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Supreme Court of Appeals
Richmond, Va.

Record No. 6967

In the Supreme Court of Appeals of Virginia at Richmond

CHARLES H. HARBAUGH, JR., ETC.

v.

COMMONWEALTH OF VIRGINIA

FROM THE CIRCUIT COURT OF FREDERICK COUNTY

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a.m.; Adjourns at 1:00 p.m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 6967

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 24th day of April, 1968.

Charles H. Harbaugh, Jr., sometimes known as Charles H. Harbaugh, II, Plaintiff in error,

against

COMMONWEALTH OF VIRGINIA, Defendant in error.

From the Circuit Court of Frederick County
Hamilton Haas, Judge

Upon the petition of Charles H. Harbaugh, Jr., sometimes known as Charles H. Harbaugh, II, a writ of error and supersedeas is awarded him to a judgment rendered by the Circuit Court of Frederick County on the 27th day of February, 1967, in a prosecution by the Commonwealth against the said petitioner for a misdemeanor; but said supersedeas, however, is not to operate to discharge the petitioner from custody, if in custody, or to release his bond if out on bail.

RECORD

* * * * *

page 1 }

STATE OF VIRGINIA
COUNTY OF FREDERICK

TO ANY SHERIFF OR POLICE OFFICER:

Whereas, S. H. Koonce has this day made complaint and information on oath before me, Virginia Ritter, Clerk, Juvenile and Domestic Relations Court of the said County, that Charles H. Harbaugh, II, Stephenson, Va., in the said County did on the 6 day of December, 1966. Unlawfully commit an assault and battery upon Charles William McDonaldson III, against the peace and dignity of the Commonwealth.

These are, therefore, to command you, in the name of the Commonwealth, to apprehend and bring before the County Court of the said County, the body (bodies) of the above accused, to answer the said complaint and to be further dealt with according to law. And you are also directed to summon: as witnesses.

Given under my hand and seal, this 6 day of December, 1966.

Virginia Ritter, Clerk (Seal)

* * * * *

page 3 } In the Frederick County Court

Commonwealth
v.
Charles H. Harbaugh II

No. JD 2041

Appeal noted to Circuit Court of Frederick County, Va., and bond posted in penalty of $500—with approved surety. Jan. 13, 1967

W. E. Edwards
Judge

* * * * *

page 25 } INSTRUCTION NO. 1

The Court instructs the jury that a parent or one standing in his place may be criminally liable for assault and battery if he exceeds or abuses his authority to correct a child and inflicts bodily punishment which exceeds the bounds of due moderation in the measure of the punishment or in the instrument used for that purpose.

H. H.

page 26 } INSTRUCTION NO. 2

The Court instructs the jury that in determining whether due moderation was exercised by the parent or one standing in his place in inflicting bodily punishment upon the child, it shall consider the circumstances attending the punishment with regard especially to the age, size and conduct of the child, the nature of his misconduct, the nature of the instrument, if any, used for punishment, and the kind of marks or wounds inflicted on the body of the child.

H. H.

page 27 } INSTRUCTION NO. 4

The Court instructs the jury that in this case, as in all criminal prosecutions, the accused is presumed to be innocent until his guilt is established by the evidence beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence.

The burden of proof is upon the Commonwealth to establish every material fact necessary for conviction by the evidence beyond a reasonable doubt.

This presumption of innocence applies at every stage of the case until or unless the Commonwealth has established every material fact necessary for conviction by the evidence beyond a reasonable doubt.

If, after a fair and impartial consideration of all the evidence, the jury entertain a reasonable doubt of the existence of any material fact necessary for conviction, the jury must find the accused not guilty. If the jury are satisfied by the evidence beyond a reasonable doubt of the existence of every material fact necessary for conviction, they must find the accused guilty.

If a set of facts or circumstances should be susceptible of two or more reasonable interpretations, any one of which interpretations points to the innocence of the accused, the jury must accept that interpretation pointing to his innocence in arriving at their conclusion to be drawn from such set of facts or circumstances.

H. H.

page 28 } INSTRUCTION NO. 7

The Court instructs the jury that the parent or one standing in *loco parentis* in punishing his children must act in good faith with parental affection and must not exceed the bounds of moderation and must not be cruel or merciless, and that any act of punishment in excess of such moderation is unlawful. While a physical punishment of a child is permissible, it must not go beyond what the child's reasonable welfare demands.

H. H.

page 29 } INSTRUCTION NO. 6

The Court instructs the jury that if you entertain a reasonable doubt whether the injuries sustained by the child were inflicted by the accused then you must find the accused not guilty.

H. H.

page 30 } INSTRUCTION NO. 3

The Court instructs the jury that you are the sole judges of the credibility of the witnesses; and in determining the weight given to the testimony of the witnesses the jury may consider the appearance and demeanor of the witnesses on the witness stand; their manner of testifying; their apparent intelligence or lack of it; their interest or lack of it in the outcome of the case; their temper, feeling or bias, if any has been shown; their opportunity for knowing the truth and having observed the things concerning which they testify; and from these and all other surrounding circumstances at the trial, the jury are to determine which witnesses are more worthy of credit and give credit accordingly.

H. H.

page 31 } INSTRUCTION NO. 5

The Court instructs the jury that if they believe from the evidence beyond a reasonable doubt that the accused is guilty of assault and *batter* as heretofore charged and defined, then you shall say so and fix his punishment at a fine not exceeding five hundred dollars ($500.00) or by confinement in jail not exceeding twelve months (12), or both.

H. H.

page 32 }

3 months to serve plus $250.00 fine

We the jury do find the defendant guilty of Assault and Battery as charged in the Warrant and do fix his punishment at a sentence in Jail of three (3) months and a fine of Two Hundred and fifty dollars ($250.00).

Walter E. Snapp
Foreman

* * * * *

page 41 }

* * * * *

ORDER

On the 27th day of February, 1967, again came the Commonwealth, by her attorney, and also came the defendant, in person and in recognizance of his bond, pursuant to an Order previously entered in this case, setting the same for hearing this day, upon the Motion of the defendant for the Court to set aside the verdict of the Jury as contrary to the law and the evidence, and also came the Court Reporter.

Whereupon, on Motion of the defendant, and over the objection of the attorney for the Commonwealth, the Court proceeded to hear evidence as to the competency of Charles William McDonaldson, III, to testify in this cause, and for the preservation of his testimony, should he be competent to testify. And after hearing of evidence upon said Motion as to the competency of the said Charles William McDonaldson, III, the Court ruled that the child was incompetent or lacked competence to testify, to which the defendant objected and excepted.

Whereupon, the Court then permitted the taking of the testimony of the said Charles William McDonaldson,
page 42 } III by the defendant, and the cross-examination by the Commonwealth.

Whereupon, the defendant withdrew his objection to the ruling of the Court that the child lacked competence, or was incompetent, to testify, and abandoned the theory for a reversal of the verdict on this ground and to the previous ruling of the Court at the trial of the case.

Whereupon, the defendant moved the Court to set aside the verdict as being contrary to the law and the evidence for the reason that Dr. Warren Gregory, over the objection of the defendant, was permitted to testify as to the probably cause of the injuries suffered by the infant child, and it was argued by the attorneys for the Commonwealth and the defendant.

After due consideration it is the judgment of the Court that the Motion of the defendant to set aside the verdict as being contrary to the law and evidence on this assignment of error, and on all other assignments of error made at the time of the trial, and not argued, shall be and the same are hereby denied, to which ruling of the Court the defendant objected and excepted.

Whereupon, the Court inquired of the defendant if he had anything to say now as to why sentence should not be pronounced against him, to which he answered saying "Nothing."

It is therefore the further judgment of this Court that the defendant is guilty of assault and battery upon Charles William McDonaldson, III, as charged in the warrant, and as set forth in the verdict of the Jury, and it is therefore the further judgment of this Court, in accordance with the verdict that the defendant be and he is hereby sen-
page 43 } tenced to jail for a term of three (3) months, and to pay a fine of Two Hundred and Fifty Dollars ($250.00), and the cost of this prosecution, and he is remanded to the custody of the Sheriff for the carrying out of the sentence.

Whereupon, the defendant moved the Court to set a *supersedes* bond, in order that he may stay at liberty while perfecting an appeal to the Supreme Court of Appeals of Virginia, to which Motion the Commonwealth responded by requesting a bond in the sum of One Thousand Dollars ($1,000.00), to which there was no objection by the defendant.

It is therefore adjudged and ordered that the defendant shall be required to post a bond with the Clerk of this Court, with adequate surety approved by him in the principal sum of

One Thousand Dollars, conditioned upon the defendant filing the petition for a writ of error with the Supreme Court of Appeals of the State of Virginia within sixty (60) days from the date hereof: otherwise, said judgment to become effective at the end of said sixty (60) days, and the defendant to be taken into custody by the said Sheriff, if the bond is posted by the appeal not perfected, for the purpose of serving the sentence heretofore imposed upon him.

ENTER:

s/Hamilton Haas
Judge

* * * * *

AMENDED NOTICE OF APPEAL AND ASSIGNMENT OF ERROR

page 53 }

* * * * *

AMENDED NOTICE OF APPEAL

To: Lee N. Whitacre, Clerk of the Circuit Court For the County of Frederick.

Counsel for Charles H. Harbaugh, Jr., the defendant in the above styled case, hereby gives Notice of an Appeal from a final judgment entered hereon on February 27, 1967.

The purpose of this Amended Notice of Appeal is to correct the name of the defendant which was inadvertently given as Charles B. Harbaugh, II, whereas the correct name of the defendant is Charles H. Harbaugh, Jr.

page 54 }

* * * * *

The Assignment of Error is herewith amended to show the correct name of the defendant as Charles H. Harbaugh, Jr. rather than Charles B. Harbaugh, II, as originally specified.

The said Charles H. Harbaugh, Jr., defendant in the above styled suit, will apply to the Supreme Court of Appeals of Virginia for a Writ of Error to said judgment, and herewith sets forth his Assingment of Error as follows:

ERROR NUMBER 1. The Court erred in refusing to grant a mistrial after the admission of hearsay testimony for reasons assigned in the record. (Transcript p. 28-29).

ERROR NUMBER 2. The Court erred in refusing to grant a mistrial after a witness expressed an opinion as to being "absolutely shocked" and "I felt guilt," for reasons assigned in the record. (Transcript p. 31-32).

ERROR NUMBER 3. The Court erred in permitting hearsay testimony by Dr. Gregory for reasons assigned in the record. (Transcript p. 45).

page 55 } ERROR NUMBER 4. The Court erred in permitting Doctor Gregory to testify to an opinion as to how certain marks on the child came about for reasons assigned in the record. (Transcript p. 50-53).

ERROR NUMBER 5. The Court erred in denying the motion for a mistrial after prejudicial immaterial and hearsay testimony of Dr. Gregory for reasons assigned in the record. (Transcript p. 59-61).

ERROR NUMBER 6. The Court erred in permitting redirect examination of Dr. Gregory not responsive to cross-examination for reasons assigned in the record. (Transcript p. 80-83).

ERROR NUMBER 7. The Court erred in permitting witness Tucker to testify concerning statements made by the defendant in the County Court below and to refer to a previous trial, for reasons assigned in the record. (Transcript p. 80-83).

ERROR NUMBER 8. The Court erred in denying the motion of the defendant to strike the Commonwealth's evidence at the conclusion of the Commonwealth's case for reasons assigned in the record. (Transcript p. 84-86).

page 56 } ERROR NUMBER 9. The Court erred in permitting cross-examination of Mr. Harbaugh as to previous spankings with anything other than his hand, for reasons assigned in the record. (Transcript p. 119-120).

