COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO: 2007-SC-493

COMMONWEALTH OF KENTUCKY APPELLANT

V.

APPEAL FROM MCCRACKEN CIRCUIT COURT
CASE NO. 02-CR-1608

DAVID NICHOLS APPELLEE

BRIEF FOR APPELLEE, DAVID NICHOLS

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Appellee has been sent via the United States mail, postage prepaid to Mike Lawrence, McCracken Circuit Clerk, P.O. Box 1455, Paducah, KY 42002-1455; Hon. Tim Kaltenbach, Commonwealth Attorney, 301 S. 6th Street, Paducah, KY 42003; Judge Craig Clymer, McCracken Circuit Judge, 301 S. 6th Street, Paducah, KY 42003; Jack Conway, Attorney General, 1024 Capital Center Drive, P.O. Box 2000, Frankfort, KY 40602-2000, and Court of Appeals Clerk, Samuel Givens, Jr., 360 Democrat Drive, Frankfort, KY 40601.

I further certify that a true and correct copy of the foregoing Brief for Appellee has been sent via Federal Express to the Clerk of the Supreme Court, Susan Stokley Clary, 209 Capitol Building, 700 Capital Avenue, Frankfort, KY 40601-3488, on this the 24th day of September, 2008.

EMILY WARD ROARK

INTRODUCTION

This matter is before the Court on the Commonwealth's Motion for Discretionary Review of the unanimous opinion of the Court of Appeals in 2006-CA-001558-MR and 2006-CA-001608-MR. The question before the Court is whether the language of RCr 7.24 and prior precedent require this Court to overturn the Court of Appeals' unanimous interpretation of RCr 7.24 which did not require the creation of a report by an expert witness solely for the purposes of reciprocal discovery.

STATEMENT CONCERNING ORAL ARGUMENT

The matter having been adequately addressed in the written briefs, Appellee does not request oral arguments in this matter.

COUNTER STATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

On August 7, 2002, Gage Kirk, an eleven month old boy, suffered a spiral fracture. The expert testimony at trial concluded that the most likely cause of the injury was someone picking him up by the leg. (Trial Video; 12/15/03; Tape 1; 14:02:50) [Hereinafter Tape 1] Gage was the youngest of three children residing with their mother, Misty Kirk, and her boyfriend, David Nichols. Misty Kirk worked an evening job. On the day of Gage Kirk's injuries, Misty was working and her children were being cared for by David Darnell, a substitute for her regular child care provider, who was on vacation. Misty Kirk arrived home from work at approximately 6:00 p.m. and proceeded to take a shower due to chemicals she comes into contact with at her work. (Trial Video; 12/15/03; Tape 2; 17:36:20-17:37:05)[Hereinafter Tape 2]. Prior to taking a shower Misty Kirk told David Darnell he could leave. However, he remained at the home along with several other individuals after Misty Kirk went to take a shower. (Tape 1; 12:16:09-12:17:30), (Tape 2; 17:39:00-17:39:46). Shauna Cornet, Misty Kirk's sister, testified she left between 6:30 p.m. and 7:00 p.m. and David Darnell was still at the home while Misty Kirk was in the shower. (Tape 1; 15:51:30-15:53:10). Nichols went to put sheets on Gage's bed and put him down for a nap. While Nichols was in the laundry room he heard Gage whimpering in the living room and went to pick him up hearing a popping noise from his leg. (Tape 1; 13:25:30-13:25:51). He immediately voiced concern to Misty Kirk who got out of the shower and the two proceeded to take Gage to the hospital. (Tape 2; 17:37:24). After a few minutes, Gage fell asleep so they assumed they had overreacted and took Gage home. (Tape 1; 13:26:20-13:26:55). A couple hours later,

Gage awoke and Misty Kirk realized there was a problem and Nichols and she immediately proceeded to the Emergency Room. (Tape 1; 13:27:03-13:27:30).

At the Emergency Room, Dr. Deweese, an orthopedic surgeon, examined Gage and determined that he suffered from a spiral fracture to his left leg. Dr. Deweese testified that the break could have occurred prior to Nichols hearing the pop in that broken bones often rub together after a break, making a popping sound. (Tape 1; 15:20:40-15:22:10).

