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**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**

**REPLY BRIEF FOR APPELLANT, KENNETH PATTERSON**

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The undersigned does certify that copies of this Reply 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. 4<sup>th</sup> Street, Wickliffe, KY 42087; the Hon. Robin Irwin, Dept. of Public Advocacy, 503 N. 16<sup>th</sup> 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 February 2<sup>nd</sup>, 2009. The record on appeal was not checked out for the purpose of this Reply Brief.

  
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**SAMUEL N. POTTER**

## **Purpose of the Reply brief**

The purpose of this Reply Brief is to address only those matters presented in the Brief for Appellee that deserve further comment, argument, and/or citation of additional authority. Kenneth Patterson could not respond to every issue in this Reply Brief due to the page limit, and he reaffirms all of the issues raised in his Brief for Appellant.

## **Statement Concerning 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.

## **Statement of Points and Authorities**

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## **Statement of the Case**

Kenneth Patterson needs to clarify a key point in the Statement of the Case section in his Brief for Appellant. On page five, it should read: "Mr. Patterson testified. He said he did not rape CAH. He said he did not touch her sexually. He said nothing happened. (VR No. 7: 11/20/07; 5:04:30.)" The word "not" was inadvertently omitted in the Brief for Appellant but should have been included. Mr. Patterson has maintained his innocence throughout this process. He has consistently stated he did not rape CAH, did not sexually touch her in any way, and did not direct any sexual comments toward her.

## **Arguments**

### **I. A Statement Based on Factual Observations 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.**

Mr. Patterson argued that the statement contained in a report made by CAH's non-testifying therapist, Melissa White, should have been admitted. The therapist expressed her concern that CAH was not being entirely truthful about her sexual abuse accusations. Julie Griesz, a social worker who also worked with CAH, wrote in her report that there were concerns that CAH was not being truthful. Mr. Patterson was prejudiced when he was not allowed to question Ms. Griesz about the concerns regarding CAH's truthfulness.

The credibility of a witness is always relevant. "Witness credibility is always at issue and relevant evidence which affects credibility should not be excluded." *Commonwealth v. Maddox*, 955 S.W.2d 718, 721 (Ky.1997). The jury is entitled to a reasonably complete picture of a witness' veracity, bias, and motivation. *Id.* Fundamental to a fair trial is the right to cross-examine witnesses regarding credibility issues. *Williams v. Commonwealth*, 569 S.W.2d 139, 145 (Ky.1978)(citing, *Davis v. Alaska*, 415 U.S. 308 (1974)). If anything is relevant and subject to cross-examination, it would be the truthfulness of an accuser.

The Appellee cited two cases that stand for the proposition that reports of social workers are hearsay and not admissible. Brief for Appellee, 3-6 (citing *Souder v. Commonwealth*, 719 S.W.2d 730 (Ky. 1986) and *Prater v. Cabinet for Human Resources, Commonwealth of Kentucky*, 954 S.W.2d 943 (Ky. 1997)). These cases can be distinguished from Mr. Patterson's case.

First, *Souder* involved a victim who was only 2.5 years old when the physical and sexual abuse occurred and 3 years old at trial. She refused to answer any questions at trial. Therefore, the trial court ruled her incompetent. *Souder*, 719 S.W.2d at 733. *Souder* has been overruled in part: "To the extent that *Souder* . . . hold[s] that testimonial incompetence is not a consideration in determining the admissibility of

out-of-court statements, [it is] hereby overruled." *B.B. v. Commonwealth*, 226 S.W.3d 47, 51 (Ky. 2007). No doubt existed about the competency of Ms. Griesz or Ms. White.

Second, *Souder* involved inculpatory statements made by the victim that the prosecution introduced through other witnesses. Thus, the hearsay evidence related directly to the guilt of the defendant. This Court has since cautioned against using hearsay and opinion from social worker's reports to achieve convictions for child abuse: "this Court has demonstrated its discomfort with convictions for child abuse based upon the hearsay testimony and ultimate fact opinion given by social workers." *Sharp v. Commonwealth*, 849 S.W.2d 542, 546 (Ky. 1993)(citing four other Kentucky Supreme Court decisions).