ERROR NUMBER 10. The Court erred in permitting cross-examination of Mr. Harbaugh as to what witnesses he had talked to concerning the case, for reasons assigned in the record. (Transcript p. 129-130).

ERROR NUMBER 11. The Court erred in refusing to permit the child, Rusty Harbaugh, to testify for reasons assigned in the record. (Transcript p. 137-140).

ERROR NUMBER 12. The Court erred in permitting Dr. Gregory to be recalled as a rebuttal witness for the Commonwealth for reasons assigned in the record. (Transcript p. 142-143).

ERROR NUMBER 13. The Court erred in permitting Dr. Gregory to give an opinion in evidence as to cause of the injury for reasons assigned in the record. (Transcript p. 144).

ERROR NUMBER 14. The Court erred in refusing to permit examination of Mrs. Combs as to previous spankings of other children, for reasons assigned in the record. (Transcript p. 146-147).

page 57 } ERROR NUMBER 15. The Court erred in granting instruction number 1 for reasons assigned in the record.

ERROR NUMBER 16. The Court erred in granting instruction number 2 for reasons assigned in the record.

ERROR NUMBER 17. The Court erred in granting instruction number 7 for reasons assigned in the record.

ERROR NUMBER 18. The Court erred in denying the motion of the defendant to strike the Commonwealth's evidence. (Transcript p. 151).

ERROR NUMBER 19. The Court erred in permitting improper argument of the Commonwealth's Attorney, for reasons assigned in the record. (Transcript p. 151M).

ERROR NUMBER 20. The Court erred in permitting improper rebuttal argument of the Commonwealth's Attorney for reasons assigned in the record. (Transcript p. 151P).

ERROR NUMBER 21. The Court erred in permitting improper rebuttal argument of the Commonwealth's Attorney for reasons assigned in the record. (Transcript page 58 } p. 151Q).

ERROR NUMBER 22. The Court erred in denying the motion to set aside the verdict for reasons assigned in the record. (Transcript p. 169).

ERROR NUMBER 23. The transcript of the testimony at page 152 to 153 indicates the foreman of the jury that returned the verdict was a "Walter E. Neff." The foreman who signed the verdict is a "Walter E. Snapp." The jury list indicates that there was no Walter E. Neff on the jury. There was a Walter Snapp.

Dated this 25th day of April, 1967.

Charles H. Harbaugh, Jr.

By: John F. Anderson
Counsel

* * * * *

page 59 }

* * * *

Filed in the Office of the Clerk of the Circuit Court for Frederick County, Va. this 25th day April, 1967, Virginia Gooden, Dep. Clerk.

page 2 } PROCEEDINGS

(Whereupon, the Court Reporter was duly sworn.)

(Whereupon, opening statements were made by counsel for either side.)

Mr. Massie: We would like to call as our first witness Mrs. Combs.

Whereupon,

AUDREY ODESSA COMBS was called as a witness on behalf of the Commonwealth and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Massie:
Q. What is your name?
A. Audrey Odessa Combs.
Q. Where do you live?
A. Bunker Hill.
Q. Is that in West Virginia?
A. That is my address. I live about one mile east of Ridgeway.
Q. Mrs. Combs, what is your occupation?
A. I am an elementary school teacher.
Q. And where do you teach?
A. Stonewall School in Frederick County.
Q. Is that up near Clearbrook?
page 3 } A. Yes, Town of Clearbrook.
Q. What class do you teach?
A. I teach first grade.
Q. How long have you been teaching?
A. Seventeen years.

Audrey Odessa Combs

Q. Mrs. Combs, going back to the morning of December the 6th, 1966, do you recall having a student in your class named Charles McDonaldson, III, or otherwise Charles Harbaugh, III?

A. Yes, sir.

Q. Do you know how old that child is?

A. According to records, I thought he was six.

Q. Is he an average size for 6 years of age?

A. I think so.

Q. Going back to that morning again, do you recall him coming into your class?

A. I was on bus duty that morning. I was down in the hall as the busses were coming in, and I reported to my classroom at 8:30 when I was relieved of bus duty.

Q. Was he there then?

A. He was and he was there at that time.

Q. Now, during the course of that morning, shortly after 8:30 when you went into your class, did you notice anything about the behavior of this child?

page 4 } A. He sat directly in front of my desk, and he was putting his books away when I came in.

Q. What do you mean by "putting his books away?"

A. He had just arrived about five minutes before, and he was taking his coat and hat off and taking his books from his book satchel and putting them in his desk and getting ready to take those things back to the cloakroom.

Q. What were the other children doing at that time?

A. Well, there are buses that come in at intervals, and some of them are already in the room and have gotten seated, and others are just coming in, putting their things away.

Q. Now, after he had gotten his books put away and for a while during the course of the morning, what did you notice?

A. Well, when he was in the process of putting his books away is when I noticed that there was something wrong with him.

Q. What did you notice?

A. He was not bending over as he usually did to put his books down in the side of his desk, but he was bending his knees only, his body was, you know, sort of stuff. He was just holding himself upright and bending his knees to get down to put the books in, or paper, or whatever he had.

Q. When you noticed that, did that create any questions in your mind?

Audrey Odessa Combs

A. Yes; I questioned him. I asked him a ques-
page 5 } tion.
Q. What did you ask him?
A. I asked him, I said, "Charles, what is the trouble this morning?"

Mr. McKee: If the Court please, I think we are getting into dangerous ground.

By Mr. Massie:
Q. Now, Mrs. Combs, when you asked him what the trouble was, did he make a reply?
A. He did.

Mr. McKee: If the Court please, I object to this. Any statement by the witness with respect to what he told to her at that time would be hearsay and inadmissible.
Mr. Massie: Your Honor, I would like to tell the Court at this time that because of the tender age of this child we have not summoned the child here to testify, because of the nature of the proposed adoption, the adopted father being the defendant. We didn't think it was proper to have the child here in this case, and I think that this act would be a word act of what occurred that morning, and I think the full evidence will reveal that it was a word act, whatever reply he would have given her at that time.
Mr. McKee: If Your Honor please, it would be awkward, I assume, to establish the truth of whatever was said, and this, of course, would make it inadmissible as hearsay.
page 6 } It's not part of the *res gestae,* it's not something that was said immediately timed or immediately after any occurrence. It is something that happened sometime later, apparently at a school.
The Court: In response to questions?
Mr. McKee: Yes, sir.
The Court: I think the objection is well taken.
Mr. Massie: All right.

By Mr. Massie:
Q. Mrs. Combs, I will have to advise you, then, that you can testify what you said, but you can't testify what the boy said.
A. All right.
Q. So give us that one side of the conversation, if you will, your side of it.

A. I will repeat that I asked him what the trouble was.

Q. All right, now, you can't say what he said. Did he then speak to you?

A. Then he answered me.

Q. Then what did you do?

A. And I jokingly said, "Why, you didn't get a paddling, did you?" And that was all was said.

Mr. McKee: I think the witness is attempting to get something into evidence by rather devious and rather obvious means. I don't think she is permitted to make a
page 7 } statement of that nature.

The Court: I think the objection is well taken.

Mr. McKee: Ask that it be stricken.

The Court: The jury will disregard the significance of the remark made by the witness, or her repeated remark that she just gave in her testimony about paddling.

By Mr. Massie:

Q. Now, Mrs. Combs, after this conversation, what did you notice about the boy?

A. He sat down he took his wraps and his book satchel back to the proper place, and he came back to his seat and sat down.

Q. Did you notice anything about him when he sat down?

A. Yes, he supported himself with his hands as he got into his desk.

Q. Now, give us a demonstration what you mean by that.

A. Well, his seat—you know, you get in from the side of the litle desks, and as he slid in he put his hands on the edges of his desk and slid in easily.

Q. Now, did you notice anything after he got into his chair?

A. I went on with my classroom procedures as usual. I didn't say any more to the child at all.

Q. Now, did you—

page 8 } A. I observed him—of course, I called the children from their chairs for reading class. I have different groups of reading. I have my children grouped, and, of course, he had to get up again from his seat that morning and came to the front of my classroom to where the small chairs were where we sat for our reading class, and he walked very stiff-legged, and you could tell that he wasn't—it wasn't normal just from observation.

Q. You had seen him, of course, before this many times walking in your class?

Audrey Odessa Combs

A. Well, I think so, since September, yes. He had been in there since the beginning of school in September.

Q. Was his walking and was the way he got into his chair different on this day than it had been on other days?

A. Quite different.

Q. Now, did you make any other observations during the course of that morning about his behavior?

A. No. He sat down, he was very quiet. He didn't participate in class that morning.

Q. Did he usually participate?

A. Yes, very well.

Q. Now, did you make any report of what you observed to the principal of the school?

A. I went on with my class procedures that morn-
page 9 } ing, had my reading classes, and we prepared for lunch. We have an early lunch at five minutes of eleven, and we all went to the cafeteria, and as we were going through the lunch line I helped Charles with his tray and helped him back to the table where he was to sit.

Q. Why did you do that, Mrs. Combs?

A. Well, he was—he was just barely getting along.

Q. All right, go ahead.

A. And Mr. Koontz came in about 11:00, in the cafeteria.

Q. In the classroom?

A. In the cafeteria.

Q. Now, is he the principal of the school?

A. Yes, he is. And I went over and mentioned it to him.

Q. And then what did you and Mr. Koontz do?

A. He told me that he would be in after lunch to talk to Charles.

Q. Did he then come back?

A. He came by my room about 12:15 and called for Charles.

Q. And what did you do then?

A. I didn't do anything. Charles got up and went out with Mr. Koontz.

Q. Did you see Charles any more that morning?

A. I didn't see Charles any more that day.

page 10 } Mr. Massie: I think that's all. Your witness.

CROSS EXAMINATION

By Mr. McKee:

Q. Mrs. Combs, what procedure do you follow in this classroom to enforce discipline yourself?

Audrey Odessa Combs

A. I set up rules and regulations in my classroom.

Q. Do you inflict any corporal punishment on these children at any time yourself?

A. What do you mean, do I smack them?

Q. Paddle them?

A. With my hand, yes.

Mr. Massie: You Honor, I object to this line of questions. It is not responsive to the direct-examination.

The Court: Well, it isn't proper cross-examination.

Mr. McKee: Your Honor, this is perhaps correct. I might have to call the witness later, if the Commonwealth's Attorney objects to me going into it at this time.

The Court: All right. Objection is sustained.

Mr. McKee: I have no other questions at this time.

Mr. Massie: All right, Mrs. Combs, will you wait outside, please?

The Witness: Yes, sir.

(Whereupon, the witness retired from the stand.)

page 11 } Mr. Massie: I'd like to approach the bench. Mr. Bennett has brought up a question of the competency of this boy to testify even if he had been brought here, and we did not, at the tender age of 6, to have him brought here.

Mr. McKee: He is seven.

Mr. Massie: Seven now. And, consequently, to let Mrs. Combs testify as to what the child said would not be in the nature of irresponsibility or viciousness or any other adverse reasoning against the interest of the defendant, it would be very accurate statements of a child who would be incompetent to testify because of the fact he would not know the difference between right and wrong, and I ask that his statement be permitted.

Mr. Bennett: In addition, the fact that the child is still in the Harbaugh home, and we don't want to put him in the position of making a statement that he has made against the defendant. This is in addition to the fact that the child really wouldn't be competent. *Not* test could have been made, and there are, I think, some—

Mr. McKee: The child is psychologically tested.

The Court: Let's take it up in chambers.

The jury may leave the box for a matter of five minutes.

