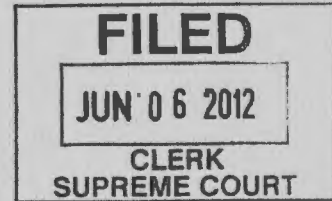


COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
Case No. 2011-SC-000115-DG



JEFFREY L. HALE,

APPELLANT,

APPEAL FROM CHRISTIAN CIRCUIT COURT
CASE NO. 09-CR-00064

VS.

AND
APPEAL FROM KENTUCKY COURT OF APPEALS
CASE NO. 2009-CA-002273

COMMONWEALTH OF KENTUCKY,

APPELLEE.

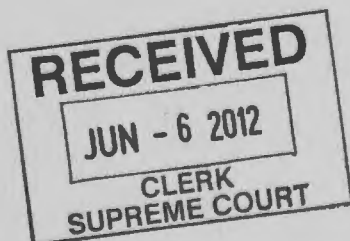
REPLY BRIEF FOR APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served on all other parties by mailing, faxing, emailing, or delivering copies to: **HON. JOHN L. ATKINS**, Judge, Christian Circuit Court, Div. II, Christian County Justice Center, 100 Justice Way, Hopkinsville, Kentucky 42240; **SAMUEL P. GIVENS JR.**, Clerk, Court of Appeals of Kentucky, 360 Democrat Drive, Frankfort, Kentucky 40601-9229; **JACK CONWAY, ESQ.**, Attorney General of Kentucky, Capitol Suite 118, 700 Capitol Avenue, Frankfort, Kentucky 40601-3449; **JOHN PAUL VERO, ESQ.**, Assistant Attorney General, Office of Criminal Appeals, Attorney General's Office, 1024 Capital Center Drive, Frankfort, Kentucky 40601; and **JOHN LINDSEY ADAMS, ESQ.**, Foster, Soyars & Associates, 209 East Fourteenth Street, P.O. Box 24, Hopkinsville, Kentucky 42241-0024; this 4th day of June, 2012.

A handwritten signature in cursive script, appearing to read "Wm. G. Deatherage Jr.".

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PURPOSE

The purpose of this Reply Brief is to address assertions made by Appellee in its Brief, in order to clarify Appellant's position with regard to the reasons why this case should be reversed and remanded.

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ARGUMENT

Appellant Jeffery Hale ("Jeff") was convicted of unlawful transaction with a minor in the first degree, KRS 530.064. In this case, both the Commonwealth's misapplication of the unlawful transaction statute and the prosecutor's misconduct require reversal of Jeff's conviction.

1. Under its plain language, the unlawful transaction with a minor statute does not apply to cases where the minor was the victim of another person's illegal conduct.

KRS 530.064(1) provides that "a person is guilty of unlawful transaction with a minor in the first degree when he knowingly induces, assists or causes a minor to engage in illegal sexual activity." The key dispute between the parties in this case involves the definition of "illegal sexual activity" under KRS 530.064. It is Jeff's position that "illegal activity" is defined as activity that is illegal for the minor under the plain meaning of the language.

The Commonwealth argues that a minor who has not committed a crime still has engaged in "illegal sexual activity." But the three statutes prohibiting unlawful transactions with a minor focus on the nature of the illegal, criminal, and prohibited conduct in which **the minor** was induced to engage. This requires examining the conduct of the minor, not the conduct of the defendant. And a minor, who has committed no crime, and in fact has been the victim of a crime, is not engaging in conduct that is "illegal" under the plain meaning of the word.

2. The legislative history of both the unlawful transaction with a minor statute and the sexual misconduct statute supports Jeff's interpretation of "illegal sexual activity."

In its response brief, the Commonwealth makes no attempt to support its interpretation of "illegal sexual activity" with any citations to the commentary

accompanying the penal code. But the General Assembly has specifically recognized that the commentary accompanying the penal code may be used as an aid in construing its provisions. KRS 500.100. And in this case, the commentary directly refutes the Commonwealth's overly expansive interpretation of "illegal sexual activity."

The commentary explicitly states that unlawful transaction statute was to replace the "vague" and "troublesome" language of the pre-code crime of contributing to the delinquency of a child." Because the unlawful transaction with a minor statute was explicitly intended to remedy the overbroad previous statute, the term "illegal sexual activity" should be construed narrowly.