Nichols was indicted for the crime of First-Degree Criminal Abuse on November 22, 2002. On December 15, 2003, the morning of trial the Court granted the Commonwealth's oral motion to exclude evidence in support of Nichols' defense that the babysitter, David Darnell, was responsible for breaking Gage's leg. This evidence included Ashley Dalton, who testified by avowal, that subsequent to the date of this incident she witnessed David Darnell take Jonathan Kirk, Gage's brother by the thigh and throw him on the floor. (Tape 1; 12:06:00–12:07:07). Misty Kirk testified by avowal that on a separate occasion after Gage's injury she observed David Darnell recklessly pick Gage up by his cast causing her such concern that she called the social worker Rebecca Kinslow and ordered David Darnell out of her home. (Tape 1; 12:14:28–12:15:05). Nichols was convicted of Second (2^{nd}) Degree Criminal Abuse and sentenced to the maximum five (5) years imprisonment. On March 11, 2005, David Nichols' previous conviction of abuse second degree by the McCracken Circuit Court was vacated and remanded by the court of Appeals in 2004-CA-634. The McCracken Circuit Court initially set the case for retrial on September 6, 2006, but has since continued the trial indefinitely as a result of this appeal.

Prior to the scheduled trial date, Nichols retained an expert witness to testify on his behalf regarding medical evidence that had previously been created by the emergency room doctor, Dr. Deweese, and a second doctor retained by the Commonwealth at trial. Nichols' anticipated expert did not run any additional test, nor did Nichols' expert generate any reports.

Out of an abundance of caution, Counsel for Nichols filed a motion to Clarify the Trial Court's previous discovery rules, attached as Appendix A, inquiring from the Court whether Nichols' expert was required to generate a report solely for the purpose of discovery procedures. The Trial Court on July 18, 2006 ruled that Nichols was not required to generate a report for the sole purpose of reciprocal discovery, but that Nichols was required to turn over his expert's name and address, attached as Appendix B.

The Commonwealth filed a Motion to Alter, Amend or Vacate the Trial Court ruling which was denied on August 8, 2006 affirming that Nichols was under no obligation to generate a report solely for discovery, the Order is attached as Appendix C. On July 27, 2006 the Commonwealth filed an interlocutory appeal with the Court of Appeals, attached as Appendix D. Nichols followed with a cross-appeal on the sole issue of the Trial Court's requirement that Nichols did have to turn over the name and address of Nichols' expert, attached as Appendix E.

On June 15, 2007 the Court of Appeals affirmed in part and reversed in part the Trial Court's Order holding that RCr 7.24 does not require an expert to generate a report regarding his expert witness for the sole purpose of discovery if the expert is not going to testify to a previously undisclosed premise and reversing the trial court's requirement that

Nichols provide the name and address of his expert witness, attached as Appendix F. The Opinion is narrowly tailored and should be upheld.

ARGUMENT

I. THE COURT OF APPEALS' UNANIMOUS OPINION PROPERLY INTERPRETED RCR 7.24 AND SHOULD NOT BE DISTURBED.

A. THE CLEAR LANGUAGE OF RCR 7.24 DOES NOT REQUIRE A REPORT FOR THE SOLE PURPOSE OF DISCOVERY.

The issue before the Court is whether the Court of Appeals' unanimous opinion erred in holding that a defendant is not required to generate an expert report "solely to satisfy discovery." The Court of Appeals ruling was strictly limited, holding "that if Nichols' expert generates a report prior to trial, then Nichols is required to provide that report to the Commonwealth. Furthermore, we hasten to add that this opinion does not limit the Commonwealth's right to object to the testimony of Nichols' expert if his expert expresses an opinion based on a premise not found in the materials previously produced by the Commonwealth." (Appendix F, Court of Appeals, Opinion, Affirming in Part and Reversing in Part, p. 16).

The Court of Appeals' Opinion was narrowly drawn to comply with RCr 7.24.

