COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

BERKSHIRE, SS NO. 2007-P-1096

COMMONWEALTH
Appellant

v.

BERNARD BARAN, JR.
Appellee

ON APPEAL FROM THE JUDGMENT OF THE BERKSHIRE SUPERIOR COURT'S ALLOWANCE OF THE DEFENDANT'S MOTION FOR NEW TRIAL

BRIEF AND RECORD APPENDIX OF THE COMMONWEALTH, APPELLANT

DAVID F. CAPELESS
DISTRICT ATTORNEY

JOSEPH A. PIEROPAN
ASSISTANT DISTRICT ATTORNEY
BERKSHIRE DISTRICT
7 NORTH STREET, PO BOX 1969
PITTSFIELD, MA 01202
TEL. 413-443-5951
BBO #550420

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ISSUES PRESENTED

I. Whether the Motion Judge, who was not the Trial Judge and who ruled upon the Defendant's motion for new trial filed nineteen years after his convictions for raping and abusing five pre-school age children, abused his discretion by finding that trial counsel provided ineffective assistance of counsel by failing to publish videotapes of the child victims' pre-trial interviews and to consult with an expert on child psychology to impress upon the jury the inconsistent statements of the children and the alleged defects in the interviewing techniques employed by the Commonwealth where all of the child victims (a) testified live before the jury, (b) displayed a hesitancy to testify, (c) often gave internally inconsistent answers on direct examination, and (d) had to be examined with the use of leading questions, and where the Appeals Court previously found that trial counsel impressed upon the jury the inference that the testimony of the children had been influenced by parents, social workers, and police officers.

II. Whether the admission, without objection, of the testimony of two expert witnesses who described symptoms of child sexual abuse

created a substantial risk of a miscarriage of justice where the Commonwealth's case against the Defendant included evidence beyond the mere allegations of the child victims that corroborated their testimony.

III. Whether the Motion Judge abused his discretion by finding that trial counsel could not possibly have had a tactical reason to exclude evidence that one of the child victims had contracted gonorrhea, where counsel effectively argued to the jury the strong inference that the Defendant, who tested negative for the disease, could not have possibly assaulted either the infected boy or any of the other victims, none of whom had contracted gonorrhea.

IV. Whether the Motion Judge abused his discretion by finding, contrary to the Appeals Court's decision in this matter on direct appellate review, that both the Trial Judge and trial counsel committed error by instructing the jury that fresh complaint evidence could not be used as substantive evidence of the crime charged and that the jury cannot accept as evidence of anything fresh complaint evidence that exceeded the scope of the victim's testimony.

V. Whether the Motion Judge abused his discretion by finding that trial counsel provided

ineffective assistance of counsel by waiving the Defendant's right to be proceeded against by indictment on two charges naming one child victim where counsel's conduct did not prejudice the Defendant.

VI. Whether the Motion Judge abused his discretion by finding that trial counsel erred by failing to object to the closure of the courtroom during the testimony of the six child witnesses where the Trial Judge's decision complied with the United States Supreme Court's ruling in *Waller v. Georgia*, 467 U.S. 39 (1984).

STATEMENT OF THE CASE

The Berkshire County Grand Jury indicted the Defendant on November 7, 1984, and he was arraigned in Superior Court on November 9, 1984, on indictments charging five counts of Rape And Abuse Of A Child Without Force, Nos. 18042, 18044, 18047, 18048, and 19050, and five counts of Indecent Assault And Battery Upon A Child Under The Age Of Fourteen Years, Nos. 18043, 18045, 18046, 18049, and 18051. (R.A. 1, 7, 15, 21, 29, 33, 37, 45, 54, 61).[1] On January 21, 1985, the

[1] References to the Record Appendix will appear as "(R.A. page.)." References to the transcript of the Defendant's 1985 trial will appear as "(Tr. volume/page.)." References to the brief filed by the Defendant on direct appeal of his conviction, No. 85-827, will appear as "(Def. Br. page)." References to the transcript of the evidentiary hearing conducted on

Defendant assented to the filing of two District Attorney's Complaints charging Rape And Abuse Of A Child Without Force, No. 18100, and Indecent Assault And Battery Upon A Child Under The Age Of Fourteen Years, No. 18101. (R.A. 69, 75). Trial commenced that same day with a total of twelve indictments alleging sexual assaults upon six children.[2]

The Trial Judge, Simons, J., entered required findings of not guilty on indictment nos. 18042 (alleging the rape of Boy D), (R.A. 4), and 18046-18047 (alleging rape and indecent assault and battery upon Boy A), (R.A. 32, 36). The jury returned verdicts of guilty on the remaining indictments. The Court, Simons, J., imposed concurrent sentences of life imprisonment on the indictments charging rape and concurrent sentences of eight to ten years on the indictments charging indecent assault and battery. (R.A. 7, 15, 21, 37, 45, 54, 61).

The Defendant filed his notice of appeal on February 14, 1985. (R.A. 11). The Appeals Court

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the motion for new trial will appear as "(MNT, Tr. volume/ page)." References to the Defendant's motion for new trial will appear as "(MNT, page)." References to the Motion Judge's Memorandum of Decision and Order allowing the motion for new trial will appear as "(Dec. page)."

[2] Pursuant to G.L. c. 265, s. 24C, and consistent with the Motion Judge's designation of the child victims' identities in his Memorandum of Decision and Order, the Commonwealth will identify the victims as follows: Boy A, Girl B, Boy C, Boy D, Girl E, and Girl F.

affirmed the convictions. *Commonwealth v. Baran*, 21 Mass. App. Ct. 989 (1986).

On January 31, 1988, the Court, Simons, J., allowed the Commonwealth's motion for commitment to the Treatment Center pursuant to G.L. c. 123A. (R.A. 12).

On June 16, 2004, the Defendant filed a motion for new trial with supporting memorandum and appendix. (R.A. 83). The Commonwealth filed its opposition to the motion on October 26, 2004. (R.A. 84). On December 16, 2004, the Defendant filed a supplemental memorandum and appendix in support of his motion for new trial, as well as transcripts of videotaped interviews of the child victims. (R.A. 84). The Commonwealth filed an amended response to the motion for new trial on January 5, 2005. (R.A. 85).

The Court, Fecteau, J., commenced a hearing on the Defendant's motion for new trial in Worcester Superior Court on December 28, 2004. (R.A. 84). The Court conducted additional hearings on January 25, 2005, February 2, 2005, February 28, 2005, April 21, 2005, and June 16, 2005. (R.A. 85).

One year later, on June 16, 2006, the Court, Fecteau, J., issued its Memorandum of Decision and Order allowing the Defendant's motion for new trial. (R.A. 85). The Commonwealth filed its notice of appeal on June 22, 2006. (R.A. 85). That same day, the Defendant filed a motion to vacate the civil commitment

and a motion for relief pending appellate review. (R.A. 86).

The Court, Fecteau, J., on June 22, 2006, ordered the Defendant to recognize in the amount of $50,000.00 cash or $500,000.00 surety with conditions. The Court allowed the motion to vacate the civil commitment on June 30, 2006. (R.A. 86).

The Court, Rouse, C.J., ordered the special assignment of the Honorable Jeffrey A. Locke for all purposes in this matter on August 30, 2006. (R.A. 86).

This Court entered this matter on its docket on July 18, 2007, and the Superior Court received notice of entry of appeal on July 23, 2007. (R.A. 87).

STATEMENT OF FACTS

For a complete statement of facts regarding the Defendant's convictions, the Commonwealth respectfully relies upon the Statement of Facts contained in its brief filed in this Court, No. 85-827.

Ineffective Assistance of Counsel

The Defendant's mother, Bertha Shaw, questioned trial counsel's ability on the second day of trial after she observed him having one alcoholic drink at Ken's Bowling Alley in Pittsfield in the late evening on a weeknight of the trial. (MNT, Tr. 6/6-7). On cross-examination, she testified that she observed trial counsel from approximately five feet for about five minutes and yet, remarkably, he never noticed her.

