523 (2003) (quoting *Strickland*, 466 U.S. at 688).

³⁵ *Strickland*, 466 U.S. at 694; accord, *Moore v. Commonwealth*, 983 S.W.2d 479, 488 (Ky. 1998).

³⁶ *Strickland*, 466 U.S. at 694; accord, *Moore v. Commonwealth*, 983 S.W.2d at 488.

³⁷ *Strickland*, 466 U.S. at 694.

³⁸ *Id.* at 693 (emphasis added).

prejudice test is whether the defendant “received a fair trial, understood as a trial resulting in a verdict worthy of confidence³⁹”. The question is not whether, if counsel had performed adequately, the jury would have acquitted appellant or convicted him of first degree manslaughter⁴⁰. The appropriate question is whether counsel’s conduct so undermined the proper functioning of the adversarial process that this Court cannot be confident that the outcome of the trial or sentencing would have been the same⁴¹.

Trial counsel was ineffective in David’s case. Troy Allen Abner performed abysmally in representing David at his murder trial. Apparently Abner was retained because he was a relative who regularly represented members of the family. Unfortunately, Abner had little trial experience and had a problem with alcohol and drugs at the time of David’s trial. Abner’s young client was charged with murder of his friend. The cause of death was questionable, and there were serious issues about whether the Commonwealth could prove that his client rather than his client’s cousin Jack beat up Chris Golden, the mental state of David if he did participate in the beating and the motive of David as opposed to Jack for the assault. Abner failed to represent David properly from the time of juvenile transfer hearing through the penalty phase of the trial.

A. THE LOVE TRIANGLE

Chris was the son of Troy who was living with Gloria while Chris and Gloria were having sex; Jack was at least trying to have sex with Gloria, causing conflict between him and Chris. And many of David’s family and friends knew about the “love triangle” and Troy’s threats to Gloria since Gloria is David’s first cousin, niece to his mother, and Jack is another first cousin. Moreover, they were willing to testify at trial.

³⁹ See *Kyles v. Whitley*, 514 U.S. 419, 434 (1995), where the Court reviewed a claim that the state did not disclose evidence favorable to the defense in violation of the rule refined in *United States v. Bagley*, 473 U.S. 667 (1985). The *Bagley* Court adopted the *Strickland* standard for determining “materiality”. Thus, *Kyles* is applicable to the prejudice analysis in IAC claims.

⁴⁰ *Norton v. Commonwealth*, 63 S.W.3d 175, 177 (Ky. 2001).

⁴¹ *Strickland*, 466 U.S. at 687; *Gall*, 702 S.W.2d at 39.

and one of them was even present!⁴² Nonetheless, Abner called none of them to testify. Only his client was called, and his testimony about the relationship was easily discredited. Mr. Abner's excuse for not calling any of the family members was that they admitted being intoxicated on the night in question and their stories kept changing (Tape No. 2; 3/11/04; 11:23:48). However, that excuse is not applicable to their testimony about Gloria's relationship with Chris and Jack, and he offered no reason for failing to call them on that topic. Their testimony would have been very helpful and his failure to call them was ineffective.

B. ABNER'S THEORY OF DEFENSE

Abner's alleged strategy was to seek an "involuntary manslaughter" instruction based on the facts David allegedly told him⁴³ (Tape No. 2; 3/11/04; 12:12:52). "Involuntary manslaughter" is a common law offense which does not exist under our Penal Code, and Abner's reference to it reveals his ignorance of the Code. Abner may have been referring to reckless homicide, KRS 507.050, or perhaps first or second degree manslaughter, KRS 507.030 or 507.040. However, Abner actually objected to the Court's instruction on first degree manslaughter (TE II 194-5) and did not tender a reckless homicide instruction. He had no explanation for that failure (Tape No. 2; 3/11/04; 12:14:15). Abner's testimony about his alleged theory of the defense is not credible. The defense he articulated in his trial summation was that Jack alone was the

⁴² Chester Jones, Belva Lake's brother-in-law, knew of the sexual relationship between Chris and Gloria and that Jack and Chris fought, told Abner about it and asked if he would be needed at trial but got no answer (Tape No. 1; 3/11/04; 12:27:21, 12:38:51, 12:40:39). Belva Lake testified Gloria was having sex with Chris and Jack and she told Abner prior to trial but was not called (Tape No. 1; 3/11/04; 14:11:51, 14:15:55). Nicki Donaldson, David's aunt, knew of Gloria's sexual relationship with Chris and Jack, attended the trial and asked Mr. Abner to call her to testify about that topic and Gloria's consumption of a large quantity of pills that night (Tape No. 1; 3/11/04; 14:20:47, 14:24:22, 14:25:33).

