COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
FILE NO. 2008-SC-236

KENNETH PATTERSON — APPELLANT

v.

APPEAL FROM FULTON CIRCUIT COURT
HON. CHARLES W. BOTELER, JR., JUDGE
INDICTMENT NO. 06-CR-00034

COMMONWEALTH OF KENTUCKY — APPELLEE

# BRIEF FOR APPELLANT, KENNETH PATTERSON

Submitted by:

SAMUEL N. POTTER
ASSISTANT PUBLIC ADVOCATE
DEPT. OF PUBLIC ADVOCACY
SUITE 302, 100 FAIR OAKS LANE
FRANKFORT, KENTUCKY 40601
(502) 564-8006

COUNSEL FOR APPELLANT

The undersigned does certify that copies of this Brief were mailed, first class postage prepaid, to the Hon. Charles W. Boteler, Jr., Judge, Fulton Circuit Court, 114 E. Wellington Street, P.O. Box 167, Hickman, Kentucky 42050; the Hon. Michael B. Stacy, P.O. Box 788, 133 N. 4th Street, Wickliffe, KY 42087; the Hon. Robin Irwin, Dept. of Public Advocacy, 503 N. 16th Street, Murray, Kentucky 42071; and served by messenger mail to Hon. Jack Conway, Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, Kentucky 40601 on November 7th, 2008. The record on appeal has been returned to the Kentucky Supreme Court.

S. N. P.

SAMUEL N. POTTER

## Introduction

Kenneth Patterson directly appeals from the Fulton Circuit Court judgment convicting him of one count of first degree rape and finding him to be a second degree persistent felony offender. He received a 50 year prison sentence.

## Statement Regarding Oral Argument

Mr. Patterson welcomes oral argument if the Court determines it would assist the Court in rendering a just and fair opinion in his case.

## Note Regarding Citation of the Record

The record on appeal contains two volumes of transcript. They will be cited as TR 1, # and TR 2, #. The record also contains 10 videotapes. They will be cited as follows:

- VR No. 2: date; time. This tape contains pretrial hearings and a portion of the mistrial that occurred in Mr. Patterson's case because of an insufficient number of jurors. Tape number 10 is a copy of this tape and will not be cited in the Brief for Appellant.

- VR No. 3: date; time. This tape contains the remainder of the mistrial and the two sentencing hearings. Tape number 4 is a copy of this tape and will not be cited in the Brief for Appellant.

- VR No. 6: 11/19/07; time. This tape contains the first day of Mr. Patterson's trial. Tape number 5 is a copy of this tape and will not be cited in the Brief for Appellant.

- VR No. 7: 11/20/07; time. This tape contains the first half of the second day of Mr. Patterson's trial. Tape number 9 is a copy of this tape and will not be cited in the Brief for Appellant.

- VR No. 8: 11/20/07; time. This tape contains the second half of the second day of Mr. Patterson's trial. Tape number 1 is a copy of this tape and will not be cited in the Brief for Appellant.

## Statement of Points and Authorities

## Statement of the Case

Mary Elizabeth Stevenson was a lousy mother to CAH. She blamed CAH and her half-siblings, CP and SP, for her second divorce. (VR No. 7: 11/20/07; 12:29:45.) In fact, Ms. Stevenson blamed her children for just about everything. (VR No. 7: 11/20/07; 12:30:15.) She even told CAH, her own daughter, that she was a mistake. (VR No. 6: 11/19/07; 4:07:30.) Ms. Stevenson would tell CAH that she did not love her. She even threatened to commit suicide in front of CAH as a guilt trip. (VR No. 7: 11/20/07; 2:29:45-2:32:30.)

The abuse was not just mental. Ms. Stevenson would hit CAH, sometimes with a wooden paddle. (VR No. 7: 11/20/07; 2:37:00.) She hit CAH on her head, in her face, and in her ribs on the way home from the police station after CAH made the accusation against Mr. Patterson that gave rise to this appeal. (VR No. 7: 11/20/07; 2:34:35.) She yelled at CAH that it was all her fault, and "I hate you, you little bitch. You've ruined my fucking life." (VR No. 7: 11/20/07; 2:34:00; 2:35:30.)

Ms. Stevenson all but conceded she was a bad mother by admitting that her Aunt, Mary Francis, took care of the children most of the time. (VR No. 7: 11/20/07; 10:31:30.) She was aware of CAH's accusations against her for beating CAH. (VR No. 7: 11/20/07; 10:35:30.) She said

they were false. However, she also said "I don't know much of nothing." (VR No. 7: 11/20/07; 10:35:40.)

Ms. Stevenson lost custody of CAH by the time of the trial. (VR No. 6: 11/19/07; 3:51:00.) Sadly, living in Mississippi, CAH's father had not played an active role in her life since she was six months old. (VR No. 6: 11/19/07; 3:51:10; VR No. 7: 11/20/07; 2:58:10.) With an unfit mother and an absent father, this left CAH without a stable, nurturing, and loving home. Unfortunately for Kenneth Patterson, he unknowingly walked into this environment.

Ms. Stevenson began dating Mr. Patterson in December, 2004. She was living at the Guest Inn in Fulton when she met him. She also worked there. Her three children lived with her: CAH, CP, and SP. Her room was next door to his. She was still married to her second husband, Mr. Stevenson, when she began seeing Mr. Patterson. She began a romantic relationship with Mr. Patterson while they were living in the hotel. She and her three children moved to 216 Vernon Street in Fulton in January, 2005. Mr. Patterson joined them in February or March. (VR No. 7: 11/20/07; 10:14:55-10:08:00.)

CP testified that he, his mom, and his sister, SP, went to a Cub Scout banquet on February 18, 2005 and that CAH stayed home with Mr.

Patterson. (VR No. 7: 11/20/07; 10:04:30; 10:05:45.) They were gone for a couple hours. He did not remember CAH being upset or saying anything to him when they got home. (VR No. 7: 11/20/07; 10:06:00; 10:07:00.)

