COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
NO. 2007-SC-0248-D

JOHN TIM JENKINS — *APPELLANT*

v.

COMMONWEALTH OF KENTUCKY — *APPELLEE*

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# BRIEF FOR APPELLANT

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On Appeal from the Woodford Circuit Court
Nos. 04-CR-00005 and 04-CR-000034
Hon. Paul F. Isaacs, Judge

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## CERTIFICATE OF SERVICE

It is hereby certified that a true copy of this Brief for Appellant has been served on the following by first-class mail, postage prepaid: Hon. Paul F. Isaacs, Judge, Justice Building, 119 N. Hamilton Street, Georgetown, KY 40324; Hon. Gregory Stumbo, Attorney General, The Capitol, Suite 118, Frankfort, KY 40601; and Hon. Gordon W. Shaw, Commonwealth Attorney, 1187 S. Main Street, Versailles, KY 40383-0468, on this 9th day of August, 2007.

Counsel for Appellant

COMMONWEALTH OF KENTUCKY
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## INTRODUCTION

This is an appeal from a jury verdict and judgment finding Appellant guilty of one count of Sexual Abuse First Degree, KRS 510.110, and one count of Indecent Exposure, KRS 510.150, and sentencing him to five (5) years imprisonment and a $250.00 fine, respectively.

## STATEMENT CONCERNING ORAL ARGUMENT

Appellant requests that the Court conduct an oral argument in this case. This appeal presents a number of significant constitutional issues, some of which are issues of first impression in Kentucky. In particular, the case involves an important issue concerning expert proof in criminal cases. Oral argument will be of assistance to the Court in resolving the various issues presented.

## STATEMENT OF POINTS AND AUTHORITIES

## STATEMENT OF THE CASE

A. Introduction.

The appellant, John Tim Jenkins, was convicted of one count of Sexual Abuse First Degree (Class D felony) and one count of Indecent Exposure (Class B misdemeanor), arising out of events at the Falling Springs Arts and Recreation Center in Versailles, Kentucky on October 8, 2003. The convictions arise from alleged conduct between Appellant and J.S., who was age eight at the time and was Appellant's little brother in the Big Brothers/Little Brothers program. *There was no physical evidence of a crime, only the coerced account of a child derived from multiple suggestive interviews conducted by an untrained investigator.* The conviction was the product of a combination of errors, each compounding the prejudicial effect of the other.

B. Procedural Background.

On January 7, 2004, the Woodford County Grand Jury returned a four count indictment (04-CR-00005) against Appellant. Count 1 charged Sexual Abuse First Degree, KRS 510.110, alleging that Appellant "subjected J.S. to sexual contact, who was incapable of consent because he was less than twelve years old" during the period August to September 2003. Count 2 also charged Sexual Abuse First Degree, alleging that Appellant subjected J.S. to sexual contact on October 8, 2003. Count 3 charged Appellant with Indecent Exposure, KRS 510.150,[1] "when he exposed his genitals in the presence of J.S." on October 8, 2003. Finally, Count 4 charged Appellant with Indecent Exposure, alleging that he exposed himself to B.F., another minor, on October 8, 2003. (R.[2] at 1). All of the conduct charged in Counts 2, 3 and 4 allegedly occurred at the Falling Springs Arts and

[1] This statute was amended post-indictment. *See* KRS 510.148 and 510.150.

[2] Record on Appeal.

Recreation Center in Versailles, Kentucky.

A subsequent indictment (04-CR-00034) was returned on April 7, 2004, charging two counts of Sodomy First Degree, KRS 510.070, both Class A felonies. Both counts charged that "[o]n or about March, 2003 to September, 2003" Appellant "engaged in deviant sexual intercourse with J.S. who was less than twelve years of age." (R. at 90).

The indictments were consolidated for trial. The case proceeded to trial on August 15, 2005. The trial court granted a directed verdict of acquittal as to Count 4 of Indictment No. 04-CR-00005, charging Indecent Exposure as to B.F. (TE,[3] Vol. V at 68-69). The jury returned a verdict of not guilty as to Counts 1 and 2 of Indictment No. 04-CR-00034, charging Sodomy First Degree, and not guilty as to Count 1 of Indictment No. 04-CR-00005, charging Sexual Abuse First Degree between August to September 2003. The jury found Appellant guilty of Counts 2 and 3 of Indictment No. 04-CR-00005 charging Sexual Abuse First Degree and Indecent Exposure. Those counts only relate to J.S. and the events at Falling Springs on October 8, 2003. (TE, Vol. VI at 129). The jury recommended sentences of five years and a $250.00 fine, respectively. (*Id.* at 145).

Appellant timely moved for a judgment of acquittal and for a new trial, (R. at 322), which was denied by an Opinion and Order entered on December 16, 2005, (R. at 381). The trial court entered a Judgment consistent with the jury's verdict and sentence on January 11, 2006. (R. at 389).[4]

Appellant appealed the convictions to the Court of Appeals raising a number of errors requiring reversal. Chief among the various issues on appeal was the trial court's failure to admit the

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[3] Transcript of Evidence.

[4] The final Judgment is attached as Appendix 1. The Opinion and Order of December 16, 2005, is attached as Appendix 2.

testimony of Appellant's forensic psychologist, Dr. Terrance Campbell. Dr. Campbell was prepared to testify concerning the improper interrogation methods employed in questioning J.S. and B.F. The Court of Appeals rejected the other issues raised on appeal, but held that the trial court applied the wrong standard in determining the admissibility of Dr. Campbell's testimony. The Court of Appeals remanded to the trial court for specific findings as to admissibility of this expert proof under KRE 702 and *Stringer v. Commonwealth*.[5] Appellant moved for discretionary review which was granted by order entered on June 13, 2007.

C. Statement of Facts.

*1. Appellant and his relationship with J.S.*

At the time of trial, the appellant, Tim Jenkins ("Tim" or "Appellant"), was 55 years of age and was the Engineering Manager at the Osram Sylvania plant in Versailles, Kentucky. (TE, Vol. V at 127-28). He and his wife have been married since 1979. They have three children, a son and two daughters. (*Id.* at 101-02; Vol. VI at 4). Years earlier Tim had volunteered as a big brother in the Big Brothers/Little Brothers program while living in Pennsylvania and West Virginia. (TE, Vol. II at 25-26; Vol. V at 130). When his children began leaving for college in the fall of 2001, Tim decided to again volunteer as a Big Brother. (TE, Vol. V at 130-31). He was matched with J.S., on September 21, 2001. (TE, Vol. I at 67; Vol. II at 12; Vol. V at 131).

J.S.'s parents had been divorced since 1999. (TE, Vol. I at 51). He lived primarily with his mother in Midway and Versailles during his match with Appellant. (TE, Vol. V at 53; Vol. VI at 11). He spent the summers with his father in Georgia. (TE, Vol. I at 52-53). Interestingly enough, Tim actually informed the Big Brothers program that he felt J.S. would be better off living with his father

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[5] 956 S.W.2d 883 (Ky. 1997), *cert. denied,* 523 U.S. 1052 (1998).

in Georgia, and the Big Brothers' records noted this suggestion. (TE, Vol. V at 189-90).

J.S.'s mother described that Tim and J.S. cared about each other. (TE, Vol. I at 68-69). She described witnessing appropriate displays of affection between J.S. and Tim, such as hugging one another or J.S. giving Tim a kiss. (*Id.* at 75). The Big Brothers program conducted in-depth reviews with J.S. and his mother on January 30, 2002, November 14, 2002, December 12, 2002, and September 29, 2003, as a part of the program's standard practice. The interviews did not reveal any reason to be concerned about the match. (TE, Vol. II at 69-71). Moreover, J.S.'s mother acknowledged that she had taught J.S. about inappropriate touches. (TE, Vol. I at 88). Oddly, J.S. never told either parent about any of the alleged abuse. (*Id.* at 86-87). The allegations first surfaced during coercive police questioning during the late night and early morning hours of October 8-9, 2003.