⁴³ Abner claimed David told him he and Chris were fooling around wrestling when Chris hit his head on the motorcycle and he was surprised at trial when appellant testified that Jack was responsible (Tape No. 2; 3/11/04; 12:26:15). The Commonwealth in its post-hearing brief excuses Abner's lack of investigation by his reliance on David's alleged statement (TR 1 of 1 124-5). However, defense counsel is not excused from the duty to investigate even if his client has confessed. See *Rompilla v. Beard*, 125 S.Ct. 2456, 2465-6 (2005).

perpetrator. However, the prosecutor easily undercut that defense since only David's testimony supported it.

Abner testified he did not recall telling anyone the trial would not go forward when it did (Tape No. 2; 3/11/04; 11:49:52). He also claimed he had everyone he needed present when trial began (Tape No. 2; 3/11/04; 11:49:01). Those statements are contradicted by William Lake who testified Abner told him the trial would be continued and he did not need to be present (Tape No. 2; 3/11/04; 14:33:44) and David who had heard from his father that the trial would be continued and that Abner told him the morning of trial he was being forced to trial (Tape No. 2; 3/11/04; 15:26:36). They are also contradicted by Abner's defective motion for continuance based on absent eye witness Dale Smith. Abner claimed to know the rules on continuance motions and had no explanation for why he did not follow them (Tape No. 2; 3/11/04; 11:36:18, 11:47:38). He did offer the excuse that he never interviewed Dale Smith and did not know if he even existed (Tape No. 2; 3/11/04; 11:48:31)⁴⁴. Moreover, when the Commonwealth suggested to him he could not have drafted an affidavit about what Smith would have said, he latched on to that (Tape No. 2; 3/11/04; 12:21:45). A reasonable conclusion is that Abner was not prepared for trial, made a defective continuance motion because he was unaware of RCr 9.04 and then had to "wing it" at trial once the motion was denied.

C. TRIAL PERFORMANCE

Once Mr. Abner's defective continuance motion was denied, he represented David Lake in the most perfunctory way possible – one question on voir dire, a very brief opening, almost no cross-examination, no witnesses for the defense other than David who was totally unprepared to testify, a brief and unpersuasive closing argument at the guilt phase and none at the penalty phase. Abner did manage to elicit damaging information

⁴⁴ That was rather ridiculous since numerous people who were involved, including the police, said that he did (TE I 117-18).

from Vesta Golden concerning an alleged conflict between David and Chris (TE I 67-8)⁴⁵. He did not challenge the medical testimony because he did not retain an expert with the funds David's father advanced him. While Abner stated at the evidentiary hearing that he did not seek funds from the court because he did research himself (Tape No. 1; 3/11/04; 11:43:21), in fact he did not explore any medical issues concerning the death of Chris, a severe diabetic, in such a short period of time on cross-examination of either Dr. Hoskins or Dr. McCloud⁴⁶. And, in spite of his alleged "involuntary manslaughter" theory of defense, he objected to the court's first degree manslaughter instruction.

David Lake claimed in his RCr 11.42 motion that Troy Golden paid Abner to represent him poorly. That claim was supported by Nicki Donaldson's testimony that she witnessed the second payment in October 1995 at Wal-Mart (Tape No. 1; 3/11/04; 14:22:42) and numerous witnesses who stated Gloria had told them about a payment before trial. At the hearing Gloria stated she had heard about the payment but did not witness it. Predictably, Abner and Troy Golden denied any payment. This Court should consider the possible payment as an explanation for Abner's very poor representation and another example of ineffective assistance of counsel.

David Lake's trial truly was a fiasco. His attorney's performance was clearly deficient and he was prejudiced because the jury was faced with two possible perpetrators – David and his cousin Jack – and could well have acquitted David if Mr. Abner had done a decent job of representation and called the many witnesses who could have supported the "love triangle" which in fact existed or challenged Jack's testimony that he had only a minor role in the beating. Moreover, David's brother William would have

⁴⁵ See *State v. Barr*, 814 N.E.2d 79 (Ohio App. 7th Dist. 2004) where the court found counsel ineffective because his cross-examination of a police officer opened the door to the defendant's suppressed inculpatory statement.

⁴⁶ Trooper Martin was surprised by Chris Golden's death. Dr. Hoskins described him as experiencing acidosis while he was treating him. That is a dangerous condition diabetics may develop based on trauma and may well have precipitated Chris's death. See generally www.diabetes.org.

testified that he saw Jack hit Chris with a pipe and kick him while David yelled for help (Tape No. 1; 3/11/04; 14:30:21). **Jack's blood was on the bar/pipe as was Chris's; David's was not** (TE I 150).

Abner's conduct at this trial certainly undermined the proper functioning of the adversarial process and this Court cannot be confident that the outcome of this trial would have been the same in the absence of his deficient representation. *See Strickland*⁴⁷. A new trial is necessary.

CONCLUSION

For the reasons set forth in this Brief, Lake's conviction must be vacated and the case remanded to juvenile court or, at a minimum, to circuit court for a new trial.

Respectfully submitted,



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⁴⁷ 466 U.S. at 687.