(Whereupon, the Court and counsel retired to chambers, where the following proceedings were had:)

page 12 } Mr. McKee: Your Honor, this child was—

The Court: Let me ask first, it has already been indicated by the prosecution that you do not intend to put the child on the stand. Frankly, I don't see how you are going to make out much of a case if you don't put him on the stand, unless you have got some eye witnesses to what you charge as an excessive administration of discipline or application of discipline.

But do you merely want to make known your reason for not calling the child—I am not quite sure that I understand what it is that you wanted to take up out of the presence of the jury.

Mr. Massie: What I want to take up is to permit the witnesses who were connected with this child on this day to testify as to what the child said.

The Court: Oh.

Mr. Massie: As an exception to the hearsay rule, on the grounds that the child is an infant of tender years, at the time 6 years, and also the fact that the child wouldn't qualify as a competent witness before the Court.

The Court: Well, I don't want to consume any more time than necessary with the problem. On the other hand, I don't want to deny the full opportunity to be heard, but I feel so strongly along the line that the evidence that has

page 13 } been attempted to be put before the jury is hearsay evidence, that the Court would be mainly in error to make any exception to the rule. I don't know of any exception to the hearsay rule that says the remark of a child of tender years is admissible. It's mainly shown that what the child did say was not an impulsive thing or spontaneous thing, but it was a deliberate answer to inquiry made of the child, and I think that's been plainly held in the Virginia decisions to constitute violations of the hearsay rule as not constituting a part of the *res gestae.* And the whole thing with the *res gestae* is the sponteniety of it adds promise of credibility, and this is far from a spontaneous remark.

I don't care how old the child is, I recognize the fact that today children are more precocious than they were in my childhood, and many children of the age of 6 or 7, particularly after they are old enough to go to school are receivable as witnesses. It is a matter for the jury to determine in weighing the credibility of the testimony of the child of tender years. The fact that this child is the subject of pending adop-

tion makes the problem more difficult, because I question the advisability of proceeding or concluding the adoption if there is a definite feeling of resentment on the part of the child to the extent that it couldn't be cured or healed by

page 14 } normal affection and love, and if this child has reached the point of a severance of any respect for his adoptive father or contemplated adoptive father, that it might well result in the abandonment of the adoption, and for the good of the child and the good of the father, too, it might be well that the adoption should be terminated, any further procedure toward that end. I don't know. That depends entirely on the wishes of the adopting parents and the response of the child.

I wouldn't want to destroy the possibility of this child being provided with a good, stable home, which conceivably could be far better than what he has ever had before. I don't know anything about that, nor that is not for me to pass upon, but at the same time I don't think that you can deny the accused is right to be faced with his accusers and have the proof of the charge adequately made to establish it beyond a reasonable doubt, and I don't see how you can accomplish that by any kid-glove development of the case or delicate handling of the case. If whoever is responsible, or the prosecution wants to bring it to a full hearing, I don't see how you can develop a case without possibly destroying the future likelihood of a successful adoption. It may be that you could, or it may be reparable in some way or another, but that remains to be seen.

If there is still a genuine purpose and desire to

page 15 } conclude this adoption to a successful end, it might be better to let this stand without being brought to a conclusive prosecution or even nolle prossed. I am not making that suggestion, but if the paramount concern is this child's future, I think those things ought to be considered, which is the most advisable thing to approach, to conclude the punishment of a father who is recognized by the prosecution to be a plain offender and should be dealt with, or is it best to consider the adoptive procedure in the future in that light.

It may be that it is too late at this stage. If it is, why, then I think the child ought to be put on the witness stand, at least an opportunity afforded to show that he is receivable as a witness, and it's up to the jury to pass on his credibility with appropriate instructions from the Court, and also with the previous determination that the child is sufficiently aware of the responsibility of a witness, that his testimony can be received. I can't pass on that at this stage, just because he happens to be 6 or 7 years old.

Mr. Massie: I take it the Court has ruled against the motion of Commonwealth to permit the statements of the child to come into evidence.

The Court: I think that may be.

Mr. Massie: I think that's all we wanted to know at this time.

The Court: Yes, sir, I think I have to do that, page 16 } in the absence of any exception.

Mr. Bennett: May I make this suggestion, Your Honor?

The Court: Yes. Do you have any authorities?

Mr. Bennett: The Virginia law is, as I can remember it, that before such a child—

Mr. McKee: Judge, I think we can save a lot of time. If the prosecution wishes to put this boy on the stand, we will be glad to bring him in the courtroom for that purpose.

I might say this: that the child is not estranged from his father. He is very happy in the home right now. Now, what the results of their putting him on the stand might be, as far as this adoption is concerned—child is concerned, that is their responsibility. If they want the child, we will produce the child.

Mr. Bennett: The question is, as I understand, Mr. McKee, whatever happens here will probably not affect the adoptive procedure. Can that be stipulated?

Mr. McKee: No, I am thinking of what emotional effect this will have on a child. This is a shattering experience for a 7-year old. That is one of the reasons we want to clear that up.

Mr. Bennett: That is one of the reasons we preferred not to bring the child in. And the Virginia law has been that such a child cannot testify unless it is shown page 17 } that he is competent.

The Court: I would expect you to put him to some tests and afford you an opportunity to attack his competency as a witness, qualification as a witness. But where can you put your hands on any exception to the hearsay rule that says that you can introduce statements made by the child in response to a series of questions propounded to him?

Mr. Bennett: If he is incompetent, he is unavailable.

Mr. McKee: He is available.

Mr. Bennett: No, he is not. As a matter of fact, he is unavailable.

Mr. McKee: There is no law that he is incompetent.

Mr. Bennett: If that is established that he is unavailable, he is incompetent to testify as a witness.

The Court: Is that an exception to the hearsay rule?

Mr. McKee: You are saying if a witness is incompetent to testify, then his statements not under oath are to be given more credit than the statements of a competent witness.

The Court: Suppose he is a competent witness but he is in Chicago and you can't reach him and he is not going to come?

Mr. Bennett: I agree with you.

The Court: Is there any pronounced rule of exception to the hearsay rule by saying you can call Tom, Dick,
page 18 } and Harry and say this Chicago witness told me thus and so.

Mr. Bennett: You are right.

I understand the right of the defendant to be able to cross-examine the evidence that is brought in against him, but the statements that are taken from this child are things going into the nature of his complaints, not necessarily their truth, but simply the nature of them, and they are able to cross-examine the people who observed the child who will testify more adequately to his pain or—

The Court: I am not persuaded of any recognized exceptions in the hearsay rule, and the objection on the ground of hearsay, I think, would be well taken, and you'd be denied the right to their testimony. So you are left in a situation where you have either got to put on somebody else who does know, or call the child himself.

Mr. Massie: We have some other evidence to that effect.

The Court: All right.

(Whereupon, the Court and counsel returned to the Courtroom where the following proceedings were had:)

The Court: Call your next witness, Mr. Massie.

Mr. Massie: All right. We'd like to call Mr. Roger Koontz.

Whereupon,

page 19 } ROGER KOONTZ was called as a witness on behalf of the Commonwealth and, being first duly sworn, was examined and testified as follow:

DIRECT EXAMINATION

By Mr. Bennett:

Q. Would you state your name, please?

A. Stanley Roger Koontz.

Roger Koontz

Q. Mr. Koontz, what is your occupation?
A. Principal of the Stonewall School, Clearbrook.
Q. How long have you been principal there?
A. Two years.
Q. Mr. Koontz, directing your attention to December 6th, 1966, were you at the school on that date?
A. Yes, I was.
Q. On that day did you have a chance to see one child by the name of Rusty—it's Harbaugh now, I think.
A. Yes, sir.
Q. Could you tell the Court and the jury, please, under what circumstances you did see the child and your observations?
A. Yes. Mrs. Combs, the first grade teacher, asked if I would look at Charles. He seemed to—

Mr. McKee: If the Court please, I think the witness ought to be instructed he is not to testify what other people said to him.

page 20 } By Mr. Bennett:
Q. Don't say anything she said, what you observed, what you might have done there, but not what anyone else said.

The Court: In other words, you won't be permitted to state what Mrs. Combs told you or what the child may have told you, but what you, yourself, saw and observed with relation to the child's behavior, his physical condition, and so on.

The Witness: Well, I went to her room and got the child and took him to my office where Mrs. Barr, the school nurse, was present, since this was her day in my school, and asked her if she would examine the child with me. And I turned the child around partially away from her so that his back would be towards her and so that I could also see it, and the outside of his pants around the buttocks showed marks, I'd say around —water marks around the size of an apple; that is, the mark that water will make on clothing, but it was on each side of the pants.

So I took down the outer pants, and he had on, I think, white cotton underpants, and these showed blood marks and round seepage water marks about the size of a nickel, to be conservative, very definitely and adhered—appeared to be adhered to the body itself. I carefully took these underpants

page 21 } down, and the outer layer of skin was attached to the cotton underpants and went down with it. So both these places were then raw down to the second layer of skin.

The child had both legs in the back, that is, where we were looking at it, purple marks. The child was purple down to, I'd say, two inches of the knees and upwards above the belt line, a deep purple. And at the end of the purple marks there was a conflagration or whelp type of thing that would not come about by beating but probably would come about—

Mr. McKee: If the Court please, I think the witness should be restricted from testifying as to his conclusions concerning what he saw. He should be restricted to what he saw, and that's it.

The Witness: All right, I saw these whelps that appeared to be maybe an inch wide. Now, they were at the end of this deep purple. And along with the nurse, then, who was there and also observed this, we carefully put the child's pants back on and took him to our clinic room in the school and placed him down, face down, lying on the bed in the clinic room. We went back to my office and discussed the case and what should be done about it. To me, this was extremely—

Mr. McKee: If the Court please, again, this—

The Witness: —serious.

The Court: Objection is sustained. It is up to the jury to determine whether it is extreme or out of reason.

page 22 } By Mr. Bennett:

Q. Mr. Koontz, I'd like to show you these pictures, stipulated by counsel, that were taken the day after the boy was brought to your office. Do these pictures correspond with what you saw on that day, or is there any difference between—

A. The only difference, these pictures do not show the discoloration in both legs in the area above the buttocks. However, the skin being off on each end of the buttock is very definitely—definitely corresponds with what I saw that day.

Q. And what disposition did you make of the child after you had examined him?

A. I called the Superintendent of Schools, found that he was with the School Board, and I talked to him on the phone, and I said that in my opinion this case—

Mr. McKee: If the Court please, again we are getting into matters which are questions of opinion.

The Court: Yes. Your opinion is not appropriate evidence, the witness is told, and the objection is well taken to that statement.

By Mr. Bennett:

Q. Just state what was done objectively. What was done with the child after you saw it—what you did with
page 23 } the child. Where was it taken—did you take him anywhere?

A. The child was in the clinic room, and we had, then, other people come to the school, and I personally didn't take the child anywhere, no.

Q. You last saw him there in the clinic?

A. Well, after the assistant superintendent arrived and after the visiting teacher arrived, he was taken to the hospital, he was taken to—

Q. At least, he was taken—

Mr. McKee: If the Court please, I think this is again a matter of hearsay. He says he didn't take him anywhere. I don't think he can testify somebody told him what they did. I think this is competent for others to tell.

By Mr. Massie:

Q. Did you instruct anyone to take the child?

A. Yes, we instructed the visiting teacher—

Mr. McKee: Your Honor, which one of these attorneys is examining this witness? I think the Commonwealth should be restricted to one attorney, not two, on each witness.

The Court: The Court will permit Mr. Massie to conclude if there is any further examination he thinks might be brought out that was omitted.

Mr. Massie: Your Honor, I apologize for injecting into the case. I just was trying to bring out the evidence.
page 24 } The Court: Go ahead.