*2. The events of October 8, 2003.*

After work on October 8, 2003, Tim picked up J.S., then age eight, and, B.F., then age six, to go swimming at Falling Springs Arts and Recreation Center as they had earlier planned. (TE, Vol. V at 150). Brittany King, age 21, was working as a life guard that evening. (TE, Vol. II at 77). She saw Tim and the boys arrive some time after 7:00 p.m. (*Id.* at 81). She observed them swimming and playing in both the therapy pool and the larger lap pool.[6] At least 15-20 other people were in the lap pool. (*Id.* at 101-02). King described what she considered to be "inappropriate" conduct, such as Tim throwing the boys and swimming up under them. "[Y]ou couldn't tell exactly what he was doing, but it looked like he was nibbling on their thighs." (*Id.* at 82-84). None of the other

[6] The testimony was undisputed that Falling Springs has a large, multi-lane, indoor swimming (lap) pool and a smaller therapy pool parallel to one another, separated by a deck area. Photos of the pool area are in the record. (*See* Commonwealth Exhibits 1, 2, and 3).

swimmers voiced concern. (*Id.* at 103-04). She never saw Tim touch either of the boys under their swim suits. (*Id.* at 105).

Megan Davenport, age 19, was also working as a life guard that evening. (Davenport Depo.[7] at 3-4). She recalled that Tim asked permission for the boys to swim in the therapy pool. (*Id.* at 7). While in the therapy pool area, she observed the boys running around and Tim swimming up underneath them and throwing them. (*Id.* at 9). She did not see any inappropriate touching. (*Id.* at 23). She recalled that "after the boys had been running around for a while, Brittany [King] decided to go in and tell them that if they wanted to run and play, they could come out to the big pool." (*Id.* at 10). As to contact between Tim and J. S., she testified, "I don't remember him kissing the older boy." (*Id.* at 28). "I don't remember seeing any inner thigh contact with the older boy. . . ." (*Id.* at 29). She recalled that Tim and the boys only stayed in the pool "[m]aybe, a half hour – it wasn't very long." (*Id.* at 13).

Despite their vague observations concerning what amounted to nothing more than benign horseplay, King and Davenport reported to Greg Shanks, a supervisor at Falling Springs, that Tim was being "overly playful" with the boys. He looked in on Tim and the boys in the therapy pool, but saw nothing worthy of concern. (TE, Vol. II at 174-75, 187-88). Roger Maybrier, the head life guard, also observed Tim and the boys in the pool, but testified that "what I saw in the pool wasn't so much concerning me . . . ." (TE, Vol. II at 117). He merely observed them playing "shark" or "alligator."[8] (*Id.* at 124-25, 127).

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[7] Megan Davenport was moving to Oregon prior to trial, and therefore testified by deposition.

[8] Maybrier testified that "shark" or "alligator" is a game where one person is in the middle of the pool playing the role of the "shark" or "alligator," and the other players try to swim

As the boys left the swimming pool area, J.S. exclaimed to Tim that he and B.F. "[w]e're going to take a shower." (TE, Vol. II at 90, 105). At the request of the young lifeguards, Shanks followed Tim and the boys to the locker room. (*Id.* at 178). He first saw Tim and J.S. in the handicapped accessible shower together. B.F. was in a separate shower. (*Id.* at 179). He later observed that all three were in the handicapped accessible shower. (*Id.* at 181). Shanks and Roger Maybrier were in the locker room purposely making "a lot of noise." As Shanks explained: " Because I wanted, I wanted him to know that someone was in there, just so, just -- that someone was in there." (*Id.* at 183). Maybrier agreed that he and Shanks made their presence in the locker room obvious by "being very loud, opening and closing lockers." (*Id.* at 118).

Both Shanks and Maybrier were in the locker room when Tim and the boys got out of the showers. (TE, Vol. II at 183). Shanks described that B.F. "came out before anybody else for a few minutes and was drying off. And at that time I proceeded to ask him, you know, who he came with and if he had a good time, and he answered me." (*Id.* at 184). B.F. told Shanks that he was having a good time. (*Id.* at 195). Shanks did not see any physical contact between Tim and the boys, either in the shower or the locker room. (*Id.* at 194, 202). Despite having observed no inappropriate physical contact between Tim and the boys, Maybrier and Shanks decided to call the police. (*Id.* at 118).

*3. The police interviews of J.S. and B.F.*

When the Versailles/Woodford County police officers arrived at Falling Springs, they immediately separated Tim from the boys. They took B.F. home and took J.S. to the Versailles Police Department. (TE, Vol. IV at 22). At approximately 10:30 p.m., Versailles Police Officer Rick

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from one end of the pool to the other without being caught or bitten. (TE, Vol. II at 124-25).

Qualls, the lead investigator, arrived. (*Id.* at 13). He observed that J.S. "had been crying, he was very scared and nervous . . . ." (*Id.* at 12). He had J.S. moved to the Woodford County Police Department for questioning. (*Id.* at 13). J.S.'s mother and a social worker, Andrea Pandaru, finally arrived at about 11:00 p.m. (TE, Vol. I at 65; Vol. III at 132).

J.S.'s mother was not permitted to be present while J.S. was interviewed. (TE, Vol. I at 109). Qualls and Pandaru both conducted the initial portion of J.S.'s interview, (TE, Vol. III at 134), the first 20 to 30 minutes of which was *not recorded*, (TE, Vol. IV at 67-68).[9] During this initial phase of the interview, J.S. *made no allegations of sexual misconduct.* (TE, Vol. IV at 116; Vol. III at 145). Qualls then left the room and Pandaru described what occurred during his absence:

> I was still talking to him [J.S.], *and I also was trying to explain to him that it is important to tell the truth, if he has anything he needs to say, then now is a good time to do it. . . . So I explained to him if there was something that he needs to say, he can do it now,* and if he would like for me to leave the room, then he can -- then I can do that. And that's when it was requested for me to leave the room, when Rick [Qualls] came back in.

(TE, Vol. III at 135-36) (emphasis added). With Pandaru out of the interview room, J.S., in response to questions by the untrained Qualls, said that Tim had touched his "pee pee" at Tim's house on some prior occasion. *There was no mention of any sexual contact at Falling Springs.* (*Id.* at 152). The questioning of this eight year old boy ended at approximately 2:00 a.m. on October 9, 2003. (TE, Vol. I at 66).

Qualls and Pandaru interviewed J.S. a second time the next morning, October 9. (TE, Vol. III at 136-37, 139, 156-57). During this interview J.S. mentioned, for the first time, that Tim had allegedly touched his "privates" while they were *in the pool* at Falling Springs. (*Id.* at 159). Qualls

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[9] The remainder of the interview, containing critical questioning, was tape recorded.

conceded, however, that until he (Qualls) suggested the possibility of inappropriate touching, J.S. had never mentioned any sexual contact in the pool. (TE, Vol. IV at 134). There was no mention of sodomy in either interview. (*Id.* at 137).

Qualls and Pandaru interviewed B.F. twice on October 9, 2003. (TE, Vol. III at 166-67; Vol. IV at 22-23). B.F. claimed to have seen Tim touch J.S.'s "pee-pee" while they were *in the pool.* (TE, Vol. III at 168). He never mentioned, in either interview, seeing Tim touch J.S.'s privates while *in the shower*, a point that would eventually prove significant. (*Id.* at 168, 169; TE, Vol. IV at 136).

Based solely on information obtained from J.S. and B.F. in these interviews, Appellant was indicted on two counts of Sexual Abuse First Degree – one based on an alleged touching in the Falling Springs pool and the other as a result of an alleged earlier touching at Appellant's residence. He was also indicted on two counts of Indecent Exposure as a result of his being nude in the presence of the two boys in the Falling Springs locker room.

During subsequent counseling J.S. alleged that he had been sodomized by Appellant. As a result, J.S. was referred for a March 1, 2004 interview at the Children's Advocacy Center in Lexington. Based on statements made in that interview, Appellant was indicted on two counts of Sodomy First Degree. (TE, Vol. IV at 31, 34, 137). J.S. had never mentioned any act of sodomy during the extensive interviews conducted on October 8 and 9, 2003. (*Id.* at 137).