The Commonwealth's interpretation of "illegal sexual activity" also is contradicted by the commentary accompanying the "sexual misconduct" statute of KRS 510.140, which provides that the purpose of the sexual misconduct is to avoid the "stigma" and "unnecessarily harsh" consequences faced by a young defendant who violated the statutory rape provisions. *Cooper v. Commonwealth*, 550 S.W.2d 478, 479 (Ky. 1977).

But under the Commonwealth's definition of "illegal activity", the legislative purpose of the sexual misconduct statute is completely defeated. Any 17-year-old who engages in consensual sexual intercourse with a 15-year-old would be guilty of unlawful transaction with a minor. If all persons who are guilty of sexual misconduct, which is intended to be a less stigmatizing misdemeanor offense, are also guilty of the Class B felony of unlawful transaction with a minor, then sexual misconduct statute is superfluous.

Moreover, the sexual misconduct statute was explicitly created to avoid the stigma of being characterized as "rape." But under the Commonwealth's

interpretation of "illegal sexual activity," any person guilty of sexual misconduct is also guilty of KRS 530.064, which carries with it the stigma, as well as the harsh penal consequences, of "violent offender" status. KRS 439.3401(1)(g).

3. The Commonwealth has not disputed the fact that its interpretation of "illegal sexual activity" leads to absurd results.

It is the Commonwealth's position that a defendant's violation of the statutory rape provisions of KRS 510 is sufficient to qualify as "illegal sexual activity" under the unlawful transaction with a minor statute. But in its response brief, the Commonwealth never disputes any of the absurd or overly harsh results of its interpretation.

The Commonwealth did not dispute that under its interpretation of "illegal sexual activity" a person who induces an 11 year old to have sexual intercourse with him has a lower penalty than he would for committing the underlying offense without the inducement. But a person who induces a 12 year old to have sexual intercourse with him has an increased penalty. Under Kentucky law, a strict literal construction of a statute is not required to be followed if it would lead to an unreasonable or absurd result. *Commonwealth v. White*, 3 S.W.3d 353, 354 (Ky. 1999).

But in this case, Jeff is not asking the Court to ignore the strict literal construction of a statute to avoid an unreasonable and absurd result. Instead, Jeff is asking the Court to apply the literal meaning of "illegal activity" to avoid unreasonable and absurd results.

In response to this argument, the Commonwealth argues that, while its interpretation may lead to absurd results, the function of this Court is to not to legislate but to ascertain the legislative intent. But, as this Court has recognized, "statutory

interpretation, logic, and belief in the good sense of the legislature” are all relevant concerns when determining application of a statutory provision. *Commonwealth v. Merriman*, 265 S.W.3d 196, 201 (Ky. 2008). (“By statutory interpretation, logic, and belief in the good sense of the legislature, the Violent Offender Statute cannot be read to apply to youthful offenders.”). The Commonwealth is in effect requesting that the Court set aside logic and a belief in the good sense of the legislature, and hold that the General Assembly intended for the unlawful transaction with a minor statute to lead to absurd results.

Jeff’s interpretation of the statute leads to no absurd results. Nor does Jeff’s interpretation decriminalize any otherwise illegal conduct. In cases where the minor was the victim, not having been induced to engage in illegal sexual activity herself, the defendant nevertheless would be guilty of the substantive offense he committed in violation of the provisions of Chapter KRS 510.

4. The Commonwealth’s expansive definition of “illegal sexual activity” affects numerous lesser sexual offenses, which would have far-reaching consequences for any person accused of having consensual sexual contact with a minor.

The Commonwealth’s interpretation of KRS 530.064 makes statutory rape a lesser included offense of first degree unlawful transaction with a minor. As such, a person who induces, assists, or causes a minor to engage in consensual sexual activity is guilty of the greater offense of unlawful transaction with a minor.

