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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# REPLY 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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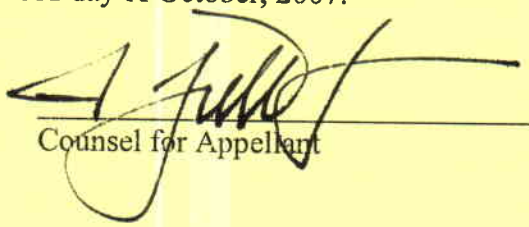
## CERTIFICATE OF SERVICE

It is hereby certified that a true copy of this Reply 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 23rd day of October, 2007.



Counsel for Appellant

## STATEMENT OF POINTS AND AUTHORITIES

The Commonwealth does not dispute the facts as recited by Appellant in any respect. There was no physical evidence of a crime, only the coerced account of a child. Moreover, the "factual" accounts of J.S. and B.F. changed dramatically at trial.

## I. DR. CAMPBELL'S TESTIMONY WAS IMPROPERLY EXCLUDED.

The Commonwealth misstates the standard of review concerning the admissibility of this expert evidence. It must be admitted if is both reliable and relevant. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 578 (Ky. 2000). The trial court's reliability determination is reviewed for clear error, while the relevance determination is reviewed for abuse of discretion. *Ragland v. Commonwealth,* 191 S.W.3d 569, 575 (Ky. 2006). The trial court made no findings as to either.

The Commonwealth does not question the fact that Dr. Campbell's testimony satisfied the requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Likewise, it does not attempt to defend the trial court's erroneous reasoning in excluding the evidence, *i.e.*, that Kentucky has not expressly adopted the "taint hearing" concept. (*See* TE, Vol. III at 90-91). The Commonwealth obviously concedes that Appellant never sought a taint hearing. (*Id.* at 52-53). Rather, it asserts that Dr. Campbell's testimony was not admissible based on an unintelligible argument regarding the admissibility of opinions on the "ultimate issue" under *Stringer v. Commonwealth*, 956 S.W.2d 883 (Ky. 1997), and the notion that *Stringer* does not permit comment on the "character of another witness." Thus, the Commonwealth creates a never-before-recognized sub-category of expert proof it describes as "non-character expert testimony," as apparently contrasted against what it would characterize as "character expert testimony" – another non-existent category of proof.

Initially it is important to note that the Appellant never sought to introduce any evidence

constituting a comment on the "character" of any witness. The proposed testimony from Dr. Campbell related solely to the manner in which the untrained investigators conducted the interviews of the minor witnesses. At no time did he propose to offer any comment or opinion on the "character" -- or credibility -- of the investigators or the minor witnesses. (*See* TE, Vol. III at 46; "we're introducing testimony as to the credibility of the interviewing methods that were used, not to the credibility of the witness").

Next, it should be observed that this convoluted argument by the Commonwealth is a poorly conceived morph of an unsuccessful argument it offered to the Court of Appeals. There the Commonwealth asserted that Dr. Campbell's testimony was not admissible because it went to the "ultimate issue." This argument was soundly rejected by the Court of Appeals due to the well-established precedent on "ultimate issue" testimony in *Stringer*.

In *Stringer* a physician testified that the 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.
> . . .

> 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 889-91 (emphasis added). The Court went on to add:

> Our failure to adopt proposed KRE 704 simply left the "ultimate issue" unaddressed in the Kentucky Rules of Evidence and, therefore, subject to common law interpretation by proper application of the rules pertaining to relevancy, KRE 401, and expert testimony, KRE 702. If we had wished to adopt a rule of evidence precluding any expert opinion embracing the ultimate issue, it would have been a simple matter to have done so when we approved the Rules of Evidence and submitted them to the legislature in 1991.

*Id.* at 891-92.

Dr. Campbell's finding that the investigative interviews of J.S. and B.F. were consistent with coercion "is only a relevant evidentiary fact tending to make the ultimate fact more or less probable." *Id.* at 891. It is not testimony going to the "ultimate fact" of innocense or guilt. Moreover, it is certainly not a comment on the "character" of any witness.

Finally, the Commonwealth points out that the *Stringer* Court rejected the testimony of this same Dr. Terence Campbell. As noted in the *Stringer* opinion, however, the circumstances there were drastically different:

> Since the interviews of [the child] ***were neither videotaped nor audiotaped***, Dr. Campbell could not ascertain whether proper procedures had been followed in this case. Thus, he ***presumed*** that proper techniques were not followed and, *ergo*, the testimony of the children was unreliable. This proposed hypothesis ***premised upon speculation*** was properly excluded as irrelevant.