Ms. Stevenson was right when she said she "didn't know much of nothing." She did not know when she left for the banquet or when she returned. She could not remember what CAH was doing when they got back. She could not remember where CAH was when they got back. She could not remember what CAH was doing when they left. She could not even remember if CAH went to the banquet with her or not. (VR No. 7: 11/20/07; 10:46:00.)

Fulton County Police Department Lieutenant Benny Duncan interviewed CAH for the first time on June 16, 2005. (VR No. 6: 11/19/07; 3:09:20.) At that interview, CAH accused Mr. Patterson of touching her sexually on one occasion. (VR No. 6: 11/19/07; 3:11:45.) Lt. Duncan interviewed CAH a second time on March 15, 2006. This time, she accused Mr. Patterson of rape. She alleged that it occurred in late March or early April of 2005. This was two or three months before her first interview with him. (VR No. 6: 11/19/07; 3:12:30.) She also made accusations that she had been touched sexually by Mr. Paul and someone named Waldo. (VR No. 6: 11/19/07; 3:14:00; 3:17:30.)

Julie Greisz was a social worker for the Cabinet for Health and Family Services. She met CAH at Cumberland Hall, a psychiatric hospital, around November, 2005. (VR No. 6: 11/19/07; 3:49:00.) Ms. Greisz and CAH discussed the allegations some while Ms. Greisz was driving her to Timbrook, which was also a psychiatric hospital. (VR No. 6: 11/19/07; 3:55:30.) CAH told Ms. Greisz that her mother, Ms. Stevenson, did not believe her accusations. (VR No. 6: 11/19/07; 3:52:50.)

Ms. Greisz was not allowed to testify about CAH's allegations of sexual abuse by Mr. Paul at Cumberland Hall that were investigated and declared to be unsubstantiated. (VR No. 7: 11/20/07; 3:50:00; 3:52:00.) Further, she was not allowed to testify about a statement that she included in her report that CAH's therapist, Melissa White, had some concerns about the truthfulness of some of CAH's allegations. (VR No. 8: 11/20/07; 6:06:00.)

CAH was not consistent in her allegation against Mr. Patterson. She told two different stories to Lt. Duncan over a nine month time span. At trial, CAH did testify that the rape occurred on the night of CP's Cub Scouts banquet in their house on Vernon Street in her mom's bedroom. (VR No. 7: 11/20/07; 11:24:30; 11:37:00.) CAH agreed that the case against Mr. Patterson depended on whether her testimony was believable beyond a reasonable doubt. (VR No. 7: 11/20/07; 4:45:15.)

There were also differences between her testimony and her statements to Lt. Duncan. (VR No. 7: 11/20/07; 4:09:30.) She testified that she did not touch Mr. Patterson's penis, but she told Lt. Duncan that she did. (VR No. 7: 11/20/07; 4:10:05-4:16:00.) She testified that she took off her own clothes and got into bed because she did not want him to do it, but she told Lt. Duncan that she was already in bed when he unbuttoned her pants. (VR No. 7: 11/20/07; 4:16:00-4:21:15.) She testified that there was no substance left on the sheets, but she told Lt. Duncan that some "white stuff" came out of her. (VR No. 7: 11/20/07; 4:21:15-4:22:30.)

Mr. Patterson testified. He said he did not rape CAH. He said he did touch her sexually. He said nothing happened. (VR No. 7: 11/20/07; 5:04:30.)

The Fulton County Grand Jury indicted Mr. Patterson for one count of first degree rape and for being a second degree persistent felony offender on May 25, 2006. (Transcript of Record (TR) 1, 1.) A trial scheduled for August 30, 2007 ended in a mistrial because the trial court was unable to seat the necessary number of qualified jurors following voir dire. (TR 2, 176.) A jury trial was held on November 19 and 20, 2007. The jury found Mr. Patterson guilty of first degree rape and found him to be a second degree persistent felony offender. (TR 2, 207.) The jury recommended an enhanced sentence of 50 years. (TR 2, 214.) The trial court entered a

final judgment that followed the jury's recommendation. (TR 2, 222.) Mr. Patterson appeals that judgment to this Court. Further facts will be developed throughout this brief as necessary.

# Arguments

## I. A Statement Made By a Non-testifying Therapist Which Was Contained in the Report of the Testifying Social Worker That CAH Fabricated Some Sexual Abuse Accusations Should Have Been Admitted.

### Preservation

This issue was preserved. The testifying social worker, Julie Greisz, was questioned outside the presence of the jury twice regarding this matter. (VR No. 6: 11/19/07: 3:40:30-3:42:15; VR No. 8: 11/20/07; 6:03:15-6:04:15.) The trial court did not allow Mr. Patterson to question Ms. Greisz about her report that contained the non-testifying therapist's statement that CAH was fabricating some allegations of sexual abuse. (VR No. 8: 11/20/07; 6:06:00.)

### Argument

By avowal, Ms. Greisz testified that she wrote in her report that there were concerns CAH was not being honest about her abuse accusations. Melissa White, CAH's therapist at Timbrook, was concerned about CAH's honesty regarding her abuse, and Ms. Greisz recorded this in her report. Ms. White was concerned that CAH was copying the abuse stories of other girls in group therapy to make friends and get along and not

reporting abuse that actually happened to her. (VR No. 6: 11/19/07; 3:40:30-3:42:30; VR No. 8: 11/20/07; 6:03:15.)

This evidence was relevant. KRE 401. Evidence that CAH's therapist had concerns about CAH's honesty regarding some of her abuse accusations made it more probable that she was not completely honest about her allegations against Mr. Patterson, which was Mr. Patterson's theory of the case.

Admission of this statement would not violate the rule against hearsay. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition—such as intent, plan, motive, design, mental feeling, pain, and bodily health—is not excluded by the hearsay rule. KRE 803(3). The state of mind of Ms. White, CAH's therapist, was clear. She had concerns about CAH's honesty.

In *Hampton v. Commonwealth*, 133 S.W.3d 438, 443 (Ky. 2004), testimony that the defendant's husband said he would divorce her if they lost their trailer, which supported the Commonwealth's theory that the defendant murdered her husband over financial and marital problems, was admissible under KRE 803(3). In Mr. Patterson's case, a treating therapist had reservations about the authenticity of some of her patient's accusations. Mr. Patterson's theory of the case was that CAH made up

the allegations against Mr. Patterson because of the poor home life her mother provided.