In response to this argument, the Commonwealth argues that this is a case where “conduct **may** support an indictment under KRS Chapter 510 sexual offense as well as an indictment for unlawful transaction with a minor in the first degree.” But given that virtually any sexual relationship between consenting parties would require the other to “assist” in the sexual activity, the Commonwealth’s

interpretation provides that any person who enters a consensual sexual relationship with a minor is guilty of both a violation of KRS 510 and KRS 530.064. This means that conduct that previously was a misdemeanor would now be a Class B felony offense.

This would greatly increase the punishment given to high school students who find themselves in violation of the lesser, misdemeanor sexual offenses, which were explicitly created to protect younger defendants from the harsh consequences of the felony rape laws.

For example, under KRS 510.130, **any** sexual contact between an 18-year-old high school senior and his 15-year-old freshman girlfriend is a violation of KRS 510.130. But a violation of KRS 510.130 is only a B misdemeanor.

But, under the Commonwealth's interpretation of "illegal activity," the high school senior will no longer face merely a B misdemeanor, with the chance of probation or a deferral. Instead, he would be facing a B felony, with a minimum sentence of 10 years, and no chance for probation or parole before serving 85% of his sentence.

Even if the Commonwealth's interpretation of "illegal sexual activity" was supported by the plain language of the statute, which it is not, the Commonwealth's interpretation must still be rejected. Under Kentucky law, "doubts in the construction of a penal statute will be resolved in favor of lenity and against a construction that would produce extremely harsh or incongruous results or impose punishments totally disproportionate to the gravity of the offense." *White v. Commonwealth*, 178 S.W.3d 470, 483-84 (Ky. 2005). In this case, if the overly expansive construction of "illegal sexual activity" is not corrected, defendants who are guilty of minor sexual crimes will face punishments totally disproportionate to the gravity of their offense.

5. Jeff's interpretation of "illegal sexual activity" was never raised in any previous case before the Supreme Court.

The Commonwealth failed to address the majority of Jeff's arguments concerning the legislative history of KRS 530.064 and the absurd and disproportionate results of the Commonwealth's interpretation of "illegal sexual activity." Instead, the Commonwealth's primary argument is that Jeff's interpretation of "illegal activity" fails, based on this Court's decision in *Young v. Commonwealth*, 968 S.W.2d 670, 672 (Ky. 1998).

But in *Young* the defendant was not asking the Court to define "illegal activity." Instead, the defendant argued that "while th[e] evidence might have sustained convictions of criminal solicitation of an offense, KRS 506.030, mere words are insufficient to support convictions of criminal attempt to commit an offense, KRS 506.010." *Young v. Commonwealth*, 968 S.W.2d 670, 672 (Ky. 1998).

The defendant in *Young* never argued that under KRS 530.064 "illegal activity" means activity that is illegal for the minor, rather than the defendant. Rather, the defendant argued that "mere words" could not support a conviction for criminal attempt. Because the defendant in *Young* was not seeking to define "illegal sexual activity", the Court was never presented with any of the arguments raised in this appeal.

The Court in *Young* ultimately concluded that "mere words" were enough to support a conviction. *Id.* at 674. But, that holding does not prevent the Court from giving meaningful judicial scrutiny to the definition of "illegal sexual activity" for the first time.

The other Kentucky Supreme Court case cited by the Commonwealth is *Combs v. Commonwealth*. But in *Combs*, like in *Young*, the Court was never asked to

define “illegal activity.” Instead, the Court in *Young* was asked to determine whether the minor’s lack of consent to the sexual activity prevented a conviction under KRS 530.064. *Combs v. Commonwealth*, 198 S.W.3d 574, 578 (Ky. 2006). Because the defendant in *Combs* had his convictions reversed based on the minor’s lack of consent, the Court was never called upon to define the term “illegal sexual activity.”

The only other case cited by the Commonwealth is the Court of Appeals decision in *Quist v. Commonwealth*, 338 S.W.3d 778 (Ky. App. 2010). But the Court of Appeals in *Quist* did not engage in any meaningful analysis of the definition of “illegal sexual activity.” As an initial matter, unlike the substantial authority cited by Jeff in this case, “Quist provide[d] no authority for his interpretation of KRS 530.064.” *Quist v. Commonwealth*, 338 S.W.3d 778, 781 (Ky. App. 2010). Furthermore, the Court of Appeals, as it did in its opinion in this case, cited *Young* as binding authority in ruling against the defendant. When the cases cited by the Commonwealth are examined, it is apparent that no defendant has ever raised the arguments that are now before this Court, in any court in Kentucky.