By Mr. Massie:

Q. Did you instruct Mr. Swagler Koonce, the visiting teacher, to take this child anywhere?

A. Yes.

Q. Where?

A. We directed them that they take this child to a physician, a doctor.

Q. Is this the last you saw of the child?
A. This is the last I saw of the child. The child was then taken from the school.

Mr. Massie: Thank you, sir.
You may examine.
Mr. McKee: No questions.
Mr. Massie: That's all, Mr. Koontz.

(Whereupon, the witness retired from the stand.)

Mr. Massie: May we ask Mrs. Betty Barr to come in, please?

Whereupon,

BETTY R. BARR, was called as a witness on behalf of the Commonwealth and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Massie:
page 25 } Q. What is your name?
A. Betty R. Barr.
Q. Where do you live, Mrs. Barr?
A. Merriman's Lane in Frederick County.
Q. What is your occupation?
A. I am a registered nurse, Professional License No. 15960.
Q. Mrs. Barr, are you employed by the Frederick County School System?
A. I am.
Q. Are you employed as a nurse in the school system?
A. Yes, sir.
Q. Going back to the day of December the 6th, 1966, did you have occasion to be at Stonewall School in Frederick County that day?
A. I did.
Q. Did you see a young child—

Mr. McKee: Before we go any further, I wonder if I might inquire what the witness is reading from? I don't think the witness is permitted to testify—

Betty R. Barr

The Court: I haven't seen her read.
Mr. McKee: She has some notes there in her hand.
The Court: She hasn't been reading from it yet.

By Mr. Massie:

page 26 } Q. Mrs. Barr, did you have occasion on that day to see a *child* nicknamed Rusty Harbaugh, or McDonaldson?

A. I did.
Q. Did you see him at the Stonewall School?
A. I did.
Q. Do you recall about what time it was?
A. Yes, sir.
Q. What time?
A. Approximately 12:30.
Q. Is that in the afternoon?
A. In the afternoon.
Q. And where did you first see the child?
A. He was brought into the administrative offices.
Q. Now, did you examine this child?
A. I did.
Q. Tell the Court, then, what you did and what occurred during the course of the examination, but don't tell what anyone said to you, just tell what you observed and what happened, what took place.
A. All right. It's customary for me to go to Stonewall School on Tuesday, and I did go on Tuesday, December 6th, and I arrived at the school at approximately 12:30, was preparing for lunch, which is my usual routine, and Mr. Koontz—

page 27 } Mr. Roger Koontz, the principal of the school, asked me if I would delay—

Mr. McKee: If the Court please, again, she has been told not to say what anybody said to her, just what she did.

Mr. Massie: She is not quoting Mr. Koontz, and I don't think it's harmful if she lays background for what she did.

Mr. McKee: Just say what she did.

The Court: I think there has to be some indulgence along the line. The witness is bound to make some allusions to certain remarks that technically may be inadmissible, but it is perfectly normal for a person relating his or her story to give a little background on it, and unless it is harmful violation of the hearsay rule, I think we can let it go.

Mr. McKee: Your Honor, I agree there is nothing harmful in this, but I am just afraid that once we get started that the *dendency* is to continue on where we might get to the point where—

The Court: Just let the witness be impressed with the fact that the testimony should be limited to your own observations and not what somebody else may have related to you or told you.

The Witness: I was asked to delay my lunch and to see a child. The principal of the school brought a youngster in for me to see, and the child approached the administrative offices with a limp, and then he came into the inner office, and he was introduced to me as Charles Harbaugh. I observed that this child had a cast on his left arm. My first impression was that he came to me because of the cast on his arm. Then the conversation which involved the principal who brought the child to me to observe and the child's conversation was that it wasn't the cast that was the problem.

page 28

So I talked with him and asked him what was wrong with his leg, which is ordinary procedure when they bring a child to me. We have to have a conversation leading up to it, especially a child of that age. We don't just assume that the child is going to describe his problem. So I spoke with him, and we had a very pleasant conversation, and I noticed that on the seat of his trousers there was a mark which appeared to me—two marks which appeared to me to be like water drainage, or there was a mark there.

By Mr. Massie:

Q. Was it damp?

A. No. No, it was not. And I determined that I should see just what the problem was, and I determined this because the child indicated that he had been spanked—

Mr. McKee: Now, if Your Honor please—

The Witness: Well, that's the reason I did it.

Mr. McKee: I would have to move that this be—Your Honor, I am afraid I am going to have to move for a mistrial. This is the very issue in the case. The witness has been told she was not to say anything that was said to her, and she has interjected this, and I respectfully move that the Court declare a mistrial.

page 29

Mr. Massie: Your Honor, I don't think it is harmful at this

time, and I think in view of the later evidence that will be brought out by the Commonwealth, it will not be harmful at this time. The Court can rule on it later.

The Court: I think the Court can take care of it by telling the jury to disregard the witness's testimony as to what this child may have told her. Now, the witness said that the child indicated that he had been spanked. Obviously, that was either drawn from an observation that the witness made or from the statement that the child made, and the Court has ruled that the child's statements in answer to your questions are inadmissible.

The Witness: Yes, sir.

The Court: And you can only testify before this jury as to what observations you made of the physical condition of the child, and the jury can draw its own inference from those physical observations just as well as the witness can draw as to how the marks may have gotten there.

Mr. McKee: If Your Honor please, I would ex-
page 30 } cept to the Court's overruling my motion.

The Court: The motion for mistrial is denied.

Mr. McKee: Exception noted, Your Honor.

By Mr. Massie:

Q. Now, you may proceed, Mrs. Barr.

A. Well, Mr. Koontz was in the office with me, and we took his trousers down. The child was not able to do it because of the cast on his arm. So I turned him with his back to me, and we took the trousers down, and as I took them down—he was wearing knit underpants—I noted that over the apex of the cheek of the buttocks on either side there was what I termed serous drainage.

Q. Mrs. Barr, let me interrupt you for a moment. I show you Commonwealth's Exhibit No. 2 and ask you if you can identify that as being the child's appearance when you saw it. These are stipulated to have been taken the day after the day you saw the child.

A. Yes, sir, I would say that this is the condition that I observed.

Q. All right, now, when you talk about that apex of the buttocks, would you point that out to the jury so that they will see what you are talking about?

A. Here and here (indicating on photograph).

Q. Is that where the red marks are?
page 31 } A. Yes, sir.

Q. Now, what did you notice about those blood areas?

A. Well, when I took the underpants down, as I took them down the tissue from these two areas adhered to the underpants. I was absolutely shocked—

Mr. McKee: Now, if Your Honor please—

The Witness: I felt guilt—

Mr. McKee: This witness is doing everything she can to create prejudice. She has been told time and time again she is not to make these statements.

The Court: Mrs. Barr, let me make this impression on you so it won't be repeated interruptions in the course of your examination. It is perfectly proper for you to tell this jury what observation you made without telling the jury what your conclusions were or your impressions were. They may have a different impression from the one that you drew about the severity of it, and so forth, but you are at liberty to tell this jury what you saw, and they, as jurors, can draw an impression just as well as any witness can or anybody else, but it is for the jury to draw the inferences and the conclusions and the impression, not for the witness to draw it. So you should eliminate from your testimony what your personal and individual impression may have been and limit it to the physical observations that you made at the time.

page 32 } The Witness: I will try.

Mr. McKee: Your Honor, I would again renew the motion for mistrial based upon the last statement of the witness.

The Court: The motion is denied.

Mr. McKee: Exception.

The Court: All right.

By Mr. Massie:

Q. All right.

A. Well, the tissue adhered to the knit underwear, and then I observed the child's back.

Q. Is this above the buttock area?

A. Yes, sir. Above the natural waistline of the child.

Q. Will you point that area out to the jury?

A. Where the belt would fit on, you know where the trousers would rest, approximately from there up to the rib cage, I observed an unusual color, not usually, in my experience, found, which was dark red, and then from the natural waist-

line down, oh, extending down over both cheeks it was sort of a purple color, and then from the cheeks down about *thre* or four inches on the legs it was—the tissue felt hard and white like a welt.

Q. I show you this photograph No. 3 and ask you if that was a picture of what you observed, also.

page 33 } A. Yes, sir.

Q. Now, were there any marks below the buttocks?

A. Not—just as I described it, below the buttocks extending about three inches down on the leg it appeared hard and white. It was a different color of the buttocks.

Q. All right, now, when you pulled these knitted underpants off, you say that the tissue came with the pants?

A. That was my impression, yes.

Q. What was the condition of these two red marks on the apex of each buttocks? Was there any skin there?

A. I would say the first layer of skin was off, and therefore it was what we call a serous drainage or it was moist. There was not a scab.

Q. All right, after you observed this condition of the child, what did you do, Mrs. Barr?

A. Well, I redressed the child, and I took him over to the clinic area, which is on the other side of the administrative offices, and we have a cot there, and I let him—I helped him to get on the cot and lie down, and because of the cast I placed him face down with his arm up in an extended position and made him as comfortable as possible and just left him there and told him that I would be back to see him, and then I returned to the Principal's office.

Q. Now, was this cast on his left arm?

page 34 } A. Yes, sir.

Q. Now, after you had placed the child on a cot and gone back to the principal's office, did you see the child again that day?

A. Yes, sir.

Q. Where?

A. In the clinic area. I saw him several times that day.

Q. Still on the cot?

A. Still on the cot.

Q. Did you take the child anywhere that day?

A. Yes, sir.

Q. Where did you take the child?

A. In the School Board car I assisted in transporting him to Dr. Gregory's office.
Q. Is that here in Winchester?
A. On West Boscawen Street.
Q. Did you go into the doctor's office with the child?
A. I did.
Q. Were you present when the doctor examined the child?
A. No, sir.
Q. Did the doctor take the child from your custody in his office?
A. Yes, sir.

page 35 } Mr. Massie: That's all.
Mr. McKee: No questions.
Mr. Massie: You may go back in the hall, Mrs. Barr.
The Court: Do you want to keep these witnesses corralled here?
Mr. Massie: I would like to until I know what the defense does, Your Honor.

(Whereupon, the witness retired from the stand.)

Mr. Massie: I'd like to call Melton Wright to the stand.

Whereupon,

MELTON WRIGHT was called as a witness on behalf of the Commonwealth and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Massie:
Q. Mr. Wright, what is your name?
A. Melton Wright.
Q. What is your occupation?
A. Assistant Superintendent of Schools in Frederick County.
Q. Dr. Wright, in that capacity, did you see a child nicknamed Rusty Harbaugh at the Stonewall School on December the 6th, 1966?
page 36 } A. That is correct, I did.
Q. Were you at the school, or were you called there?

Melton Wright

A. No. I was at the School Board Office and was called to come to school.

Q. About what time do you recall you were there?

A. I was at the school at approximately 2:00 o'clock.

Q. Now, you say you saw this child?

A. Yeah, I did.

Q. Did you examine him at all?

A. Well, I saw the child's lower anatomy exposed.

Q. I show you Commonwealth's Exhibits 2 and 3 and ask you if this is what you observed.

A. That's correct.

Q. When you saw the condition of this child, did you make any recommendations as to what should be done with the child?

Mr. McKee: If the Court please, I don't think there is any issue about what was done with the child. I don't see where this is material. It's conceded that the child was taken from the school to Dr. Gregory's office. I don't see why the *repitition* over and over of the same thing is getting us anywhere.

The Court: Well, further than that, I doubt if the witness's recommendations would be admissible anyhow. I page 37 } think you had better limit the witness to his own observations of the material matters under inquiry here other than his own judgment or his own conclusions or own theories, and so on.

By Mr. Massie:

Q. Did you, as the Assistant Superintendent of Schools, tell the Superintendent of this particular school to do any certain thing to this child?

