

COMMONWEALTH OF KENTUCKY  
SUPREME COURT OF KENTUCKY  
CASE NO. 2012-SC-591-D  
(2011-CA-452)

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SUPREME COURT

(ON APPEAL FROM MADISON CIRCUIT COURT,  
CASE NO. 09-CR-258)

SAMUEL CRABTREE

APPELLANT

v.

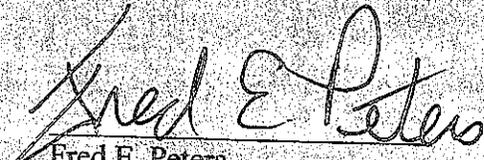
BRIEF FOR THE APPELLANT  
SAMUEL CRABTREE

COMMONWEALTH OF KENTUCKY

APPELLEE

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Respectfully submitted,

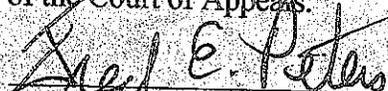


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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the Appellant's brief has been served on all parties by mailing or hand-delivering same this the 17<sup>th</sup> day of June, 2013 to Hon. William G. Clouse, Jr., Judge, Madison Circuit Court, Division I, 101 W. Main St., Richmond, KY 40475, and Hon. Jennifer Smith, Madison Commonwealth Attorney's Office, 101 W. Main St., #201, and Hon. Jack Conway, Attorney General, Capitol Suite #118, 700 Capitol Avenue, Frankfort, Kentucky 40601, while the original and 10 copies have been filed with the Clerk of the Supreme Court. I further certify that the record has not been checked out from the office of the Clerk of the Court of Appeals.

BY:

  
Fred E. Peters

## **INTRODUCTION**

The Appellant is before the Court to appeal his conviction on January 26, 2011 and multiple rulings of the Trial Court at trial, including the failure to give a direct verdict based on insufficient evidence of knowing possession, the failure to instruct the jury on his defense, the refusal to allow character evidence offered by the Appellant, and the submission of a pure question of law to the jury, namely statutory interpretation.

**STATEMENT CONCERNING ORAL ARGUMENT**

The Appellant believes that an oral argument would be helpful to the Court in deciding the issues of this case. This case presents not one, but two cases of first impression in the Commonwealth, and as such the Appellant requests the opportunity to present its position directly to the Court and to address any issues it may not have anticipated, due to the lack of caselaw on these issues.

**TABLE OF POINTS AND AUTHORITIES**

Introduction.....2  
Statement Concerning Oral Argument.....3  
Table of Points and Authorities.....4-5  
Statement of the Case.....6-12  
Argument.....13-25

I. *The Legislature has Amended KRS 531.355 to Criminalize the Intentional Viewing of Child Pornography, Proving that Mere Viewing was not Criminalized under the Statute in Effect at the Time of this Trial* .....13-14

a. Blackburn v. The Maxwell Co., 305 S.W.2d 112 (Ky. 1957).....14  
b. Louisville Country Club v. Gray, 178 F. Supp. 915, 918 (W.D. Ky. 1959),  
aff'd, 285 F.2d 532 (6th Cir. 1960).....14  
c. Whitley County Board of Education v. Meadors, 444 S.W.2d 890 (Ky. 1969).....14  
d. Brown v. Sammons, 743 S.W.2d 23, 24 (Ky. 1988).....14  
e. Woods v. Commonwealth, 142 S.W.3d 24, 41 (Ky. 2004).....14  
f. 73 Am.Jur.2d Statutes § 65 (2001).....14  
g. City of Somerset v. Bell, 156 S.W.3d 321, 326 (Ky. Ct. App. 2005).....14  
h. Eversole v. Eversole, 185 S.W. 487, 489 (Ky. 1916).....14

II. *Files Located in the Thumbcache of a Computer and Files Which were Never Truly Downloaded to the Computer Cannot Constitute a Valid Basis for a Conviction of Knowing Possession of the Material in Said Files*.....15-22

a. KRS 531.335.....16  
b. Commonwealth v. Love, 334 S.W.3d 92 (Ky. 2011).....16  
c. US v. Flyer, 2011 WL 383967 (9<sup>th</sup> Cir. 2011), citing US v. Romm, 455 F.3d 990 (9<sup>th</sup> Cir. 2006), United States v. Kuchinski, 469 F.3d 853 (9th Cir. 2006), and United States v. Navrestad, 66 M.J. 262 (C.A.A.F. 2008).....16  
d. Aguilar-Turcios v. Holder, 691 F.3d 1025 (9th Cir. 2012).....18  
e. US v. Keefer, 405 Fed. Appx. 955 (6th Cir. 2010).....18  
f. United States v. Keefer, 490 Fed. Appx. 797 (6th Cir. Ohio 2012).....19  
g. State v. Barger, 233 Or App 621, 226 P3d 718 (2010).....19  
h. United States v. Moreland, 665 F.3d 137 (5th Cir. Miss. 2011).....19  
i. United States v. Dobbs, 629 F.3d 1199 (10th Cir. Okla. 2011).....20  
j. United States v. Woods, 730 F. Supp. 2d 1354, 1368 (S.D. Ga. 2010) ...21  
k. United States v. Willis, 2008 CCA LEXIS 199 (N-M.C.C.A. May 27, 2008) .....21  
l. Worden v. State, 213 P.3d 144, 147 (Alaska Ct. App. 2009).....21  
m. Barton v. State, 286 Ga. App. 49 (Ga. Ct. App. 2007).....21  
n. Osborne v. Ohio, 495 U.S. 103 (U.S. 1990).....21