RCr 7.24(3)(A)(i) reads as follows:

> "any results or reports of physical or mental examination and of scientific tests or experiments made in connection with the particular case... **within the possession, custody, or control of the defendant,** which the defendant intends to introduce as evidence or which were **prepared by a witness** whom the defendant intends to call at trial when the results or reports relate to the witnesses testimony."

As can plainly be read from the Rule, RCr 7.24(3)(A)(i) deals with reports or examinations that have already been created, and that are in the possession or control of the defendant. Additionally, these reports must either have been intended for

introduction into evidence themselves or prepared by a witness whom the defendant intends to call at trial. None of these conditions are present in the case before the Court. In the Appellee's present situation, there is neither a pre-existing report that was created by an expert witness with the intent to be used as evidence, nor was there ever any kind of report created by an Appellee's expert witness that he intends to call at trial. A plain reading of the Rule thus compels the Court to find that RCr 7.24(3)(A)(i) does not require the creation of a report by an expert for the sole purpose of turning it over to the Commonwealth during reciprocal discovery.

The Appellant cites numerous arguments in support of requiring the creation of a report including fundamental fairness and logistical practice concerns. As shown in this Court's precedent, however, in many instances the preparation of a report would not allay the Commonwealth's concerns. A defendant's expert's report may not incorporate his entire testimony leading to the same complaints of undisclosed premises. Moreover, a report would often unfairly limit a defendant's expert to the four corners of the document. Counsel can never fully anticipate the extent of an expert's testimony until the close of the Commonwealth's case and limiting a defendant to a stale, out-dated document written months before trial would violate the defendant's right to present witnesses and a defendant's right to cross examine witnesses in his own behalf.

The Commonwealth is moving the Court to create a black letter rule that any party which retains an expert that the party intends to call at trial must require that expert to prepare a report and that the report must be produced in reciprocal discovery. RCr7.24 simply contains no such requirement.

B. THE PROPER QUESTION IS WHETHER AN EXPERT WITNESS TESTIFIES TO AN UNDISCLOSED PREMISE.

The focus and question before the Court has been structured as whether a defendant is required to generate an expert's report solely for the purpose of discovery. Clearly, nothing in the language of RCr 7.24 requires a defendant to create an expert report for the sole purpose of discovery. The core issue before the Court is not whether an expert has to provide a report, but whether an expert will testify to a premise not readily deducible from evidence available to the other party. Precedent, including the decisions of this Court, dictates that the question is not whether a defendant is required to provide a report but whether an expert will testify to a premise not readily deducible from evidence available to the other party. That is to say, will the expert testify to a new scientific result or a new "undisclosed premise?"

This Court has followed a plain reading of RCr 7.24, rejecting the argument of Appellant that the rule requires discovery beyond the scope of the language. Recently, the Court in *Jones v. Commonwealth*, 237 S.W.3d 153, 156 (Ky. 2007) citing *Gray v. Commonwealth*, 203 S.W.3d 679, 686 (Ky. 2006) declared "[W]e recently expressly rejected the notion that RCr 7.24 encompasses anything not explicitly covered by the rule by holding that RCr 7.24(3)(A)(i) 'applies only to results or reports of scientific tests or experiments.' "

The *Jones* Court held that under the reciprocal discovery rules, it was not required that the defendant's expert disclose the basis upon which the defendant's expert intended to challenge the Commonwealth's DNA expert and the methods in which the Commonwealth's DNA expert analyzed DNA mixtures contained on a vaginal swab

taken from a victim. The defendant's expert had prepared a one page report furnished to the Commonwealth but it did not pertain to the disputed testimony. The trial court confined the defense expert's testimony to the four corners of the report. *See Jones,* 237 S.W.3d at 155-156. The trial court's preclusion of the defense expert's testimony was based on the holding that "RCr 7.24(3)(A)(i) required the parties to provide in discovery the theories underlying their expert's opinions." *Id.* at 156. This Court disagreed and reversed the trial court finding "that nothing in the language of RCr 7.24 itself supports the trial court's decision to bar [the defense expert's] contested testimony." *Id* at 157. The Court stated that the bar on the defense expert's testimony was "premised on an impermissibly broad interpretation of RCr 7.24." *Id.*