Hearsay statements contained in reports are admissible. The Supreme Court of Kentucky is not concerned about the trustworthiness of information provided for medical treatment or diagnosis that is contained in patient records. *Matthews v. Commonwealth*, 163 S.W.3d 11, 27 (Ky. 2005)(harmless error occurred when the self-authentication of the records failed and no foundation was laid by live testimony). The records in *Matthews* included the victim's insurance information, address, and the medical report. The medical report included a transcription of the doctor's notes dictated during an examination of the victim, which detailed the victim's account of the rape and the treatment given by the doctor. *Id.* at 21.

*Kirk v. Commonwealth* involved the prosecution of a 20 year old murder case. 6 S.W.3d 823, 828 (Ky. 1999). The pathologist who performed the autopsy on the victim died prior to trial, but the circuit court admitted his report. The autopsy report was admissible under the business records exception to the hearsay rule based on the showing that it was regular practice of the coroner's office to cause such reports to be produced, that the report was made at or near the time of autopsy, that the report was made by a person with knowledge—the deceased

pathologist, and that it was kept as a record in course of regular conduct of business of coroner's office. *Id.* at 827-828. Citing KRE 803(6)(B), the Supreme Court concluded that the pathologist's "opinions contained in the report were admissible because those opinions would have been admissible had he been available to testify in court." *Kirk*, 6 S.W.3d at 828.

Ms. Greisz was supposed to write everything about CAH in her report. (VR No. 8: 11/20/07; 6:04:00.) Ms. Greisz included Ms. White's concern about CAH's honesty regarding her abuse allegations in her report. This fact, had it been introduced to the jury, would have made Mr. Patterson's theory of defense more probable. Reversible error occurred when it was not admitted. Mr. Patterson deserves a new trial where the statement is introduced.

## II. Other Unsubstantiated Allegations of Sexual Abuse Made by CAH Should Have Been Admitted.

### Preservation

This issue was preserved. Ms. Greisz and CAH testified about these allegations outside the presence of the jury. (VR No. 6: 11/19/07; 3:37:00-3:40:30; VR No. 7: 11/20/07; 3:30:25-3:41:00.) The trial court did not allow this evidence to be introduced. (VR No. 7: 11/20/07; 3:50:00; 3:52:00.)

**Argument**

Mr. Patterson sought to introduce two other sexual abuse accusations made by CAH. One dealt with Mr. Paul, an employee at Cumberland Hall. CAH said he inappropriately touched her breast in her room. She reported it to her therapist and was questioned by two older ladies about what happened. (VR No. 7: 11/20/07; 3:30:25-3:34:30.) She told Lt. Duncan about the incident. CAH told him that her therapist said that her complaint would help because someone else had complained. She also told Lt. Duncan that her complaint was not substantiated. (VR No. 7: 11/20/07; 3:40:00.) The other allegation dealt with someone named Waldo when CAH was about five years old. It involved inappropriate touching. (VR No. 6: 11/19/07; 3:38:30.)

The trial court excluded these unsubstantiated allegations because they were not demonstrably false. (VR No. 7: 11/20/07; 3:50:00; 3:52:00.) The Court of Appeals of Kentucky has formed the following rule:

> [T]he general rule which has emerged in cases involving sexual offenses, is that the admissibility of evidence of similar accusations made by the victim depends on whether they have been proven to be demonstrably false. To comport with the defense theory of a fabrication scheme, there must be proof of the falsity of the unrelated allegations.

*Hall v. Commonwealth*, 956 S.W.2d 224, 227 (Ky. App. 1997). Thus, false accusations are admissible if they are demonstrably false and if the

probative value of the evidence outweighs its prejudicial effect. *Berry v. Commonwealth*, 84 S.W.3d 82, 91 (Ky. App. 2001).

While the rule has some appeal to it, the Court of Appeals has not provided much guidance for how it is to work. Denial of the allegations by the alleged perpetrator under oath does not meet the demonstrably false standard. *Berry*, 84 S.W.3d at 91. A separate allegation of rape in *Hall* was not admitted for two reasons. First, the alleged rape occurred after the conduct for which Hall was being tried. Second, the court found that the veracity of the subsequent allegation had not yet been tested. *Hall*, 956 S.W.2d at 227.

Demonstrably false is a standard nearly impossible to meet. Even the Court of Appeals is beginning to acknowledge this: "[w]e are not unaware that there is an immense gap between what is true and what can be proved to be demonstrably false." *Capshaw v. Commonwealth*, 253 S.W.3d 557, 565 (Ky. App. 2007).

Short of a recantation, what would qualify as demonstrably false? Not even an acquittal following a trial would satisfy the standard. As this Court is well aware, an acquittal only means there was not proof beyond a reasonable doubt, not that the defendant was innocent. Further, DNA or eyewitness evidence cannot prove allegations to be demonstrably false

because the accuser may just change the date of the offense from late March or early April to the middle of February.

Mr. Patterson could not show that CAH's accusation against Mr. Paul was demonstrably false. Mr. Patterson could show the accusation was unsubstantiated following an investigation by Cumberland Hall and that no criminal charges had been filed. Had the standard not been nearly impossible to meet, the trial court would have admitted it. The trial court believed that other unsubstantiated allegations would have been "very probative evidence." (VR No. 6: 11/19/07; 3:31:30.) This Court should alter the Court of Appeals' standard and order a new trial which allows Mr. Patterson to introduce this very probative evidence.

## III. The Commonwealth Improperly Bolstered the Credibility of CAH Through the Testimony of the Officer That Took Her Two Statements By Soliciting Testimony That Juvenile Victims Often Add Details About What Happened Over Time.

### Preservation

This issue was preserved by the objection detailed below. (VR No. 6: 11/19/07; 3:18:30.)

### Facts

The first witness called by the Commonwealth was Fulton Police Department Lieutenant Benny Duncan. He twice interviewed CAH regarding her accusations against Mr. Patterson. The following exchange took place on redirect examination.