III.	<i>The Trial Court Erred when it Refused to Instruct the Jury on the Defense of Temporary Innocent Possession.....</i>	<i>22-27</i>
	a. <u>Skaggs v. Commonwealth</u> , 2009 Ky. Unpub. LEXIS 160 (Ky. 2009).....	23
	b. <u>Taylor v. Commonwealth</u> , 995 S.W.2d 355, 360 (Ky. 1999), citing <u>Kelly v. Commonwealth</u> , 267 S.W.2d 536, 539 (Ky. 1954).....	23
	c. CR 9.54(1).....	23
	d. <u>Thomas v. Commonwealth</u> , 170 S.W.3d 343 (Ky. 2005).....	23
	e. <u>Commonwealth v. Adkins</u> , 331 S.W.3d 260 (Ky. 2011).....	23
	f. KRS 218A.220.....	24
	g. KRS 218A.1412 – 218A.1417.....	24
	h. <u>Nichols v. Commonwealth</u> , 142 S.W.3d 683 (Ky. 2004).....	24
	i. <u>Adams v. State</u> , 706 P.2d 1183.....	24
	j. <u>Jordan v. State</u> , 819 P.2d 39 (Alaska Ct. App. 1991).....	24
	k. <u>State v. Thornton</u> , 557 S.W.2d 1 (Mo. Ct. App. 1977).....	24
	l. <u>Moreau v. State</u> , 588 P.2d 275 (Alaska 1978).....	25
	m. <u>Kohler v. Commonwealth</u> , 492 S.W.2d 198 (Ky.App. 1973).....	25
IV.	<i>The Circuit Court Erroneously Assigned the Jury a Question of Statutory Interpretation, a Pure Question of Law, which was a Key Issue at Trial..</i>	<i>27-29</i>
	a. KRS 531.335.....	27
	b. <u>Daniels v. CDB Bell, LLC</u> , 300 S.W.3d 204 (Ky. Ct. App. 2009).....	27
	c. <u>Kenton County Fiscal Court v. Elfers</u> , 981 S.W.2d 553, 556 (Ky. App. 1998).....	28
	d. <u>Masonic Widows &amp; Orphans Home &amp; Infirmary v. Louisville</u> , 309 Ky. 532 (Ky. 1948).....	28
V.	<i>Mr. Crabtree’s Character for Truthfulness was Attacked by the Prosecution Throughout the Trial, and his Character Evidence Should have been Admitted to Rebut Accusations of his Statement to Law Enforcement Being False..</i>	<i>29-32</i>
	a. <u>Partin v. Commonwealth</u> , 918 S.W.2d 219, 222 (Ky. 1996) (overruled on other grounds by <u>Chestnut v. Commonwealth</u> , 250 S.W.3d 288 (Ky. 2008)).....	29
	b. KRE 404(a)(1).....	29
	c. <u>Fleming v. Commonwealth</u> , 419 S.W.2d 754, 755 (Ky. 1967).....	30
	d. <u>Clark v. Commonwealth</u> , 165 Ky. 472 (Ky. 1915).....	30
VI.	<i>Cumulative Error.....</i>	<i>32-33</i>
	a. <u>Funk v. Commonwealth</u> , 842 S.W.2d 476 (Ky. 1992).....	33

## STATEMENT OF THE CASE

In the Fall of 2008, the Appellant, Samuel Crabtree, was a student at Eastern Kentucky University. Mr. Crabtree had previously suffered multiple concussions playing football and in car accidents. As a result, he suffered cognitive impairment and was allowed accommodations by ECU, including being allowed to answer questions in writing and being given additional time on tests.<sup>1</sup> Mr. Crabtree's friends and family testified that since he suffered the concussions, his decision-making process was abnormally slow.<sup>2</sup>

In October of 2008, Mr. Crabtree was having problems with his laptop computer running too slowly. A friend recommended that he take his computer to a company called Resnet, a company affiliated with ECU that repairs computers for students, to have it screened for viruses. While working on the computer a Resnet employee saw filenames which she deemed to be suspicious.<sup>3</sup> Resnet then contacted the ECU police, and Ofc. Mark McKinney responded to the call. Ofc. McKinney declined to inspect the material himself, confiscated the computer, and sent it to the KSP lab in Frankfort.<sup>4</sup>

After the computer was sent to the lab, Mr. Crabtree showed up at Resnet to collect his laptop and was directed to the ECU Police. Sam immediately went to the ECU police department, where Det. Brandon Collins saw him sitting in the lobby. Sam agreed to talk to the detective about his laptop.<sup>5</sup> During the ensuing interrogation, the Appellant admitted to having downloaded shock videos from Limewire, an online peer-to-peer (P2P) file-sharing program, and that some of the material he saw could have been

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<sup>1</sup> Trial Transcript, Day 2, 9:24:55

<sup>2</sup> Trial Transcript, Day 2, 9:35:45

<sup>3</sup> Trial Transcript, Day 1, Disc 1, 11:37:50

<sup>4</sup> Ibid at 13:08:15

<sup>5</sup> Ibid, at 13:16:45

considered child pornography. He told the detective that he felt sick upon viewing the material, that he knew doing so was wrong, and that he attempted to delete the material from his computer,<sup>6</sup> though Sam's knowledge of computers is quite limited.

During the course of the trial and post-trial motions, the issue of the interpretation of this statement was raised several times. Most notably, during a hearing on the Appellant's Motion for a Bond Pending Appeal, the Circuit Court stated that it disagreed with the interpretation of the Appellant, and that the statement indicated that Mr. Crabtree only felt sick during the interview with Det. Collins,<sup>7</sup> which would lead to the conclusion that getting caught was the source of his sick feeling, rather than viewing the material. The Court further asserted that appellate courts should look at the statement and judge the content for itself.<sup>8</sup> The Appellant asks this Court to do the same, but also to review the testimony of Det. Collins, who interviewed Sam, concerning the substance of the confession. Det. Collins testified unequivocally that Sam said that he felt disgusted, embarrassed, and sick at the time he viewed the material,<sup>9</sup> and thus the sick feeling he expressed was not the product of being questioned by police, but rather the sick feeling he felt when he saw the offensive material, the same sick feeling that led him to immediately delete that same material.

The forensic examination of the computer was completed by Cynthia Fitch of the Kentucky State Police. Ms. Fitch found a functioning copy of the program Limewire on the computer. Limewire is a file-sharing program that allows its users to connect to each others' computers directly through the Limewire network and download files directly

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<sup>6</sup> Appellant's Statement, attached as Exhibit A.

<sup>7</sup> Hearing on Appeal Bond, March 9, 2011, at 14:26:55

<sup>8</sup> Ibid, at 14:28:35.

<sup>9</sup> Trial Transcript, Day 1, Disc 1, at 13:40:05.

from each others' hard drives.<sup>10</sup> It keeps no database where music, movies, and other material is stored. Files are given their names by the users, and the actual content cannot be known until it is downloaded and viewed.<sup>11</sup>

Downloads on Limewire can be done in masse, and the search engine that finds files to be downloaded lists the results of the search by the number of users on the network who have the file on the computer, and not based on the relevance of the result to the terms used in the search.<sup>12</sup> As Devin Gibbs, a former Limewire user, testified at trial, the most numerous images, i.e. those that appear most frequently at the top of the results list, are often pornographic videos, as these videos contain viruses, which spread throughout the system.<sup>13</sup> Mr. Gibbs testified that he had personally searched for popular music, such as Michael Jackson's Thriller, and received search results for files labeled as "16-year-old Blowjob" and other "ridiculous" results.<sup>14</sup> On top of that, as the Appellee's expert testified, the contents of the files do not always match.<sup>15</sup> In other words, since the filenames are attached by the users, rather than a central database, there are no controls in place to ensure that the label of a file and its actual contents match.

It should be noted that the Limewire site and network have since been taken down by the FCC for copyright infringement.

