paring the two statutes, the court noted that the supervised release statute states explicitly, "the court may order, as a further condition of supervised release . . . any other condition it considers to be appropriate" (18 U.S.C. § 3583(d) (2001)). The conditional release statute contains no such language. Thus, the court reasoned that the omission of a provision allowing judges to impose ancillary conditions on insanity acquittees was deliberate, as Congress would not have written two statutes with different language if they were intended to have the same meaning.

The court held that a district court may not revoke an insanity acquittee's conditional discharge unless the acquittee has failed to comply with his prescribed regimen of medical, psychiatric, or psychological care or treatment. The court acknowledged that this limits the ability of courts to hospitalize potentially dangerous individuals. However, it suggested that such a dangerous person could be arrested, or the prescribed treatment regimen could be modified. District courts were urged not to hesitate in pursuing either of these courses of action.

*Discussion*

In clarifying that insanity acquittees may be remanded to the hospital only if they are noncompliant with treatment, this case raises the interesting question of how to manage patients who are dangerous in the community despite treatment compliance. The court ruled that Mr. Crape could be arrested if he continued to write threatening letters. While this is certainly an option that serves the goal of public protection, it potentially starts the whole cycle of criminal charges, insanity pleas, hospitalization, and conditional release all over again. One wonders whether this is really the most sensible approach to containing dangerous behavior and attending to an acquittee's treatment needs.

Another option for managing the compliant but dangerous insanity acquittee that this case mentions is a judicial modification of the treatment plan. As a conceptual matter, this seems reasonable, but it is unclear whether judicial intervention could occur in a time frame that would be sufficient to contain the danger. For example, in the event that Mr. Crape wrote several letters with escalating threats over the course of a few days, how long would it take for a hearing to be scheduled, adequate due process to be observed, and the treatment plan to be modified? The pace of the judicial process may simply be too slow to intervene effectively in an acutely dangerous situation.

Last, by stating that the district court may not order ancillary conditions of release prohibiting Mr. Crape from writing threatening letters, this decision seems to suggest that such conditions should be added to his psychiatric treatment plan. If that were the case, Mr. Crape would be considered noncompliant with treatment and therefore subject to hospitalization if he wrote a threatening letter. This method clearly shifts the responsibility for monitoring aspects of the patient's behavior (i.e., criminal activity) that are typically under the purview of a probation officer or the courts to the mental health clinician. The clinician is then placed in the uncomfortable dual role of providing both treatment and court monitoring. Although this decision does not address the potential strain placed on the therapeutic alliance by such an arrangement, it is certainly worthy of consideration by mental health professionals before initiating treatment with conditionally released insanity acquittees.

Disclosures of financial or other potential conflicts of interest: None.

# Improper Rejection of Evidence and Expert Testimony

**Kathleen R. Rivera, MD**
***Fellow in Forensic Psychiatry***

**Charles Dike, MD, MPH**
***Assistant Clinical Professor***

***Law and Psychiatry Division***
***Department of Psychiatry***
***Yale University***
***New Haven, CT***

## Kentucky Supreme Court Reverses Ruling Involving Admissibility of Expert Witness and Interview Tapes in a Child Sexual Abuse Allegation

In *Jenkins v. Commonwealth*, 308 S.W.3d 704 (Ky. 2010), the Kentucky Supreme Court found that a trial court erred in not allowing expert witness testimony regarding improper interviewing techniques that could affect the reliability or accuracy of a child witness's memory. Further, the Kentucky Supreme Court also reversed the trial court's ruling that a

taped interview of the child should not be brought into evidence.

*Facts of the Case*

John Tim Jenkins, a married father of three children, rejoined the Central Kentucky Big Brothers Program in 2001, after his son left for college. After an extensive application and screening process, he was matched with J.S. in September 2001. He engaged in activities with J.S., including attending ballgames, bike riding, swimming, and the movies. J.S. occasionally ate dinner with Mr. Jenkins, his wife, and family. J.S.'s mother had no concerns about the match between her son and Mr. Jenkins and, in fact, observed that he seemed happy with his Big Brother.