(MNT, Tr. 6/11-12). The Defendant, in similar testimony, claimed to have smelled alcohol on the breath of counsel before the beginning of each afternoon session. (MNT, Tr. 6/32-33). Ms. Shaw, however, testified on cross-examination that, although claiming on direct examination to have observed trial counsel's eyes to have been bloodshot on the third day of trial, she failed to include this second incident in her written affidavit. (MNT, Tr. 6/8, 12-13).

The Defendant testified that he too began to question the competency of trial counsel's representation when, during the testimony of a Commonwealth witness, counsel asked him to write down any questions he had for the witness because he allegedly had none. (MNT, Tr. 6/23-24). The Defendant also alleged that counsel attended the competency hearing without informing him that he had a right to be present or instructing him to waive that right. (MNT, Tr. 6/27-28).

The Defendant claimed he asked counsel to retain an expert witness after learning from him that a State therapist had questioned his sister's children. The Defendant testified that he had asked trial counsel to bring those children in to testify on his behalf or least question the doctor as to what they said, both of which he testified counsel did not do. (MNT, Tr. 6/25). According to the Defendant, counsel did not

call any of the other children with whom he had spent time alone that had not made criminal allegations against him. (MNT, Tr. 6/31-32). However, on cross-examination he admitted that the jury was made aware that a large number of children at Early Childhood Development Center (ECDC), with whom the Defendant had contact, had not made any allegations against him. (MNT, Tr. 6/38-39).

He also testified that despite his conversation with trial counsel about the need and importance of calling or consulting with expert witnesses, no expert witnesses were called. (MNT, Tr. 6/32). He testified that he was not informed that he could petition the court for funds for an expert witness if his family could not afford one. (MNT, Tr. 6/32). The Defendant testified that when trial counsel brought some documents and the videos with him to meet with him, it was he who noticed that they were the edited versions, to which counsel remarked that he "didn't even notice that." (MNT, Tr. 6/35).

Conflict of Interest

Former Cain Hibbard associate Virginia Stanton Smith testified that sometime after 1984 she took a position on the ECDC board of directors. (MNT, Tr. 1/10). As to the exact date of when she took the board position or whether she was serving in October of 1984, when the allegations against the Defendant first

surfaced, Ms. Smith testified that she was unsure, although she did agree that she co-signed a January 10, 1985, letter to the parents of the children at ECDC that expressed ECDC's sympathy and concern for the parents whose children may have been abused by the Defendant, an ECDC employee. (MNT, Tr. 1/11, 14-15).

Recognizing that a conflict of interest was about to develop because Cain Hibbard, her employer, had decided to represent Girl E, one of the child victims, Ms. Smith testified that she resigned from the ECDC board of directors on February 1, 1985. (MNT, Tr. 1/18-22). Despite having been on the ECDC board during discussions concerning the Defendant, prior to Cain Hibbard's appellate representation of him, Ms. Smith testified that she would never have shared information from the board discussions with the attorney handling the Defendant's appeal because that information was confidential. (MNT, Tr. 1/36-38).

Although aware that Cain Hibbard had decided to represent Girl E in a civil suit, C. Jeffrey Cook, who joined Cain Hibbard as a partner in February of 1984, testified that he did not know when that decision occurred nor of any other information concerning the representation. (MNT, Tr. 1/58-59). According to Mr. Cook, Cain Hibbard attorney David O. Burbank opened a file pertaining to Girl E on February 5, 1985, but that file was disposed of sometime between 1992 and 1995.

(MNT, Tr. 1/49-52). While testifying that he represented Girl E and her mother, Mr. Burbank stated that he had no current recollection of the representation and that his awareness of its occurrence was from a copy of a February 4, 1985, letter from the Berkshire District Attorney's office to him. (MNT, Tr. 1/137). Based on the letter, Mr. Burbank testified that he had sought any non-privileged documents in the District Attorney's file relating to any statements made by the child victim. (MNT, Tr. 1/138). Mr. Cook further testified that he did not have any idea why he would have asked for and received a letter from then-First Assistant District Attorney Daniel A. Ford regarding Commonwealth v. Bernard Baran. (MNT, Tr. 1/59-69). The letter, dated January 3, 1985, stated that a copy of the Baran search warrant and affidavit accompanied it per the request of Mr. Cook, who agreed that he made the request, but also testified that it would have been unusual for him to have contacted the District Attorney's office as he was a corporate transaction lawyer. (MNT, Tr. 1/59-69). Mr. Cook testified that the search warrant was for the body of the Defendant, so that bodily fluids, including blood, could be taken from him and tested for gonorrhea at the Berkshire Medical Center (BMC). (MNT, Tr. 1/108-109). Mr. Cook testified that this letter was never given to the Defendant, (MNT, Tr. 1/75), nor did he consider

whether or not the letter constituted evidence of bias that should have been provided to the Cain Hibbard attorney who was acting as the Defendant's appellate counsel. (MNT, Tr. 1/78-79).

Mr. Cook testified that he had no idea if Cain Hibbard ever disclosed its relationship with the child victim and her mother to the Defendant. (MNT, Tr. 1/84). Mr. Burbank testified that he was certain that Cain Hibbard attorney Leonard H. Cohen disclosed the prior representation to the Defendant because it was the firm's practice to do so. (MNT, Tr. 3/24).[3] This testimony by Mr. Burbank, a veteran professional with knowledge of how Cain Hibbard conducted its affairs, directly contradicted the testimony of both Bertha Shaw and the Defendant, who both, in almost identical fashion, claimed that Cain Hibbard never disclosed the fleeting prior representation of Girl E and her mother to them. (MNT, Tr. 3/41-42, 45). Despite the brief prior representation of Girl E and her mother, Mr. Burbank also testified that no potential existed for him to give the Defendant a less-than-zealous appellate brief because the representation was brief, the firm ultimately did not take Girl E's case, and Attorney Cohen disclosed the representation to the Defendant. (MNT, Tr. 3/30).

Mr. Burbank testified that, by looking at the Commonwealth's certificate of discovery, a two page handwritten report by Dr. Jean Sheeley, dated October 13, 1984, was included in the Defendant's appellate file and that this representation of the Defendant along with that of Girl E occurred after this date. (MNT, Tr. 1/161-162).

Cain Hibbard still is general counsel for BMC, Berkshire Health Systems and their affiliates. (MNT, Tr. 1/86). This representation included some physician groups, although Mr. Cook could not recall if Cain Hibbard represented Dr. Sheeley in 1985. (MNT, Tr. 1/87).

Suggestive Interviewing Techniques

Dr. Maggie Bruck testified that her expertise is in the field of memory, factors that can taint and change memory, along with memory capabilities. (MNT, Tr. 5/5-8).[4] Dr. Bruck admitted that she had not conducted investigations or clinical research in the field of child abuse and that she did not have any training in the field of evaluation and treatment of abused children. (MNT, Tr. 5/3-4).

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[3] The pages of Volume 3 of the transcript of the hearing conducted on the motion for new trial are erroneously numbered "2-2" through "2-52."

[4] The pages of Volume 5 of the transcript of the hearing conducted on the motion for new trial are erroneously numbered "4-3" through "4-152."

Dr. Bruck engaged in detailed testimony of the phenomenon of "child sexual abuse accommodation syndrome." (MNT, Tr. 4/11-12). According to the doctor, this syndrome reportedly includes the child making no revelations about the abuse; the child remaining silent; when asked about abuse, the child will provide statements which he or she will rarely recant; and the child is forthcoming with information. (MNT, Tr. 4/11-12). Dr. Bruck further claimed that there is also a question regarding the reliability of the children's report and whether they are vulnerable to suggestion. (MNT, Tr. 4/11-12).

Dr. Bruck posited her opinion that upon reviewing the unedited versions of the interview videotapes, she could have materially assisted trial counsel in explaining how the interviews led to the Defendant being accused of the crimes. (MNT, Tr. 4/13). Dr. Bruck claimed that the videotapes would have been helpful for a number of reasons, such as what the children actually said and what the interviewers said to them. (MNT, Tr. 4/13). Further, she testified that a child's first spontaneous statement, or the statement made prior to the opportunity for an adult to push or coach, is the most reliable testimony a child can give. (MNT, Tr. 4/16).