The fact that this Court has never been asked to analyze what qualifies as “illegal activity” under KRS 530.064 also undercuts the Commonwealth’s argument that the General Assembly intended KRS 530.064 to apply to any consensual sexual activity with a minor based on the fact that the General assembly has not amended KRS 530.064 to redefine “illegal sexual activity.”

But this Court has never been asked to rule on what qualifies as “illegal sexual activity.” Therefore, the General Assembly cannot have adopted a judicial interpretation of “illegal activity” when this Court has never had the opportunity to give a definitive analysis for the General Assembly to either accept or reject.

Based on the above analysis, the Court should proceed to the merits of Jeff's statutory interpretation of "illegal sexual activity." The Court will then have the opportunity, for the first time, to employ ordinary statutory construction techniques to define the term "illegal sexual activity" in a case where the issue has been placed directly before the Court. To hold otherwise would require a determination that the General Assembly intended for KRS 530.064 have absurd results and extremely harsh consequences for young defendants who commit minor sexual offenses.

6. The prosecutor's misconduct during closing arguments was flagrant and deprived Jeff of his right to a fair trial.

The prosecutor's closing argument at Jeff's trial improperly focused on C.P.'s lost innocence and virginity. These were not fleeting references, but were instead the overall theme of the closing argument. The Commonwealth attempts to argue that the references to C.P.'s lost virginity falls within the proper bounds of closing argument. But the Commonwealth never argues that C.P.'s virginity and lost innocence were in any way relevant to whether or not Jeff committed the offense of unlawful transaction with a minor.

The Commonwealth states that appellants are not permitted to feed one can of worms to the trial judge and another to the appellate court. But in this case, it was the Commonwealth who "fed the can of worms" to the trial court. It was Jeff, on the other hand, who requested that the trial court grant a new trial based on the prosecutor's improper closing argument.

The Commonwealth next argues that the references to C.P.'s virginity were brief, and did not unnecessarily glorify the victim. But if pervasive, irrelevant

references to virginity and lost innocence do not qualify as unnecessarily glorifying the victim, it is difficult to imagine any case that would.

The prosecutor's request that the jury decide this case on their emotions was not an accident, as it was a reiteration of the prosecutor's request during his opening statement. In addition, it is difficult for the Commonwealth to argue that the prosecutor was merely commenting on the evidence when he originally made the request before Jeff was able to put on any evidence whatsoever.

As the Commonwealth noted, the standard of review for palpable error review is whether the prosecutor's actions were "shocking" or jurisprudentially intolerable." *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006). But given the extremely prejudicial effect that the prosecutor's numerous references to virginity and lost innocence, while simultaneously giving the jury license to act on their passions, the end result is a closing argument that was "shocking" or "jurisprudentially intolerable." Because the lost innocence theme was first introduced in the prosecutor's opening statement, it is clear that this was not some accidental reference. Instead, it was the theme throughout the entire trial, which culminated in a closing argument that focused almost exclusively on glorifying the victim. As such, the prosecutor's closing argument deprived Jeff of his legal right to have his case decided by an impartial jury, unprejudiced by the glorification of the victim's lost virginity and innocence.

CONCLUSION

No Kentucky court has defined "illegal sexual activity" under KRS 530.064. Only two cases before this Court have even examined the statute since it was passed with the rest of the penal code in 1974. And in neither of those cases was the Court

asked to define "illegal sexual activity." For this reason, the definition of "illegal activity" under the unlawful transaction with a minor statute is ripe for judicial review.

Under the well established rules of statutory construction, KRS 530.064 only applies to activity that is illegal for the minor to perform. Under the plain language of the statute, the victim of the crime in this case did not engaged in the "illegal activity" required for a conviction under the statute. Furthermore, the Commonwealth has not denied that an overly expansive interpretation of "illegal sexual activity" would bring about the absurd and overly harsh results.

For the reasons provided herein, and in his earlier Brief, Defendant, Jeffery L. Hale, respectfully requests that the Kentucky Supreme Court reverse and vacate his conviction and sentence.

Respectfully Submitted,



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