A. Well, I suggested that the child be taken to the doctor.

Mr. Massie: That's all.

Mr. McKee: No questions.

Mr. Massie: I have no objection to the witness leaving now.

Mr. McKee: I have no objection to this witness being excused.

The Court: You are discharged from the further attendance under your summons, then, Mr. Wright.

The Witness: Thank you, sir.

(Whereupon, the witness retired from the stand.)

Dr. Warren R. Gregory

Mr. Massie: I'd like to call Dr. Gregory to the stand, please.

Whereupon,

page 38 } DR. WARREN R. GREGORY was called as a witness on behalf of the Commonwealth, and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Massie:

Q. What is your name, sir?

A. Dr. Warren Gregory.

Q. What is your occupation?

A. A pediatrician.

Q. Where do you practice?

A. In Winchester, Virginia, and am Chief of the Pediatrics of Winchester Memorial Hospital.

Q. Dr. Gregory, how long have you been a physician?

A. Today starts my 14th year in Winchester, sir.

Q. Where did you receive your education?

A. University of Virginia in Charlottesville for medicine, my residency training, and also an instructor on the staff there before coming to Winchester.

Q. About how long were you there at the University?

A. I started medical school in 1946, graduated in 1950, interned and took two residencies and an additional year of teaching and research in hematology.

Q. Dr. Gregory, on the 6th of December, 1966, did you have occasion to examine one Rusty Harbaugh, or Charles Harbaugh the Third, or a McDonaldson the Third?

A. Yes, sir.

page 39 } Q. Where did you first see this child?

A. On that day?

Q. Yes.

A. He was brought to my office in the middle of the morning by the visiting teacher and the school nurse.

Q. Did you examine this child?

A. Yes, sir.

Q. I show you Commonwealth's Exhibits Nos. 2 and 3 and ask you if you observed the child's condition. Does that reflect the condition of the child that was brought into your office?

Dr. Warren R. Gregory

A. Yes, sir, these were taken the day following the examination, to my knowledge.

Q. Is that a photograph of the child also, No. 1?

A. Yes, sir.

Q. Dr. Gregory, what did you observe in the course of your examination of this child?

A. Both cheeks of the buttocks were swollen to approximately half their normal size. The swelling extended on the right side into the lower back and on the right side into the upper thigh. The center of the buttocks area had been blistered, blistered about two inches in diameter. The blisters had broken and serum was oozing from each of these areas onto the boy's underpants.

page 40 } Q. Now, when you observed this condition, did you prescribe any treatment?

A. With the boy's condition at that present time, plus prior knowledge of what had happened to this lad in previous contacts with him, I advised—

Mr. McKee: I think perhaps we had better have a recess or we are going to be in trouble.

The Court: All right. Do you want to interpose some objection out of the presence of the jury?

Mr. McKee: I think there are some matters which counsel had better take up with the Court concerning the testimony of this witness before—

Mr. Massie: The procedure would be to make some objection, or we will go on with the testimony.

Mr. McKee: We may—

Mr. Massie: I know Dr. Gregory is not going to give any hearsay testimony. He has been so advised, and he is not going to give any opinion testimony unless it is an expert opinion. If I propose a question and the defense wants to object to the question, then we are in normal court procedure. I think we should follow that.

The Court: I think I can reasonably and fairly assume that the objection really lies to some indication that the doctor has given about some previous or prior experiences

page 41 } involving this child. I think the objection is well taken, and the witness should be restrained and refrain from testifying on any matter that doesn't pertain to the immediate assault charge under inquiry, namely, the assault charge of December the 6th, I believe it was.

Mr. Massie: I would like to ask him just one question. I don't think it would be objectionable.

The Court: And the jury is told to disregard any inference or any remark made by the witness or any inference to be drawn from that remark with respect to some other observation of this child on some previous occasion.

By Mr. Massie:

Q. Doctor, have you been the family physician for this child in the past?

A. Since August of '66.

Q. August of '66. All right, now, Dr. Gregory, did you give any medication and treatment for this child?

A. I advised that the boy be hospitalized for his injuries.

Q. Was he then hospitalized?

Q. Subsequently to the proceedings necessary to have him admitted.

Q. Was this the same day or a different day?

A. The following day, I believe, sir.

page 42 } Q. Now, did you attend him while he was in the hospital?

A. Yes, sir.

Q. Was this the Winchester Memorial Hospital?

A. Yes, sir.

Q. And how long was he in the Winchester Memorial Hospital?

A. Let's see, he was admitted on 12-7-66 and discharged on 12-19-66.

Q. How many days is that? I didn't quite catch it.

Mr. McKee: The jury can add, Your Honor.

The Witness: Twelve days.

By Mr. Massie:

Q. Twelve days. All right, now, Dr. Gregory, have you any record of the size and age of this child?

A. The information given me and in his hospital record is that this child was born on the 31st of January, 1960.

Q. Now, do you have any measurements as to weight and length of the child?

A. Yes, sir.

Q. What was the weight of the child at this time?

A. (Looking at paper.) I don't have this part of his record, his weight at the time, the day of admission. I have previous weights of previous observations.

Dr. Warren R. Gregory

Q. All right, how long before this?

page 43 } A. We have an observation on 8-16-66, August the 16th, '66.

Mr. McKee: I don't see what the materiality of the weight of the child in August '66 has to these proceedings.

Mr. Massie: It has a lot to do with the difference between the two parties involved in the assault and battery, Your Honor.

Mr. McKee: We admit that the child is considerably smaller than his father.

The Court: Go ahead.

Mr. Massie: I'd like to have it established.

The Witness: On August 16th, 1966, he was 40 1/2 pounds and 45 inches, well within the range of normal for a child of his age.

By Mr. Massie:

Q. Was his weight and size approximately the same on December the 6th?

A. Essentially, yes.

Q. Now, Dr. Gregory, what did you observe about this child's condition and his behavior while he was in the hospital?

A. His condition responded nicely to treatment. He was a model patient in the hospital.

Q. Did you have any occasion while the child

page 44 } was in the hospital to discuss the child with the father pp that is, the proposed adoptive father, Mr. Harbaugh, the defendant in this case?

A. On several occasions.

Q. Now, will you repeat those conversations as nearly as you can recall them?

Mr. McKee: If the Court please, I'd like to be heard on motion with respect to that. Wonder if we might have a brief recess.

The Court: Let's take it up at the bar of the Court, right here.

Mr. McKee: I would move that any alleged conversation between the doctor and Mr. Harbaugh would be privileged. This man was a physician for Mr. Harbaugh, and I think that any conversations that they had would be privileged, and we claim that privilege.

Dr. Warren R. Gregory

Mr. Massie: Your Honor, I know of no rule as to privileged communication between the doctor and the father of the child who is in the hospital who is being treated by the doctor, particularly when there is an assault charged between the father and the child.

The Court: As a matter of fact, there wasn't even any legal privilege to the communication between a patient and the doctor until comparatively recently. I think it was page 45 } a prevalent belief that there was such a privilege, but there never has been until recent enactment by the Virginia Legislature, and that only pertains to the patient and the doctor, and in this instance I gather from what the indication is that the patient was the child and not the father.

Mr. McKee: He is the family physician for him, Your Honor.

The Court: Objection is overruled.

Mr. McKee: Exception noted, Your Honor.

By Mr. Massie:

Q. Then, Doctor, tell us what the nature of your conversations with Mr. Harbaugh were and where they were and when they were.

A. On the evening we were making rounds—

Q. Give us approximately the date.

A. Oh, approximately the 8th or 9th of December. My associate and I were in the lobby of the hospital, and Mr. Harbaugh was there. He came to us and inquired as to Rusty's status. He was informed that Rusty's fate was out of my hands and his hands as far as his general information was concerned, and I was very sorry about that, and he said, yes, he didn't mind spending a few days in jail for spanking this boy if it would help him grow up and be a law-abiding citizen.

Q. Did he give you any reason for spanking the child?

page 46 } Mr. McKee: *Of* the Court please, there is no indication that any question was asked about any reason. I think he is trying to lead the witness and suggest the answer. Object to it as leading.

The Court: What is the objection to the question?

Mr. McKee: I object to the question as being leading in form. He asks the witness if he gave any reason for spanking the child. I think it is an improper form for the question to be. He asked him what he said.

Mr. Massie: He brought out the statement, and I wanted to fully develop it.

The Court: The objection is overruled.

Mr. McKee: Exception noted, Your Honor.

By Mr. Massie:

Q. Will you answer the question, please, sir?

The Court: Did he give you any reason for the spanking?

The Witness: Not at that particular time, Your Honor. There had been previous advice about the problem that had been involved with the boy between the adopted father and the boy, but not at that particular evening, sir.

By Mr. Massie:

Q. Dr. Gregory, can you more fully develop the nature and the substance of your conversation with him on
page 47 } that particular day when you were visiting the patients?

A. That's about the essence of it, sir.

Q. Did you have a later conversation with him concerning the child?

A. Yes, sir.

Q. And when and where did he make any statements?

A. He came to my office on a subsequent date, approximately two days later and informed both my associate and my office nurses that spanking—that, yes, he had spanked him, wasn't that the proper way to handle a boy who wasn't obeying?

Q. Did he say in what way the child would not obey him?

A. Not at that particular time, no, sir.

Q. Did he at any time give you any particular reason why this particular offense or action occurred?

A. No, sir, not this particular offense.

Q. Did he make any complaints about the child's eating habits or any other actions of the child?

Mr. McKee: If the Court please, again the questions are leading and have nothing to do with this, the child's eating habits or something of that nature. I think he is trying to say again—again the Commonwealth's Attorney is trying to suggest an answer to the witness. He is not satisfied with the one he got. I object to it.

The Court: The witness has already testified
page 48 } that the father, or the accused gave no reason for

his admitted spanking. He has already said he gave no reason for it on this occasion, that is, the spanking of the 6th or the day before.

By Mr. Massie:

Q. Dr. Gregory, in the course of your conversations with the defendant, after the child was placed in the hospital, was the subject of spanking that you discussed with him in relation to the condition of the child in the hospital, the condition that you had seen of the child?

A. I don't quite get the question, sir.

Q. You have mentioned the fact that the defendant stated that he would have no objection to spending some time in jail if spanking—

Mr. McKee: I don't think the Commonwealth's Attorney should repeat the testimony of the witness.'

The Court: I don't see that he is.

Mr. McKee: It is only for prejudice purposes.

The Court: Objection is overruled.

Mr. McKee: Exception noted.

By Mr. Massie:

Q. Dr. Gregory, when he was speaking of having no objection to serving time in jail for spanking the child if it would keep the child from being a juvenile delinquent, page 49 } was your conversation and his conversation concerning the condition of the child then in the hospital?

A. I made no comments and made no evaluation of the problem because of the then-existing legal relationship between the two. The child was in the charge of the welfare, and I made no comment and asked no questions of the father at the time.

Q. Did you discuss the condition of the child with the father?

A. No, sir, only that the child's fate was now out of his hands and out of my hands.

Q. Dr. Gregory, do you have any children?

A. Three, sir.

Q. Do you have any boys?

A. Two, sir.

Mr. McKee: If the Court please, again, I don't think this has any materiality to the case in question at all, how many

children Dr. Gregory has, the sex of the children. It has nothing to do with this case.

The Court: What is the significance?

Mr. Massie: Well, perhaps—

The Court: I suppose he is leading up to something, but I—

Mr. Massie: Perhaps I ought to put it on *on* re-
page 50 } buttal. I was trying to—

By Mr. Massie:

Q. Dr. Gregory, have you experienced any spanking situations with a bare hand or with a hand of an adult on the—

Mr. McKee: Again, I object to that. It is not material what other situations he would have experienced, and they would be based on hearsay in any event, because—unless the doctor witnessed the spanking or whatever he is talking about.