The examination of the Appellant's Limewire files led to five videos for which he was charged. Four of the videos were in the "Incomplete" file, as the download had been terminated prior to completion, while only one video, upon which Count 1 was based,

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<sup>10</sup> Trial Transcript Day 1, Disc 2, 14:27:00

<sup>11</sup> Trial Transcript, Day 1, Disc 2, 14:58:50

<sup>12</sup> Trial Transcript, Day 2, 9:38:05

<sup>13</sup> Ibid, 19:39:35

<sup>14</sup> Ibid, 19:39:05

<sup>15</sup> Trial Transcript, Day 1, Disc 2, 14:58:50

was found in the "Saved" folder, as a full, uninterrupted download.<sup>16</sup> The Appellee's expert testified that Limewire users can manually terminate such downloads, and that doing so would result in the file remaining in the Incomplete folder.<sup>17</sup> The Saved folder video, which served as the basis for Count 1, was a short clip that showed a vagina, but the age of the woman was impossible to determine. The jury would eventually agree that this video did not constitute child pornography and acquit the Appellant of the only count connected to the only file which had not been deleted or never fully downloaded. All the other videos were incomplete, interrupted downloads.

No forensic evidence from the computer or any other evidence was presented to show that Mr. Crabtree ever viewed any of the incomplete videos,<sup>18</sup> or any of the other material for which the Appellant was convicted, for that matter.<sup>19</sup> In fact, the KSP Report stated that it appears that the only video in the Saved file was ever viewed by Mr. Crabtree, and as mentioned previously, the jury found acquitted him of that count.

Further examination uncovered the images that form the basis of all of the still image charges against the Appellant in the so-called "thumbcache" file. When files are placed in a folder on the computer and that folder is opened and viewed only once even in thumbnail form, the computer automatically creates a copy of the thumbnail image and moves it to the thumbcache file. Even if the file is deleted immediately, the image remains in the hidden thumbcache. This process is done automatically by the computer without the knowledge and consent of users.<sup>20</sup> The pictures are copied to the thumbcache file as soon as the folder is open, regardless of whether or not the computer user actually

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<sup>16</sup> Trial Transcript, Day 1, Disc 2, 14:26:30

<sup>17</sup> Trial Transcript, Day 1, Disc 2, 16:16:45

<sup>18</sup> Trial Transcript, Day 1, Disc 2, 15:59:00

<sup>19</sup> Ibid, at 15:51:30

<sup>20</sup> Trial Transcript, Day 1, Disc 2, 15:50:55

clicked on any individual files to enlarge and view them. Likewise, one can receive any number of images in his or her thumbcache file from a single opening of a single folder, as it instantly saves all the thumbnail images in that folder as soon as it is opened.<sup>21</sup> As the Appellee's expert testified, it is entirely possible that one could have an enormous amount of such images in one's thumbcache drive as the result of opening a single folder a single time,<sup>22</sup> briefly viewing content that one finds sickening, then promptly deleting the material.<sup>23</sup>

As Ms. Fitch testified, the thumbcache file is a "hidden" file, and most users are unaware that it exists at all.<sup>24</sup> Testimony at trial showed that the Appellant was inexperienced with computers,<sup>25</sup> and furthermore, Ms Fitch stated explicitly that there was no evidence that Mr. Crabtree ever viewed the actual thumbcache files or that he even had the capacity to do so.<sup>26</sup> Ms. Fitch further testified that special software is needed to view the Thumbcache files, and that Sam did not have that software on his computer.

The forensic investigation revealed nothing more than incomplete videos from interrupted downloads, one video that was later determined not to be child pornography, and thumbcache files, which were never themselves viewed by the Appellant. When asked if she had ever participated in a case where the forensic evidence consisted mainly of thumbcache files and not actual images, she stated that while thumbcache files have been a "part of" other prosecutions, "we usually have images to go with it."<sup>27</sup> Ms. Fitch's

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<sup>21</sup> Trial Transcript, Day 2, 10:11:45

<sup>22</sup> Trial Transcript, Day 2, 10:23:50

<sup>23</sup> Trial Transcript, Day 2, 10:23:30

<sup>24</sup> Trial Transcript Day 1, Disc 2, 15:08:25

<sup>25</sup> Trial Transcript, Day 2, 9:37:15

<sup>26</sup> Trial Transcript, Day 1, Disc 2, 15:53:15

<sup>27</sup> Trial Transcript, Day 1, Disc 2, 15:50:25

thorough forensic examination could not show who viewed these images, when they were viewed, what search terms were used, or even if they were ever viewed at all prior to going to the thumbcache file.<sup>28</sup> Point of fact, the only evidence that the Appellant ever viewed any of the material is his own statement that *he did so, was thoroughly sickened by it, and then immediately deleted it, or at least thought that he had deleted it, based on his limited knowledge of computers.*

The case was tried on January 24 and 25, 2011. The Trial Court denied the Appellant's directed verdict motions on the grounds of insufficient evidence to prove knowing possession of all the material except for the video which was the subject of Count 1. The Court further denied directed verdict on the issue of criminal attempt to possess the Incomplete video charged as Count 4, which only showed a fully clothed girl, lying on her side, and was not remotely pornographic under the statutory definition.

At the opening of Appellant's case, the Court refused to allow character testimony in favor of Mr. Crabtree by Hon. Burt May, in spite of the fact that the Appellant's character was repeatedly attacked by the Appellee by stating that his confession was "minimized," and thus untruthful. As counsel for Appellant predicted in arguing the motion, the questioning of Appellant's character for truthfulness escalated into full blown character assassination in the Appellee's closing, by asserting that his statements about feeling sick and revolted by the material were completely fabricated, in spite of a previous assertion by Appellee's counsel that she would do no such thing.<sup>29</sup>

The Trial Court went on to hold that it would not rule on the issue of whether knowing possession under KRS 351.335 was satisfied by mere viewing or whether an

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<sup>28</sup> Ibid, at 15:51:30

<sup>29</sup> Trial Transcript Day 2, 9:12:45

intent to keep the material must be shown. Instead, the Court left this question of statutory interpretation, a question of pure law, in the hands of the jury, by allowing counsel to present opposing views on the interpretation of the statute to the jury. Moreover, presenting these multiple theories of guilt under one instruction ran afoul of the requirement for a unanimous verdict, as the theory of Mr. Crabtree intending to keep the material was wholly unsupported by the evidence. Finally, during closing, counsel for the Appellee blatantly misstated the record by stating that there was “absolutely no evidence” that the Appellant stopped the downloading of the Incomplete files, in spite of the fact that the testimony of her own expert contradicted this statement. Upon objection, the Court ruled that such statements constitute “argument” and allowed them to be presented to the jury without correction or admonition.