As in *Jones*, the Commonwealth's objection in the case before the Court is "premised on an impermissibly broad interpretation of RCr 7.24." The Commonwealth, in the name of "fundamental fairness," asks this Court to create a black letter rule requiring defense experts to provide summaries of their theories even if that testimony is not based on independent tests, experiments, or physical or mental examinations. Only an impermissibly broad interpretation of RCr 7.24 of the type this Court struck down in *Jones* permits such a ruling. As the facts of the case at bar demonstrate, there is neither intent, nor opportunity for surprise, or unfair advantage to the defense as the expert will testify only to premises that are based upon and readily deducible from the material in the possession of the Commonwealth.

The case before the Court regards the alleged criminal abuse of a small child. The child suffered a femur fracture. The Defendant was convicted of Second Degree Abuse but that conviction was later reversed in a separate appeal on unrelated issues. In the

previous trial, the Commonwealth called two expert witnesses who offered their opinion as to the nature and cause of the injuries. Counsel for the defense has had no occasion to conduct any scientific tests, experiments or results. The child is now seven years old and necessarily there will be no further opportunity to conduct new tests or examinations on a six year old injury. Consequently, there will be no new evidence that defense counsel's expert will reveal. Defendant's expert will simply review, interpret and offer an opinion on the testimony of the Commonwealth's expert. No new premise will be disclosed and there is no surprise or unfair advantage. Defendant's expert has prepared no reports, conducted no physical or mental examinations or scientific tests or experiments and has neither plans nor ability to conduct any in the future. The expert's testimony will be limited exclusively to reviewing and rebutting what has been prepared and introduced in discovery through the Commonwealth. Appellee's expert's testimony is similar to the expert in *Jones* in that there is no unfair "surprise" or "sandbagging" in the defense expert disagreeing with the Commonwealth's expert's process and conclusions. *Id.* 158-159.

In addition to the plain language of RCr 7.24, this Court has continually looked to whether an expert witness testifies to an undisclosed premise in determining whether or not a party has committed a discovery violation. In an effort to counter this point, the Commonwealth relies on *Barnett v. Commonwealth*, 763 S.W.2d 119 (Ky. 1988), but that reliance is misplaced. *Barnett* involved an expert serologist who was permitted to testify that faint traces of blood from defendant's hands and arms were "attributable to washing away the blood that could have been expected from the victim's wounds." *Barnett*, 763 S.W.2d at 123. The issue in *Barnett* was not whether a prosecutor's expert must provide

a report. The issue was whether the defendant "had a reasonable opportunity to defend against the premise" of the expert's testimony. *Id.* The Court in *Barnett* found the expert's testimony was based on an undisclosed premise and was therefore discoverable under RCr 7.24 because no such opportunity for a reasonable defense existed. Thus, the presence or absence of an expert report was not the determinative factor in deciding whether or not the testimony of an expert was admissible. Rather, the question was solely one of whether or not the opposing party was afforded "a reasonable opportunity to defend against the premise" of the expert's testimony. The Court of Appeals, far from deviating from *Barnett*, recognized this key issue and directly followed *Barnett's* holding in recognizing that the Commonwealth will have ample opportunity to defend against any theories put forth by the defense expert.

Likewise, in *Milburn v. Commonwealth*, 788 S.W.2d 253 (Ky. 1989) this Court allowed the testimony of a firearm's expert who filed a report which found lead residue on the victim's wound, but at trial explained the residue to have been the result of a close range fire from the muzzle end of a firearm. The report clearly omitted the "expert's opinions" as to what the physical findings indicated. The Court distinguished this from *Barnett*, finding that the expert's testimony was based on a premise within the report, and that the expert simply withheld his opinions to trial. The expert in *Barnett*, in comparison testified on an unknown premise against which the defendant had no opportunity to defend. As was the case in *Milburn*, in the present case the expert witness will testify only to a premise that is based on the information in the possession of the Commonwealth and is not obligated to present a summary of his opinions prior to trial.