The Court: I don't know that the materiality of the testimony has been made plain to the Court, but possibly Mr. Massie should be afforded the opportunity of fully pointing that out.

Mr. Massie: Perhaps I can approach it from this question, Your Honor:

The Court: All right.

By Mr. Massie:

Q. Dr. Gregory, would the spanking of a child such as this child with the hand, with clothes on the child, cause this condition to exist?

Mr. McKee: If the Court please, before he answers that question, I'd like to object to it. I think it calls for a conclusion as to a fact which we are here to determine. It's not a medical question, it's a question of fact which is not the sub-
ject of expert testimony. I think it's the same
page 51 } thing as tire marks in the road, asking somebody
to interpret tire marks. This is not permissible. It goes beyond the scope of what an expert is permitted to testify.

The Court: Well, is it the contention of the prosecution that parental discipline would be limited as a matter of law to the use of the palm of the hand?

Mr. Massie: That is a question for the jury, Your Honor, but I think it is a question as to what damage can be done by the palm of the hand or by any other instrument, and I think

the Court and the jury should have the benefit of expert testimony as to how this type of injury could develop or could exist or could come about, what kind of severe—what kind of beating, what kinds of injury, what kinds of circumstances would cause this kind of an injury to the child.

Mr. McKee: If Your Honor please, that would be purely speculative, and that, as I say, is the crucial issue in this case, and that is what the jury has to determine. I don't believe the physician who is admittedly qualified in the treatment of injuries is similarly qualified in speculating as to how they may have come about.

The Court: Is there such a thing as a spanking expert?

Mr. McKee: I don't believe so.

The Court: Then I think that anybody who is familiar with the normal reaction to bodily punishment would be

page 52 } entitled to express some views as to the normal reaction to bodily punishment.

Mr. McKee: Your Honor, I believe the law is, in cases such as that, that is the decision the jury must make, and the witnesses must be restricted to stating what they observe. It's just the same thing as the tire marks on the highway. You cannot testify, nor any expert can be brought in to interpret tire marks. The only thing you can do in an automobile case involving tire marks is have the witnesses point out where the tire marks were, and the jury must interpret them.

The Court: It is true—

Mr. McKee: And I think this is true in this case. He can say what marks he has observed, and he has already told the jury what he observed. The jury has to draw the conclusion as to what could or could not cause them. I don't believe the witness can invade the province of the jury in that respect to give his own version as to what type of instrumentality would be involved, because it would be the kind of matters that are not the subject of expert opinion.

Mr. Massie: Your Honor, I think the cases in Virginia have cited that it is proper to ask opinion evidence of doctors as to how injuries of individuals do occur and can occur.

The Court: I think the doctor is qualified to

page 53 } express an opinion as to how the apparent bodily injury to this child might have been brought about.

Mr. McKee: If the Court please, I note my exception to the ruling of the Court.

The Court: All right, your point is saved.

Dr. Warren R. Gregory

By Mr. Massie:

Q. Dr. Gregory, will you give your opinion as to how this type of injury could have happened to the child?

A. Mr. Massie, I have seen initiations and hazings and been spanked as a child, I have spanked my own, I have been through high school and college initiations and professional school initiations, and I have never seen anything that resembled this.

Q. Could this—

Mr. McKee: If the Court please, I renew my move that that be stricken.

The Court: Objection is overruled.

By Mr. Massie:

Q. Could this have happened by the use of the hand?

A. It would have had to have been a prolonged and intensive and probably with pants down and not up. That is—

Q. What would you say would be prolonged and intensive if these injuries were suffered by a hand from another person?

A. Oh, something like a hundred blows to each
page 54 } cheek.

Q. Can you give us in detail what the condition of each cheek was?

A. The center area was swollen to about half again its normal size.

Mr. McKee: If the Court please, he is repeating testimony which was previously given. I see no material—

Mr. Massie: He didn't give this before.

Mr. McKee: He did.

The Court: Yes, he testified the cheeks were swollen to about half again the normal size. He has testified to that.

Mr. Massie: I am sorry.

By Mr. Massie:

Q. Doctor, could this have happened by the use with such as a paddle or a board?

A. Certainly fewer blows could have produced it from a board.

Q. You mean, fewer than the hand?

A. Fewer than the hand.

Q. Would it have been—about how much less, then, would you say?

Dr. Warren R. Gregory

A. A quarter, possibly.

Q. A quarter less?

In other words, it was a hundred blows by the hand; it would be 75 blows by the board?

page 55 } A. Well, no, it would be one-fourth the total. Depends upon the strength of the individual administering the blow and the resistance that the receiver is giving to it.

Q. Was there anything about—

A. I would say five or ten blows, probably, from a board could not produce this amount of blistering.

Q. Was there anything peculiar about this child's condition that would lend itself to being more easily injured than a normal person?

A. I can certainly think of none. The child was in excellent nutrition, the general health was good.

Q. Would the condition of the child's complexion—

A. He was a fair, red-headed child, and redheads are notorious for being sensitive as far as sunburn and insect bites are concerned. I have no knowledge of any unusual reaction to trauma.

Q. Your opinion is as to trauma the child would be no different than a blond or brunette?

A. I don't think so.

Mr. McKee: Is Mr. Massie testifying, or the witness?

Mr. Massie: It was a question, not a statement.

The Witness: I know of no difference between those individuals.

page 56 } The Court: Let me ask this, Dr. Gregory: I believe that you identified those photographs of the appearance of this child at the time. Does that photograph fairly represent the appearance of the buttocks of the child at the time in question, the photograph in front of you there, Exhibit No. 2, I believe it is?

The Witness: Yes, sir. These were—it was more intensive the date the injury occurred. These were taken 24 hours or so later.

The Court: Well, but—

The Witness: They are fairly representative, yes, sir.

The Court: Your observation as to the severity of the injury was based on the appearance of the child at the time the photograph was taken?

The Witness: No, sir; 24 hours earlier.

Dr. Warren R. Gregory

The Court: Oh, earlier?

The Witness: Yes, sir. He was brought to my office on the 6th; these photographs were taken at the Welfare Office on the 7th.

The Court: I thought they were taken the day that he was first observed to have eased himself in his seat at school.

The Witness: No, sir.

Mr. Massie: No, sir, these were taken by the
page 57 } Welfare Department the day after he was taken to
Dr. Gregory's office.

The Court: Twenty-four hours' difference?

The Witness: Yes, sir, and 24 hours' difference would have made the—well, the only difference that doesn't show up here, some of the redness had possibly subsided by that time, an area surrounding and center blanching, but essentially they represent the amount of blistering in the center.

The Court: All right.

Mr. Massie: That's all the questions I have.

CROSS EXAMINATION

By Mr. McKee:

Q. Dr. Gregory, this child was admitted to the hospital on the 7th day of December, correct?

A. Yes, sir.

Q. And he was admitted for a neurological work-up for history of persistent and repeated vomiting, wasn't it?

A. Yes, sir.

Q. That was why he was in the hospital for 12 days?

A. No, sir.

Q. You have your discharge summary?

A. Yes, sir.

Q. He was put in the hospital because of the stomach?

A. No, sir.

page 58 } Q. That is what he stayed in the hospital 12
days for?

A. No, sir. This boy, if you wish to end this facet of the—

Q. I am asking you, sir, this: You stated that you saw him and he was blistered. Are you telling the jury that he was in the hospital 12 days because of the blisters on his fanny?

A. When this child was first presented to me—

Q. Could you just answer that question?

Mr. Massie: Go ahead and answer the question. And don't interrupt him.

Mr. McKee: I think that is susceptible to being answered yes or no: was he kept in the hospital 12 days for the condition of his fanny?

The Witness: His fanny was being treated the entire 12 days that he was in the hospital.

By Mr. McKee:

Q. That was the time that he was kept in the hospital for other reasons?

A. During the time he was in the hospital, other things were being done to him relating to his total condition.

Mr. McKee: That's all.

REDIRECT EXAMINATION

By Mr. Massie:

page 59 } Q. What was his total condition, and what did you do?

A. This child was first presented to me in August with a a chief complaint by the father that he had—"the boy chews and chews and chews his food and vomits—

Mr. McKee: I don't see where this has any relation to this case, and the only reason I asked that was to find out the reason he stayed in the hospital.

The Court: I think this goes to that inquiry.

Mr. McKee: The only thing I wanted to find out is why he was in the hospital. The inference was it was the condition of his buttocks.

The Court: Then the doctor is going into this aspect of vomiting, too.

Mr. McKee: Yes, sir, and I don't see what materiality it has. I don't know the point that he was treated for that as well.

The Court: Well, I thought you were trying to bring into the record before the jury the fact that he was held there.

Mr. McKee: Yes, sir, I was trying to determine why he was in the hospital for 12 days.

The Court: Yes.

Mr. McKee: I don't think anything else has any materiality other than the fact that he—

page 60 } The Court: The injury to his buttocks wasn't responsible for confinement for 12 days alone, was it, or was it?

Dr. Warren R. Gregory

The Witness: His injury was being treated the entire time he was there, sir. There were other things that went on during that time, and it related to the boy's total condition that were involved, sir, in the decision to have him admitted to the hospital, because of a series of incidents which had occurred. I can elaborate if—

Mr. McKee: If Your Honor please, I think the witness again is deliberately making statements which are prejudicial and were not opened up, and they are intended to be prejudicial.

The Court: I want to know for my own information, and I expect the jury would, too, to determine whether or not the injuries to his buttocks were so severe that it took 12 days' hospitalization as reasonable and necessary to cure the injury to the buttocks.

The Witness: The amount of injury had lowered his blood count sufficiently for him to become anaemic, Your Honor, and he was being treated for that. This boy had a history of vomiting persistently, and I wished to observe if he would carry out that behavior in the hospital. His father stated on first admission that this boy would do nothing right and he had tried everything to try to get him to behave
page 61 } properly, including spanking him, prior to my first consultation.

Mr. McKee: If Your Honor please, the doctor is not answering the Court's question and launching on a long dissertation.

The Court: I think he is answering to the point to show there were other symptoms aside from the buttock injury that required the hospitalization.

Is that correct?

The Witness: Yes. Others besides those I have mentioned to Your Honor.

The Court: Well, let's don't go too far in any other side symptoms that are not connected with the injury.

The Witness: These all bear upon the foster father-child relationship.

Mr. McKee: I think the witness is deliberately trying to create prejudice here. He knows he is not supposed to get involved in this. He is volunteering things.

The Court: I think you are laying more emphasis on it than the amount it deserves.

Mr. McKee: I think there has been prejudice to the accused, and I renew my motion for mistrial.

Dr. Warren R. Gregory

The Court: Motion is denied.
Mr. McKee: Exception.
The Court: Proceed with the questioning of the
page 62 } witness.
Mr. McKee: I have no further questions.

By Mr. Massie:
Q. Did the beating of this child—condition of this child having been beaten on the buttocks affect the child in other ways besides the swelling of the buttocks and the bruising and the discoloration of the back and legs and buttocks and the losing or blistering of the skin on the buttocks? In other words, did it affect the child in any other way?
A. There was enough extravasation of the blood in the tissue to cause the child to become anaemic.

Mr. McKee: If the Court please, we have been over this before, too. It is not responsive to the question we were asking on cross-examination, and it is repetitive of what he has already testified to.