On October 8, 2003, after a full day at school, Mr. Jenkins took eight-year-old J.S. and his six-year-old friend B.F. swimming. Two lifeguards became suspicious of Mr. Jenkins' play with the boys, "swimming up under them and lifting them up out the water" and seemingly "nibbling on their thighs," (*Jenkins*, p 706). They thought that Mr. Jenkins was kissing the boys' faces and legs. The head lifeguard recognized the activity as a game in which a shark or alligator pursues the other swimmers, and he was not concerned.

After swimming, Mr. Jenkins and the boys were followed by the lifeguard supervisor as they headed for the men's locker room. He observed Mr. Jenkins and J.S. naked and showering together in the handicapped shower stall. The head lifeguard joined the supervisor and noted that B.F. had joined Mr. Jenkins and J.S. in the shower. They saw no touching or other inappropriate behavior.

Afterwards, B.F. told the lifeguards that Mr. Jenkins was a Big Brother. This increased their suspicions, because Mr. Jenkins was not a relative. They called for the police. Both boys were driven in police vehicles—B.F. to his home and J.S. to a police station. By the time Detective Quails arrived, after 10:00 p.m., J.S. was "scared and crying," and so they drove to a quieter station, arriving at about 11 p.m. J.S.'s mother, accompanied by a social worker, arrived shortly thereafter. She was informed about the detective's suspicions that J.S. had been sexually abused.

Near midnight, Detective Quails initiated a recorded interview with J.S., even though he had no special training in interviewing minors. His mother was not allowed to be present. During the first 30 minutes, he denied any allegations of sexual abuse. However, "[a]fter unrelenting and suggestive questioning, J.S. finally agreed . . . that he had been touched once" (*Jenkins*, pp 707–708). The interview ended between 1:30 and 2:00 a.m., when J.S. was released to his mother.

In a second recorded interview conducted the next day by the social worker and Detective Quails at J.S.'s home, J.S. agreed with the detective's suggestions that there was a second touching. Subsequently, he was enrolled in individual and group therapy focused on sexual abuse.

In January 2004, Mr. Jenkins was indicted on two counts of first-degree sexual abuse related to J.S., and two counts of indecent exposure for showering in the nude in the presence of both boys. Five months after J.S.'s sex abuse therapy began, two counts of sodomy were added following an interview of J.S. by a forensic interviewer.

During the trial, the defense asked Dr. Terence Campbell, a forensic psychologist, to testify regarding improper interviewing techniques that may result in unreliable reporting by a child witness. The court held an extensive *Daubert* hearing, in which Dr. Campbell testified at length, pointing out serious problems with the interview techniques used by Detective Quails. The trial court, acting on its understanding that Kentucky law prohibited testimony that would appear to comment on the credibility of a child witness, ruled that the testimony was inadmissible; credibility of a witness was a matter for the jury and, hence, beyond the purview of an expert witness. The trial court also disallowed playing the interview tapes on hearsay grounds; jurors may inadvertently focus on the truthfulness of the information contained in them, rather than on the interviewing techniques. The trial court found Mr. Jenkins guilty of one count of first-degree sexual abuse and one count of indecent exposure to J.S. and not guilty of the other charges. Mr. Jenkins was sentenced to five years on the sexual abuse charge and fined $250 on the indecent exposure conviction.

Mr. Jenkins appealed. The court of appeals held that Dr. Campbell's testimony was not precluded by Kentucky law and remanded the case to the trial court to make findings under Kentucky Rule of Evidence 702 (1992). It rejected the other errors.

Mr. Jenkins moved for discretionary review, which was granted by the Kentucky Supreme Court. The court addressed "the admissibility of expert evi-

dence of suggestive interview techniques with children; the admissibility of the interview tapes; and the sufficiency of evidence to support the indecent exposure conviction" (*Jenkins*, p 709).