*4. The trial testimony of B.F. and J.S.*

Contrary to what he said in the October 2003 interviews, at trial B.F. *did not* testify to any inappropriate touching *in the swimming pool.* He admitted that he, J.S., and Tim played the "alligator game" in the pool. (TE, Vol. III at 19-20, 27). But in his trial testimony B.F. claimed, for the first time, that he saw Tim *touch* J.S.'s "private" while they were *in the shower* at Falling

Springs. (*Id.* at 22-24). He explained, "I wasn't in their shower, but I opened the door, the curtain." (*Id.* at 22). He then claimed that he was only in the shower with Tim "[o]ne second." "I only went in there one time to tell them . . . it was time to go." (*Id.* at 28). "I got out of the shower, then I opened the curtain and saw him touch [J.S.'s] private." (*Id.* at 30). B.F. had never mentioned any touching in the shower during his October 9, 2003 interviews. (*Id.* at 168, 169; Vol. IV at 136).

Likewise, J.S.'s trial testimony was a complete departure from his assertions made during the interviews of October 8 and 9, 2003. Initially, he testified to five acts of sexual conduct: four at Tim's residence, (TE, Vol. V at 9-17), and one in Tim's vehicle, (*Id.* at 17-18). None of those events were alleged to have occurred on October 8, 2003, and Tim was acquitted of all counts which related to those preposterous claims.[10] J.S. went on to testify, however, that while *in the shower* at Falling Springs, Tim "put his mouth on my front toward privates." (*Id.* at 23). *Even the prosecutor conceded that J.S. had never disclosed this allegation at any time prior to trial.* (*Id.* at 45). Shockingly, it was this testimony that lead to Appellant's convictions.

J.S.'s credibility was questionable at best. *His anal and genital exams were normal.* (TE, Vol. I at 145, 149). He admitted that he did not tell the truth "most of the time" during the October 8, 2003 interview, (TE, Vol. V at 37), and that he could not remember whether he told the truth during his October 9 interview, (*Id.* at 38). He admitted saying in his March 1, 2004 interview: "And, I'm like, still afraid of cops because I'm, like, are they going to arrest someone or they're going to do something on what I tell them?" (*Id.* at 61). Interestingly, he conceded: "And the sooner I'm done with my psychiatrist, you know, my psychiatry, the sooner I can forget about it all." (*Id.* at 61). Most

[10] There were issues at trial as to whether these allegations constituted charged or improper uncharged "conduct." (TE, Vol. V at 44-46, 82-87).

disturbing, however, neither J.S. nor B.F. told anyone, including the prosecutor, about the alleged conduct in the shower at Falling Springs. The first time they made such an allegation was *while they were testifying at trial.* (*Id.* at 57-58; Vol. III at 168, 169; Vol. IV at 136). It shocks the conscience that this previously undisclosed story resulted in the convictions.

## ARGUMENT

I. THE PROPER APPLICATION OF KRE 702 REQUIRES ADMISSION OF THE TESTIMONY OF APPELLANT'S FORENSIC PSYCHOLOGIST AND THE TRIAL COURT ERRED BY EXCLUDING SUCH EVIDENCE.[11]

Appellant's expert witness, Terrance Campbell, Ph.D., a highly qualified forensic psychologist, was prepared to testify concerning improper questioning techniques which can result in unreliable reporting by child witnesses, and specifically, the improper questioning methods utilized by social worker Pandaru and Officer Qualls in interviewing J.S. and B.F. (TE, Vol. III at 43-95).[12] This was particularly relevant given Qualls' concession that he was not trained to question children concerning allegations of sexual abuse. (TE, Vol. IV at 71-72). The trial court committed reversible error in excluding Appellant's expert proof.

The testimony of Dr. Campbell should have been admitted under KRE 702. It was "scientific, technical, or other specialized knowledge" that would have "assist[ed] the trier of fact to understand the evidence or to determine a fact in issue . . . ." KRE 702. As such, it was

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[11] This error was preserved by the arguments of counsel and avowal testimony, (TE, Vol. III at 43-93), as well as Defendant's Motion for Judgment of Acquittal and Alternative Motion for a New Trial, (R. at 332).

[12] The relevant portion of the transcript, containing the arguments of counsel and Dr. Campbell's avowal testimony, is attached as Appendix 3.

admissible under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999).[13] The *Daubert* "gatekeeping" function *requires* the trial court to determine "whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." This necessarily involves "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert*, 509 U.S. at 592-93. As a part of this "gatekeeping" function, the trial court is to examine a number of factors about the theory or technique: (1) whether it can and has been tested; (2) whether it has been subjected to peer review and publication; (3) whether there is a high known or potential rate of error and whether there are standards controlling its operation; and (4) whether it enjoys general acceptance within the relevant scientific, technical or other specialized community. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 578-79 (Ky. 2000). "[T]he failure to apply one or another of [the *Daubert* factors] may be unreasonable, and hence an abuse of discretion." *Kumho Tire*, 526 U.S. at 159 (Scalia, J. concurring).

In short, expert evidence must be admitted if it is both reliable and relevant. *Goodyear Tire*, 11 S.W.3d at 578. The trial court's reliability determination is reviewed for clear error. *Miller v. Eldridge*, 146 S.W.3d 909, 915 (Ky. 2004). The relevance determination is reviewed for abuse of discretion. *Id.* at 915.

Dr. Campbell's avowal testimony established the admissibility of his opinions. He testified

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[13] *Daubert* and *Kumho Tire* have been adopted by the Supreme Court of Kentucky. *See Mitchell v. Commonwealth*, 908 S.W.2d 100 (Ky. 1995), *overruled in part, Fugate v. Commonwealth*, 993 S.W.2d 931 (Ky. 1999), and *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575 (Ky. 2000).

concerning his extensive credentials, (TE, Vol. III at 56-60), the various published and peer-reviewed scientific studies which have been conducted concerning interview techniques, (*id.* at 60-61), the empirical testing of the scientific studies, (*id.* at 61-64), and the rate of error, (*id.* at 83-85). Finally, he explained that the theories and techniques about which he would testify, including his own opinions, are generally accepted in the psychological community. (*Id.* at 64).[14] The Commonwealth offered no expert challenge to this proof. The trial court did not make any findings under *Daubert* and Rule 702, and thus committed reversible error, regardless whether it is characterized as "clear error" or "abuse of discretion."

Instead of weighing the admissibility of Dr. Campbell's testimony under Rule 702, the trial court focused solely on the notion that the "taint hearing" concept recognized in *State v. Michaels*, 642 A.2d 1372 (N.J. 1994), has not been adopted in Kentucky:[15]

> Well, I have looked at the cases that you gave me from the other states. One of the interesting things I noted in those cases and also in the 6th Circuit case, that a lot of their reasoning was based on the ruling of the New Jersey Supreme Court in Michael, which Kentucky has not adopted. So, I'm a little bit concerned that we're going into an area that Kentucky has not gone with.

(TE, Vol. III at 90-91). It was clear, however, that Appellant was *not requesting a taint hearing*:

> I'm not asking to conduct a taint hearing.
>
> . . .
>
> In the taint hearing, Your Honor, the way the courts in the other states have applied that is that they've found that there had been inappropriate questioning methods that had been applied to such an extent that the results of the interviews of the child were unreliable,

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[14] *See also* Dr. Campbell's report in the record as Defendant's Avowal Exhibit 5, which further supports the admissibility of his testimony. A copy is attached as Appendix 4.

[15] Kentucky has never ruled directly on the propriety of a "taint hearing." *See Pendleton v. Commonwealth,* 83 S.W.3d 522, 526 (Ky. 2002)(acknowledging but not deciding the issue).

> they've not permitted the child to testify at all. . . . We don't have that situation. They're [the prosecution] going to get to put their child on the stand and they're going to get to inquire of the child. We, on the other hand, are entitled to put Dr. Campbell on the stand to talk about the improper questioning methods that have been used with this child from the very outset of this investigation.