Moreover, in *Vires v. Commonwealth*, 989 S.W.2d 946 (Ky. 1999) an accident reconstructionist was called to testify by the Commonwealth without producing a report or conducting any scientific tests or experiments. The witness simply testified regarding materials and pictures of the scene, which had been produced by the Commonwealth to the Defendant's counsel. The Court held that the detective's testimony was admissible because "[h]e did not rely upon any undisclosed premise as a basis for his conclusion." *Id.* at 948. The Court's theory was that where there was no undisclosed premise, there was no unfair surprise to the Defendant.

In the present case there is a comparable factual situation to that which existed in *Vires*. As noted above, the expert called by Appellant will simply review the reports and testimony of doctors that initially saw the alleged child victim and offering his or her opinion as to the original doctor's procedures, theories on cause of injury, and other conclusions. Appellee's expert will not conduct scientific tests or experiments. This event occurred August 7, 2002 and the case was not remanded until July 7, 2006 by which time the fracture had completely healed precluding any new tests or examinations. In the absence of new test or examinations, there is no reason to generate a new report. If such a report were generated, it would have to be disclosed pursuant to RCr 7.24, but because all the premises about which the defense expert will testify are found in the information in the possession of the Commonwealth, no disclosure is required by the language of the rule or any concern of unfair surprise.

Similarly, in *Collins v. Commonwealth*, 951 S.W.2d 569 (Ky. 1997) the court allowed a rape victim's treating physician who prepared a report to testify as to her opinion regarding physical findings and extensive medical research not contained in the

report. Even though the expert's testimony reflected opinions not contained in the report, this Court held that the opposing party was not unduly surprised. *Collins*, 951 S.W. 2d at 574.

The common theme of *Barnett*, *Milburn*, *Vires* and *Collins* is that an expert is not permitted to testify to an undisclosed premise against which the opposing party has no reasonable opportunity to defend. This was true in *Barnett*, *Milburn* and *Collins* where a report was prepared, as well as in *Vires* where no report was produced. The case at bar is in perfect keeping with this precedent. Appellant's expert will not base his testimony on any new scientific tests, experiments or undisclosed premises. Rather, the expert's opinions will be based entirely on the evidence provided to Appellant's counsel in discovery from the Commonwealth. The Commonwealth has a more than reasonable opportunity to defend against expert opinions that will be based solely on the facts, data and expert testimony that they themselves have provided.

The *Jones* Court summarized the concerns it had with this issue in its discussion of *Barnett*, writing:

> Thus, as we have previously attempted to explain, *Barnett* stands for the principle that an expert may not testify to an additional, undisclosed principal or premise not readily deducible from the conclusions contained in that expert's report. In other words, *Barnett* was based upon our desire to prevent a party from being deliberately surprised at trial."

Jones, 237 S.W.3d at 158.

Contrary to the Commonwealth's incorrect assertion that *Barnett* "stands for the proposition that opinions offered by expert witnesses . . . should be discoverable, even when the opinion is based upon facts known to the opposing party," the Court's clear concerns were that an expert will testify to an undisclosed premise that will result in

unfair surprise to the other party. (Brief for Appellant, 6-7). As demonstrated incontrovertibly by *Vires*, the premise of an expert's testimony is not always discoverable so long as it is not addressed to an undisclosed premise. Absent an undisclosed premise there is no possibility of unfair surprise. As demonstrated in *Barnett*, a black letter rule that all experts must produce a report prior to trial will not prevent testimony on undisclosed premises or unfair surprise. Moreover, as clearly indicated in *Vires*, the presence of a report is not a requirement to testify. The line of cases decided by this Court from *Barnett, Vires, Milburn* and *Collins* to *Jones* has firmly established that a party must provide an expert's "undisclosed premise" a new scientific finding or result but never an opinion as to what the premise, physical finding or scientific fact may establish.