This Court's concern is not present in Mr. Patterson's case. The evidence at issue is exculpatory, not inculpatory. It will not help secure a conviction. Rather, this evidence supports Mr. Patterson's theory of defense that CAH manufactured the rape allegation so that she could be removed from her mother. Testimony that her therapist believed that CAH was inventing or exaggerating other instances of sexual abuse would make Mr. Patterson's defense more believable. The Constitution guarantees Mr. Patterson "a meaningful opportunity to present a

complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)(citing, *California v. Trombetta*, 467 U.S. 479, 485 (1984).

Third, language in *Prater* quoted by the Appellee supports the admission of the statement. The Appellee wrote "factual observations of social workers recorded in . . . case records are admissible under the business records exception . . ." Brief for Appellee, 3-4(quoting *Prater*, 954 S.W.2d at 958. This testimony is allowed "because such observations would be admissible if the social worker testified in person." *Prater*, 954 S.W.2d at 958.

Ms. White's report was based on her observations of CAH in group therapy where CAH would copy and adopt the abuse stories of other girls. Ms. Griesz should have been allowed to testify about Ms. White's factual observations that CAH would replicate the accusations of abuse from other girls in her group therapy. This fact would have allowed Mr. Patterson to argue in closing that CAH was creating abuse stories to stay out of her mother's custody and that she accused Mr. Patterson of rape so that she could escape from her mother's abuse.

Omission of this fact prejudiced Mr. Patterson by not allowing him to question the veracity of his accuser and completely presenting his defense. A new trial is required.

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

Because Mr. Patterson's fact pattern differs from the facts of *Hall v. Commonwealth*, 956 S.W.2d 224, 226 (Ky. App. 1997), a different test should apply for the admissibility of the evidence. CAH's sexual abuse allegations that were investigated and found to be not substantiated should have been introduced.

The cases relied on by the Court in *Hall* to support the 'demonstrably false' test can be distinguished from Mr. Patterson's case. *Hall*, and the cases cited therein, involve an unrelated allegation made by the victim and a mere denial by the accused.

In *Hall*, the accused made a rape allegation against three men, which was unrelated to her allegation against Hall. The three men denied the allegation. The accused maintained her allegations but declined to pursue the matter further because of her experience in her case against Hall. *Hall*, 956 S.W.2d at 226. Nothing in the investigation discredited or disproved the accused's allegation against the three men. In fact, had the accused cooperated, her accusation against the three men might well have proceeded to trial.<sup>1</sup>

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<sup>1</sup>The cases cited by *Hall* can be similarly distinguished. For example, *Hughes v. Raines*, 641 F.2d 790, 792 (9<sup>th</sup> Cir. 1981)(the evidence of the other accusation was that the accuser said the charges were true, the accused denied the charges, and district



Mr. Patterson's case differs. CAH accused Mr. Paul of inappropriately touching her in a sexual manner. Cumberland Hall investigated the allegation and found that her allegation could not be substantiated. Thus, in Mr. Patterson's case, there is more than a mere denial. Rather, there is a finding that the allegation was unsubstantiated. Apparently, based on CAH's testimony, law enforcement made no further investigation of the matter as CAH said she had not been contacted about it since making the allegation. (VR No. 7: 11/20/07; 3:39:00.)

The exclusion of this evidence prejudiced Mr. Patterson. The motive of a witness is always relevant:

the precluded cross-examination concerned the "possible biases, prejudices, or ulterior motive of the witness as they may relate directly to the issues or personalities in the case at hand." . . . Such evidence, the Court found, is "always relevant as discrediting the witness and affecting the weight of his testimony." . . . In his concurrence, Justice Stewart emphasized that:

the Court neither holds nor suggests that the Constitution confers a right in every case to impeach the general credibility of a witness through cross-examination about his past delinquency adjudications or criminal convictions.

*U.S. v. Bartlett*, 856 F.2d 1071, 1089 (8<sup>th</sup> Cir. 1988)(quoting *Davis v. Alaska*, 415 U.S. 308, 316; 321 (1974)).