The jury ultimately acquitted Mr. Crabtree on Count 1, the sole completely downloaded video, and convicted him of the remaining counts that had not been dismissed by directed verdict as duplicate images, namely the incomplete videos and 50 images found in the thumbcache file. The Appellant made a motion for a new trial on the basis of a defect in the jury instructions and insufficient evidence, among other issues. After a hearing, the Madison Circuit denied the motion for a new trial. The case was appealed to the Court of Appeals, briefed and argued orally, but that Court affirmed the conviction in Crabtree v. Commonwealth, 2012 Ky. App. LEXIS 137 (Ky. Ct. App. Aug. 17, 2012). The present Motion for Discretionary Review and appeal follows.

## ARGUMENT

- I. *The Legislature has Amended KRS 531.355 to Criminalize the Intentional Viewing of Child Pornography, Proving that Mere Viewing was not Criminalized under the Statute in Effect at the Time of this Trial.*

In the 2013 regular session, the Legislature passed and the Governor signed HB39, which amended the statute to “criminalize the intentional viewing of child pornography where the viewing is deliberate, purposeful, and voluntary and not accidental or inadvertent.” While this Court may one day have to determine whether evidence of brief viewing, disgust, and deletion is sufficient for a conviction of intentional viewing, that issue is not presently before the Court, as this case was tried under the prior statute.

The prior statute criminalized knowing possession but made no mention of viewing, intentional or otherwise. In fact, the Legislative Research Committee stated in its Fiscal Impact Statement prior to the passage of HB39 that the bill’s purpose was “to make it a crime to intentionally view material portraying a sexual performance by a minor. Under existing law, it is a crime to possess any matter visually depicting a minor in an actual sexual performance.”<sup>30</sup> (Emphasis in original). This document upon which legislators relied in voting this bill into law very specifically stated that it was creating a new cause of action for intentional viewing, as the prior law criminalized possession rather than viewing.

The Circuit Court’s rulings and the prosecution’s entire case centered on the idea that pre-2013 KRS 531.355 could be interpreted to include viewing as knowing possession, an interpretation which has now been expressly rejected by the Legislature.

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<sup>30</sup> Local Mandated Fiscal Impact Statement of the Kentucky Legislative Research Committee for HB39 of the 2013 Regular Session, dated 2/27/13, attached as Exhibit B.

It is well-settled law in the Commonwealth that when the Legislature amends a statute, courts must presume that the law has been changed. Blackburn v. The Maxwell Co., 305 S.W.2d 112 (Ky. 1957); Louisville Country Club v. Gray, 178 F. Supp. 915, 918 (W.D. Ky. 1959), aff'd, 285 F.2d 532 (6th Cir. 1960) Whitley County Board of Education v. Meadors, 444 S.W.2d 890 (Ky. 1969), Brown v. Sammons, 743 S.W.2d 23, 24 (Ky. 1988), Woods v. Commonwealth, 142 S.W.3d 24, 41 (Ky. 2004), and 73 Am.Jur.2d Statutes § 65 (2001). Perhaps the clearest statement of this rule of interpretation was given by this Court in 1916 and quoted by the Court of Appeals in the recent case of City of Somerset v. Bell, 156 S.W.3d 321, 326 (Ky. Ct. App. 2005):

“where a statute is amended or re-enacted in different language, it will not be presumed that the difference between the two statutes was due to oversight or inadvertence on the part of the Legislature. On the contrary, it will be presumed that the language was intentionally changed for the purpose of effecting a change in the law itself.” Ibid, at 326, citing Eversole v. Eversole, 185 S.W. 487, 489 (Ky. 1916)

Simply stated, the Legislature must be presumed to act with purpose. If a statute is amended to criminalize specific behavior, it must be presumed that the Legislature was aware that the prior law did not criminalize said behavior, and sought to make changes to that law. The Appellant was tried under the predecessor statute for behavior that was arguably criminalized by the new statute. The entire case against the Appellant, including the prosecution's theory of liability, the Court's directed verdict ruling, and the jury instructions, were predicated on an interpretation of the pre-2013 statute that has been shown to be incorrect by the subsequent actions of the Legislature. As such, the Appellant respectfully requests that his conviction be overturned.

*II. Files Located in the Thumbcache of a Computer and Files Which were Never Truly Downloaded to the Computer Cannot Constitute a Valid Basis for a Conviction of Knowing Possession of the Material in Said Files.*

The Appellant in this case, Samuel Crabtree, was convicted under KRS 531.335 of knowingly possessing 53 images and 4 videos of child pornography, none of which were actually on his computer. The Commonwealth failed to introduce even a scintilla of evidence that Mr. Crabtree ever viewed any of the images or videos for which he was convicted, or that he was the one who actually downloaded them. The images were in a file that is inaccessible to the average computer user, and the videos were never truly downloaded at all. This evidence is insufficient to support a conviction for knowingly possessing such material.

The Appellant's Motion for Directed Verdict was made and argued thoroughly both at the end of Day 1,<sup>31</sup> and when it was renewed at the close of proof,<sup>32</sup> as the Circuit Court had ordered that the motion be held until that point. The Appellant made the argument that insufficient evidence was produced to show that the images and videos were knowingly possessed by Mr. Crabtree, and that all that was shown in the evidence was temporary, innocent possession.<sup>33</sup> In fact, the only evidence presented that Mr. Crabtree was even aware of the material was his own statement that he viewed it, was disgusted by it, and deleted it. Further testimony showed that filenames on the program he used, Limewire, did not necessarily match the actual content,<sup>34</sup> and that even completely innocuous searches in that system often returned pornographic results, even

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<sup>31</sup> Trial Transcript, Day 1, disc 2, 16:34:20

<sup>32</sup> Trial Transcript, Day 2, 10:32:00

<sup>33</sup> Ibid, at 10:33:10

<sup>34</sup> Trial Transcript, Day 1, Disc 2, 14:58:50

files purporting to be child pornography.<sup>35</sup> The only charge not included in the motion for directed verdict was Count 1, on which the jury returned a not guilty verdict. The Appellee presented its position, and the Circuit Court denied the motions.<sup>36</sup> As this issue pertains to a question of law, it is subject to de novo review. Commonwealth v. Love, 334 S.W.3d 92 (Ky. 2011)

This issue presents two key questions. First, can one who temporarily views material be charged with knowingly possessing such material? Second, can images that are automatically stored on your computer serve as the basis for a charge of knowing possession of that material? Though a case of first impression in Kentucky, other jurisdictions have heard cases covering these issues.