With the benefit of hindsight and extensive amounts of research on the topic, Dr. Bruck testified

that a suggestive interview is one which uses leading questions and is coupled with interviewer bias, where the interviewer has a prior belief and attempts to elicit information that is consistent with that belief. (MNT, Tr. 4/20). According to her, inconsistent information is ignored or punished, and, as there is no alternative hypothesis, the information is not tested against an alternative hypothesis. (MNT, Tr. 4/20). Interviewer bias appears in the form of repeated questions, a lack of open-ended questions, and selective reinforcement (oral praises for answers consistent with the priori belief). (MNT, Tr. 4/21-22). Dr. Bruck further testified that other possible suggestive interview techniques include the child's parent or parents being in the room during the interview and the use of anatomically correct dolls. (MNT, Tr. 4/23-24). According to her testimony, children wish to please authority figures and do not possess the cognitive skills to understand that the dolls are a symbol of themselves. (MNT, Tr. 4/25).

Dr. Bruck then presented her own edited versions of the interviews to illustrate what she considered to be examples of suggestive interviewing techniques. (MNT, Tr. 4/32). She pointed out what she thought were suggestive techniques, such as the use of dolls; information presented by the children that is not followed up on by the interviewer; biased interviewing;

leading questions; the use of puppet shows demonstrating good touch/bad touch; parents being in the room; and information taken out of context. (MNT, Tr. 4/39-75).

Dr. Bruck admitted that she made her conclusions after having reviewed merely what defense counsel wanted her to review: unedited videotapes; police reports; trial transcripts; and Department of Social Services reports. (MNT, Tr. 4/16-17). These sources were coupled with answers she received from questioning the defense attorneys and reviewing an affidavit compiled by the defense regarding the case. (MNT, Tr. 4/16-17).

On cross-examination, Dr. Bruck acknowledged that she does not have experience investigating child abuse cases, does not have any clinical experience with abused children, and is not trained to do the evaluation and treatment of abused children. (MNT, Tr. 5/3-4). The prosecutor confronted her with her statement that the Defendant would have never been charged with any assaults had the first child not disclosed being abused, and asked if she maintained that opinion despite the fact that the child was diagnosed with gonorrhea. Dr. Bruck said that she "stepped beyond [her] announced expertise to answer that question." (MNT, Tr. 5/23-24).

Elizabeth Keegan, Direct of Victim Services for the Berkshire District Attorney's Office, was the Victim Assistance Advocate who assisted the child victims before and during the Defendant's trial in 1985. Ms. Keegan testified that all of the children had made initial disclosures prior to their videotaped testimony. (MNT, Tr. 5/86). She stated that the videotapes were made to be shown to the grand jury in place of the children having to testify. (MNT, Tr. 5/88).[5] As part of her duties as victim advocate, Ms. Keegan maintained contact with the children's parents throughout the proceedings and showed the children the courtroom where they would eventually testify before a jury. (MNT, Tr. 5/90). Ms. Keegan testified that the Berkshire District Attorney's victim advocates no longer interview and question children in the same manner as they did in 1984 because techniques have changed. (MNT, Tr. 5/93). She explained that the Office no longer uses anatomically correct dolls because times have changed and new, more effective techniques have been developed. (MNT, Tr. 5/99).

[5] Ms. Keegan also testified that it was the plan to also use the videotapes at trial in place of the children's testimony, but that did not happen. MNT, 5/88-89). The practice of videotaping had not been done before by the Berkshire District Attorney's Office and was used on only one other subsequent case. *Id.*

SUMMARY OF THE ARGUMENT

The Motion Judge abused his discretion by allowing the Defendant's motion for new trial. Specifically, he found that videotaped interviews of the child victims could have been used to impeach not only the testimony of the children, but also the allegedly suggestive interviewing techniques. The Motion Judge placed too much weight upon the relevance of the videotapes because they were made after the children had made initial disclosures of sexual abuse. Furthermore, the prolonged trial testimony of the children abundantly demonstrated their hesitancy to identify the Defendant as their abuser, their internally inconsistent versions of the abuse, and the prosecutor's reliance upon leading questions. (24-30).

The admission of expert witness testimony describing child sexual assault symptoms exhibited by the child victims sis not create substantial risk of a miscarriage of justice because the Commonwealth's case against the Defendant included compelling evidence of his guilt beyond that provided by the children's testimony. (30-36).

The Motion Judge abused his discretion by finding that trial counsel provided ineffective assistance by using the Commonwealth's evidence that one of the child victims had contracted gonorrhea to argue that the

Defendant, who tested negative for the disease, could not have abused the child. (36-40).

The Motion Judge erroneously ruled that the Trial Judge's limiting instructions on fresh complaint testimony impermissibly let the jury consider the evidence for substantive purposes. A plain reading of the instructions reveals that the court explicitly forbade the jurors from treating the evidence as proof of the sexual assaults. (40-45).

The Motion Judge erroneously found that trial counsel was ineffective by waiving the Defendant's right to be proceeded against by indictment where the Defendant has failed to show any prejudice resulting from trial counsel's acquiescence to the filing of District Attorney's complaints. (45-46).

The Motion Judge erred by finding that the trial judge improperly closed the courtroom to the public when the child victims testified, despite making a discerned effort to protect the Defendant's rights to a public trial. (46-51).

ARGUMENT

INTRODUCTION

The Defendant argued in his motion for new trial, and the Motion Judge, Fecteau, J., generally found, that he was denied a fair trial because of errors allegedly committed by the Trial Judge, his trial counsel, and the prosecutor, and he further claimed

that newly discovered evidence casts doubt upon the reliability of the Commonwealth's evidence at trial. Specifically, the Motion Judge ruled that trial counsel provided ineffective assistance by failing (1) to obtain and/or utilize videotapes of the child victims' statements made in preparation for trial; (2) to retain or consult with an expert and to object to expert opinion testimony offered by the Commonwealth that allegedly commented upon the credibility of the child victims; (3) to attempt to exclude evidence that one child had contracted gonorrhea, whereas the Defendant himself tested negative for it and no other child victim had contracted the disease; (4) to object to fresh complaint testimony that the Appeals Court previously ruled was properly admitted; (5) to require the Commonwealth to proceed by way of indictment upon charges against one of six child victims; and, (6) to protect the Defendant's right to a public trial despite the Trial Judge's order that closed the court room only during the testimony of the child victims, which abided by the Supreme Court's decision in *Waller v. Georgia*, 467 U.S. 39 (1984).

The Commonwealth contends that the Motion Judge, who was not the Trial Judge, abused his discretion by finding that the Defendant's 1985 trial was infected with prejudicial constitutional error. One example of this abuse of discretion is the Motion Judge's finding

that the Trial Judge gave the jury an erroneous instruction limiting the use of fresh complaint testimony. Upon direct appeal in 1986, the Appeals Court affirmed the content and the timeliness of the Trial Judge's fresh complaint instructions. *Commonwealth* v. *Baran*, 21 Mass. App. Ct. 989 (1986), *further appellate review denied*, 397 Mass. 1103 (1986). Furthermore, the Motion Judge relied upon developments in the common law occurring subsequent to the date of the Defendant's conviction to rule on issues regarding the use of expert opinion testimony at child sexual assault trials. As to other rulings by the Motion Judge, the Commonwealth respectfully contends that his findings are based in significant part upon surmise and facts arguably absent from the record evidence. For example, the Motion Judge accurately characterized one of the bases of the Defendant's motion for new trial to be trial counsel's alleged failure to impeach the Commonwealth's evidence as "the creature of an unfair climate of hysteria, homophobia and suggestion." (Dec. 23, R.A. 113). Although the Motion Judge does not specifically refer to this alleged hysteria in his decision, he did fault trial counsel for introducing the topic of the Defendant's homosexuality into the trial, thereby "compounding the prejudice to the Defendant." (Dec. 60, R.A. 150). The only evidence at trial suggesting that the Defendant was the target

of homophobic paranoia was a reference to a statement made by the common-law husband of the mother of Boy A, and the Motion Judge found only one additional piece of evidence - a similar statement by Mother A herself - that trial counsel did not discover that supported this claim of hysteria. (Dec. 150, 153). Given the meager evidence of any homosexual anxiety that pervaded the trial, the Motion Judge abused his discretion by finding that trial counsel prejudiced the Defendant.