Commonwealth: How long have you been a police officer?
Witness: I started March 14th 1989.
Commonwealth: And have you interviewed child victims before?
Witness: Yes sir.
Defense: Your Honor, may I approach?
Judge: You may.
Defense: Any testimony regarding past experience interviewing other children is definitely not relevant to this case.
Judge: What was to be the question?
Commonwealth: Whether child victims open up immediately in his past experiences.
Defense: That's something that cannot be testified to, your Honor.
Judge: I will allow it, but I don't think you need to get too much into that because I don't know I mean he's got almost 20 years experience. I mean, you start getting into a tricky area, but that question I will overrule your objection.
Commonwealth: So in your 20 years as a police officer, have you interviewed child victims before?
Witness: Yes sir.
Commonwealth: Are they sometimes reluctant to give up information?
Witness: Most always
Commonwealth: Do they sometimes come back to give more details?
Witness: Yes sir
Commonwealth: So it would not be uncommon for a child victim to tell you something and then elaborate on it later?
Witness: Most of the time that's the case.
Commonwealth: In your experience has it been that child victims come back with more information as time goes on, is that correct?
Witness: Yes sir.
Commonwealth: Nothing further. (VR No. 6: 11/19/07; 3:18:15-3:20:20.)

**Argument**

The Supreme Court of Kentucky has consistently condemned the practice of allowing one witness to vouch for the credibility of another

witness. *Bussey v. Commonwealth*, 797 S.W.2d 483, 484-485 (Ky.1990); *Moss v. Commonwealth*, 949 S.W.2d 579, 583 (Ky.1997)(stating that "[a] witness's opinion about the truth of the testimony of another witness is not permitted."); *Dickerson v. Commonwealth*, 174 S.W . 3d 451, 472 (Ky.2005).

This condemnation, and the exclusion of such evidence, is a necessary component for a properly functioning jury system. Questions of credibility are reserved for the jury's consideration. *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). Therefore, "a witness may not vouch for the truthfulness of another witness." *Stringer v. Commonwealth*, 956 S.W.2d 883, 888 (Ky. 1997)(*citing Hall v. Commonwealth*, 862 S.W.2d 321, 323 (Ky. 1993); *Hellstrom v. Commonwealth*, 825 S.W.2d 612, 614 (Ky. 1992). The reason such testimony is excluded is that it "remove[s] the jury from its historic function of assessing credibility." *Newkirk v. Commonwealth*, 937 S.W.2d 690 (Ky. 1996). Our system of justice "entrust[s] to the wisdom of the twelve men and women who comprise the jury the responsibility to sort between conflicting versions of events and arrive at a proper verdict." *Id.* at 696.

It is just as improper for a witness to vouch for the credibility of out-of-court statements of another, as it is for another witness' testimony at

trial. *Hall*, 862 S.W.2d at 323. Vouching for the truth of such statements, even by an expert, is impermissible. *Hellstrom*, 825 S.W.2d at 614.

What occurred during Mr. Patterson's trial amounts to nothing less than one witness vouching for the credibility of another. With no physical evidence and no eyewitnesses, this was a model "he said, she said" case. For all the evidence introduced by both sides during this case, Mr. Patterson's case really depended on how the jury answered one question: "who do we believe more, CAH or Kenny Patterson?" With the introduction of Lt. Duncan's testimony bolstering the credibility of CAH, the Commonwealth improperly affected the jury's determination of CAH's credibility.

Mr. Patterson's constitutional rights to a fair trial and due process have been denied. 6th and 14th Amendments, U.S. Constitution; §§ 2, 3, and 11, Ky. Constitution. Reversal of his convictions is required.

## IV. Reversible Error Occurred When Irrelevant Evidence Was Admitted.

### Preservation

Mr. Patterson preserved this issue when he objected to the introduction of this irrelevant evidence. (VR No. 8: 11/20/07; 6:26:35; VR No. 6: 11/19/07; 4:54:35; VR No. 6: 11/19/07; 9:57:20; VR No. 7; 11/20/07; 10:21:30.)

**Law**

"All relevant evidence is admissible," but for a few exceptions. KRE 402. Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401. A fact of consequence may be an element of the offense or something that disproves a defense. A party establishes relevance on any showing of probativeness, however slight. *Springer v. Commonwealth*, 998 S.W.2d 439, 449 (Ky. 1999).

Issues regarding the admissibility of evidence are reviewed for an abuse of discretion. *See Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Abuse of discretion occurs when the trial court's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Id.*

KRE 403 states that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." Unduly prejudicial evidence is that which is unnecessary and unreasonable. *Johnson v. Commonwealth*, 105 S.W.3d 430, 439 (Ky. 2003)(*quoting, Price v. Commonwealth*, 31 S.W.3d 885, 888 (Ky. 2000)). The court must consider the probative and prejudicial nature of the

evidence and then determine whether the harmful effects substantially outweigh the probative worth. *Barnett v. Commonwealth*, 979 S.W.2d 98, 103 (Ky. 1998).

**Argument**

*1. The tape of the phone call Mr. Patterson made to the father of SP and CP was not relevant to the indictment being tried, was more prejudicial than probative, and impeachment on a collateral matter.*

Mr. Patterson's defense at trial was that the situation at home for Ms. Stevenson's children was so bad that CAH made up the allegation against Mr. Patterson just to get out of the situation. To support this theory, Mr. Patterson testified that Ms. Stevenson was having problems with her ex-husband, the father of SP and CP. A divorce decree prevented him from seeing his children, SP and CP, but he still showed up at their school and at home. To protect the children, Mr. Patterson called the father of SP and CP and left messages telling him to stop. (VR No. 7: 11/20/07; 5:29:05-5:31:00.)

The Commonwealth cross-examined Mr. Patterson about this. The Commonwealth said a tape of the messages he left contained the statement that Mr. Patterson was their daddy and their father was just a sperm donor. Mr. Patterson believed he said that SP and CP call him daddy and that they call the father of SP and CP father. The Commonwealth said they would play the tape later. (VR No. 8: 11/20/07; 5:45:20.)