In United States v. Flyer, 633 F.3d 911 (9th Cir. Ariz. 2011), the Defendant was charged with possessing files downloaded from the same Limewire program used by the Defendant in the present case. The Court held that one could not be convicted of knowing possession of images in a cache file, unless it could be shown that the defendant knew about the images in the cache and accessed those files. *Ibid*, citing US v. Romm, 455 F3d 990 (9<sup>th</sup> Cir. 2006), United States v. Kuchinski, 469 F.3d 853 (9th Cir. 2006), and United States v. Navrestad, 66 M.J. 262 (C.A.A.F. 2008). The Flyer Court further held that, even though the files may have previously been on the computer and deleted, that fact did not establish a case for knowing possession of the images in question on or about the day of the indictment.

In affirming the Appellant's conviction, the Court of Appeals relied heavily on Romm, *supra* and to a lesser extent on Kuchinski, *supra* to assert that the act of viewing

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<sup>35</sup> *Ibid*, 19:39:05

<sup>36</sup> Trial Transcript, Day 1, Disc 2, 16:39:25 and Day 2, 10:39:00

material on a screen falls under the purview of criminal possession. This reliance was misplaced. In Romm, there was no dispute that the Defendant was aware of the existence of the files. He had confessed to intentionally saving the files because he liked child pornography. The confession in the present case was that the Appellant viewed the material, was disgusted by it, and deleted it. He never had any intention of saving or keeping the material. The only reason it remained on his computer was because the computer's caching function saved it without his knowledge. In Kuchinski, the Court reversed the conviction of the Defendant for images located in a cache file, when there was no evidence that the defendant had knowledge of those files' existence.

Romm, Kuchinski, and the far more tech-savvy opinion from that same Court, Flyer, supra all stand for the general proposition that scienter is a necessary requirement for knowing possession. In essence, one cannot knowingly possess that which one does not know one has. In the present case, which also involves cache files, absolutely no evidence was presented that the Appellant had knowledge of their existence, much less access to them. In fact, the evidence presented is that these files are hidden from the average user, only accessible with special software, and that the Appellant was a novice when it came to computers.

Moreover, Romm is further distinguishable by the fact that Romm was also charged with "receiving" child pornography, and the case was decided a year prior to the amendment of the federal statute by the Enhancing the Effective Child Pornography Prosecution Act of 2007 that criminalized "accessing with intent to view," distinguishing access and viewing from receiving and possessing.

The effect of that amendment was discussed in Aguilar-Turcios v. Holder, 691 F.3d 1025 (9th Cir. 2012). In that case, the Defendant pled guilty to viewing child pornography during a court martial, and the Immigration Department sought to use this guilty plea as an “aggravating felony” that would lead to his deportation. The federal statute, however, only listed receiving or possessing the material as an aggravating felony for the purposes of deportation. The Court held specifically that, “The act of accessing, visiting, or going to an Internet site is not the equivalent of possessing or receiving a visual depiction” and noted that the statute was subsequently amended to include accessing and viewing the material, “underscoring that possession is distinct from both accessing and viewing.” *Ibid*, at 1040. As discussed above, the courts of the Commonwealth take the same position, recognizing an amendment to a statute as a change to the law, and if something is criminalized by an amendment, that means that it did not fall under the purview of the prior law. Like the opinion of the Court of Appeals in this case, Romm was decided prior to the Legislature weighing in on the issue. Aguilar-Turcios was decided after that amendment.

Furthermore, in US v. Keefer, 405 Fed. Appx. 955 (6th Cir. 2010), the Defendant had been sentenced for possessing 1215 images of child pornography. The proof at trial showed that he had knowingly possessed 7 images, and the remaining 1208 images were found in unallocated space on his hard drive, which meant they had been deleted. The prosecution argued that the mere presence of these traces of contraband was sufficient to support such a conviction and sentencing. The appellate court disagreed, and held that presence alone is not sufficient for a showing of knowing possession. *Ibid*, at \*4. The present case presents the exact same kind of evidence. The Commonwealth was only

able to prove that the images in question may have been present on Mr. Crabtree's computer at some time in the past. Mere *presence* on a computer is not sufficient to meet the burden of showing that a defendant *knowingly possessed* illicit material.

That case was before the Sixth Circuit again in United States v. Keefer, 490 Fed. Appx. 797 (6th Cir. Ohio 2012). This time, the Court affirmed the inclusion of the cache files in Keefer's sentencing, but did so only because *viewing* child pornography is illegal under *Ohio state law*, which is sufficient to have the images included in the sentencing under federal law. *Ibid*, at 800. As noted above, the Legislature has shown conclusively that *viewing child pornography was not illegal in Kentucky at the time of this case*, and as such both Keefer cases support an interpretation that cached images cannot serve as a basis for a conviction of knowing possession.

Likewise, in State v. Barger, 233 Or App 621, 226 P3d 718 (2010), the Court found that merely searching for and viewing child pornography is not "possession or control" for the purposes of criminal possession. While the Defendant concedes that Oregon statutes are somewhat different, its definition of both "knowingly" and "possess" follow the same plain meaning standards adopted by the rest of the country, and the principle of law on which the case was decided is that viewing does not rise to the level of knowing possession.

Further, in United States v. Moreland, 665 F.3d 137 (5th Cir. Miss. 2011), the Fifth Circuit held that files stored in a computer's cache may only serve as a basis for a conviction of knowing possession if it is shown that the defendant had knowledge of and access to the files in question. The Court noted that "courts have treated as determinative whether the defendant had sufficiently expert computer knowledge to know about and

access those files or whether there were independent facts that showed the defendant's knowledge and dominion of child pornography images on the computer.” Ibid, at 153. The Court then contrasted cases with novice users and cache files with several cases involving sophisticated users who had the ability to access the files, in which convictions were upheld. In the present case, every bit of evidence in the record points to the Appellant being a novice with neither knowledge of nor access to the hidden cache.

Likewise, in United States v. Dobbs, 629 F.3d 1199 (10th Cir. Okla. 2011), the Court found the issue of knowledge of the cache files to be determinative. In Dobbs, the Defendant was charged with both knowingly receiving and knowingly possessing child pornography under federal law. The government presented evidence that Dobbs was “methodically seeking out child pornography” and that images of such material were found in the thumbcache of his computer. Ibid, at 1201. The Court held that this evidence was insufficient for a conviction unless it could be shown that the Defendant had knowledge of and access to the computer’s cache.

The Dobbs Court further held that, in regards to the charge of knowing receipt, the government had shown no evidence that the Defendant had ever had any contact with the specific images submitted to the jury. No connection was ever made between the actual images the Defendant was charged with viewing and the evidence that the Defendant was actively seeking out child pornography. In the present case, even assuming brief viewing and deletion is sufficient for knowing possession, no evidence was ever presented to the jury that the actual images with which the Appellant was charged were ever viewed. In fact, the Commonwealth’s expert testified that her thorough forensic examination could not show who viewed these images, when they were

viewed, what search terms were used, or even if they were ever viewed at all.<sup>37</sup> As the Dobbs Court noted, the burden needed to secure a conviction of knowing receipt through viewing is only met when the act of seeking out the material can be connected to the actual images charged. No such connection has been made.