*Id.* at 892 (emphasis added). Due to the speculation involved, the testimony in *Stringer* was neither reliable nor relevant. In this case, however, Dr. Campbell reviewed the ***actual interviews*** of J.S. and B.F. (TE, Vol. III at 70-71). He was not speculating. He was prepared to point to specific instances

of coercive questioning. (TE Vol. III at 76-82; Appendix 4 to opening brief at 13-35).

It should be observed that the Commonwealth has misrepresented Chief Justice Lambert's concurrence in *Stringer.* The Chief Justice concurred in the *Stringer* majority decision to exclude Dr. Campbell's testimony because "Dr. Campbell implied that, due to the extreme suggestibility of children and certain non-standard practices in the investigation of abuse, the child witnesses' testimony was not reliable." *Stringer,* 956 S.W.2d at 895-96. His Honor has never written that testimony limited to commenting on the interview techniques utilized, after having actually reviewed the audiotapes of the interviews, and without opining as to the reliability of the child witnesses' in-court testimony, is in any way improper or inadmissible.

The foreign cases cited by the Commonwealth are easily distinguished. In *United States v. Huberty,* 53 M.J. 369 (U.S.A.F. 2000), the MMPI results and related theory were excluded due to the absence of any acceptance in the scientific community, or peer reviewed studies, of the theory. *Id.* at 372-73. In *Timmons v. State,* 584 N.E.2d 1108 (Ind. 1992), the expert ***was permitted to testify "with respect to the issue of interview bias,"*** and was only barred from opining that the bias ***did in fact result in*** unreliable interviews. *Id.* at 1112-13. In *State v. Russell,* 571 A.2d 229 (Maine 1990), the expert's testimony was barred because the interviews were not recorded and he could only offer "a generalized critique of the techniques he *understood* [*i.e.*, speculation] were used." *Id.* at 231. In *State v. Walters,* 659 N.W.2d 151 (Wis. App. 2003), *rev'd on other grounds*, 675 N.W.2d 778 (Wis. 2004), the proof was excluded because the expert could not point to "specific examples of improper techniques used." *Id.* at 158. And in *State v. Biezer,* 947 S.W.2d 540 (Mo. App. 1997), the Court acknowledged that it admitted such testimony in *State v. Sloan,* 912 S.W.2d 592 (Mo. App. 1995), "not to attack the credibility of the victim, but to show the state's interviewer acted improperly in

dealing with the victim by using techniques and methods that were unreasonably suggestive." *Biezer*, 947 S.W.2d at 542. But the *Biezer* Court excluded expert proof primarily due to the more advanced ages of the victims – 11 and 17 – making them "less susceptible to suggestion." *Id.* None of these peculiarities apply to the instant case.

Detective Qualls was not trained to question children. (TE, Vol. IV at 71-72). No one disputes that there is a "science" to questioning children in sexual abuse cases. This evidence was admissible.

Finally, it is significant that the Commonwealth does not dispute that the factual record is more than adequate for this Court to make a decision on the admissibility of Dr. Campbell's testimony in this case. There is no need for a remand for further fact-finding by the trial court. *Cf. B. B. v. Commonwealth*, 226 S.W.3d 47 (Ky. 2007) (Supreme Court did not remand for further fact-finding on the issue of competency of a witness, but held the witness incompetent based on the record created by the trial court). The Commonwealth obviously concedes this point. Accordingly, the convictions should be reversed.

## II. THE RESTRICTION ON CROSS-EXAMINATION REQUIRES REVERSAL.

The Commonwealth suggests that Appellant simply wanted to turn on the audiotaped interviews of J.S. and B.F. during the cross-examination of Detective Qualls, and allow them to play uninterrupted. On the contrary, Appellant intended to take Qualls through the audiotaped interviews in segments, stopping throughout the playing to question the detective about the suggestive questioning. (*See, e.g.*, TE, Vol. IV at 86-87).

The Commonwealth wrongly comments that Appellant has "abandoned his argument that

the tape was not hearsay." This issue was addressed in Appellant's opening brief and clearly has not been "abandoned." (Brief for Appellant at 22).