The Court of Appeals was noticeably conservative in the holding following the clear precedent of Supreme Court Opinions and the explicit language of the Criminal Rule. The Court of Appeals in reaching the decision distills the key from Supreme Court Opinions interpreting RCr 7.24 and reciprocal discovery requirements as follows:

> "[i]n cases where the Supreme Court determined that an expert had testified to an opinion that was based on a undisclosed premise, as in *Barnett*, the Court concluded that the opposing party was unduly surprised and had lost the opportunity to defend against that premise; thus, the Court reversed. On the other hand, in those cases where the Court decided that an expert's opinion was not based on an undisclosed premise, as in *Vires*, *Milburn* and *Collins*, the Court resolved that the opposing party was not unduly surprised by the expert's testimony; therefore, the Court affirmed." Appendix F, Court Of Appeals Opinion, Affirming In Part and Reversing In Part, p. 14-15.

Moreover, the Court of Appeals limited its own ruling by holding:

> "if Nichols' expert generates a report prior to trial, then Nichols' is required to provide that report to the Commonwealth. Furthermore, we hasten to add that this opinion does not limit the Commonwealth's right to

> object to the testimony of Nichols' expert if his expert expresses an opinion based on a premise not found in the materials previously provided by the Commonwealth."
> Appendix F, Court Of Appeals Opinion, Affirming In Part and Reversing In Part, P. 16.

The Court of Appeals' Opinion leaves no room to hide evidence and frustrate the trial process as the Appellant claims. As the Order explicitly sets forth when an expert is testifying regarding a premise known to the opposing party there is no surprise and if the expert testifies to a premise unknown to the opposing party, it must be disclosed. In its Order, the Court of Appeals established sufficient safeguards to prevent the type of practices that so concern the Commonwealth and its Opinion should be affirmed.

The Appellant attempts to counter the clear precedent of this Court and the Court of Appeals by relying heavily upon the dicta of an unpublished opinion, *George v. Commonwealth,* 2003 WL 22227195, No. 2001-SC-1067-MR (Ky. 2003). That case holds no precedential value as it is improperly cited since there are numerous cases on point decided as recently as 2007 which have been cited by the Appellee such as *Jones, Barnett*, *Vires*, *Milburn* and *Collins*. CR 76.28 (c). Counsel has addressed numerous Supreme Court cases that adequately address the issue and the use of an unpublished opinion on this issue is clearly contrary to CR 76.28(c).

Additionally, Appellant relies upon numerous cases outside the jurisdiction to bolster their argument. The Commonwealth's heavy reliance on foreign cases only serves to highlight the absence of support for its position in the statutes and case law of Kentucky. Moreover, the citations from foreign jurisdictions are of no value as binding precedent before this Court and were fully presented and rejected in the Court of Appeals.

In addition to the fact that they are not binding on this Court, the foreign cases cited by the Commonwealth do not directly address the issue in this case. *People v. Martinez*, 970 P.2d 469, 472 (Colo. 1998) dealt with the constitutionality of a state discovery rule, but failed to address expert witnesses or an obligation to generate a report for the sole basis of discovery. *State v. Pawlyk*, 115 Wash. 2d 457, 800 P.2d 338 (1990) is an extremely limited holding regarding a state court rule that requires defendants who raise an insanity defense and retain a psychiatrist as an expert witness, to provide the psychiatrist report in discovery regardless of whether counsel intends to call the expert. *Commonwealth v. Faulkner*, 528 Pa. 57, 595 A.2d 28 (1991) is similarly limiting in its ruling. The defendant filed a motion for a psychiatrist expert, but refused to be interviewed by the Commonwealth's expert, therefore the Court required the defendant to reduce the expert's opinions to writing. In *Commonwealth v. Paszko*, 391 Mass. 164, 461 N.E. 2d 222 (1984) the Massachusetts Supreme Court held that it was not error to require the defendant to turn over a ballistics report previously prepared by defendant's experts. However, it is important to note that footnote 26 of the *Paszko* decision confirms that the Court initially took no action when the prosecution filed the reciprocal discovery requests, because at the time defendant's counsel responded no report existed. This supports the proposition that only reports in existence were discoverable and the Court did not require reports "to be prepared" for the sole purpose of discovery.