Numerous other jurisdictions have reviewed these issues and reached similar results. United States v. Woods, 730 F. Supp. 2d 1354, 1368 (S.D. Ga. 2010) (knowledge of the user that the material is being stored on the computer is a crucial element of the offense), United States v. Willis, 2008 CCA LEXIS 199 (N-M.C.C.A. May 27, 2008) (where defendant viewed and deleted, conviction for receiving child pornography was affirmed, but conviction for possession was reversed), Worden v. State, 213 P.3d 144, 147 (Alaska Ct. App. 2009) (viewing without intentionally storing on computer not sufficient for knowing possession), Barton v. State, 286 Ga. App. 49 (Ga. Ct. App. 2007) (automatically stored temporary internet files not sufficient for conviction, as there was no affirmative step to save them to hard drive of computer),

Moreover, the US Supreme Court has held that, absent the element of scienter, statutes banning child pornography are unconstitutionally overbroad. Osborne v. Ohio, 495 U.S. 103 (U.S. 1990).

Each count of the indictment required the Commonwealth to prove that Samuel Crabtree knowingly possessed the specific material, each individual picture and video, in order to secure a conviction. The sole proof presented that he had done so was his confession to having viewed 5 or 6 images, which were not specified, just before deleting them, and that he had viewed a single video, which he also tried his best to delete. An extensive forensic investigation was unable to find any evidence that Sam Crabtree had

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<sup>37</sup> Ibid, at 15:51:30

viewed the material for which he was convicted, or that he was even aware that this material was on his machine. In fact, the Commonwealth's expert, Cynthia Fitch, testified that there was no proof that he knew anything about the thumbcache or that he had the special software needed to open that file. Likewise, she testified that there was no evidence that the Defendant had viewed any of the incomplete videos before or after the download was stopped. The sole video for which there is evidence of a viewing formed the basis of the charge for which Sam Crabtree was acquitted.

Temporarily viewing material and deleting it is not the same as knowingly possessing that material, and even if the Court determines that it is in spite of the Legislature's clear statement to the contrary, there is no evidence that Sam Crabtree knew about or ever viewed the images and videos for which he was convicted. Absent any evidence that Mr. Crabtree viewed or knowingly possessed any of the material for which he was convicted, the verdict on all the counts of which he was convicted should have been directed in his favor.

*III. The Trial Court Erred when it Refused to Instruct the Jury on the Defense of Temporary Innocent Possession.*

Samuel Crabtree confessed to having sought out "shock images" on his computer, that he found some images that could be considered child pornography, and that he was sickened by this material and deleted it. At trial, the Appellant sought to prove that the possession of the material was both unknowing, for the reasons stated above, and that his possession was temporary and innocent. The Circuit Court, however, refused to instruct the jury on the issue of temporary innocent possession, holding that the defense does not exist, and that it would not apply to Sam Crabtree's case even if it did.

Though much of the argument took place off the record and in chambers, the positions of the parties and the Court's ruling were put on the record to enable review.<sup>38</sup> Specifically, the primary issue on appeal is the Circuit Court's failure to give a temporary innocent possession instruction. This issue was discussed separately, with the parties positions presented, caselaw cited, and the Court's ruling being made on record.<sup>39</sup> As issues pertaining to jury instruction are questions of law, they are subject to de novo review. Skaggs v. Commonwealth, 2009 Ky. Unpub. LEXIS 160 (Ky. June 25, 2009)

In Taylor v. Commonwealth, 995 S.W.2d 355, 360 (Ky. 1999), citing Kelly v. Commonwealth, 267 S.W.2d 536, 539 (Ky. 1954), the Court noted that under CR 9.54(1) an instruction is required to be given for any defense that is "deducible or supported to any extent by the testimony." See Also Thomas v. Commonwealth, 170 S.W.3d 343 (Ky. 2005). Thus, so long as the theory of the defense is supported to any extent by the evidence, it must be presented to the jury.

The defense of innocent possession and its accompanying instruction have been adopted in the Commonwealth. In Commonwealth v. Adkins, 331 S.W.3d 260 (Ky. 2011), the Court found an innocent possession instruction to be proper on two grounds. While one rationale was from the statutory creation of the defense under KRS 218A.220, the other rationale arose from the Legislature's attachment of a "knowingly and unlawfully" mens rea to the possession and trafficking statutes, KRS 218A.1412 – 218A.1417.

Specifically, the Adkins Court found that, by adding the mens rea requirement of knowingly or intentionally, the Legislature "implicitly recognize[d] an innocent

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<sup>38</sup> Trial Transcript, Day 2, 13:39:25

<sup>39</sup> Trial Transcript, Day 2, 13:42:25.

possession or innocent trafficking defense, and whenever the evidence reasonably supports such a defense—where there is evidence that the possession was incidental and lasted no longer than reasonably necessary to permit a return to the owner, a surrender to authorities, or other suitable disposal—the instructions should reflect it.” Ibid, at \*3. Thus, by adding the mens rea requirement to a possession crime, drug possession in that case, the Legislature made a clear distinction between those who possess contraband illegally and those who do so only temporarily and innocently. The statute at issue in this case, KRS 351.335, has the same mens rea requirement for “knowingly” possessing proscribed material and adds a requirement that one have knowledge of the content of the material charged, and thus the same innocent possession defense is implied.

Therefore, as in Adkins, the defense of innocent possession negates the mens rea of the offense, and the failure of the Circuit Court to instruct the jury on a valid defense that negates an element of the offense is reversible error. Nichols v. Commonwealth, 142 S.W.3d 683 (Ky. 2004)

The courts of the Commonwealth are not alone in recognizing an implicit temporary possession defense based on the implications of mens rea requirements and the definition of possession. See Adams v. State, 706 P.2d 1183 (Alaska Ct. App. 1985) (“passing control” cannot be a basis for possession, instructions that allow jury to convict innocent possessor held to be reversible error), Jordan v. State, 819 P.2d 39 (Alaska Ct. App. 1991) (innocent possession/passing control instruction required when all direct evidence shows brief possession and immediate abandonment), State v. Thornton, 557 S.W.2d 1 (Mo. Ct. App. 1977) (failure to instruct on innocent possession when evidence

supports the defense is prejudicial error), Moreau v. State, 588 P.2d 275 (Alaska 1978) (temporary possession instruction allowed in drug case)

Moreover, the need for a Defendant's theory of a case to be presented to the jury in the instructions is even more important in cases where the Defendant confessed in reliance on that defense. In Kohler v. Commonwealth, 492 S.W.2d 198 (Ky.App. 1973). Kohler confessed to selling heroin, asserting as his only real defense "that he acted in good faith with the intent only to be of assistance to law enforcement officers." Ibid, at 199. The trial Court denied his request for an affirmative instruction setting forth this defense. The Court of Appeals reversed his conviction, recognizing that Kentucky courts have long held that when a Defendant confesses to an illegal act, but asserts a legal excuse or justification exonerating him from criminal intent the court should submit his theory of defense in concrete form.