Moreover, the Commonwealth fails to even acknowledge that the same evidence can be offered for two different purposes; one of which may be inadmissible, while the other is admissible. *See* Lawson, *The Kentucky Evidence Law Handbook* §8.05[2] (4th ed. 2003). Appellant's proposed use of the audiotapes of the interviews was for an admissible purpose, *i.e.*, to show that improper interview techniques were used which led to the allegations. An admonishment by the trial court as to how the jury was to use and consider this evidence was appropriate; complete exclusion of the evidence was not.

Finally, the Commonwealth argues that the trial court's ruling should be reviewed for abuse of discretion. Appellant thinks not. This constitutes more than the mere exclusion of an item of evidence. This involves a restriction on Appellant's key defense – that suggestive questioning was used to obtain an accusation of sexual abuse. "An exclusion of evidence will almost invariably be declared unconstitutional when it 'significantly undermine[s] fundamental elements of the defendant's defense.'" *Beaty v. Commonwealth*, 125 S.W.3d 196, 206-07 (Ky. 2003). The exclusion of this evidence requires reversal of the convictions.

## III. THE PROSECUTOR'S COMMENTS REQUIRE REVERSAL.

The prosecutor made three flagrant comments. She commented that there was evidence that the jury had not heard. (TE, Vol. VI at 88). The trial court gave no admonition. Next she commented: "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). Finally, she commented that Appellant "is one of the most offensive people you will ever meet. Someone who sexually abuses young, vulnerable

**children**." (TE, Vol. VI at 115). Again no admonition was given. A prosecutor's misconduct in closing 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 v. Commonwealth,* 91 S.W.3d 564, 568 (Ky. 2002)). These comments were deliberately placed before the jury, and thus, are flagrant.

The Commonwealth contends that the evidence against Appellant was "overwhelming" and that should be the end of the inquiry. The contention is ludicrous. The acquittals on the most serious charges – sodomy – as well as the acquittal on the sexual abuse first charge and the directed verdict of acquittal on one of the misdemeanors clearly demonstrate that this was a very close case; one where such flagrant comments likely persuaded the jury to convict.

The Commonwealth ignores the analogous case of *Mack v. Commonwealth*, 860 S.W.2d 275, 276-77 (Ky. 1993), where the Supreme Court reversed on nearly identical comments. *Mack* is indistinguishable from the instant case and compels reversal.

## IV. THE LATE JURY DELIBERATIONS REQUIRE REVERSAL.

The major distinguishing factor in this case, verses all other cases cited by the Commonwealth, is the trial court's acknowledgment that the jury was expended when it reported being deadlocked at 12:10 a.m. It was then that the trial court observed: "I understand that we're getting pretty close to everybody's limits." (TE, Vol. VI at 127). With that the court admonished the jury and sent them back for another hour and 35 minutes of deliberations. A verdict was returned at 1:50 a.m. and a sentencing verdict was reported at 2:55 a.m. All of this followed working the jury until 8:00 p.m. on the previous evening and beginning again at 8:30 a.m. on the day of the deliberations.

The Commonwealth has to go back to 1899 to find a case where a longer jury deliberation was held not to violate the defendant's due process rights. Much has changed since 1899. In that day it would have been acceptable for the jury to be all white, all male, and all landowners. These deliberations exceeded the limits of due process. This is the case where the Court should pronounce some discernible limits on the length and conditions of jury deliberations. These deliberations certainly exceeded the bounds of due process.

## V. THE AMENDMENT OF THE INDICTMENT REQUIRES REVERSAL.

The Commonwealth contends that this argument is not properly preserved. The transcript demonstrates otherwise. (TE, Vol. III at 100-03; Vol. V at 44-46). Moreover, this issue was timely presented in Appellant's post-trial motion. (R. at 323). Interestingly, the Commonwealth appears to admit that the shifting facts amounted to an amendment of the indictment. (*See* Commonwealth Brief at 19, arguing that the indictment could have been amended).

## VI. THE INDECENT EXPOSURE CONVICTION SHOULD BE REVERSED.

The Commonwealth misstates the facts. At no time did Appellant tell or encourage either J.S. or B.F. to remove their clothing. (TE, Vol. V at 155). Appellant did not invite either of the boys into the shower. (*Id.*).

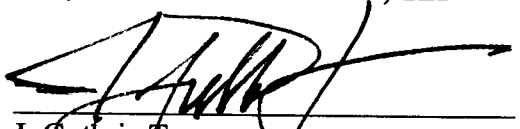
The Commonwealth completely ignores the fact that the indecent exposure statute only applies to circumstances involving "public view." KRS 510.150, Commentary (1974). There was nothing "public" about Appellant taking a shower in the men's locker room.

## 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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