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attorney chose not to prosecute); *U.S. v. Bartlett*, 856 F.2d 1071, 1087-1088 (8<sup>th</sup> Cir. 1988)(the evidence of the other accusation was a roommate of the accuser testifying that the accuser made the accusation but nothing came of it and that private investigator determined no formal complaint was filed with the police) *U.S. v. Cardinal*, 782 F.2d 34, (6<sup>th</sup> Cir.)(an accusation was withdrawn out of fear of reprisal).

Mr. Patterson's theory of defense at trial was that CAH made up the accusation against him so that she could get away from her mother who verbally abused her by yelling and cussing at her, emotionally abused her by threatening to commit suicide in front of her, and physically abused her by hitting her. At first, CAH only accused Mr. Patterson of touching her. This did not get her out of the house, though. As time went by and the abuse continued, the accusation grew to rape. This produced the desired result - CAH was removed from her mother's care.

The evidence of CAH's unsubstantiated allegation against Mr. Paul would have made Mr. Patterson's theory more believable to the jury. Why CAH made the unsubstantiated allegation was not important. It could have been that CAH did not like Mr. Paul or that she wanted out of Cumberland Hall because those kind of facilities are not exactly fun even if they are preferable to abuse she received at home. She may have liked the positive attention she received from people after making an accusation. What was important was that CAH made at least one other sexual abuse allegation that was investigated and unsubstantiated. Given Mr. Patterson's theory and his consistent claim of innocence, this evidence was relevant, persuasive, and should have been admitted.

Finally, the Appellee criticizes Mr. Patterson's argument for not articulating an alternative test for the admission of this evidence. Brief

for Appellee, 7. The problem with the *Hall* "demonstrably false" test is the adverb demonstrably. How can a defendant prove that an allegation is demonstrable false? Not even a not guilty verdict would prove an accusation demonstrably false, as noted in the Brief for Appellant. Brief for Appellant, 11-12. This "immense gap between what is true and what can be proved to be demonstrably false" excludes a correspondingly immense amount of otherwise relevant evidence. *Capshaw v. Commonwealth*, 253 S.W.3d 557, 565 (Ky. App. 2007).

Language from the Brief for Appellee suggests a more workable test. "[M]ost jurisdictions that have addressed the issue similarly require more than simple denial testimony as proof that another sexual assault accusation was false." Brief for Appellee, 8(quoted *Quinn v. Haynes*, 234 F.3d 837, 851 (4<sup>th</sup> Cir. 2000)).

The *Quinn* proposition that more than a simple denial is required to admit other sexual abuse allegations made by the complaining witness seems reasonable. This Court would have to decide what more than a mere denial is required. As a starting point, Mr. Patterson suggests the following test: "evidence of substance that would allow a jury to conclude that the allegation was false."

This standard would require some fact or facts in addition to the denial by the accused that makes it more likely than not that the allegation was false. Thus, a he-said-she-said type of case would not be admissible because it involves only a subjective denial. Instead, a fact or facts that are independent of the subjective denial which support the falsity of the accusation would be required before the other allegation could be introduced.

The presence of this additional evidence of falsity would make it more reasonable for the jury to conclude that the allegation was false. It would also allow defendants who have such information to present a complete defense. At the same time, it protects the alleged victim from the embarrassment and character attack frequently associated with he-said-she-said type cases because something other than the accused or the accuser tends to disprove the accusation. Further, under this test, the jury would still be free to reject the defendant's position.

More than a mere denial of the sexual abuse allegation is present in Mr. Patterson's case. First, an investigation concluded that the allegation could not be substantiated. Second, the police did not follow up on CAH's allegation, probably because of the initial investigation. Third, CAH's avowal testimony showed that no criminal prosecution was pending. These additional facts were evidence of substance that would allow a jury

to conclude that the allegation was false. Reversible error occurred when this evidence was not admitted. Mr. Patterson deserves a new trial.

## **Conclusion**

For these reasons and those stated in the Brief for the Appellant, 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,



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