In the present case, the Defendant confessed to the police that he had viewed 5 or 6 images and one video of child pornography, but that he had deleted them immediately. That confession was predicated on his belief that he had not possessed the material in a way that would leave him open to a criminal conviction. As such, under Kohler, the Defendant had a right to have his defense submitted to the jury.

In the present case, the Appellant's statement was introduced as evidence and testimony was entered concerning that statement. Paraphrasing, Mr. Crabtree confessed that he was looking for "shock videos," saw the material, was sickened by it, and deleted it immediately. Such conduct qualifies as temporary possession, only lasting until there is "suitable disposal." While Sam lacked the technical know-how to remove every trace of the material from his system, his act of deletion or failure to complete the download,

which is uncontroverted for every count of which he was convicted, evinces a lack of mens rea that implicates the Adkins innocent possession defense and warrants an instruction on this issue, especially in light of the fact that the Commonwealth stated in her closing argument that simply downloading material, then deleting or stopping the download, was possession under the statute..

The Circuit Court further held that a defense of temporary innocent possession was not warranted, because there was no evidence in the record that possession of the material at issue in this case was incidental. The Court of Appeals agreed, finding that the act of downloading the images negated the defense. This conclusion is faulty on two grounds. First, the Appellant admitted to looking at shock videos on the internet. While certainly distasteful, searching out and viewing shock videos, in and of itself, is not illegal. The prosecution argued that Mr. Crabtree deliberately sought out child pornography, but his statement shows that he may have just cast his net too wide while searching for legal shock videos on Limewire. The fact that he felt sick and made every effort to delete the material lends credence to this interpretation.

Second, the defense of temporary innocent possession goes to the mens rea of the accused, not the actus reus. Mr. Crabtree's statement shows that he did not have any intention to possess the material, knowingly or otherwise. It sickened him, and he did his best to throw it away. He did not know the computer was automatically saving the files in its cache. Those files, the files for which he was charged and tried, were in his possession without his knowledge. Looking at illegal material, being disgusted by it, and throwing it away is the precise sort of scenario that temporary innocent possession was designed to cover, and the failure to give that instruction was prejudicial error.

Moreover, the Appellant confessed to law enforcement in reliance on a defense that was supported by the evidence, and as such, there was a question of fact to be resolved by the jury, and the Appellant was entitled to have his theory of a lawful defense heard and considered by the jury. The failure of the Circuit Court to instruct the jury on this issue is reversible error, and that error is magnified even further by the fact that the question of the existence of the defense was left to be decided by the jury.

*IV. The Circuit Court Erroneously Assigned the Jury a Question of Statutory Interpretation, a Pure Question of Law, which was a Key Issue at Trial.*

A key issue in this case is the definition of knowing possession under KRS 531.335, specifically whether knowing possession requires more than temporarily viewing and immediately discarding contraband. As the caselaw and arguments above suggests, this issue presents a complicated legal question.

Although this legal issue was the defining question of this case, the Court refused to instruct the jury on the interpretation of the law. Without any guidance from the Court, the only alternative was for the parties to argue their own interpretations of the law to the jury in their closing arguments and to allow the jury to interpret the statute governing the case, as the Appellee suggested at trial.<sup>40</sup> To make matters worse, in her closing argument, the Appellee specifically pointed to the lack of any language in those same instructions as an indication that temporary innocent possession was not a defense, in that the prosecution was not required to prove that he intended to keep the material.<sup>41</sup>

As the role of judges and juries in a trial is a question of law, it is subject to de novo review. See Daniels v. CDB Bell, LLC, 300 S.W.3d 204 (Ky. Ct. App. 2009)

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<sup>40</sup> Trial Transcript, Day 2, 10:40:15.

<sup>41</sup> Trial Transcript, Day 2, 15:35:05

It is axiomatic that the law of the case is to be determined by the Court and given to the jury, and that the jury is to decide only questions of fact and, in some instances, mixed questions of law and fact. In Kenton County Fiscal Court v. Elfers, 981 S.W.2d 553, 556 (Ky. App. 1998), the Court held that “the issue of the correct interpretation of a statute, or as in this case a resolution, is decidedly a question of law and is not one appropriate for a jury’s determination.” In Elfers, the specific issue addressed was whether a term set forth in a statute should be defined by the Court in its instructions or by the jury. The Court made it clear, in no uncertain terms, that statutory interpretation is the province of the court, not the jury. See also Masonic Widows & Orphans Home & Infirmary v. Louisville, 309 Ky. 532 (Ky. 1948)

The Court of Appeals held that providing the statutory definition for “knowingly” and “possession” was sufficient to instruct the jury on the issue. If anything, the years of litigation in this case and so many others have shown that the issue is not as simple as that. The line between knowingly possessing material and viewing/accessing it is a very fine one, but also a crucial one. That line must first be established by the law before it can be applied to the facts. Combining a difficult issue of statutory interpretation with the actual merits of the case placed the jury outside of its constitutional role and prejudiced the Appellant’s right to a fair trial.

In the present case, the definition of knowing possession was a key issue. The Appellant argued that one must have the intent to keep something in order to possess it, while the Appellee asserted that merely viewing material and discarding it is sufficient. Regardless of how this Court ultimately decides to resolve this issue, the fact remains that putting this question of statutory interpretation in the hands of the jury was improper, and

it tainted the trial. We cannot know how the shift from a factual determination to a legal one affected the deliberations of the jury, but what is known is that the jury was forced to serve an improper purpose, and a new trial is the only way to cure this defect.