(*Id.* at 52-53). Appellant urged that the evidence was admissible under Rule 702:

> I think the point still stands that this is expert evidence that is generally accepted in the scientific community. It is undisputed that it is empirically tested. It is undisputed that it is peer reviewed. It meets all of the Daubert standards. It is an area where under Rule 702, the jury would be assisted by the expert evidence. . . . [T]his is scientific, technical or other specialized knowledge that will assist the trier of fact to understand the evidence, or to determine a fact in issue. . . . This testimony would educate the jury on a fact in issue and that is how this child, this piece of evidence was handled in questioning just like a crime scene expert would be appropriate to testify that the physical evidence was not properly gathered and did not render reliable results.

(*Id.* at 92-93). The trial court was unpersuaded. Dr. Campbell was not permitted to testify.

The Kentucky Supreme Court has recently reversed a murder conviction where the trial court conducted an extensive *Daubert* analysis, but erroneously focused solely on the scientific methodology employed and failed to consider the conclusions drawn by the expert. *Ragland v. Commonwealth,* 191 S.W.3d 569, 580 (Ky. 2006)("The trial court erroneously confined its *Daubert* analysis to the ICP methodology of CBLA and failed to consider the scientific reliability of the conclusions drawn by [the expert] *ipse dixit* from the CBLA results"). Clearly then, the failure to conduct ***any*** *Daubert* analysis is, in and of itself, reversible error.

More to the point, however, Dr. Campbell's testimony is admissible because it is both reliable and relevant. The propriety of the interrogation techniques used with J.S. and B.F. were squarely in issue. This is not a subject area on which lay jurors are informed. On the contrary, it is

a subject area embraced by an extensive body of psychiatric and psychological research and analysis.[16]

Moreover, numerous courts have concluded that expert testimony concerning interview techniques in child sexual abuse cases is reliable and admissible. *See State v. Wigg*, 889 A.2d 233, 239 (Vt. 2005)("a large majority of courts have held that the type of general expert evidence introduced in this case, explaining the proper and improper methods of examining children who may be victims of sexual assault, is admissible"); *State v. Speers*, 98 P.3d 560, 562 (Ariz. App. 2004)("trial court erred by refusing to allow Defendant to present expert testimony on the subject of the proper protocols for interviewing young children to avoid suggestiveness and the implanting of false memories"); *Commonwealth v. Delbridge,* 855 A.2d 27 (Pa. 2003)(expert proof admissible to determine child's competency); *United States v. LaBlanc*, 2002 U.S. App. LEXIS 18036 (6th Cir. 2002)(finding Dr. Campbell's testimony satisfied *Daubert's* reliability standard); *State v. Sargent*, 738 A.2d 351, 354 (N.H. 1999)(reversing and holding that the failure to admit such expert testimony was not harmless; "the proper protocols and techniques used to interview child victim witnesses is a matter not within the knowledge and understanding of the average juror"); *Barlow v. State*, 507 S.E.2d 416 (Ga. 1998)(reversing for failure to admit such expert proof); *State v. Gersin,* 668 N.E.2d 486, 488 (Ohio 1996)(affirming reversal of conviction and holding that "[a]n expert testifying as to interviewing protocols does not usurp the role of the jury, but rather gives information to a jury which helps it make an educated determination"); *State v. Sloan*, 912 S.W.2d 592, 596 (Mo. App. 1995)(reversing for failure to admit expert proof and observing that "[o]pinions of experts on

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[16] *See* the numerous peer-reviewed articles and studies footnoted in Dr. Campbell's report (Appendix 4).

improper or suggestive techniques employed by individuals investigating allegations of sexual abuse of children have been allowed in several jurisdictions"); *State v. Kirschbaum,* 535 N.W.2d 462, 466, 467 (Wis. App. 1995), *review denied,* 537 N.W.2d 571 (Wis. 1995)("[m]any jurisdictions . . . recognize the utility of expert testimony on the suggestive interview techniques used with a young child and how suggestive techniques can shape a young child witness's answers"; "the child psychologist's testimony in this case . . . to discuss the procedures and techniques used in pretrial interviews . . . and how these procedures and techniques may have affected the reliability of the child's recollections . . . is a subject with which a lay juror may be unfamiliar"); *State v. Malarney,* 617 So.2d 739 (Fla. App. 1993)(reversing conviction based on erroneous exclusion of such expert proof). *See* John R. Christiansen, *The Testimony of Child Witnesses: Fact, Fantasy, and the Influence of Pretrial Interviews,* 62 Wash. L. Rev. 705 (1987). *See also Pendleton v. Commonwealth,* 83 S.W.3d 522, 526 (Ky. 2002)(denying request for continuance to allow time to retain an expert on suggestive questioning, *but not finding such evidence inadmissible*).

The rationale for admitting such evidence was ably explained by the Supreme Court of Georgia:

> The defendant in a child molestation case is entitled to a thorough and sifting cross-examination of the State's witnesses. However, "cross-examination of a child witness could be ineffectual if the child sincerely takes his or her recollections to be grounded in facts and does not remember the improper interview procedures which may have suggested them." *State v. Kirschbaum, supra.* at 467 [535 N.W.2d 462 (Wisc. App. 1995)]. Similarly, cross-examination of the interviewer is not necessarily sufficient. Child sexual abuse cases are a special lot. A major distinguishing aspect of a child sexual abuse case is how the victim came to relate the facts which led to the bringing of criminal charges. A defendant not only should be able to cross-examine prosecution witnesses regarding how they obtained their information, but also should have the chance to present expert testimony as to how such information is ideally obtained.

> Prosecutors are free to cross-examine, or to question the idea that there is only one blanket method of interviewing that should be applied to every child.

*Barlow v. State*, 507 S.E.2d 416, 418 (Ga. 1998). After an exhaustive examination of the issue the court in *Commonwealth v. Delbridge,* 855 A.2d 27 (Pa. 2003), observed:

> We . . . determine that a sufficient consensus exists within the academic, profession[al], and law enforcement communities, . . ., to warrant the conclusion that the use of coercive or highly suggestive interrogation techniques can create a significant risk that the interrogation itself will distort the child's recollection of events, thereby undermining the reliability of the statements and subsequent testimony concerning such events.

*Id.* at 36-37.

As the Georgia Supreme Court observed, "how the victim came to relate the facts which led to the bringing of the criminal charges," *Barlow*, 507 S.E.2d at 418, is a significant issue in cases involving allegations of child sexual abuse. In this instance, J.S. had been Appellant's "little brother" since September 2001. There had been no reason for any concern about their relationship. J.S. had never reported any inappropriate conduct to anyone, including his parents. But on October 8, 2003, he was isolated, held captive by the police, and interviewed alone in a highly coercive environment until nearly 2:00 a.m. Adding to the suspicion surrounding the "fact or fantasy" of the allegations, J.S. later provided a new account of events at trial, which, for the first time, included some alleged conduct in the shower at Falling Springs. B.F., as well, gave a new version of "facts" at trial. These disturbing circumstances raise serious questions about the manner in which these boys were questioned initially, as well as the integrity of the interview results. Are their accounts real or the imagined product of coercive questioning? Dr. Campbell was prepared to demonstrate that coercive or suggestive questioning techniques were utilized. (TE, Vol. III at 76-82; Appendix 3 at 76-82;

Appendix 4 at 13-35). *Compare State v. Wigg*, 889 A.2d 233, 241-42 (Vt. 2005), holding that it was error not to admit case-specific testimony as to whether the interviewers followed or deviated from proper questioning methods. Appellant should have had the "chance to present expert testimony as to how such information is ideally obtained." *Barlow*, 507 S.E.2d at 418.

The mere fact that the expert testimony related to the methods used in questioning children did not render the Rule 702 analysis "unique" vis a vis the analysis necessary for the admission of any other expert proof. The fundamental issues are the same regardless of the type of expert testimony under consideration: Is it reliable – is it valid science – and is it relevant – does it relate to the facts and issues in this case? The answer to both is a resounding "yes" as to Dr. Campbell's proposed testimony.