The Supreme Judicial Court has looked with caution upon efforts to litigate issues that could have been resolved in the course of normal appellate proceedings:

> "'[A] motion for new trial may not be used as a vehicle to compel . . . review and [consideration of] questions of law,' on which a defendant has had his day in an appellate court, or [on which he has] forgone that opportunity. *Commonwealth* v. *McLaughlin*, 364 Mass. 211, 229 (1973). While a judge does have the discretion to rehear such questions, this court has recommended restricting the exercise of that power to 'those extraordinary cases where, upon sober reflection, it appears that a miscarriage of justice might otherwise result.'. *Commonwealth* v. *Harrington*, 379 Mass. 446, 449 (1980)." *Fogarty* v. *Commonwealth*, 406 Mass. 103, 107-108 (1989).

Commonwealth v. *Watson*, 419 Mass. 110, 112 (1991). Here, twenty-two years after his trial, the Defendant asserts arguments on appeal that are not novel because they were either raised by appellate counsel or they do not warrant a finding that justice was not done at his trial.

The Appeals Court recently summarized the applicable standard of review of an order on a motion

for new trial where, as here, the Motion Judge was not the trial judge:

> We review a judge's decision denying a motion for new trial under Mass.R.Crim.P. 30(b), as appearing in 435 Mass. 1501 (2001)," to determine whether there has been a significant error of law or other abuse of discretion." *Commonwealth v. Grace*, 397 Mass. 303, 307 (1986). In the case before us, the motion judge was not the trial judge. Therefore, "deference is owed only to the motion judge's assessment of the credibility of the witnesses; [the appellate] court is in 'as good a position as the motion judge to assess the trial record.'" *Commonwealth v. Phinney*, 446 Mass. 155, 158 (2006), quoting from *Commonwealth v. LeFave*, 430 Mass. 169, 176 (1999).

Commonwealth v. Fortini, 68 Mass. App. Ct. 701, 703 (2007).

The Supreme Judicial Court recently defined the standard of review where ineffective assistance of counsel is claimed:

> A fourth exception comes into play when a defendant alleges (as this defendant has done) that his failure to preserve an issue stems from ineffective assistance of counsel, whether at trial or on appeal. See *Commonwealth* v. *Egardo*, 426 Mass. 48, 49-50 (1997).
>
> If we determine that an error has been committed, we ask whether it gives rise to a substantial risk of a miscarriage of justice -- ineffectiveness is presumed if the attorney's omission created a substantial risk, and disregarded if it did not.

Commonwealth v. *Randolph*, 438 Mass. 290, 295-296 (2002). The pertinent inquiry is defined as follows:

> That test requires us to determine "if we have a serious doubt whether the result of the trial might have been different had the error not been made." *Commonwealth* v. *LeFave*, 430 Mass. 169, 174 (1999). Specifically, we consider four questions: (1) whether there was error, (2) whether the defendant was prejudiced by the error, (3)

> "considering the error in the context of the entire trial," whether it would be "reasonable to conclude that the error materially influenced the verdict," and (4) whether we may infer from the record that counsel's failure to object was not a reasonable tactical decision. *Commonwealth* v. *Randolph*, *supra* at 298. We find a substantial risk of a miscarriage of justice and grant relief "only if the answer to all four questions is 'yes.'" *Id.*

Commonwealth v. *Russell*, 439 Mass. 340, 344-345 (2003).

A fair assessment of the performance of a criminal defense attorney, under the Sixth Amendment requirement of effective assistance of counsel, requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. *Strickland* v. *Washington*, 466 U. S. 668, 677 (1984). Any lawyer combing the record can try the case better. *Commonwealth* v. *McGann*, 20 Mass. App. Ct. 59, 61 (1985). A court must also indulge a strong presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Strickland*, 466 U. S. 668 at 677; *Commonwealth* v. *Florentino*, 396 Mass. 689, 690 (1986). Furthermore, case law illustrates that the minimum threshold for effective assistance of trial counsel is satisfied in all but the most egregious circumstances.[6]

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[6] See *Commonwealth* v. *Little*, 376 Mass. 233 (1978) (holding that a defendant was not denied effective assistance of counsel, even though his trial counsel

I. TRIAL COUNSEL DID NOT PROVIDE INEFFECTIVE ASSISTANCE BY NOT RETAINING AN EXPERT WITNESS TO OFFER AN OPINION REGARDING ALLEGEDLY SUGGESTIVE INTERVIEWING TECHNIQUES USED BY THE COMMONWEALTH OR BY FAILING TO VIEW THE UNEDITED VIDEOTAPES OF THE CHILD VICTIMS' PRE-TRIAL STATEMENTS BECAUSE THE TRIAL TESTIMONY OF THE CHILDREN ABUNDANTLY DEMONSTRATED THEIR CONTRADICTORY STATEMENTS AND HESITANCY TO ACCUSE THE DEFENDANT OF ABUSING THEM.

The Motion Judge ruled that trial counsel committed error by failing to obtain or effectively utilize videotapes of the children's statements made in preparation for grand jury and trial proceedings. The Judge found that the videotapes would have supported the Defendant's argument that the Commonwealth employed improper interviewing techniques to question the children. Likewise, the Judge found that counsel deprived the Defendant of the assistance of an expert witness who could have explained to the jury the shortcomings of the interview techniques, as well as to "counterbalance the critically important and powerful opinions given by the Commonwealth's experts on the truth telling of child sexual abuse victims." (Dec. 33, 39; R.A. 123, 129).

The Commonwealth contends that the Motion Judge placed undue weight upon the relevancy of the

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testified that his personal problems and medication he had been taking interfered with his handling of the case); *Commonwealth* v. *Leate*, 361 Mass. 347 (1972) (holding that a defendant was not denied effective assistance of counsel even though his trial attorney was seventy-two years of age, with deficiencies of sight, hearing and memory).

videotapes. Those recorded interviews occurred only after the children had first disclosed being sexually assaulted by the Defendant. The Defendant's own expert witness, Dr. Bruck, testified that children's first disclosures are the most reliable. (MNT, Tr. 4/16). The transcript of the trial reveals the inconsistent and hesitant manner in which the children ultimately testified, forcing the prosecutor to ask, repeatedly in some instances, leading questions to elicit responses.[7] As such, the trial testimony of the children closely resembled the videotaped interview sessions of the children and the jurors observed first-hand the children's demeanor and assessed their credibility without the need for expert testimony to describe the alleged flaws in the pre-trial interviews.

The Motion Judge found that the edited versions of the videotapes omitted denials of wrongdoing by the Defendant and suggestive questions. (Dec. 7, R.A. 97). However, none of the tapes were shown to the jury or offered in evidence. He also found that the testimony of Dr. Bruck "would serve to explain the significance of the newly discovered videotapes." (Dec. 12, R.A. 102). The unedited videotapes show that the

[7] Trial counsel objected to the leading nature of the questioning of the children and appellate counsel raised the issue on direct appeal. The Appeals Court affirmed the Trial Judge's denial of counsel's objections. *Commonwealth v. Baran*, *supra* at 991.

interviewers engaged the children in conversation with varying degrees of response from the children. Although some prodding was done, and the children occasionally lapsed into "denial mode" when they became tired of the questioning, it is very apparent that these are typical conversations with three and four year olds in which the children had to be constantly refocused by the adults. This is particularly significant where, as here, the children were being asked to once again talk about a horrible experience, after having had already done so, in some cases, several times before. (MNT, Tr. 5/87-88).

Consequently, the relevancy of the videotapes to the jury was not nearly as significant as the Motion Judge found it to be because, as Dr. Bruck acknowledged, a child's first spontaneous statement, or the statement made prior to the opportunity for an adult to push or coach, is the most reliable testimony a child can give. (MNT, Tr. 4/16). The videotaped interviews were conducted after the children had made their initial disclosure and were not investigative interviews, but attempts to record the previously revealed disclosure(s). (MNT, Tr. 5/88). Furthermore, unlike adults who are able to reduce a statement to writing and then be cross-examined with the content of the document, pre-school-age children cannot be cross-examined with videotapes to demonstrate inconsistent

statements. However, where the trial demeanor of the child witness mirrors that displayed on the videotape, complete with asserted lapses of memory and even denials of abuse, the Defendant need not have resorted to publishing a videotape that generally repeats what the jurors have already observed in the courtroom.