On rebuttal, the Commonwealth called the father of SP and CP. He testified that Mr. Patterson called him to tell him to stop seeing his children. He left so many messages that the tape in his answering machine became full. He pressed charges, which led to a harassment conviction. (VR No. 8: 11/20/07; 6:13:00-6:14:55.)

The Commonwealth started to play the 15 minute tape of the messages Mr. Patterson left on the answering machine of the father of SP and CP. The tape portrayed Mr. Patterson as drunk, repeating words and phrases with slurred and rambling speech. (VR No. 8: 11/20/07; 6:15:15-6:19:05.) After about four minutes, Mr. Patterson objected to playing the whole tape because it was irrelevant to the charge against CAH and more prejudicial than probative. The trial court said it was probably impeachment on a collateral matter. Despite this, the trial court let him play the tape. (VR No. 8: 11/20/07; 6:19:05-6:21:30.) The tape was played again for another three minutes. (VR No. 8: 11/20/07; 6:23:50-6:26:35.) Mr. Patterson objected again and asked for a mistrial because the statement the Commonwealth asked about had still not been played. (VR No. 8: 11/20/07; 6:26:50.) After a few minutes of trying to find the exact statement, the trial court sustained Mr. Patterson's objection because the tape portrayed him as drunken, cussing, and belligerent and it regarded a collateral matter. (VR No. 8: 11/20/07; 6:35:30.)

Reversible error occurred when the Commonwealth played the tape of the phone call. First, it was not relevant. That Mr. Patterson made a drunken phone call to his girlfriend's ex-husband does not make it any more likely or less likely that CAH's allegation was true. The father of SP and CP was not the father of CAH.

Second, admitting the tape was more prejudicial than probative. The jury laughed at the tape of Mr. Patterson's messages. The jury laughed immediately after the trial court and the two lawyers went back to chambers to discuss the tape. Their laughter was so loud, the judge heard it in chambers and had to return to court to admonish them. Even after this admonition, the jury laughed again a few moments later. (VR No. 8: 11/20/07; 6:27:00.) Seldom is prejudice so apparent on the record.

Third, playing the tape was impeachment on a collateral matter. A party may not use specific instances and extrinsic evidence to impeach a witness's credibility. *Hogan v. Hanks*, 97 F.3d 189, 191 (7th Cir. 1996)(*cert. denied*, 520 U.S. 1171, (1997)); *see also, White v. Coplan*, 399 F.3d 18, 25 (1st Cir. 2005)(*cert. denied*, 546 U.S. 972 (2005)); *State v. Raines*, 118 S.W.3d 205 (Mo. App. 2003). Here, the Commonwealth used extrinsic evidence, the tape of messages, of a specific instance, Mr. Patterson calling the father of SP and CP, to impeach Mr. Patterson's

credibility by trying to contradict his statement that he did not want to Ms. Stevenson's children to call him daddy. Mr. Patterson deserves a new trial where this prejudicial and irrelevant evidence is excluded.

*2. Dr. Shumaker's testimony was not relevant due to the passage of time and absence of meaningful findings.*

At Mr. Patterson's first trial, which ended in mistrial because there were not enough qualified jurors, he challenged the admissibility of Dr. Shumaker's testimony. Mr. Patterson argued his testimony was not relevant because his examination occurred 10 months after the alleged rape. The trial court believed Mr. Patterson's argument went to the weight of the evidence, not its admissibility. (VR No. 2: 8/30/07; 1:23:10.) Mr. Patterson renewed this objection at his second trial, and the trial court heard Dr. Shumaker's testimony in chambers before ruling on the objection. (VR No. 6: 11/19/07; 4:54:35.)

Dr. Shumaker examined CAH in March of 2006. (VR No. 6: 11/19/07; 4:56:40.) He noticed a little indentation, or cleft, in her vaginal lining. It was compatible with a penetrating injury, but he could not tell how long it had been there. The cleft was well healed and not new. (VR No. 6: 11/19/07; 5:01:00.) He took photographs of the cleft, but they did not turn out, and he did not bring them with him. (VR No. 6: 11/19/07; 4:59:20.) On cross-examination in chambers, Dr. Shumaker testified that injuring herself with a tampon would also be compatible. (VR No. 6:

11/19/07; 5:03:45.) The trial court allowed the testimony. (VR No. 6: 11/19/07; 5:04:45.)

Dr. Shumaker's testimony was not relevant. He examined CAH in March, 2006, and CAH claimed the rape occurred in February, 2005. (VR No. 7: 11/20/07; 11:26:00.) Thus, around 11 months had passed. Further, she testified that only partial penetration occurred with only a couple of attempted thrusts before he got frustrated and pulled out. (VR No. 7: 11/20/07; 12:16:15-12:18:00.) She noticed no blood afterwards, either. (VR No. 7: 11/20/07; 12:27:00.) Therefore, it was highly unlikely that any injury had occurred. Even if it did, it was even more unlikely that it was still visible. Most tears heal within a couple of weeks. (VR No. 6: 11/19/07; 5:13:00.) On the contrary, the cleft just as likely was caused by a tampon from her last period two weeks before the examination. (VR No. 6: 11/19/07; 5:15:30.)

Note carefully the doctor's testimony. The cleft he observed was just as compatible with an alleged rape that occurred 11 months earlier as it was with a cleft resulting from the use of a tampon during her period two weeks before he examined her. This testimony does not make it more likely or less likely that CAH's accusation was true. Even had the doctor seen no clefts or any injuries or abnormalities of any type, he still could have testified that his observations were compatible with the accusation

because the vaginal lining heals so quickly. Thus, the doctor could have seen nothing but still testified that the rape might have happened. While the relevancy threshold is low, there is still a threshold. Dr. Shumaker's testimony did not meet it. It should not have been admitted, and Mr. Patterson deserves a new trial.

*3. The jail house snitch testimony was not relevant because he never mentioned rape.*

Charles Johnson and Mr. Patterson shared a cell together in the Fulton County Jail. At some point, Mr. Johnson made a statement against Mr. Patterson. Mr. Patterson objected to Mr. Johnson testifying before his trial began, but the trial court allowed him to testify. (VR No. 6: 11/19/07; 9:56:05-9:59:05.)