Appellant had a right to offer testimony that this critical evidence – the statements of J.S. and B.F. – were secured in a fashion that rendered the allegations unreliable. This is no different than allowing a defendant to call an expert on crime scene investigations to show that permitting untrained personnel to collect blood samples without following established protocols could result in contaminated samples, which could lead to misidentification of the defendant as the perpetrator. Whether this practice *did* lead to a misidentification would be a question for the jury. Likewise, whether the interview techniques employed by the untrained personnel in the instant case *did* lead to false allegations against Appellant would be left for the jury. Dr. Campbell's testimony should have been admitted.

The only remaining question is the proper remedy for the trial court's error. The Court of Appeals concluded that "this case must be remanded to the trial court for specific findings" on the "factors" identified in KRE 702 and *Stringer v. Commonwealth,* 956 S.W.2d 883 (Ky. 1997), *cert.*

*denied,* 523 U.S. 1052 (1998). *Stringer*, of course, merely restates the standards for admissibility of expert evidence set out in Rule 702 and *Daubert*, *viz*:

> Expert opinion evidence is admissible so long as (1) the witness is qualified to render an opinion on the subject matter, (2) the subject matter satisfies the requirements of *Daubert* . . ., (3) the subject matter satisfies the test of relevancy set forth in KRE 401, subject to the balancing of probativeness against prejudice required by KRE 403, and (4) the opinion will assist the trier of fact per KRE 702.

*Stringer,* 956 S.W.2d at 891. *Stringer's* most significant contribution to Kentucky's jurisprudence was its clarification as to the admissibility of opinions which purport to address the so-called "ultimate issue." In *Stringer* a physician testified that a child abuse victim showed signs of vaginal trauma and that "those findings were compatible with [the child's] history that she had given me." *Id.* at 889. The Court rejected arguments that this testimony constituted an opinion on the "ultimate issue":

> If Dr. Nunemaker had testified that he believed Appellant to be guilty, such would have been an opinion as to the ultimate issue. However, *an opinion that a result is consistent with a factual scenario is not an opinion that the scenario occurred.*
>
> The real question should not be whether the expert has rendered an opinion as to the ultimate issue, but whether the opinion "will assist the trier of fact to understand the evidence or to determine a fact in issue." KRE 702. . . . Presumably, jurors do not need assistance in the form of an expert's opinion that the defendant is guilty or not guilty. However, they usually do need the assistance of a medical expert in determining the cause of a physical condition in order to understand the evidence and determine the ultimate fact in issue. KRE 401; KRE 702.

*Id.* at 889-90 (emphasis added). The Court continued:

> In a criminal case, the ultimate fact in issue is whether the defendant is guilty or not guilty. *Whether the physical findings testified to by Dr. Nunemaker were consistent with sexual abuse is only a relevant evidentiary fact tending to make the ultimate fact*

*more or less probable. KRE 401.*

*Id.* at 891 (emphasis added). Similarly, Dr. Campbell's finding that the interviews are consistent with coercion "is only a relevant evidentiary fact tending to make the ultimate fact more ***or less*** probable." *Id.* at 891 (emphasis added). It is not testimony going to the "ultimate fact" of innocense or guilt. Thus, *Stringer* makes it clear that Dr. Campbell's testimony is admissible.

The record before this Court shows that the *Stringer* factors – in short, relevance and reliability – are satisfied. The trial court developed an adequate record to make the Rule 702 admissibility determination, it just failed to do so under the mistaken belief that such was tantamount to a "taint" determination. Where such an extensive record has already been developed a remand to determine admissibility is not appropriate. *Compare Commonwealth v. Christie,* 98 S.W.3d 485, 492 (Ky. 2002) (case remanded where the trial court held expert eyewitness identification to be *per se* inadmissable *without* developing an adequate factual record). In this case the convictions should be **reversed** and the case remanded for a new trial with directions to **admit** the testimony of Dr. Campbell as to (a) proper techniques and procedures for interviewing children regarding allegations of child sexual abuse, (b) identification of improper questioning techniques and procedures used by the investigators in the instant case, and (c) the risk of unreliable interview results and false allegations flowing from such improper questioning techniques and procedures. The trial court should, of course, retain its discretion as to admissibility determinations on the fine points of the expert testimony.

It was error not to admit the testimony of Dr. Campbell. This was a close case as evidenced by the acquittals. The testimony may well have convinced the jury that the suggestive interviews produced unreliable allegations. The judgment should be reversed.

## II. THE TAPED INTERVIEWS BY THE LEAD INVESTIGATOR WERE ADMISSIBLE IN CROSS-EXAMINATION OF THE INVESTIGATOR TO EXPOSE THE IMPROPER INTERVIEW TECHNIQUES.[17]

Further aggravating of the trial court's erroneous exclusion of the testimony of Dr. Campbell, the court improperly restricted the cross-examination of the lead investigator. (TE, Vol. IV at 76-115).[18] This restriction violated Appellant's due process right to offer a defense to the charges.

During the cross-examination of Officer Qualls, Appellant sought to play the audiotape of Qualls' interviews with J.S. on October 8 and 9, 2003.[19] (TE, Vol. IV at 76). The purpose was "to show that he was prompted throughout the entire interview. It's going to show that the Detective is the one that provided the allegations, not [J.S.]" (*Id.* at 79).

> I am entitled to put the evidence in front of the jury to show that this is a tainted interview. Now, I've been prohibited from doing that through Dr. Campbell, which is the way I wanted to do it. The Court's already said that I've got a right to challenge through cross examination the way in which the child was interviewed. The only way I can do that effectively is for the jury to hear the tape and me be able to talk to the officer about what's on the tape. I don't have to be put in the position, Judge, where the jury has to take my word for it as to what's on the tape, or my word for it as to how the officer conducted the questioning. I'm entitled to let the jury hear what the officer said and inquire of the officer about that.

(*Id.* at 81-82). Counsel explained that it was critical for the jury to hear not only the suggestive questions, but also hear that the officer's prompting was successful:

> Well, if you do that to me [redact J.S.'s answers], I can't show that his [the officer's] prompting questioning has been effective. It's not just the officer saying, well, did he unzip your pants or did he pull

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[17] This error was preserved by timely objection during trial. (TE, Vol. IV at 76-115).

[18] This portion of the transcript is attached as Appendix 5.

[19] The audiotape of the interviews is in the record as Defendant's Avowal Exhibit 7.

> your pants down, it's the fact that he said did he unzip your pants and pull your pants down, and the boy said unzip. *It's the fact that the boy is adopting the prompting that leads to the unreliability of the interview.*

(*Id.* at 93)(emphasis added).

The trial court was concerned that the taped interviews may be hearsay and that they would impeach J.S. before he testified. (*Id.* at 83, 91, 97-102). Appellant addressed the hearsay issue:

> They [the interviews] are not being offered for the truth of the matter asserted. They are being offered to show that the suggestive faulty questioning by the police officer is successful with the child. My very point is that that tactic is producing an unreliable result in this interview that what came out of the interview is not the truth. It's everything but the truth.

(*Id.* at 96). Likewise, the court's concern about premature impeaching of J.S. was addressed:

> It doesn't matter to me what the child gets up on the stand and says. If the child got up and repeated verbatim what's in the statement, it would not make one iota of difference to me because my purpose in doing this is not to impeach the child. It is to impeach the integrity, to challenge the integrity of the manner in which the investigation was conducted.

(*Id.* at 107). A limiting instruction would have alleviated these concerns.

The trial court excluded the taped interviews, but held that Qualls could be asked about his questioning of J.S. (*Id.* at 114). This method of cross-examination proved predictably ineffective. As to whether the officer recalled specific questions and answers, he gave responses such as "Perhaps," (*id.* at 117), "I remember saying something to that effect," and "That was, I believe, his answer," (*id.* at 121).