Examples of the children's testimony that duplicated their videotaped interviews can be found in the testimony of four of the six children.[8] Boys C and D often resorted to simply nodding their heads in response to questions, thereby causing the prosecutor to ask leading questions in an effort to elicit answers from the boys. (Tr. 5/41-44, 54-57). Examples of witnesses initially denying either being abused or observing the Defendant abusing other children, and then affirming the fact of abuse, include Boy D first affirmatively nodding when asked if the Defendant touched Boy C, then not responding when asked where Boy C was touched, and then, after several questions, pointing to his own groin. (Tr. 5/57). Girl E had to be asked four times where the Defendant touched her before she provided a response, and she then remained

[8] The Commonwealth's case commenced on an ominous note when Boy A, the first child witness to appear before the jury, failed to offer any incriminating evidence and answered very few of the prosecutor's questions. (Tr. 4/99-108). The Trial Judge subsequently entered required findings of not guilty on all indictments naming Boy A as a victim.

mute for another four questions when asked if he touched her in another place on her body. (Tr. 6/30). Girl F initially refused to affirm to tell the truth and she told the court that she would not testify about "what really happened" because she "didn't like it." (Tr. 6/47-48). The prosecutor's efforts to make the child comfortable failed and the court permitted the witness to be excused for a lunch break. (Tr. 6/54). After having lunch at her grandmother's house, Girl F returned to the witness stand, immediately nodded approvingly when asked to tell what happened, and then denied ever being touched by the Defendant. (Tr. 6/85-86). Only after being given an anatomically correct doll did Girl F describe how the Defendant assaulted her. (Tr. 6/87).

The children's live appearance before the jury left little need for trial counsel to resort to the videotapes to expose any perceived weaknesses in their testimony. The trial evidence also revealed that four of the children had made their initial disclosure of abuse to their parents after the parent first questioned them about being touched. Boy A, while being bathed by his mother, pulled on his penis, which caused a bloody discharge. When asked if anyone touched him, he said the Defendant had. This was the first disclosure of sexual abuse by the Defendant. (Tr. 4/160-161). Mother B asked Girl B if the

Defendant ever "touched her funny." (Tr. 4/132-133). Mother F had a conversation with Girl F about "some things that happened to her" at ECDC and Girl E said that the Defendant touched her vagina. (Tr. 6/93). Likewise, Mother E asked Girl E if anybody ever touched her and the girl replied that the Defendant had touched her. (Tr. 6/39). The other two children gave spontaneous disclosures without explicit prompting. Boy C attended a puppet show describing good touch and bad touch and he drew a picture of a happy face, which he said was "daddy," and a sad face, which he said was the Defendant. At subsequent sessions with Patricia Palumbo of the Department of Social Services he gave additional disclosures of abuse. (Tr. 5/74-75). Boy D exhibited odd behavior at home, including removing all of his clothes and refusing to discuss what he had done at day care. One day he blurted out that the Defendant had "pepeed in somebody's face" and had touched Boy D's penis. (Tr. 5/79).

The failure by trial counsel to retain an expert witness to highlight the allegedly suggestive interview techniques employed by the Commonwealth or to publish the videotapes to the jury to impeach the credibility of the children did not deprive the Defendant of a substantial ground of defense because counsel brought these perceived weaknesses in the Commonwealth's case to the jury's attention. As the Appeals Court noted,

the relevance of the fresh complaint testimony became evident "in light of the various attempts by the defendant's trial counsel to insinuate by questioning and argument that the testimony of the victims had been influenced by parents, social workers and members of the prosecution team." *Commonwealth v. Baran*, 21 Mass. App. Ct. at 991. Therefore, because trial counsel's efforts to impeach the credibility of the children's accusations did not go unnoticed by the Appeals Court upon review of the trial transcript, it cannot be argued that counsel's efforts, if not stellar, were ineffective.

II. THE ADMISSION OF EXPERT TESTIMONY DID NOT CREATE A SUBSTANTIAL RISK OF A MISCARRIAGE OF JUSTICE BECAUSE THE COMMONWEALTH'S CASE DID NOT RELY SOLELY UPON THE CREDIBILITY OF THE CHILDREN.

The Motion Judge found that the testimony of the expert witnesses improperly rendered their opinion as to the general veracity of sexually abused children. (Dec. 49, R.A. 139). The Commonwealth contends that the testimony did not vouch for the children's credibility, but instead described how a child psychologist assesses child complaints of sexual abuse In the alternative, even if the testimony improperly vouched for the children's credibility, its admission did not create a substantial risk of a miscarriage of justice because the Commonwealth's case featured additional evidence that incriminated the Defendant.

The Supreme Judicial Court recognized in 1989 that child victims of sexual assault present special challenges for jurors hearing their testimony and assessing their credibility, and therefore expert opinion is relevant and helpful to jurors.

> Other courts have uniformly allowed expert testimony on the typical symptoms of sexually abused children because the information is beyond the common knowledge of jurors and of assistance in assessing a victim witness's testimony and credibility. "While jurors may be capable of personalizing the emotions of victims of physical assault generally, and of assessing witness credibility accordingly, tensions unique to the trauma experienced by a child sexually abused by a family member have remained largely unknown to the public. As the expert's testimony demonstrates the routine indicia of witness reliability -- consistency, willingness to aid the prosecution, straightforward rendition of the facts -- may, for good reason, be lacking. As a result jurors may impose standards of normalcy on child victim/witnesses who consistently respond in distinctly abnormal fashion."

Commonwealth v. *Dockham*, 405 Mass. 618, 630 (1989), quoting *State* v. *Middleton*, 294 Or. 427, 440 (1983) (Roberts, J., concurring).

> It is within the trial judge's discretion, subject to proper limiting instructions, to admit expert testimony on the general behavioral characteristics of sexually abused children. See *Commonwealth* v. *Dockham*, 405 Mass. at 627-630. The proffered rationale is that absent counseling with respect to such characteristics, juries might unfairly impose standards of normalcy on child victims who, because of their experiences, were likely to act abnormally. "The routine indicia of witness reliability -- consistency, willingness to aid the prosecution, straightforward rendition of the facts -- may, for good reason, be lacking." *Id.* at 629-630.

Commonwealth v. *DeLonely*, 59 Mass. App. Ct. 47, 54 (2003).

Subsequent to the Supreme Judicial Court's decision in *Dockham*, the Appeals Court ruled that, "[w]hile testimony regarding general behavioral characteristics of abused children is permitted, a linking of the generalized opinion to the experience of the actual child witness is impermissible vouching." *Id.* at 55.

Ms. Satullo and Dr. King offered brief testimony[9] regarding their role in the investigation of the matter. Both witnesses, one a psychotherapist and the other a child psychiatrist, testified they had met Girl B, and Ms. Satullo had met Boy A, but neither testified to having any contact with any of the other four child victims. Ms. Satullo, who interviewed Girl B for the District Attorney's office, (Tr. 5/139), described symptoms of child sexual abuse and answered a hypothetical question posed by the prosecutor. (Tr. 5/146-147). She testified that it would be significant for a child to make a report of sexual abuse and to repeat the story continuously because for children of very young age "in order to repeat a story and to tell the details again, the same needs to be a true story. That's one of the things we look for often with children is a story that holds up over time with the

[9] Ms. Satullo's testimony spanned twenty-three pages of trial transcript, (Tr. 5/135-148; 6/2-12), while Dr. King's testimony spanned only eleven pages. (Tr. 6/106-117).

same facts. It's hard enough for adults to repeat a story with details. It really is impossible for a child to do that." (Tr. 5/148). The Trial Judge immediately instructed the jurors that expert witnesses are not permitted to comment upon the testimony of other witnesses and that assessing the credibility of a witness is "exclusively the province of jurors." (Tr. 5/151).