On direct-examination, the Commonwealth asked Mr. Johnson if Mr. Patterson said he was guilty. Mr. Johnson said: "Well, I assumed he, I mean, well, yeah, he did tell me he was guilty, but he, like I said, he said that couldn't, ah, they wouldn't be able to prove nothing because 12 months had, had elapsed." (VR No. 6: 11/19/07; 4:36:00.) Mr. Johnson also said that Mr. Patterson told him that he liked to fondle little kids, that he liked for them to see him naked, that he wanted to make the family's life a living hell, and that he wanted to kill them all. He also threatened to kill Mr. Johnson and his family if he ever told anyone. (VR No. 6: 11/19/07; 4:40:10.)

None of this testimony was relevant. Not once did Mr. Johnson testify that Mr. Patterson admitted to raping CAH. Instead, he made wild accusations about killing people and fondling kids. None of this dealt even indirectly with whether CAH's allegation of rape was true. His testimony consisted wholly of uncharged and unrelated bad acts. A new trial is warranted where Mr. Johnson's testimony is not admitted so that Mr. Patterson receives a trial on only the crimes charged.

*4. What music Mr. Patterson liked to listen to was not relevant.*

During the direct-examination of Ms. Stevenson, the Commonwealth asked her if there was a song that Mr. Patterson liked to listen to really loud. Mr. Patterson objected, but the trial court allowed it. Ms. Stevenson said Mr. Patterson liked to listen to "Jokerman" and "Red House." (VR No. 7: 11/20/07; 11:21:10-11:23:45.)

While Ms. Stevenson's recollection of Mr. Patterson's choice of music might have been interesting, it was not relevant to his trial. Further, her testimony bolstered CAH's testimony that Mr. Patterson played "Jokerman" before and after the alleged rape. (VR No. 7: 11/20/07; 2:19:30.) While CAH's testimony about "Jokerman" was arguably relevant—no objection was made to it, Ms. Stevenson's was not. It served only to prop up the credibility of CAH. It should not be admitted at a new trial.

### Conclusion

Mr. Patterson was denied his rights under the 5th, 6th, and 14th Amendments to the United States Constitution and Sections 2, 3, 7 and 11 of the Kentucky Constitution. Therefore, his conviction must be vacated and the case remanded for a new trial where these irrelevant pieces of evidence are not admitted.

## V. Reversible Error Occurred When Mr. Patterson Did Not Receive a Competency After He Had Been Evaluated for Competency and Criminal Responsibility.

### Preservation

A competency hearing had been set, but was postponed and never rescheduled. This Court should review this issue since the mandatory language of KRS 504.100(3) imposes an absolute duty of compliance upon the trial court. *Cf.*, *Arnold v. Commonwealth*, 573 S.W.2d 344, 346 (Ky. 1978).

### Argument

Prosecution of a person who is incompetent to stand trial violates due process. *Medina v. California*, 505 U.S. 437, 439 (1992). "Whether a defendant is competent to stand trial is a threshold question which must be answered before the defendant can be tried or sentenced." *Gabbard v. Commonwealth*, 887 S.W.2d 547, 551 (Ky. 1994). KRS 504.090 states "[n]o defendant who is incompetent to stand trial shall be tried, convicted or sentenced so long as the incompetency continues."

Under RCr 8.06 and KRS 504.100, if the trial court has reasonable grounds to believe a defendant lacks the capacity to appreciate the proceedings against him, or to participate rationally in his defense, the court must *hold a mandatory hearing. Gabbard*, 887 S.W.2d 547. The mandatory nature of the hearing stems from the plain language of the statute: "After the filing of a report (or reports), the court shall hold a hearing to determine whether or not the defendant is competent to stand trial." KRS 504.100(3). As the Kentucky Supreme Court stated in *Commonwealth v. Fint*, 940 S.W.2d 896, 897 (Ky. 1997), "[a]s used in the statutory laws of this state, unless the context otherwise requires, the word 'shall' is mandatory." The failure of a trial court to follow the dictates of a mandatory statute is an abuse of discretion. *Id.*

The United States Supreme Court "has held that due process requires an evidentiary hearing whenever there is sufficient doubt of competency as to require further inquiry on the question." *Gilbert v. Commonwealth*, 575 S.W.2d 455, 456 (Ky. 1978)(citing *Drope v. Missouri*, 420 U.S. 162 (1975) and *Pate v. Robinson*, 383 U.S. 375 (1966)). While the defendant continues to bear the ultimate burden at a competency hearing of proving he is incompetent to stand trial, there is no presumption that he is competent, and the Commonwealth cannot rely on the report without giving Mr. Patterson the right to cross examine the evaluating doctor. *Gabbard*, 887 S.W.2d 547.

Mr. Patterson was entitled to a hearing regarding his competency to stand trial. The trial court entered an order on November 16, 2006 to have the Kentucky Correctional Psychiatric Center evaluate the competency and criminal responsibility of Mr. Patterson. (TR 1, 48-49.) The competency hearing was originally scheduled for January 19, 2007, but was twice rescheduled, first to January 22, 2007 and then to February 23, 2007. (TR 1, 87; 93.) It was not held on either of those dates.

At the next pretrial hearing on March 28, 2007, the record begins with the parties discussing Mr. Patterson's competency. They were not sure whether a competency hearing was scheduled for that day, or even if Mr. Patterson had been evaluated. (VR No. 2: 3/28/07; 12:59:00.) The trial court had Mr. Patterson's new lawyer, Hon. Robin Irwin, call the evaluating doctor. (VR No. 2: 3/28/07; 1:02:00.) Mr. Patterson's lawyer returned a few minutes later and told the trial court that "he is fine." The trial court said they still needed to have a hearing, even if it was the morning of trial. (VR No. 2: 3/28/07; 1:04:35.) Thus, the trial court was aware of Mr. Patterson's mental condition, and he was entitled to a hearing.

No evidentiary hearing on his competency was held after his evaluation. No evidentiary hearing was held after the trial court said one

needed to be held. As a result, Mr. Patterson was denied due process of law and a fair hearing, as well as his rights under RCr 8.06, KRS 504.090 and KRS 504.100(3). 6th and 14th Amds., U.S. Const.; § 2 and 11, Ky. Const. This Court must vacate Mr. Patterson's conviction and remand his case for an evidentiary hearing and determination of his mental competence. KRS 504.100(3); *Gabbard*, 887 S.W.2d 547.