The taped interviews were admissible through Qualls – the interviewer – for the stated purpose, *i.e.*, to challenge the integrity of the investigation. Barring Appellant from playing the interviews during the cross-examination of Qualls acted to undermine Appellant's defense, *i.e.*, to

show that the allegations were the product of suggestive questioning as opposed to the uncoerced byproduct of truthful reporting.

The Court of Appeals held that the tapes were not admissible under KRE 801A. On the contrary, because the tapes were not being offered to prove the truth of the matter asserted, they did not fall within the definition of hearsay. Since these tapes were not hearsay, and thus were "nontestimonial" in nature, *see* Lawson, *The Kentucky Evidence Handbook* §8.05[2] (4th ed. 2003), an analysis under KRE 801A is improper.[20]

This restriction on the cross-examination of the lead investigator deprived Appellant of his due process right to offer a defense to the charges. The events of October 8, 2003, were critical to this case. What the jury believed about that evening at Falling Springs lead to the convictions. This Court has recognized the right of a defendant to offer a defense:

> "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 1045, 35 L. Ed.2d 297 (1973). This right, often termed the

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[20] As explained by Professor Lawson:

> Wigmore used an abstraction to illustrate the reach of the hearsay rule. Suppose that witness A, he said, proposes to testify that someone else said "Event X occurred." Such testimony from A (and from any witness proposing to repeat in the courtroom what he or she heard from another person outside the courtroom) could serve two very different purposes depending upon the circumstances of the case and the intention of the offering party. On the one hand, it could serve to prove that on a given occasion Event X occurred in fact. On the other hand, it could serve to prove merely that, on a given occasion, that person uttered the words "Event X occurred." This distinction, said Wigmore, is between a "testimonial" and a "nontestimonial" use of the statement. The importance of this distinction is that the hearsay rule applies only to the former and not the latter.

*Id.* at 556-57.

> "right to present a defense," is firmly ingrained in Kentucky jurisprudence, *e.g.*, *Rogers v. Commonwealth*, Ky., 86 S.W.3d 29, 39-40 (2002); *Holloman v. Commonwealth*, Ky., 37 S.W.3d 764, 767 (2001); *Mills v. Commonwealth*, Ky., 996 S.W.2d 473, 489 (1999); *McGregor v. Hines*, Ky., 995 S.W.2d 384, 388 (1999); *Barnett v. Commonwealth*, Ky., 828 S.W.2d 361, 363 (1992), and has been recognized repeatedly by the United States Supreme Court. *See United States v. Scheffer*, 523 U.S. 303, 308, 118 S. Ct. 1261, 1264, 140 L. Ed.2d 413 (1998); *Michigan v. Lucas*, 500 U.S. 145, 149, 111 S. Ct. 1743, 1746, 114 L. Ed.2d 205 (1991); *Taylor v. Illinois*, 484 U.S. 400, 408, 108 S. Ct. 646, 652, 98 L. Ed.2d 798 (1988); *Rock v. Arkansas*, 483 U.S. 44, 55, 107 S. Ct. 2704, 2711, 97 L. Ed.2d 37 (1987); *Crane v. Kentucky*, 476 U. S. 683, 690-91, 106 S. Ct. 2142, 2146-47, 90 L. Ed.2d 636 (1986); *Green v. Georgia*, 442 U. S. 95, 97, 99 S. Ct. 2150, 2151-52, 60 L. Ed.2d 738 (1979); *Washington v. Texas*, 388 U. S. 14, 22-23. 87 S. Ct. 1920, 1925, 18 L. Ed.2d 1019 (1967). ***An exclusion of evidence will almost invariably be declared unconstitutional when it "significantly undermine[s] fundamental elements of the defendant's defense."*** *Scheffer, supra.*, at 315, 118 S. Ct. at 1267-68.

*Beaty v. Commonwealth*, 125 S.W.3d 196, 206-07 (Ky. 2003)(emphasis added). "'No matter how credible the defense, our system of justice guarantees the right to present it and be judged by it.'" *Id.* at 210 (quoting *Pettijohn v. Hall,* 599 F.2d 476, 483 (1st Cir. 1979)). The preclusion of this area of cross-examination, along with the exclusion of Dr. Campbell's testimony, totally eliminated Appellant's ability to offer the highly plausible defense that the false allegations were the product of the investigators' coercive questioning. The tapes were critical to proving out this theory.

The taped interviews were admissible through Qualls to challenge the integrity of the investigation. Barring Appellant from playing the tapes made it impossible to show that the allegations of sexual abuse were the product of suggestive questioning. This restriction on the cross-examination violated Appellant's confrontation rights. So long as there is a "connection . . . between the cross-examination proposed to be undertaken and the facts in evidence" the cross-examination should be permitted and any restriction thereon constitutes a violation of the defendant's right to

confrontation. *Commonwealth v. Maddox*, 955 S.W.2d 718, 721 (Ky. 1997). The convictions must be reversed.

## III. A MISTRIAL MUST BE GRANTED WHEN THE PROSECUTOR, DURING SUMMATION, "GUARANTEES" THE EXISTENCE OF OTHER UNCHARGED CONDUCT.[21]

Further compounding the prejudicial trial environment, the trial court erred in refusing to grant a mistrial where the prosecutor, on three occasions, encouraged the jury to convict based on speculation that there were other instances of sexual misconduct which were shielded from the jury's hearing. The burden is on the Commonwealth "to show the conduct was not prejudicial" to Appellant. *Big Rivers Electric Corp. v. Barnes,* 147 S.W.3d 753, 762 (Ky. App. 2004).

At three points during closing argument the prosecutor strongly inferred, if not specifically stated, that there was incriminating evidence which the jury was not permitted to hear. On the first occasion, the prosecutor stated:

> You also have had to sit through a lot of stuff where we have gone up to the bench time and time again, and I know you all were probably wondering what now? Now what are they talking about? But, we want to let you know that the rules of evidence allow some things, they don't allow others, and so we have to go to the bench. And so, we're not trying to keep stuff from you. You know, certain tapes can be played, certain people can say this. *But just because you haven't heard some of those things, it doesn't mean this case hasn't been proven to you beyond a reasonable doubt.*

(TE, Vol. VI at 88) (emphasis added). Appellant objected and moved for a mistrial arguing that the comment "implies to the jury that that which they have not heard would have erased a reasonable

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[21] This error was preserved by timely objections and motions for mistrial. (TE, Vol. VI at 88-89, 101-03, 115-16).

doubt from their mind." (*Id.* at 89). The motion for a mistrial was overruled. (*Id.* at 89).

A short time later, the prosecutor made another argument in the same vain, but more blatant. In discussing the fact that J.S. made new allegations months after the October 2003 interviews, the prosecutor argued:

> As a matter of fact, [J.S.] came to us when he felt safe. When he felt comfortable enough, [J.S.] came to us and said, I know more. I want to tell you a little bit more. I'm far enough removed now from the situation, I didn't tell you all of it at first, there's more. *And you know what, ladies and gentlemen? I* ***guarantee*** *there's a whole lot more we don't know about still today. I* ***guarantee*** *there's a whole lot more.*

(TE, Vol. VI at 101) (emphasis added). Appellant again objected, (*id.* at 101), and moved for a mistrial arguing that the prosecutor "is inviting the jury to engage in wholesale speculation based on something that's not supported by the evidence," (*id.* at 102). The trial court acknowledged the impropriety of the prosecutor's argument:

> *You can't just throw open the door and say, well, there may be a lot more going on out there and we didn't introduce any proof on it. . .* . I think I'm going to tell them that they can only consider the evidence, the matters that are in evidence. *I think you're [the prosecutor] getting really close to going beyond that, so let's move on to something else and I'll tell them that.*

(*Id.* at 103) (emphasis added). For the prosecutor to "*guarantee* there's a whole lot more" certainly surpasses "getting really close"; it's over the top.

In a final blow, the prosecutor argued: "But he is one of the most offensive people you'll ever meet. Someone who sexually abuses young, vulnerable ***children***." (*Id.* at 115). This was met with an immediate objection and motion for a mistrial due to the fabricated reference to multiple victims. (*Id.* at 115-16). There was no remedy provided by the trial court. (*Id.* at 116).