Regarding Dr. King, her testimony primarily discussed her opinion that Girl B had been emotionally traumatized. Dr. King had seen Girl B fifteen times since October of 1984. (Tr. 6/107). She relied upon her psychiatric evaluation of her to form this opinion, which was largely based upon the history provided by the child and mother and her observations of the child's behavior. (Tr. 6/110). The only comparison the doctor made to symptoms commonly exhibited by child sexual assault victims was Girl B's bedwetting. (Tr. 6/113). Otherwise, the doctor's testimony described the significance she attached to Girl B's recurrent nightmares, in which her hands were cut off by a witch, and her playtime, in which Girl B claimed that her legs were a tunnel into which cars entered and crashed. (Tr. 6/113-114). Dr. King explained that children communicate through their play, which is a form of language for them. (Tr. 6/108).

Ms. Satullo testified to symptoms of child sexual abuse without making comparisons to Girl B. Although her choice of words - the repetition of a "true story" - may have been unfortunate, she explained her answer in terms that were neither profound nor obscure, and are commonly used by attorneys to argue the reliability of witnesses' memories and testimony. Dr. King opined that Girl B suffered emotional trauma and she was entitled to explain the basis of her opinion. As such, it was proper for her to identify symptoms of trauma that she recognized in Girl B's behavior and to explain their significance to the jury.

Furthermore, the Trial Judge's instructions to the jury, both after Ms. Satullo's testimony and in his final charge, properly explained the proper function of expert testimony. The instructions specifically stated that expert opinion does not extend to an opinion whether a particular witness is telling the truth. (Tr. 5/150-151; 8/82). "Such limiting instructions safeguarded the jury's proper use of [Ms. Satullo's and Dr. King's] expert testimony." *Commonwealth* v. *Dockham*, 405 Mass. at 629.

The Motion Judge held that the expert opinion testimony should have been excluded and the error was not harmless. (Dec. 51, R.A. 141). However, because trial counsel did not object to the evidence, the proper standard of review is whether the error

constituted a substantial risk of a miscarriage of justice. *Commonwealth v. Perkins*, 39 Mass. App. Ct. 557, 584 (1995). Such a standard has been met where the complainants' allegations were the ***only*** evidence against the defendant. *Id.* See also *Commonwealth v. Federico*, 425 Mass. 844, 853 (1997).

Here, by contrast, the Commonwealth's evidence consisted of more than just the mere allegations of the children. For example, the Commonwealth proved that the Defendant was the only male staff worker at ECDC in 1984 and that he was the only employee named Bernie or Bernard. (Tr. 5/132-133). The Defendant had been alone with children at the day car center, (Tr. 3/70, 72, 74-75, 76, 108), and he admitted this fact in his own testimony, as well as the fact that he brought children from the playground to the bathroom. (Tr. 7/143-149). Furthermore, ECDC had occasions to reprimand him for being nowhere to be found. (Tr. 4/30). Dr. Sheeley testified that Girl B's vaginal injuries were consistent with full penetration. (Tr. 6/124-125). Furthermore, several children exhibited behavior that suggested that they had been traumatized in a manner consistent with sexual abuse. Girl B experienced bedwetting and clingy behavior. (Tr. 4/143). Boy C cried at night, did not want to go to school, and also clung to his mother. (Tr. 5/73). Boy D removed all of his clothes when going to the bathroom

and played with his penis when watching television. (Tr. 5/78). Boys C and D corroborated each other's testimony by verifying that they were together when the Defendant abused Boy C. (Tr. 5/42, 55-57, 60). Therefore, the strength of the Commonwealth's case negates a finding of a substantial risk of a miscarriage of justice.[10]

III. TRIAL COUNSEL EFFECTIVELY USED THE COMMONWEALTH'S EVIDENCE THAT ONE ALLEGED VICTIM HAD CONTRACTED GONORRHEA, THAT THE DEFENDANT TESTED NEGATIVE FOR THE DISEASE, AND THAT NO OTHER CHILD HAD CONTRACTED GONORRHEA TO ARGUE THAT THE DEFENDANT COULD NOT HAVE ABUSED THE CHILDREN.

The Motion Judge found that trial counsel's failure to attempt to preclude the Commonwealth from introducing evidence that Boy A had tested positive for

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[10] The Motion Judge also faulted trial counsel for failing to investigate a notation in Dr. Sheeley's medical report of her examination of Girl E stating that the child complained of being assaulted in a similar manner by a man named "Chino" in a motel on or about the Fourth of July of 1984, some three months prior to her disclosure of abuse by the Defendant. (Dec. 53, R.A. 143). The Commonwealth contends that this evidence, which revealed that Girl E was able to distinguish between her assailants, to identify the separate locations of the abuse, and to recall the specific date of the prior abuse, is as much of a "two-edged sword" as were the nine additional Department of Social Services reports of children who also claimed to have been abused by the Defendant, but not prosecuted by the Commonwealth. (Dec. 23, n.25, R.A. 113). Although the Defendant could have impeached Girl E with the fact that another person had assaulted her, and therefore supported a theory that the Defendant was being accused of a crime committed by someone else, such a strategy ran the equally high risk that the jury would find Girl E to be a credible witness based upon her ability to recall and describe incidents of past abuse.

gonorrhea, and his subsequent failure to move to strike the evidence after the trial judge entered required findings of not guilty on the indictments relating to Boy A, constituted ineffective assistance of counsel. (Dec. 59, R.A. 149). The Judge's ruling focuses solely on the lack of relevance to the Defendant's guilt that this evidence offered to the Commonwealth, while ignoring the very real value that it posed to his defense. The evidence regarding gonorrhea afforded the Defendant two separate, forceful arguments in his defense.

First, the failure of the Defendant to have the disease demonstrated not only the unlikelihood that the Defendant was the source of Boy A's disease (and thus the abuser) but, even more importantly, it strongly suggested that it was not the Defendant but rather someone else who had abused Boy A. In his closing argument, trial counsel highlighted the ridiculousness of the Commonwealth's logic concerning the gonorrhea. (Tr. 8/20). He explained to the jury that the Commonwealth wanted them to "believe that since his tests were negative he must be the guy that gave [Boy A] gonorrhea. Because his tests were negative." (Tr. 8/20). As counsel tactfully argued, the logic of this argument escaped common sense. (Tr. 8/20). Trial counsel stressed to the jury that the Commonwealth presented absolutely no evidence that the Defendant had

gonorrhea between January and October of 1984 or at any time prior. (Tr. 8/20). In fact, counsel made a focused argument that the evidence pointed to the contrary, that the Defendant, upon his second arrest, tested ***negative*** for gonorrhea. (Tr. 8/20).

This argument was underscored by the fact that none of the other children tested positive for the disease. In fact, in his closing argument, trial counsel brought to the jury's attention that, according to two doctors who testified for the Commonwealth, the probability of contracting gonorrhea from an infected person was either thirty to eighty percent or forty to sixty percent. (Tr. 8/36-37). Using this testimony, that he neither objected to nor asked to be stricken from the record, counsel permitted himself to argue to the jury that given those two probabilities, "there would be very little chance that only one person in six is going to come out with" gonorrhea and that "if Bernie Baran had gonorrhea and if he did all the terrible things he supposedly did" why was there "only one case of gonorrhea?" (Tr. 8/37).

Secondly, this factual scenario - that one of the children has the disease while neither the Defendant nor any of the other children did - undercut the whole theory of the Commonwealth's accusations against the Defendant: that the same person had abused all of the children similarly, and under similar circumstances.

This use of the gonorrhea evidence was, in fact, effectively seized upon by trial counsel and argued to the jury. Trial counsel brought it to the jury's attention in his opening statement, (Tr. 3/47-48), reinforced its significance through cross-examination of Commonwealth witnesses, (Tr. 5/91-92), and forcefully argued its support of the Defendant's innocence in his closing argument. (Tr. 8/20-21).