*Ruling and Reasoning*

The Kentucky Supreme Court ruled that the trial court erred in denying the defense's request for an expert witness on the subject of the use of suggestive interviewing techniques on children. It reversed Mr. Jenkins' conviction and remanded for a new trial.

In reversing the trial court's ruling that expert witness testimony was inadmissible because it would improperly comment on the credibility of the child witness (an appraisal reserved for the jury), the supreme court observed that testimony on improper interview technique spoke to the reliability of the witness's recollection and not the truthfulness or credibility of the witness. The "the trial court erred in ruling that the evidence was inadmissible as a matter of law" (*Jenkins*, p 711), since "such evidence *assumes the witness is testifying truthfully*—but may be mistaken in his or her belief" (*Jenkins*, p 711, emphasis in original). The role of the expert would be to opine on how the information was obtained, rather than on the veracity of the witness's statements.

The supreme court had not before considered the admissibility of expert testimony on improper interviewing, but noted that many other states have done so. Dr. Campbell's testimony was deemed to meet the *Daubert* standard for expert witness testimony, as it was reliable and relevant, because the theories and principles governing the techniques for interviewing children are well supported in the scientific evidence and are outside the knowledge of the average juror.

With regard to rejection of the interview tapes on "hearsay grounds," the Supreme Court held that the trial court erred in not admitting them, because they "were offered as proof that the investigation was flawed . . . by showing the coercive and suggestive manner in which the interviews were conducted and the allegations obtained" (*Jenkins*, p 713). The court observed that the truth of the matter asserted in the tapes was not at issue; therefore, admitting the tapes would be a proper nonhearsay use.

*Discussion*

The scientific literature indicates that children's thought processes, recall of memories, and responses to situations are different from those of adults. The U.S. Supreme Court alluded to this in *In re Gault et al.*, 387 U.S. 1 (1967), holding that "admissions and confessions of juveniles require special caution" (p 44), and that "it has long been recognized that the eliciting and use of confessions or admissions require careful scrutiny" (p 45).

Statements and behaviors of the interviewer, including leading and suggestive questions, affect the outcome of the interview and may cause distortion of the data. For example, the National Children's Advocacy Center offered the following recommendation in 2007:

> [W]ithout specialized training, the patrol officer should not interview the child. . . . [I]f a specialized detective is not available and will not be involved, the patrol officer should know who conducts forensic interviews in their jurisdiction, how to make contact with the appropriate person or agency, and set up a time and place for the child's interview to be conducted as soon as possible [The National Children's Advocacy Center: Law enforcement's initial response to child sexual abuse, guidelines for patrol officers (Online training). Huntsville, AL: National Children's Advocacy Center, 2006].

In their 1994 argument for more objective and stringent methods in these evaluations, Jenkins and Howell reached the following conclusions:

> Examiners should use caution to be sure that bias and suggestibility are minimized at every phase of the evaluation, maintaining a stance of neutrality and healthy skepticism until all of the data are in. Examiners in sexual abuse cases should have adequate training and experience in working with children in general and sexual abuse in particular [Child Sexual Abuse Examinations: Proposed Guidelines for a Standard of Care. *Bull Am Acad Psychiatry Law* 22:5–17, 1994].

None of these precautions was taken in the *Jenkins* case. It is notable that J.S. was placed in treatment focused on sexual abuse without clear evidence of sexual abuse. The risks of such intervention are that the child could be vicariously traumatized by the stories of sexually abused children in group therapy, and the increased focus on sexual abuse in individual and group therapies could foment and cement false memories. These risks are pertinent to *Jenkins*, in which the forensic evaluation of J.S. occurred five months after beginning the sexual abuse therapy.

Allegations of child sexual abuse should always be taken seriously and vigorously investigated. However, subsequent investigations should follow established guidelines, to obtain accurate information regarding the abuse and to protect the child from further abuse, from the perpetrator of the abuse, or from well-meaning but misguided law enforcement agents.

Disclosures of financial or other potential conflicts of interest: None.