"A party aggrieved by egregious argument should not be required to demonstrate prejudice,

ordinarily an impossible task, for to do so would in most cases render reviewing courts powerless to correct the error." *Risen v. Pierce,* 807 S.W.2d 945, 949 (Ky. 1991). "[S]uch conduct will not be tolerated." *Id.* Kentucky has "adopted a rigid rule to prevent counsel from going outside the record in their arguments to the jury." *Horton v. Herndon,* 254 Ky. 86, 70 S.W.2d 975, 977 (1934).[22]

> The rule is that where an attorney makes a prejudicial statement of fact unsupported by the evidence, and the improper argument is brought to the court's attention, the court should promptly reprimand him and instruct the jury to disregard the statement and, if it be so prejudicial that it *may* improperly influence the jury, should set aside the verdict. . . .

*Id.* (emphasis added). Here the trial court acknowledged the impropriety of the comments, but did not admonish the jury to disregard the statements. (TE, Vol. VI at 89, 103, 116).

The argument flagrantly addressed matters outside the record and therefore constitutes prosecutorial misconduct. *See Barnes v. Commonwealth*, 91 S.W.3d 564, 568-69 (Ky. 2002). A prosecutor's misconduct in closing argument is "flagrant" when a comment is "deliberately . . . placed before the jury." *United States v. Carroll,* 26 F.3d 1380, 1385 (6th Cir. 1994) (cited as authority in *Barnes*). These comments were deliberate and flagrant.

The facts are analogous to those in *Mack v. Commonwealth*, 860 S.W.2d 275 (Ky. 1993), where the defendant had been convicted of sodomy and sexual abuse. The prosecutor commented in closing that "[w]e've only heard the tip of the iceberg" and "[w]hat happened in that house all the rest of the nights?" *Id.* at 276. The Supreme Court reversed, holding that "[w]e see nothing fair in telling the jury that there exists a vast store of incriminating evidence" which was not presented. *Id.* at 277. "The argument enticed the jury to override due process of law as a baneful impediment to

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[22]*Horton* has been cited as authority for this proposition in the criminal law context. *See Mondie v. Commonwealth*, 158 S.W.3d 203, 214 n.36 (Ky. 2005).

justice. . . ." *Id.* And so it was in this case.

This is another situation where the prosecution's closing argument is completely out of line and prejudicial. *Compare Ragland v. Commonwealth*, 191 S.W.3d 569, 591-97 (Ky. 2006) (Cooper, J., dissenting). This was a close case, as evidenced by the jury's acquittals. These prejudicial closing comments were enough to influence the jury to convict. Until this Court sends a clear message to prosecutors -- via reversal -- such flagrant conduct will persist. These convictions should be reversed.

## IV. A CONVICTION CANNOT BE BASED ON UNCHARGED CONDUCT, NEVER PRESENTED TO THE GRAND JURY, WHICH AMOUNTS TO A CONSTRUCTIVE AMENDMENT OF THE INDICTMENT.[23]

Until B.F. and J.S. got on the stand at trial no one had heard the version of events which resulted in Appellant's conviction, *i.e.*, that there was touching, or worse, sodomy, while *in the shower* at Falling Springs. Appellant was forced to take aim at a moving target.

Count 2 of Indictment No. 04-CR-00005 charged Sexual Abuse First Degree as to J.S. on October 8, 2003. The evidence presented to the grand jury supporting this count was Officer Qualls' testimony that J.S. told him during an October 9, 2003 interview, "*during the play in the pool* there, that Mr. Jenkins had put his hand up his shorts and touched his genitals." (Emphasis added). Qualls also told the grand jury that B.F., during his interview, said he had seen Appellant touch J.S. while

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[23] This error was preserved through objections and motions for mistrial, (TE, Vol. III at 100-03; Vol. V at 44-46), motions for directed verdict of acquittal, (TE, Vol. V at 87-90; Vol. VI at 36-37), and Defendant's Motion for Judgment of Acquittal and Alternative Motion for a New Trial, (R. at 323).

they were *playing in the pool.*[24]

J. S.'s trial testimony was a far cry from the account he gave in his October 2003 interviews and the account Qualls related to the grand jury. He testified that Appellant "put his mouth on my front toward privates" while in the *shower* at Falling Springs. (TE, Vol. V at 23). *J.S. acknowledged on the stand that he had never disclosed this account to anyone prior to trial.* (*Id.* at 58).

Likewise, B.F.'s trial testimony bore no resemblance to his October 9, 2003 interviews. At trial B.F. testified that he saw Appellant touch J.S.'s "privates" while in the *shower* at Falling Springs. (TE, Vol. III at 22-24, 30). Officer Qualls and social worker Pandaru both testified that B.F. never disclosed this account to them. (*Id.* at 168, 169; Vol. IV at 136). Even the prosecutor acknowledged that the first time she heard this allegation was at trial. (TE, Vol. III at 103).

The trial testimony of J.S. and B.F. constitutes uncharged conduct. The relevant count of the indictment was not returned in reliance on this "evidence." This Court has held that "a defendant has the right to rely on the fact that he would only have to rebut evidence of which he was given notice." *Wolbrecht v. Commonwealth*, 955 S.W.2d 533, 537 (Ky. 1997).

Being confronted with the evidence supporting the conviction for the first time at trial violated Appellant's Fifth Amendment right to due process and his Sixth Amendment rights of confrontation and effective assistance of counsel. In preparing for trial, Appellant rightfully expected that the evidence would be consistent with what J.S. and B.F. told Officer Qualls in October 2003, and consistent with what Qualls told the grand jury, *i.e.*, that touching occurred while Tim and the boys were swimming in the pool. Obviously, the defense to those allegations was that the adult witnesses present at the pool did not see any inappropriate touching, despite their close scrutiny. The

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[24] *See* pages 5 and 6 of the grand jury transcript filed in a separate envelope in the record.

trial testimony of J.S. and B.F. changed completely, resulting in an amendment, or prejudicial variance amounting to a constructive amendment, of the indictment.

The significance of an amendment, or constructive amendment, of an indictment has been recognized by the Sixth Circuit:

> A grand jury's indictment protects three constitutional due process rights, namely: the *Sixth Amendment's* right to fair notice of the criminal charges against which one will need to defend; and the *Fifth Amendment's* dual protections against twice placing a defendant in jeopardy for the same offense, and holding the defendant to answer for crimes not presented to or indicted by a grand jury. *United States v. Pandilidis*, 524 F.2d 644, 648 (6th Cir. 1975). Accordingly, "the rule preventing the amendment of an indictment should be applied in a way that will preserve these rights from invasion; . . . ." *Id.*
>
> This court recognizes two forms of modification to indictments: amendments and variances. Amendments occur "when the charging terms of the indictment are altered, either literally or in effect, by prosecutor or court after the grand jury has last passed on them." *United States v. Ford*, 872 F.2d 1231, 1235 (6th Cir. 1989) (citations omitted). Amendments are considered prejudicial per se, warranting reversal of a conviction, because they "directly infringe upon the *fifth amendment* guarantee" to hold a defendant answerable only for those charges levied by a grand jury. *Id.* Variances, however, occur "when the charging terms of an indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment" and are not reversible error unless the defendant can prove it prejudiced his defense. *Id. See also United States v. Hathaway*, 798 F.2d 902, 910-11 (6th Cir. 1986) (citations omitted). Between these distinctions lies a more subtle modification to the indictment, a constructive amendment,. . . . Constructive amendments are variances occurring when an indictment's terms are effectively altered by the presentation of evidence and jury instructions that "so modify essential elements of the offense charged that there is a substantial likelihood the defendant [was] convicted of an offense other than that charged in the indictment." *Hathaway*, 798 F.2d at 910. *See also United States v. Beeler*, 587 F.2d 340 (6th Cir. 1978).