## VI. Prosecutorial Vindictiveness Occurred When the Commonwealth's Attorney Threatened Mr. Patterson With Additional Indictments If He Did Not Plead Guilty to a Previous Indictment for Sexual Abuse.

### Preservation

This issue was preserved by the trial court's denial of Mr. Patterson's motion to dismiss. (TR 1, 98-99; 139-141.)

### Argument

"To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort . . . and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional'." *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978). Without a doubt, a person is allowed to plead not guilty and receive a jury trial. 6th and 14th Amendment, U.S. Constitution; §§ 7 and 11, Ky. Constitution. There is no presumption of vindictiveness in the pretrial setting, and "the burden remains upon the defendant to prove actual

indictiveness." *Commonwealth v. Leap*, 179 S.W.3d 809, 814 (Ky. 2005)(*citing Alabama v. Smith*, 490 U.S. 794, 799 (1989)).

The trial court held a hearing on Mr. Patterson's motion, at which he testified. Mr. Patterson was originally indicted for sexual abuse. He was not happy with the Commonwealth's offer of four years. He did not want to plead to something he did not do. His first lawyer, Hon. Carlos Moran, told Mr. Patterson that the Commonwealth's Attorney, which was Hon. Timothy Langford, told him to take the deal or Mr. Langford would indict him for rape charges. Mr. Moran did not have a name for the person who would accuse him of rape. (VR No. 2: 5/11/07; 11:43:05.)

Mr. Patterson was not told that his pending charges would be enhanced to a higher level. Rather, they would be separate charges. He had already been indicted as a persistent felony offender. These would be completely new charges, a separate transaction, a separate event, and with separate people. He told Mr. Moran no. Mr. Langford told Judge Shadoan at the next hearing that Mr. Patterson would be indicted for rape. (VR No. 2: 5/11/07; 11:44:05-11:45:45.)

Mr. Patterson wondered what was wrong with them. He felt like they wanted him to plead to something he did not do, or they would charge him with something else because he disputed those charges. (VR No. 2:

5/11/07; 11:45:45.) Mr. Moran warned him he could get 20-30 years. Mr. Patterson said the only way he would consider taking the deal was if he was released for his daughter's 18th birthday in March and graduation in June. Mr. Moran told him the sheriff's office would oppose probation or release. (VR No. 2: 5/11/07; 11:46:15.)

Mr. Patterson felt like he had a right to go to trial and assert his innocence on the original indictment. He felt like he was being punished for asserting his rights. Still, he called Mr. Moran's secretary the next day and told her to tell him he would take the deal. He felt pressured and threatened to do so. (VR No. 2: 5/11/07; 11:47:00.)

Mr. Moran came to see him the next day. Mr. Patterson said he did not want to plead to a sexual offense. He thought four years was pretty steep for standing by and watching the mother, Ms. Stevenson, make her son put on woman's clothes. Mr. Moran said he would go talk to Mr. Langford. Mr. Moran returned and told Mr. Patterson that he would be indicted by the next grand jury, which was two weeks away. Mr. Moran told him at the next court appearance that he had been indicted on a rape charge. (VR No. 2: 5/11/07; 11:48:00-11:49:25.)

Mr. Patterson told Mr. Moran he did not understand. Mr. Moran told him that he "pissed him [Mr. Langford] off," and that is why he did it. (VR No. 2: 5/11/07; 11:49:25.)

The Commonwealth cannot use its power to punish a defendant for exercising his constitutional rights. A criminal prosecution that would not have been initiated but for vindictiveness is constitutionally prohibited. *U.S. v. Adams*, 870 F.2d 1140, 1145 (6th Cir. 1989); *Blackledge v. Perry*, 417 U.S. 21, 27-28 (1974). Mr. Patterson just wanted a jury trial on the sex abuse case because he did not want to plead to something he did not do. Because he pissed off the prosecutor, he found himself convicted of rape and sentenced to 50 years in prison. This behavior typifies vindictiveness. His rape conviction should be reversed and dismissed. Alternatively, he should receive a new trial in a different venue with a different judge and a different prosecutor.

## VII. Mr. Patterson's Motion to Dismiss Should Have Been Granted Because the Commonwealth Repeatedly Failed to Provide Him With the Grand Jury Tape.

### Preservation

This issue was preserved by repeated requests for the grand jury tape and a motion to dismiss. (TR 1, 96-97.)

**Argument**

An accused is entitled to a copy of the grand jury proceeding against him: "any person indicted by the grand jury shall have a right to procure a transcript of any stenographic report or a duplicate of any mechanical recording relating to his or her indictment or any part thereof." RCr 5.16(3). An unjustified 18 month delay between the request for the grand jury tape and providing it was "indefensible." *Gosser v. Commonwealth*, 31 S.W.3d 897, 905 (Ky. 2000).

Mr. Patterson repeatedly requested his grand jury tapes. Mr. Patterson was indicted on May 25, 2006. (TR 1, 1.) A discovery order entered on the same day, May 25, 2006, ordered the Commonwealth to make available the grand jury proceedings. (TR 1, 3.) At a hearing on December 12, 2006, Mr. Patterson said he had not yet received the grand jury tape. The Commonwealth agreed to provide it. (VR No. 2: 12/12/06; 2:32:30.)

Mr. Patterson filed a motion on March 19, 2007 to dismiss the indictment because discovery had not been provided. (TR 1, 96-97.) It was overruled. (VR No. 2: 3/28/07; 1:50:00; TR 1, 103.) Mr. Patterson renewed his motion to dismiss because he had not received his grand jury tape on August 15, 2007. The trial court gave the Commonwealth until August 21, 2007 to provide the tape and told the Commonwealth to

draft an order. (VR No. 2: 8/15/07; 11:03:00.) The record on appeal does not contain such an order.