The Motion Judge further held that trial counsel compounded the prejudice to the Defendant by introducing the issue of his sexual orientation into the trial, thereby "playing into the hand of the Commonwealth and its witness Dr. Ross and facilitating the appearance of an evidentiary link between the issue of gonorrhea and the defendant, through homosexuality." (Dec. 60, R.A. 150). To the contrary, this evidence was helpful to the defendant and it was used effectively by trial counsel in arguing on behalf of his client's innocence. This evidence, in the context of how the allegations against the Defendant first surfaced and by whom, provided the Defendant with a plausible explanation to a very real and vexing set of questions that any reasonable jury would have to consider: How could something so wrong as a false accusation have been made, and who would do such a thing? Not only was it relevant and helpful for trial counsel to elicit testimony about the bias of Boy A's

family against the Defendant, but it was equally necessary for him to elicit testimony about the reason for that bias - the Defendant's homosexuality - in order to effectively present the jury with a very tangible reason to consider that the Defendant was an innocent man wrongly accused by people who did not agree with his lifestyle.[11]

IV. THE DEFENDANT WAS NOT UNFAIRLY PREJUDICED BF THE ADMISSION OF FRESH COMPLAINT TESTIMONY.

The Motion Judge found that trial counsel provided ineffective assistance because he failed to request the Trial Judge to provide a limiting instruction regarding the proper use of fresh complaint evidence contemporaneously with the testimony of each fresh complaint witness. (Dec. 66-67, R.A. 156-157). The Trial Judge gave the jury a limiting instruction twice

[11] In his closing argument, trial counsel, relying upon ECDC records, mentioned the Defendant's homosexuality as a reason why the common-law husband of Boy A's mother had a bias against the Defendant and would have falsely accused him of abusing the child. (Tr. 8/21). The Motion Judge, although cognizant of counsel's effort, nonetheless found him to be ineffective by failing to engage the Commonwealth in discovery proceedings that would have revealed a notation in a police report that the mother of Boy A had made specific homophobic statements regarding the Defendant. (Dec. 63, R.A. 153). Although this fact would have been relevant for impeaching Mother A, counsel's failure to discover the police report did not deprive the Defendant of a substantial ground of defense. Furthermore, this is the only evidence of any homophobic bias within ECDC at the time of the abuse, thus diminishing the Defendant's claim that he was a victim of rampant homophobia that pervaded the community and deprived him of a fair trial.

during the trial: once after the direct examination of Mother B, (Tr. 4/156-158), and again in his final charge. (Tr. 8/83-84). Instead of repeating the full limiting instruction after the testimony of subsequent fresh complaint witnesses, the Trial Judge reminded the jury of his prior instruction. The Motion Judge also found that the full instruction given by the Trial Judge did not sufficiently limit use of fresh complaint evidence to corroborating the victims' testimony, but impermissibly permitted the jury to use it as substantive evidence. (Dec. 67-68, R.A. 157-158). Further, the Motion Judge found that the scope of several fresh complaint witnesses' testimony exceeded the testimony of the child victims. (Dec. 68-69, R.A. 158-159). The Commonwealth contends that the Motion Judge abused his discretion by ruling upon issues that had been previously argued and decided on the Defendant's direct appeal.

At the time of the Defendant's trial and initial appeal in 1985, the doctrine of fresh complaint had already prohibited the introduction of facts that exceeded the scope of the victim's testimony. The Supreme Judicial Court held in 1976 that fresh complaint evidence could not include statements not included in the victim's testimony: "Our rule does not involve an unfair loading of the case against the defendant. He is entitled to have it impressed on the

jury that the testimony may be used for corroborative purposes only; it cannot be used as hearsay to fill gaps in the prosecution's case. Usually it will be merely repetitive of the victim's testimony at the trial." *Commonwealth* v. *Bailey*, 370 Mass. 388, 396 (1976) (citations omitted).

Appellate counsel argued that the Commonwealth improperly called sixteen fresh complaint witnesses in an effort to accumulate "unjustified, unnecessary and non-probative" evidence of guilt. (Def. Br. 76). Appellate counsel stated in his summary of the argument that the Defendant's burden at trial was made heavier by his inability to cross-examine these witnesses' testimony that described allegations "sometimes in greater detail than [that] supplied by the victims themselves." (Def. Br. 18). The Appeals Court, citing to *Commonwealth* v. *Bailey*, *supra*, denied the Defendant's challenge to the fresh complaint evidence by holding that the Trial Judge gave proper limiting instructions and "wisely refused to allow more than one witness to testify to the content of any one complaint." *Commonwealth* v. *Baran*, *supra* at 991.

The Motion Judge found that the Trial Judge's limiting instruction "could easily be viewed by the jury as permitting [the fresh complaint evidence's] substantive use" because the judge instructed the jury "that the testimony 'is available for you to use as you

see fit.'" (Dec. 67-68, R.A. 157-158). A complete reading of the relevant portion of the limiting instructions reveals that the Trial Judge explicitly told the jury that fresh complaint evidence could not be used as substantive proof of the crimes. First, during trial, the court stated as follows:

> Here's the important thing to remember about Fresh Complaint. There are two points I want to make. ***Fresh Complaint is not positive evidence that the assault took place because repeating a story or telling a story more than once doesn't make it more so than not.*** It simply is offered to corroborate for your use in whether you believe, whether you accept the testimony of the person who actually says they experienced the sexual assault. So, it's for that purpose. If you accept the testimony of Fresh Complaint then you may consider such testimony for whatever light you feel it provides on the alleged victim's truthfulness on the witness stand here, or in the area of the witness stand. ***But, again, you may not take it as direct proof of the event that occurred as - or described in the Fresh Complaint.*** (Tr. 4/157-158) (emphasis added).

In its final charge, the court repeated its admonition limiting the use of fresh complaint evidence to corroborating the testimony of the victim:

> If you believe the testimony you've heard that Fresh Complaint was made in this case then in deciding how much credibility to give the alleged victim's testimony in this trial as to what happened, you may consider that the Fresh Complaint was made and also all the details of the Fresh Complaint that were related to you. ***But I instruct you that you may not consider the fact of Fresh Complaint as positive evidence that a sexual attack did, in fact, occur since the likelihood that any story is true is not increased just because it is repeated on occasion by the alleged victim.***

> So it's for you to say. If you accept the testimony of Fresh Complaint you may consider such testimony for whatever light you feel it provides on the victim's truthfulness on the witness stand in the courtroom in this trial. ***But again, you may not take it as direct proof that the events occurred as described.*** (Tr. 8/83-84) (emphasis added).

Furthermore, the Trial Judge's limiting instruction mid-trial also admonished the jury to ignore any details stated by the fresh complaint witness that were not included in the victim's testimony:

> Now, obviously, it follows then that if the person relating the Fresh Complaint states in detail that which wasn't stated by the alleged victim in the direct testimony then of course, that's not evidence of anything and you can't accept that detail which you find and you recall was not stated by the alleged victim in direct testimony. (Tr. 4/158).

Consequently, this Court can find now, as it did in 1986, that the Trial Judge's instructions were complete and correct.[12]

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[12] The Appeals Court's ruling that the Trial Judge gave proper limiting instructions also warrants the reversal of the Motion Judge's finding that trial counsel was ineffective by failing to request limiting instructions contemporaneous with the presentation of the evidence. "Proper instructions on the limited use to which fresh complaint evidence could be put were given at the conclusion of the testimony of the first fresh complaint witness, and the jury were reminded of those instructions on several occasions in the course of the Commonwealth's case." *Id.*

V. TRIAL COUNSEL'S WAIVER OF THE DEFENDANT'S RIGHT TO BE PROCEEDED AGAINST BY INDICTMENT IN THE MATTER OF BOY C DID NOT PREJUDICE THE DEFENDANT.

The Motion Judge found that trial counsel's failure to assert the Defendant's right to a probable cause hearing deprived the Defendant of the opportunity to discover the evidence against him. (Dec. 72, R.A. 162). The Commonwealth contends that the Defendant has failed to show any prejudice resulting from trial counsel's acquiescence to the filing of Boy C's District Attorney's complaints.