By Mr. Massie:
Q. Doctor, was this child suffering any traumatic effects as a result of the condition of his buttocks?
A. As part of the evaluation, I had a qualified psychologist examine the child while he was in the hospital, and I have a full report of the psychologist available for the Court.
Q. In your opinion, did the beating of the child on the buttocks affect the child besides the swelling of the
page 63 } *butticks,* the discoloration of the back and legs, the condition of anaemia—

Mr. McKee: If the Court please, that is not responsive to the questions that were asked on cross-examination.

By Mr. Massie:
Q. —which would require treatment?

The Court: Let it go ahead. Go ahead.
Mr. McKee: Exception.

By Mr. Massie:
Q. All right, Doctor, will you answer that question?

Dr. Warren R. Gregory

A. Both I and the psychologist who examined the child in the hospital—

Mr. McKee: If the Court please, if he is going to express an opinion based on a psychologist's report to him, it would be clearly inadmissible.

The Witness: This was my own opinion, sir, before the psychologist examined the child and from observation of the child in the hospital.

Mr. McKee: I would appreciate it if the Court would rule on my objection.

The Court: I have forgotten what the objection was.

Mr. McKee: My objection is saying that both I and the psychologist agreed to such and so. That would be perfectly thoroughly inadmissible to testify anything the
page 64 } psychologist did.

The Court: The objection is well taken to the judgment on the part of the psychologist, as the report of the psychologist is hearsay evidence. It would be inadmissible. Limit it to your own knowledge and to your own testimony.

By Mr. Massie:

Q. Doctor, answer the question.

A. In my opinion, sir, the child's previous behavior of being a difficult child to manage completely disappeared under the environment of the hospital. He did not vomit once the entire time he was in the hospital. He ate all of his meals vigorously. He was a model patient. He took all of his treatments properly, and he was thriving under the new environment.

Q. Did he cause any trouble or disciplinary problems while he was there?

A. None whatsoever.

Mr. Massie: That's all.

Mr. McKee: No further questions.

Mr. Massie: Doctor, you may leave the witness stand.

The Court: Do you want to discharge Dr. Gregory?

Mr. Massie: I'd like to have him stay, Your Honor.

(Whereupon, the witness retired from the stand.)

page 65 } Mr. Massie: Will you ask Mrs. Pitcock to come in, please?

Whereupon,

EVA PITCOCK was called as a witness on behalf of the Commonwealth and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Massie:

Q. What is your name?

A. Eva Pitcock.

Q. Where do you live?

A. Opequon.

Q. Is that in Frederick County?

A. Um-hum.

Q. Mrs. Pitcock, do you take children for the Welfare Department.

A. Yes, sir.

Q. On or about December the 7th, 1966, did you have occasion to take into your home one Rusty Harbaugh?

A. Yes, sir, I did.

Q. Did you receive him from the Welfare Department?

A. Yes, sir, they brought him out.

Q. And did you keep him in your home?

A. That day and that night and the next day.

page 66 Q. Did you have occasion to care for him while he was there?

A. Yes, I did.

Q. And what care did you give the child?

A. Well, I fed him and I got him ready for bed.

Q. Did you have any trouble with his eating?

A. Not too much. They just said they didn't want or particularly care for it, so I didn't make them eat it.

Q. In getting them prepared for bed, did you notice anything about his physical condition?

A. Yes, sir, I did.

Q. What was it?

A. His little rear end was oozing liquid, fluids from his body.

Q. Did he make any complaints about it?

A. When I started to wash him he did, yes.

Q. Did it bother him?

A. Only when I washed him, but otherwise he played and seemed very contented.

Eva Pitcock

The Court: When was this, Mrs. Pitcock, you had the child? When was this that the child was brought to you?

The Witness: The 6th of December.

Mr. McKee: The night before he went in the hospital, Your Honor.

page 67 } By Mr. Massie:

Q. Mrs. Pitcock, did you take his little underpants off?

A. Yes, sir, I did.

Q. Did you give them to the Welfare Department?

A. Yes, I did, because I put a pair of my son's on him that night.

Q. I ask you if you can identify these (handing underpants).

A. If they have stain on the back, those are his.

Q. You look at them first and see.

A. Those are his.

Q. Did you take those off of him?

A. Yes, I did.

Q. Is that the condition they were in when you saw them?

A. Yes, sir, and also the next morning when he got out of bed, the clean ones had the same thing on them, and they had come off on the sheet, the stain.

Mr. Massie: I'd like to offer these in evidence.

Mr. McKee: No objection.

Mr. Massie: Mark that Commonwealth's Exhibit No. 4.

(The underpants referred to were received in evidence as Commonwealth's Exhibit No. 4.)

Mr. Massie: That's all, Mrs. Pitcock. Thank you very much.

page 68 }

Mr. McKee: No questions.

(Whereupon, the witness retired from the stand.)

Mr. Massie: Will you call Mrs. James in, please?

Whereupon,

ROBERTA JAMES was called as a witness on behalf of the Commonwealth and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Massie:

Q. Mrs. James, what is your name?

A. Roberta James.

Q. And where do you live?

A. I live in Berryville.

Q. What is your occupation?

A. I am Superintendent of Frederick County Welfare Department.

Q. Mrs. James, did you take into custody at the request of the Frederick County Court, Rusty Harbaugh, or Charles Harbaugh the Third?

A. Yes, sir, I did.

Q. Did you place him then in the home of Mrs. Pitcock?

A. Yes.

Q. Did you take these photographs that have
page 69 been introduced in evidence?

A. I took some photographs.

Q. Of Rusty Harbaugh?

A. Yes.

Q. Mrs. James, did you ever discuss this matter with Mr. Harbaugh?

A. No.

Mr. Massie: I think that's all.

Mr. McKee: No questions.

Mr. Massie: That's all, Mrs. James, you may leave the stand.

And, Your Honor, at this time I'd like to have a recess to have the child brought in to testify. I will waive that if the Court will hear us in chambers one moment, providing we can have a recess for just a few moments.

The Court: Let's take a brief recess. The jury can leave the box, recess for ten minutes.

(Whereupon, a short recess was taken, and the Court and counsel retired to chambers, where the following proceedings were had:)

Mr. Massie: Your Honor, I anticipate—it is sometimes wise to anticipate—that the question would be whether or not the Commonwealth has tied in the condition of the child with the action of the father and that if that motion is made page 70 } and the Court should make a ruling contrary to the Commonwealth, then I would like to be in a position to call the child to testify. Otherwise, I won't call the child if the Court should rule with the Commonwealth that there has been a tying-in of the statements of the father to Dr. Gregory about the beating and whatever slapping, whipping, or spanking. If the Court rules that there had been sufficient evidence the father administered disciplinary action to the child, then I wouldn't call the child. But I would call it for that purpose alone, to establish that that child was disciplined by the father.

Mr. McKee: If the Court please, I don't believe the Commonwealth's Attorney should be permitted to ask the Court for a prospective ruling to determine who he is going to call as witnesses. I think he ought to complete his case and rest, and what motions are appropriate, or we feel are appropriate will be made, but I don't think, Your Honor, he should ask Your Honor to tell him in your opinion what the ruling will be in this case, unless he is prepared to rest his case.

The Court: That is what he is doing. He is asking the Court, really, to pass on an anticipated motion to strike the evidence of the prosecution before the prosecution has rested, and I don't see—

Mr. Massie: Here is what I anticipate, Your Honor: that it would be the reopening of the case to permit us page 71 } then to bring the child in.

The Court: I think you have to make that determination. You have got to decide for yourself whether you want to rest.

Mr. Massie: Of course, if I make that decision myself, I am not going to take any chances, and we have got a problem here, relationship of prospective son and father. Now, if they want us to push it to the hilt, we will, if that's what they want. Now, of course, otherwise, we are going to—it's up to them. I am giving them an option, really.

The Court: I don't think the Court can suggest to you how the case should be presented or at what stage you should rest. I mean, that's your responsibility, and you have got to exercise it and live with it.

Mr. Massie: All right, let's call the child in.

The Court: While we are in recess, do you want to pass

upon the competency of the child in chambers while we are here?

Mr. McKee: It would be better.

The Court: I think it would be better.

(Whereupon, Mr. McKee retired from the room.)

The Court: I ask this as a matter of inquiry: Does the defense question the competency of the child as a witness?

page 72 } Mr. Potts: I don't really know how the child—I don't particularly question the competency of the child.

The Court: Do you have any objection to the child testifying?

Mr. Potts: No, no, we don't.

The Court: If one side wants to put the child on and the other side doesn't object, I am not too much concerned about testing the competency of the child, but let it be resolved by the jury after the examination of the child.

(Whereupon, Mr. McKee returned to chambers with Charles Harbaugh III.)

The Court: What is this little boy's name? This is Rusty, but what is—

Mr. McKee: Rusy Harbaugh.

The Court: —his first name?

Mr. McKee: His first name is Charles.

The Court: How old are you, Charles?

Master Harbaugh: Seven.

The Court: You started to school, I gather. Is this your first year or second year in school?

Master Harbaugh: I don't know—this is the second.

The Court: Let me see, were you there for one Christmas? You were in school this past Christmas, weren't you? I don't mean on Christmas day.

page 73 } Master Harbaugh: (Nodding affirmatively.)

The Court: Were you there the Christmas before that?

Master Harbaugh: Nope. First I did go to Stonewall.

Mr. McKee: This is his second school.

The Court: You changed schools, but this is the first year that you have gone to public school, is that right?

Master Harbaugh: Yes.

The Court: What do they teach you in first grade? They teach you the ABC's, is that it?

Master Harbaugh: Well, I guess they did teach people ABC, but now they are making us write and do things.

The Court: Well, can you do any reading of any consequence?

Master Harbaugh: Yes.

The Court: Do you know the difference between the truth and a falsehood?

Master Harbaugh: Yes. I don't know what a falsestood is, though.

The Court: A falsehood is just what it says, is a false statement. But you know the difference between something that is honest and true and something that is made up, that is not true, that is untrue. You know that difference, don't you?

Master Harbaugh: Yes, sir.

page 74 } The Court: That's, in other words, the difference between a lie and the truth. You have heard people tell a lie—have you ever heard a person tell a lie, that you thought was a lie—anybody?

Master Harbaugh: I haven't heard it yet.

The Court: Well, you'd know it—if you'd know that whatever the person was saying was not true, what would you think of it?

Master Harbaugh: Well, thought if they wanted to tell the truth would get in trouble.

The Court: Well, telling the truth is the aim of the right kind of a person, isn't it, to tell the truth?

Master Harbaugh: Yes.

The Court: Have you ever told an untruth that you know of?

Master Harbaugh: Yes, I have.

The Court: Well, did it hurt you? Did it bother you any when you told an untruth?

Master Harbaugh: Not 'specially.

The Court: But you were conscious of the fact, you knew that it wasn't true at the time, though, didn't you?

Master Harbaugh: Yes.

The Court: Did it hurt anybody else to tell an untruth, if you told an untruth?

Master Harbaugh: Yes, it did.

page 75 } The Court: If you are called upon to give testimony in court, in here before this jury, do you think that you can tell them the entire truth about whatever you might be asked?

Master Harbaugh: Yes.

The Court: Do you know what might be the result if you did not tell the truth—knowingly, that is? I mean, anybody

can be mistaken, but I mean, do you know what the result would be if you deliberately answered a question falsely, knowingly falsely?

Master Harbaugh: Well—

The Court: I wouldn't expect you to know the result in the sense of all of the results, all of the consequences, but are you attending any kind of church school or Sunday School at this time, or previous to this? You know what a Sunday School is, don't you?

Master Harbaugh: Yes.

The Court: Have you been going to any Sunday School anywhere?

Master Harbaugh: Yes.

The Court: Where?

Master Harbaugh: Up Clearbrook.