Finally, the Commonwealth argues that this Court adopt a procedure similar to Federal Rule 16. Clearly, the Kentucky General Assembly did not intend to adopt a procedure similar to the Federal Rule as it created a purposeful distinction in the language between the Kentucky Rules of Criminal Procedure and the Federal Rules on this

particular issue. For the most part the Kentucky rules closely track the Federal Rules. However, FRCRP 16(b)(1)(C), which is titled "Expert witnesses", diverges significantly from RCr 7.24 in that the Federal Rule requires that the defendant, at the government's request, give the government a "[w]ritten summary of any testimony that the defendant intends to use...." Unlike the other aspects of the Federal Rules that Kentucky has largely closely tracked, the Federal Rules were not followed in regard to expert witnesses. The implication of such a purposeful distinction must be that the Kentucky General Assembly did not intend for experts to be forced to write a summary of their testimony or a report for the sole purpose of complying with reciprocal discovery.

II. THE CLEAR LANGUAGE OF RCR 7.24 AND THE PRIOR DECISIONS OF THIS COURT DO NOT REQUIRE DISCLOSURE OF THE NAMES OF WITNESSES.

Last, the Court of Appeals' reversal of the Trial Court's Order that the name and address of an expert witness does not have to be provided to the opposing party prior to trial is firmly rooted in common law. The Court relied upon *King v. Venters*, 596 S.W.2d 721 (Ky. 1980) which firmly established that RCr 7.24 sets forth the information required in reciprocal discovery and that a list of witnesses is not specified. The Court has continued to follow that precedent in *Lowe v. Commonwealth*, 712 S.W.2d 944 (Ky. 1986) holding the lower court abused its discretion in entering an order requiring the Commonwealth to disclose a list of "all persons present within the knowledge of the Commonwealth at the time the acts charged in the indictments allegedly occurred." *Id.* at 945. Again, the Court found in *Weaver v. Commonwealth*, 955 S.W.2d 722 (Ky.1997), that a party is not required to disclose names of persons present. More recently, in *Hodge*

v. Commonwealth, 17 S.W.3d 824 (Ky. 2000) the Court found the Judge's order of a witness list exceeded his authority.

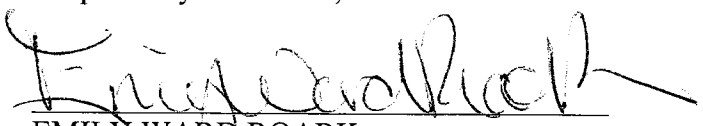
Moreover, the language of RCr 7.24 does not require the Defendant provide the name and address of a defense expert or a report for the sole purpose of discovery. The Court of Appeals Opinion was based on solid Supreme Court precedent, the clear language of RCr 7.24 and is narrowly tailored to ensure there is not an abuse of the discovery process.

CONCLUSION

The precedent of this Court as set forth in *Jones*, *Barnett, Vires, Milburn* and *Collins* firmly holds that RCr 7.24 does not require the creation of an expert report as a requirement of reciprocal discovery. The plain language of RCr 7.24 makes no mention of the need to create a report solely for discovery purposes and this Court has "rejected the notion that RCr 7.24 encompasses anything not explicitly covered by the rule." The Court of Appeals was conservative in its holding which followed the clear precedent of Supreme Court opinions and the explicit language of the Criminal Rule. The Court's Opinion does not leave room to hide evidence and frustrate the trial process as the Commonwealth claims. Troubled by this outcome, the Commonwealth asks this Court to depart from its own precedent, the plain language of RCr 7.24 and the intent of the General Assembly and create a new rule which is neither necessary to, nor able to prevent its stated concerns of unfair surprise. As set forth in the sound reasoning of the Court of Appeals' unanimous opinion, when an expert is testifying regarding a premise known to the opposing party there is no surprise. The Court of Appeals holding is narrow, based

on this Court's solid legal precedent, follows the clear language of the rule and should be affirmed.

Respectfully Submitted,



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