The Motion Judge's finding that trial counsel unreasonably forfeited the opportunity to discover flaws in the Commonwealth's case regarding Boy C fails to present any evidence overlooked or ignored by counsel as a result of his agreement to waive a probable cause hearing. He states that counsel should have sought the Child Abuse and Neglect Report prepared by the Department of Social Services as well as the unedited videotape of the child's interview. (Dec. 72, R.A. 162). However, the Defendant does not claim that the Commonwealth intentionally failed to provide Boy C's Child Abuse Report as part of discovery. Instead, he claims that counsel failed to make use of information in the report that allegedly supported a defense theory of suggestibility, which applies to all children, not just Boy C. (MNT, 204-206). Similarly, the allegation that counsel did not view an unedited

videotape of Boy C's interview, which contains information regarding additional perpetrators of sexual abuse upon the child, is also not isolated to Boy C's case. The Commonwealth contends that trial counsel's agreement to join Boy C's complaints for trial and to waive the right to a probable cause hearing did not prejudice the Defendant and that the Appeals Court's decision affirming the Trial Judge's order denying the motions for severance and particulars renders this claim moot.[13]

VI. THE DEFENDANT WAS NOT DEPRIVED OF A PUBLIC TRIAL.

The Motion Judge found that trial counsel failed to protect the Defendant's right to a public trial. (Dec. 72, R.A. 162). The Commonwealth contends that the procedure followed by the Trial Judge conformed to the requirements of *Waller v. Georgia*,[14] 467 U.S. 39

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[13] The Appeals Court found that the Defendant suffered no prejudice from the joinder of all indictments for trial, and it noted that the Commonwealth had provided full discovery to the Defendant and that the crimes occurred over a nine-month period of time. The Appeals Court thus found that the Trial Judge's denial of the motion for particulars did not deprive the Defendant of the opportunity to present an alibi defense. *Commonwealth v. Baran*, *supra* at 990.

[14] Holding that a court must meet four requirements before closing the courtroom: First, the party wishing to close the court must provide an overriding interest that is likely to be prejudiced; second, the closure shall not be any longer than is necessary to protect that interest; third, the judge must consider alternatives to closure that are reasonable; and finally, the judge must make findings that are adequate to support closure. *Waller v. Georgia*, 467 U.S. at 48.

(1984), and was therefore proper and did not violate the Defendant's rights.

While the record does not indicate that any party presented evidence of a "significant risk of psychological harm or trauma to the minor complainant if required to testify in open court," *Commonwealth v. Martin*, 417 Mass. 187, 195 (1994), *Waller* and its progeny do not preclude a judge from concluding so. To the contrary, a trial judge's "personal observations of the witnesses may also be valuable." *Id.*, 417 Mass. at 195.

The Trial Judge was not required to rely on expert testimony before making his decision, but rather he could be satisfied by his personal observations of the child witnesses. *Commonwealth v. Dockham*, 405 Mass. at 623 (holding that a trial judge was not required to consult medical evidence before deciding that is was necessary to record the testimony of child witness outside the courtroom because testifying in open court would cause severe emotional and psychological trauma). The Trial Judge used his common sense and experience along with his observations of the child witnesses to conclude that the children, all under the age of five, testifying about being sexually abused, would suffer great psychological harm and or trauma if forced to testify in open court.

As to the duration prong, from the record and newspaper accounts it is clear that the closure was no longer than necessary. The Trial Judge did not close the courtroom from the onset of the trial, but rather closed the courtroom on January 25, 1985, the beginning of the fifth day of trial, when the first two child witnesses took the stand. (Appendix To Memorandum In Support Of Motion For New Trial, 211). On that day, the mother of a four-year-old boy testified "in open court" as to her son's behavior changes. *Id.* According to a Berkshire Eagle article dated January 29, 1985, the courtroom had been closed "to all but the jury and court officials for the testimony of the six young witnesses." *Id. at* 213.

Further, the record indicates that the courtroom was open on January 29, 1985, when the defense commenced its case in chief. On that day, trial counsel called Dolly Haywood to the stand as his fifth witness, whereupon the prosecutor objected because she had not been sequestered that day. (Tr. 7/58-59). In fact, on cross-examination Ms. Haywood admitted that she had seen four witnesses testify that day while she sat "in the front row with Mrs. Baran." (Tr.7/66). There was no mention of Ms. Haywood being permitted to remain in the closed court as a result of the closure decision following the competency hearing. The Trial Judge decided that when the children testified, the

courtroom was to be closed with the only exceptions being Mr. Baran's mother, brother and sister. (Comp. Hearing, 91). That the court was closed only to the extent absolutely necessary to protect the children is further evidenced by the stated intent of the Trial Judge. Prior to the resumption of the trial on January 23, 1985, the Motion Judge stated that the Defendant's mother, brother and sister would be present during the trial, "including portions which the courtroom is closed because children are testifying." (Tr. 3/2). This statement evidences the Judge's intent to close the courtroom "only for the duration of the testimony" of the children. *Commonwealth v. Martin*, 417 Mass. at 195.

As to the third prong of *Waller*, prior to the testimony of the child witnesses on January 24, 1985, the Trial Judge, trial counsel and the prosecutor engaged in a conversation concerning the need to partition the courtroom through the use of a "screen" during the testimony of the child witnesses. (Tr. 4/17-20). Trial counsel objected to the use of such screens to partition the court, which is reflected by the record. (Tr. 4/19). Furthermore, in the event that the courtroom was partitioned, the Judge suggested the need for sketches or photos of the partition for purposes of the record. (Tr. 4/20). The use of partitions to protect the child witnesses was a

reasonable alternative that the court considered, thus meeting the third requirement of *Waller*.

Finally, although the Trial Judge, in his decision to close the court, did not make any particularized findings of fact supported by the record, this failure does not require the reversal of the Defendant's convictions. *U. S. v. Galloway*, 937 F.2d 542, 546 (10th Cir. 1991) (holding that the failure to make findings at the time of a partial closure did not require reversal of defendant's convictions for kidnapping for purposes of sexual abuse and extortion). As in *Galloway*, the courtroom was only partially closed, as the Defendant's relatives were permitted to remain in the court during the testimony of the children. Where, as here, the closure is narrowly drawn, "the failure to make record findings in and of itself does not require a new trial." *Id.* at 547.

Further, the lack of findings prevents the determination that the Defendant's right to a public trial was outweighed by interests advanced by the Commonwealth in protecting the child witnesses. *Id.* Granting the Defendant "a new trial under these circumstances without making that determination would constitute a windfall and would not be in the public interest." *Id. Cf. Waller v. Georgia, supra*, citing *Goldberg v. United States*, 425 U.S. 94, 96 (1976) (holding that the Court should not vacate the

petitioner's conviction and order a new trial because the petitioner's rights could be protected by remand and an inquiry consistent with the Court's opinion). As in *Galloway*, this is especially true here since the Defendant objected generally to the order of the partial closure, but failed to object to the lack of findings by the Trial Judge. *Galloway*, 937 F.2d at 547. When the Trial Judge discussed the use of the screens in the courtroom, trial counsel objected to the partitioning, but made no mention nor objection concerning the Trial Judge's lack of findings. (Tr. 4/19).

As such, "where the constitutional deficiency is the absence of findings to support a trial order," the appropriate remedy is not a new trial, but rather for the Court to "either remand for factfinding, or examine the record itself, before deciding whether the order measured up to constitutional standards." *Globe Newspaper*, 457 U.S. at 622. Although the Trial Judge was deficient in making adequate findings on the record, this deficiency can be properly remedied by examining the record and finding that the Defendant was not deprived of a public trial. *Galloway*, 937 F.2d at 547.

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Honorable Court reverse the Order of the Superior Court and affirm the Defendant's convictions.

RESPECTFULLY SUBMITTED,

COMMONWEALTH OF MASSACHUSETTS

By: _____
DAVID F. CAPELESS
DISTRICT ATTORNEY

By: _____
Joseph A. Pieropan
Assistant District Attorney
Berkshire District Attorney
7 North Street, P.O. Box 1969
Pittsfield, MA 01202-1969
Tel. (413) 443-5951
BBO# 550420

Date: August 25, 2007

CERTIFICATION OF COMPLIANCE

I, Joseph A. Pieropan, do hereby certify that I have complied with the Rules of Court that pertain to the filing of briefs as set forth in Rule 16(k) of the Massachusetts Rules of Appellate Procedure.

Signed under pain and penalty of perjury, this 28 day, _____ of August, 2007.

Respectfully submitted,

_____
Joseph A. Pieropan
Assistant District Attorney

ADDENDUM