Mr. Patterson was forced to raise this issue another time, this time on the eve of his first trial. This time the Commonwealth responded by saying there was usually nothing exculpatory in the grand jury proceedings. (VR No. 2: 8/29/07; 2:16:10-2:23:30.) The next day, the day Mr. Patterson's trial was supposed to start, the Commonwealth finally provided a copy of the grand jury tape to Mr. Patterson. Unfortunately, it was inaudible. Mr. Patterson's lawyer tried to listen to the original over the phone, but was only able to hear about 30% of it. The motion was again denied. (VR No. 2: 8/30/07; 1:09:10-1:12:20.)

The failure to timely provide discovery merits relief. In *Anderson v. Commonwealth*, 864 S.W.2d 909, 914 (Ky. 1993), failure to provide discovery denied the defense the opportunity to prepare for and refute the incriminating evidence by cross examination or other proof. This was held to be reversible error in *Anderson* where a social worker testified to incriminating comments a co-defendant had made that were in the social worker's notes. 864 S.W.2d at 913-914. The notes were not provided to defense counsel in discovery. *Id.*

A total of 15 months passed between Mr. Patterson's initial request for the grand jury tape and the Commonwealth's disclosing the grand jury tape to him. He asked for it at four different hearings before he finally received it. The copy he finally did receive was of such poor quality that it was useless. This failure to timely comply with multiple discovery orders denied him to his right to due process. 5th and 14th Amds., U.S. Const.; §§ 2, 3, 10, 11, 14 Ky. Const. His motion to dismiss should have been granted.

## VIII. Mr. Patterson Deserved a Hearing On Whether His Comprehensive Sex Offender Evaluation Had Been Properly Prepared.

### Preservation

This issue was preserved by Mr. Patterson's request for a hearing. (VR No. 3: 2/28/08; 12:13:05.)

### Argument

Mr. Patterson was originally scheduled to be sentenced on January 24, 2008. However, he pointed out that no one met with him to do the sex offender evaluation. The evaluation had been completed, but it had not been signed. The trial court examined the report and observed some things he did not understand, like "victim was neither a stranger nor a victim." The trial court decided to postpone sentencing to obtain a signed copy. (VR No. 3: 1/24/08; 1:49:15-1:53:45.)

Mr. Patterson's sentencing hearing was rescheduled for February 28, 2008. The same report was filed, but this time it had been signed. Mr. Patterson objected to the report and requested a hearing. (VR No. 3: 2/28/08; 12:13:05.) The trial court denied the request for a hearing because the report would not affect how the court would sentence Mr. Patterson. (VR No. 3: 2/28/08; 12:22:15.)

Mr. Patterson was entitled to a properly prepared evaluation before being sentenced. A comprehensive sex offender presentence evaluation is required by KRS 532.050(4). Administrative regulations have been promulgated to govern the evaluation of sex offenders. The regulations state:

> Section 2. Comprehensive Sex Offender Presentence Evaluation Procedures.
>
> (1) An approved provider shall conduct a comprehensive mental health evaluation following the professional standards of care in the area of his certification or licensure. **This shall include a face-to-face interview** and a review of collateral information. When the results of initial mental health screening procedure dictate, additional appropriate psychological testing addressing cognitive functioning, mental illness, and severe characterological impairment shall be employed as circumstances allow.

501 Ky. Admin. Regs. 6:200(emphasis added). Further, the regulations require that:

> "An approved provider shall place his **signature** at the end of the recommendation report if he: (a) Conducted the comprehensive sex offender presentence evaluation; or (b) Reviewed and approved the evaluation."

501 KY ADC 6:200, §3(5)(emphasis added).

The regulations make two things clear. First, the evaluation must be based on a face to face interview between the evaluator and the person being evaluated. Second, the evaluator must sign the report to authenticate it and attest to its veracity. According to Mr. Patterson, neither was done. He asked the trial court how the Commonwealth could get away with something it did not do. He said the law says shall, and he called the report a fabrication. (VR No. 3: 2/28/08; 12:20:45.) This situation warranted an evidentiary hearing where the evaluator could testify as to what happened. Mr. Patterson's case should be remanded for that hearing.

## IX. Considering Arguments I-VIII, *Supra*, Mr. Patterson Did Not Receive a Fundamentally Fair Trial, and This Court Should Reverse His Case for a New Trial Due to Cumulative Error.

### Preservation

This issue was not preserved. Mr. Patterson requests consideration of the issue pursuant to RCr 10.26.

### Argument

It is the long established authority in this Commonwealth that an accumulation of concurrent errors may authorize a reversal where no one error taken alone would justify a reversal. *Funk v. Commonwealth*, 842 S.W.2d 476, 483 (Ky. 1992); *Peters v. Commonwealth*, 477 S.W.2d

154 (Ky. 1972); *Faulkner v. Commonwealth*, 423 S.W.2d 245 (Ky. 1968); *James v. Commonwealth*, 197 Ky., 577, 247 S.W. 945 (1923).

The errors argued above combine to raise serious doubt about the fairness and justice of Mr. Patterson's trial and convictions. He certainly felt that way. At his sentencing hearing, during the argument regarding the sex offender evaluation, Mr. Patterson's lawyer told the trial court he felt he had been treated unfairly by the Commonwealth for adding charges, by the complaining witness changing stories about him, and by the limitation of his lawyer's ability to cross-examine on certain issues. (VR No. 3: 2/28/08; 12:19:40.) These issues and the others raised in the Brief for Appellant call into question the reliability and fairness of Mr. Patterson's conviction.

Cumulative error denied Mr. Patterson his right to due process and a fair trial. 5th, 6th, and 14th Amds., U.S. Const.; and §§ 2, 3, and 11, Ky. Const. Based on the cumulative effect of the errors described *supra*, this Court should reverse Mr. Patterson's conviction and sentence and remand his case for a new trial.

## Conclusion

For these reasons, Kenneth Patterson respectfully requests this Court to reverse his conviction and sentence and remand his case to the Fulton Circuit Court with instructions to grant a new trial. Mr. Patterson also welcomes any and all other relief this Court determines is appropriate.

Respectfully submitted,

Samuel N. Potter
Assistant Public Advocate
Dept. of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601

Counsel for Appellant,
Kenneth Patterson