*United States v. Combs*, 369 F.3d 925, 935-36 (6th Cir. 2004) (emphasis original). A variance is

material, or rises to the level of a constructive amendment, if the variance misleads the defendant in making his defense. *See Runyon v. Commonwealth*, 393 S.W.2d 877, 880 (Ky. 1965), *cert. denied*, 384 U.S. 906 (1966).

The significant shift in the evidence related to the charge of Sexual Abuse First Degree on October 8, 2003, amounts to such a prejudicial variance – a constructive amendment of the indictment. Appellant arrived at trial planning to defend against the allegations by establishing that the witnesses saw no criminal conduct occur in the pool. Instead, he was confronted with a new story alleging criminal conduct in the shower. This variance mislead Appellant in making his defense. *Id.* Variances amounting to constructive amendments are prejudicial *per se* and require reversal. *United States v. Ford*, 872 F.2d 1231, 1237 (6th Cir. 1989), *cert. denied*, 495 U.S. 918 (1990).

A grand jury's indictment is intended to protect the defendant's due process rights through the "Sixth Amendment's right to fair notice of the criminal charges against which one will need to defend." *Combs*, 369 F.3d at 935. When Appellant was forced to defend constantly changing allegations, this right was violated. This requires reversal of the Sexual Abuse conviction.

## V. THE EVIDENCE DID NOT SUPPORT THE PUBLIC ELEMENT NECESSARY TO OBTAIN A CONVICTION FOR INDECENT EXPOSURE.[25]

The indictment charged Appellant with Indecent Exposure "when he exposed his genitals in the presence of J.S." on October 8, 2003. (R. at 1). The instructions required the jury to find that Appellant "intentionally exposed his genitals to J.S. under circumstances *in which he knew such*

[25] This issue was preserved by Appellant's motion for a directed verdict of acquittal, (TE, Vol.V at 68-69; Vol. VI at 36-37), and by Defendant's Motion for Judgment of Acquittal and Alternative Motion for a New Trial, (R. at 329).

*conduct was likely to cause affront or alarm.*" (R. at 282) (emphasis added). At the time, the pertinent statute provided: "A person is guilty of indecent exposure when he intentionally exposes his genitals *under circumstances in which he knows or should know his conduct is likely to cause affront or alarm.*" KRS 510.150(1) (emphasis added).

Nudity in the men's locker room of the Falling Springs Arts and Recreation Center does not satisfy the statute. The boys' mothers knew Appellant was taking them swimming on the evening of October 8, 2003. (TE, Vol. I at 96-97). The boys brought their swimming suits and towels so they could change in the locker room before and after swimming. (TE, Vol. III at 26; Vol. V at 32). The boys made their own decision to shower. As they exited the pool and headed for the locker room, they left Appellant behind and exclaimed, "We're going to take a shower." (TE, Vol. II at 105). Nudity under these circumstances does not satisfy the element of the statute requiring that the conduct be "likely to cause affront or alarm."

Moreover, the statute is intended to apply to public acts: "It is the probability of *public view* that is critical. . . ." KRS 510.150, Commentary (1974)(emphasis added). Had Appellant exposed himself in the public pool area a violation of this statute would have occurred. The removal of clothing in the men's locker room for purposes of showering and changing does not constitute a violation of KRS 510.150.

A directed verdict of acquittal should have been granted as to the count involving J.S., just as it was as to the Indecent Exposure count involving B.F. The conviction for Indecent Exposure should be reversed.

## VI. APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED BY THE LATE JURY DELIBERATIONS.[26]

On the evening of August 17, 2005, the trial recessed at 8:00 p.m. The trial resumed on August 18 at 8:30 a.m. The jury retired for deliberations at 4:45 p.m. The jury deliberated uninterrupted until 12:10 a.m. on August 19, 2005. At 12:10 a.m., Appellant moved for a mistrial when the jury informed the court that it was deadlocked. (TE, Vol. VI at 126-27). At that time the trial court observed: "I understand that we're getting pretty close to everybody's limits." (*Id.* at 127). Despite this fact, over Appellant's objection, the court instructed the jurors pursuant to RCr 9.57 and sent them back for further deliberations at 12:16 a.m. (*Id.* at 126-28). The jury returned a verdict at 1:50 a.m. and then returned a sentencing verdict at 2:55 a.m.

By the time the jury communicated that it was deadlocked it was 12:10 a.m. and it had deliberated uninterrupted for 7 hours and 25 minutes. (*Id.* at 126-27). Moreover, by that time the jury had been working since 8:30 a.m., a period of nearly 16 hours. It deprived Appellant of due process of law to require the jury to continue deliberations until 1:50 a.m., when a verdict was returned. *See State v. Parisien*, 703 N.W.2d 306, 313 (N.D. 2005) (reversing where jury deliberated from 7:40 p.m. until 2:19 a.m. after a full day of trial, after jury informed the court that it was "hung," and after receiving an *Allen*-like charge); *State v. Parton*, 817 S.W.2d 28, 35 (Tenn. App. 1991) (holding it was plain error and a due process violation where jury was required to deliberate into early morning hours; the jury "should very rarely deliberate into the early morning hours without proper rest"); *State v. McMullin*, 801 S.W.2d 826 (Tenn. App. 1990) (due process violation requiring

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[26] This issue was properly preserved by timely objection, (TE, Vol. VI at 126-27), and by Defendant's Motion for Judgment of Acquittal and Alternative Motion for a New Trial, (R. at 331).

reversal based on late night jury deliberations).

Moreover, at least one Kentucky case has observed that there are limits to the amount of time a jury can deliberate. *See Tarrence v. Commonwealth,* 265 S.W.2d 40, 52 (Ky. 1953), *cert. denied,* 348 U.S. 899 (1954). There the Court observed that "it strikes us that where a jury has gone through an all-day trial, keeping or permitting them to continue their deliberations practically all night without interruption might result in an unjust verdict from tired minds." *Id.* at 52. In *Tarrence* the jury deliberated from 10:45 p.m. until 4:35 a.m., but on "several" occasions informed the trial court that it was the jurors' preference to continue deliberations.

In the instant case, the jury informed the trial court that it was deadlocked at 12:10 a.m. The trial court acknowledged that the strain and fatigue were "getting pretty close to everybody's limits." (TE, Vol. VI at 127). Nevertheless, the court *required* the jury to continue deliberating. This in fact "result[ed] in an unjust verdict from tired minds." *Tarrence,* 265 S.W.2d at 52. Accordingly, the convictions should be reversed.

## VII. THE CUMULATIVE EFFECT OF THE ERRORS DEPRIVED APPELLANT OF HIS CONSTITUTIONAL RIGHTS.

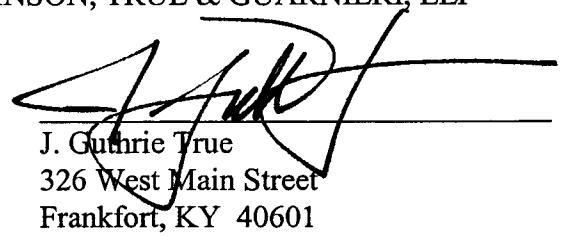
The cumulative effect of the errors deprived Appellant of due process of law under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Sections 10 and 11 of the Kentucky Constitution. Their cumulative effect mandates reversal. *See Funk v. Commonwealth*, 842 S.W.2d 476, 483 (Ky. 1992).

## CONCLUSION

WHEREFORE, the appellant, John Tim Jenkins, respectfully requests that the Court reverse and vacate the judgment of conviction, and remand this matter for a new trial if necessary.

Respectfully submitted,

JOHNSON, TRUE & GUARNIERI, LLP

BY: 

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## APPENDIX

1. Judgement and Sentence on Plea of Not Guilty of January 11, 2006 (R. at 389)
2. Opinion and Order of December 16, 2005 (R. at 381)
3. Transcript of Evidence, Volume III, pp. 43-95
4. Dr. Terrance Campbell's Report/Defendant's Avowal Exhibit 5
5. Transcript of Evidence, Volume IV, pp. 76-115