*V. Mr. Crabtree's Character for Truthfulness was Attacked by the Prosecution Throughout the Trial, and his Character Evidence Should have been Admitted to Rebut Accusations of his Statement to Law Enforcement Being False.*

The Appellant sought to introduce evidence of his character for truthfulness after his confession was attacked by the prosecution as “minimizing” his actions. The Circuit Court held that the Defendant’s character had not been raised as an issue by the prosecution, and thus the Defendant could not introduce any character evidence.<sup>42</sup> The Court of Appeals affirmed, stating that testimony elicited by the Commonwealth to the effect that the Appellant lied to Det. Collins during his confession went to his “behavior” rather than his character. As this issue pertains to the admission of evidence, it is under an abuse of discretion standard. Partin v. Commonwealth, 918 S.W.2d 219, 222 (Ky. 1996) (overruled on other grounds by Chestnut v. Commonwealth, 250 S.W.3d 288 (Ky. 2008))

The Court’s failure to admit evidence pertaining to the general moral character of the Defendant was improper on two grounds. First, the Court improperly restricted the accused from admitting character evidence unless the prosecution had first opened the door to the admittance of such evidence. KRE 404(a)(1) states in unequivocal terms that evidence of “a pertinent trait of character or of the general moral character of the accused” may be admitted at trial. The choice to admit “evidence of a pertinent trait of character or good moral character” is given to the accused, and once the accused opens this door, the prosecution may then offer rebuttal evidence. While there are prerequisites

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<sup>42</sup> Trial Transcript, Day 2, 9:11:30

to the admission of character evidence for a party in a civil action, one accused of a crime is allowed to choose whether to make character an issue, as supported by both the plain language of the KRE 404(a) and a long line of cases. See Fleming v. Commonwealth, 419 S.W.2d 754, 755 (Ky. 1967) and Clark v. Commonwealth, 165 Ky. 472 (Ky. 1915)

The Court in this case improperly gave the choice of making the accused character an issue to the prosecution, and erroneously held that the Appellant was barred from admitting any evidence as to his general moral character and pertinent character traits, in spite of the clear mandate of KRE 404(a)(1).

Second, even assuming the Court was correct that the prosecution is the party that has the discretion to decide whether or not evidence of the character of the accused may be introduced at trial, the prosecution attacked the Appellant's character for truthfulness numerous times throughout the trial, and the Appellant was not allowed to rebut these claims by introducing his own character evidence. In spite of the Court of Appeals assertion to the contrary, the Appellee elicited testimony from Det Collins that confessions are often "minimized" by accused persons with the clear implication that Mr. Crabtree had done so.<sup>43</sup> Testimony went into the record for the sole purpose of attacking Mr. Crabtree's character for truthfulness, and the Circuit Court did not allow him to defend against this accusation with his own evidence.

When the issue of admitting character evidence in the form of testimony from Burt May was being argued, counsel for Appellant presciently argued that if the Appellant's statement to police was attacked even further during closing argument, the ability to counter those attacks would have already been foreclosed.<sup>44</sup> In rejecting this

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<sup>43</sup> Trial Transcript, Day 1, Disc 1, 13:57:25.

<sup>44</sup> Trial Transcript, Day 2, 9:12:05

argument, the Court noted that the Appellee had made representations in chambers that it would not challenge the confession, but rather “embrace those comments,” though the Appellee quickly stated that it reserved the right to argue that the statement had been “minimized,” i.e. that it was untrue.<sup>45</sup>

As had been predicted, during closing and after the Appellant had any chance to respond, the questions raised about the Appellant’s character for truthfulness previously escalated into full scale character assassination. The content of Mr. Crabtree’s statement was that he viewed the material, was sickened by it, and deleted it.<sup>46</sup> Counsel for Appellee told the jury that he was not sickened by it, but rather enjoyed it,<sup>47</sup> and that he only felt sick because he had been caught,<sup>48</sup> which is not what Det. Collins testified.<sup>49</sup> Rather than “embracing” the statement, as was promised, the Appellee used imagined falsehoods in the confession to destroy the character of the accused, both in terms of his character for truthfulness and in terms of his general character, just as the Appellant had predicted. At this point, of course, there was absolutely nothing the Appellant could do to rehabilitate his character.

Contrary to the holding of the Court of Appeals, testimony that the Appellant lied during his confession went directly to his character for truthfulness and honesty. Eliciting that testimony paved the way for the prosecution to call him a liar and tell the jury that his confession was false. A person’s reputation for truth and honesty is a key issue in assigning weight and credibility to that person’s statements. The Appellant’s confession in this case was a crucial piece of evidence for both sides, as its interpretation

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<sup>45</sup> Ibid, at 9:13:10

<sup>46</sup> Attached as Exhibit A

<sup>47</sup> Trial Transcript, Day 2, 15:06:30 and 15:35:00

<sup>48</sup> Ibid, at 15:03:05

<sup>49</sup> Trial Transcript, Day 1, Disc 1, at 13:40:05.

could very well decide the outcome of the case. Under the KRE 404(a)(1), the character of the accused is not to be an issue at trial unless the defense itself makes it an issue. Only then can the Commonwealth rebut with its own proof. In the present case, the prosecution attacked the character of the accused first, and the Appellant was not allowed to defend his character with his own witnesses. The jury was told he was a liar and a bad person without him being able to make a rebuttal. Taking away his ability to defend his character is even more egregious when considering the nature of the charges in this case. The defense needed the jury to look past the sickening feeling of seeing the images, a sickening feeling the Appellant shared when he saw them, and judge the case on its merits. When the jury is told he is a liar and a bad person and he's not allowed to present evidence to counter those accusations, they are going to be much less likely to look past their shock and anger at the images themselves and judge the case on its actual merits.

The minimization of the statement and subsequent character assassination of the accused was a key part of the case against him, and by not allowing the Appellant to defend himself against these attacks, the Circuit Court committed reversible error.

#### *VI. Cumulative Error*

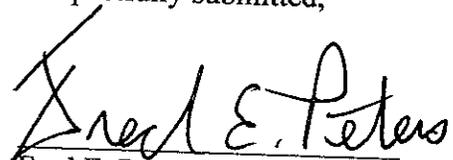
While virtually every brief on appeal contains a token cumulative error argument, the Appellant asserts that such an argument is appropriate given the specific circumstances of this case. Viewing the trial as a whole, the entire theory of defense, upon which the Appellant relied in his confession, was taken away from the jury, either by the failure of the Court to instruct on this defense or by the Circuit Court's decision to leave the question of statutory interpretation to the jury.

Even if this Court finds that knowing possession encompasses temporarily viewing and discarding material, the fact remains that this question should not have been put to the jury. When taken together, these errors had the cumulative effect of prejudice and substantiality, warranting reversal under Funk v. Commonwealth, 842 S.W.2d 476 (Ky. 1992).

**CONCLUSION**

For the reasons stated above, the Appellant respectfully requests that his conviction be reversed, and that the case be remanded back for a new trial.

Respectfully submitted,



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## APPENDIX

1. Final Judgment and Sentence of Imprisonment by Madison Circuit Court
2. Opinion of the Court of Appeals in Crabtree v. Commonwealth, 2012 Ky. App. LEXIS 137 (Ky. Ct. App. Aug. 17, 2012)
3. Voluntary Statement of the Appellant to Det. Collins
4. Local Mandate Fiscal Impact Statement for HB 39 of the 2013 Regular Session