The Court: At Clearbrook. Do they teach you there the importance of telling the truth?

Master Harbaugh: Yes.

page 76 } The Court: As against telling a false story, or a made-up lie?

Master Harbaugh: Yes.

The Court: Unless there is some serious objection to the boy giving his testimony, apparently both sides are agreeable to letting him testify, the Court would be disposed to let him take the witness stand and give his testimony and leave it to the jury to pass upon his full credibility. Is that accepted?

Mr. Massie: There is only one thing that gives me concern, Your Honor, and that is the fact that he has been living in this home since his previous trial, and he was for a while with the Welfare Department, see, until after the first trial. Then he was convicted, from which he took an appeal, and I am concerned that there may have been pressure of some duress or persuasion given to the child to testify in a certain way.

The Court: Has there been any conversation between you and Mr. Harbaugh or Mrs. Harbaugh about how you should testify if you are called? Has it been any talk between you about that? Has either one of them told you you should say this or say that or you say the other?

Master Harbaugh: No, never told me that.

Mr. McKee: Your Honor, he was instructed both

page 77} by the Welfare Department and by counsel that he was not to discuss this with the child at all, and I did talk to the child briefly this morning, and I did not tell him what to say. I asked him what he knew about it, but his father was not present when I talked to him. I told his father to leave the room.

The Court: All you will be expected to do is just tell the truth as you know it, the whole truth as you know it, and that's all. Nobody expects you to do anything else. Do you think you can undertake that?

Master Harbaugh: Yes.

The Court: I think that—I am sure he doesn't know the significance of an oath. I doubt it, but I would not mind asking him if—

Have you ever seen a court trial, either in the movies or on TV or in an actual courtroom?

Master Harbaugh: Nope.

The Court: Well, do you know as a matter of procedure that before a witness gives his testimony or is examined by the lawyer on one side or the other he is usually put on oath by the Clerk of the Court or by the presiding Judge and asked if he promises that whatever he says will be the whole truth? Do you know of any such practice as that, or any such procedure as that? Have you ever heard of it or watched it?

page 78 } Master Harbaugh: No.

The Court: I am sure he doesn't know the significance of an oath, but personally I'd be willing to let him give his testimony and let the chips fall where they may and let the jury pass upon it, unless you are going to be exacting in the more rigid showing that the witness does have some conscious appreciation of the significance of an oath and responsibility of a witness.

Mr. Massie: What concerns me most, Your Honor, is the fact that regardless of what he says, I am convinced that he has been advised what to say, because his father has visited every witness in this case and has talked to every one of them personally and has been scouring the neighborhood, and I can't sit here and believe that he hasn't been told what to say by the father.

Mr. McKee: His father was told not to talk to him. He says his father didn't talk to him, and if Mr. Massie wishes, we can have Mr. Harbaugh put under oath himself and examined with respect to that. I don't know, myself. Mr. Harbaugh says he has obeyed the orders that he was given, and I think it's true. He is the one that wants to put him on the stand. We didn't.

Mr. Massie: I have got another witness who was in the lower court present at the trial who heard the de-

page 79 } fendant testify as to what he did on this occasion.

Mr. McKee: If Your Honor please, I think that's a little bit unorthodox for the Commonwealth's Attorney to—

Mr. Massie: I think I'd rather approach it first from that direction.

The Court: Before you determine whether or not to rest, you mean?

Mr. Massie: Yes, Your Honor.

The Court: All right.

Mr. Massie: Let me check the witness.

Mr. McKee: Is this witness one who has been in the courtroom?

Mr. Massie: No, sir.

The Court: What school did you go to—what is the name of this school?

Mr. McKee: Stonewall.

The Court: What school did you go to first? What is the name of that?

Mr. Potts: I think that was Stonewall, and this is Clarke County, since he is back in Clarke County. Stonewall is Frederick.

The Court: What is the name of the school in Clarke County?

Mr. Potts: Clarke County Elementary.

page 80 } The Court: Is that where you are going now, Clarke County Elementary? Which one do you like better, or do you like one as well as the other?

Master Harbaugh: Well, I like this one better.

The Court: Is this a newer school?

Master Harbaugh: Yes.

Mr. Potts: I really don't know the age of the Stonewall School. This is a fairly old school where he is going now, 10 or 12 years old.

Mr. Massie: I have a witness who knows what he testified to in the lower court. I am going to put this other witness on, Your Honor, who heard him testify before the lower court.

The Court: All right.

(Whereupon, the Court and counsel returned to the courtroom, where the following proceedings were had:)

Whereupon,

DOUGLAS TUCKER was called as a witness on behalf of the Commonwealth and, being first duly sworn, was examined and testified as follows:

Douglas Tucker

DIRECT EXAMINATION

By Mr. Massie:

Q. What is your name?

A. Douglas Tucker.

page 81 } Q. Where do you live?

A. I live in West Virginia, Martinsburg.

Q. What is your occupation?

A. Child welfare worker.

Q. Mr. Tucker, were you in the Frederick County Court at a hearing on this case on the 13th day of January, 1967?

A. Yes, sir.

Q. Were you present when the defendant took the witness stand?

A. Yes, sir.

Q. Did you hear him testify at that time?

A. Yes, sir.

Q. Did the defendant—

Mr. McKee: If the Court please, I am going to object to any question related to any statement which was made at a prior trial by the accused, prior hearing with respect to this. This is a trial *de novo,* and I think to attempt to go back and have a witness recollect what may or may not have been said would not be proper. Object to it.

The Court: On what ground?

Mr. McKee: The ground, Your Honor, that it's evidence pertaining to what was said at an entirely unrelated hearing and a hearing which has nothing to do with this case. This is a hearing *de novo.*

page 82 } The Court: Well, I assume that.

Mr. McKee: It is prejudicial, and I don't think it is material.

The Court: That's the reason the prosecution wants to put it in, because it is going to be prejudicial to the defense, but in the sense that it would point to some culpable responsibility, I guess, but the conceivable admissibility of it would be that it would lead to concessions that were made by the accused. I don't care whether they were made at another trial or where they were made. I mean, you can always receive in evidence admissions made by the accused that are culpable admissions.

Mr. McKee: Your Honor, the very mention of this other trial is contrary to the rules of procedure of this Court. This

is supposed to be—the fact that there was a prior hearing is not supposed to be commented upon.

The Court: It is true, and this jury is trying the case as though it had never been tried before.

Mr. McKee: Yes, sir, that is correct.

The Court: But that doesn't mean that the prosecution can't put in evidence some significant circumstance that took place on some other occasion, even though it may have been at another trial. I don't think the point is well taken. Objection is overruled.

page 83 } Mr. McKee: I note my exception.

The Court: Exception noted.

By Mr. Massie:

Q. Mr. Tucker, on that occasion, under the testimony of the defendant under oath, did he make any statements concerning disciplinary action given to Rusty Harbaugh on the 6th of December, 1966, before taking him to school?

A. Yes, he did.

Q. Now, will you tell the jury and the Court just what you recall he testified to in regard to what he did to Rusty before he took him to school that morning?

A. He stated that he had spanked him with his hand that morning. I don't recall the reason, but he did state that he had spanked him with his open hand.

Mr. Massie: That's all. Your witness.

Mr. McKee: No questions.

The Court: Stand aside.

(Whereupon, the witness retired from the stand.)

Mr. Massie: Commonwealth rests.

Mr. McKee: Might we be heard on a motion? We could recess for lunch and make our motion.

The Court: I will entertain you in chambers.

(Whereupon, the Court and counsel retired to chambers, where the following proceedings were had:)

page 84 } Mr. McKee: If Your Honor please, we move to strike the Commonwealth's evidence. There is no evidence whatsoever that the accused was the agent or the instrument of the injury which Dr. Gregory found, except the

statement elicited from this witness that the accused acknowledged spanking the child with his open hand.

Now, the doctor's own testimony is to the effect that this would not be a possible cause of injuries of this nature, and it would require that the jury speculate with respect to what the accused said; that is, that they can take his statement as being true insofar as it acknowledges that he punished the child but false insofar as the extent to which he punished the child, and I think that is going a little bit further than the law would provide in this type of case.

This man, of course, has a very strong presumption of innocence going in his favor, and I don't believe that the jury should be permitted to infer from this evidence that he committed a criminal assault on this boy.

Mr. Massie: I think the evidence is clear, Your Honor, that the defendant admitted under oath that he had whipped the boy that morning, or spanked him. The evidence is clear that the spanking—that he admitted it to Dr. Gregory afterwards, that if it was severe enough for him to go to *jaile,* he didn't care as long as it disciplined the child so he page 85 } would not become a juvenile delinquent, on two occasions and once without being under oath. He discussed with Dr. Gregory in connection with the condition of the child at the hospital, and then he did it under oath, that he had spanked the child.

Now, it is up to the jury to question whether they believe everything he says or not, but the Commonwealth has proven at this stage of the proceeding, which is prima facie evidence, that this man did beat the child that morning before he took him to school and that here is the result of the beating. Now, the extent of it is whether it was within the line of discipline.

The Court: There is nothing before the jury that he was exercising the right of discipline. The only thing before the jury is that this child was whipped, and there is some evidence that he was whipped much more severely than those pictures would indicate, and there is evidence to the effect that the father has conceded that he did spank him—he used the word "spank" and then on another occasion he said, "I wouldn't mind spending a few days in jail if it will help him grow up into a better young man."

So in the face of the evidence as it now stands, in the absence of any defense of justification or in the privilege, exercise of disciplinary power of a parent, the jury page 86 } could find him guilty under the evidence before them.

Mr. McKee: I think, as the witness testified, he did not re-

call the reason why Mr. Harbaugh said he had spanked the child, but I think we can assume that there was a reason for it. I think you have got to indulge in any assumptions that are favorable to the accused.

The Court: Please don't press that on me. The motion to strike is denied.

Mr. McKee: All right, sir, we note our exception.

The Court: All right.

(Whereupon, at 12:38 o'clock, p.m., a luncheon recess was taken, to reconvene at 1:45 o'clock, p.m., of the same day.)

AFTERNOON SESSION

1:45 p. m.

page 87 } The Court: Court will come to order and resume with the Harbaugh case.

Mr. McKee: I understand the Commonwealth has rested.

Mr. Massie: Yes, sir.

Mr. McKee: Call Mrs. Harbaugh, please.

Whereupon,

GLADYS HARBAUGH was called as a witness on behalf of the Defendant and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. McKee:

Q. Would you state your name, please, m'am?

A. Gladys Harbaugh.

Q. Now, Mrs. Harbaugh, are you the wife of Charles Harbaugh?

A. Yes, I am.

Q. And are you and your husband presently in the process of attempting to adopt this child, Rusty?

A. That is correct.

Q. How long has the child been in your home?

A. About a year and a half, I'd say, or maybe possibly more, maybe longer.

page 88 } Q. Now, directing your attention to around the first of December, 1966, Mrs. Harbaugh, was your husband at home on December the first?

Gladys Harbaugh

A. No, he was not.

Q. When did he arrive home?

A. He generally left on Monday morning around 4:00 o'clock and did not return until Friday night.

Q. Now, on this particular occasion, Friday would have fallen on the second of December, I believe. Did he come home around the second day of December?

A. Yes, I am pretty sure—yes, he did.

Q. Now, during his absence that week, did anything occur, or was there anything unusual about Rusty that you'd like to tell the jury?

A. No. He was nervous at times.

Q. Was Mr. Harbaugh home that week-end?

A. Yes.

Q. Was he home the following Monday, the fifth?

A. Yes.

Q. Was he home the following Tuesday, the 6th?

A. Yes.

Q. And why was that?

A. My mother was quite ill, in fact, she was on her death-bed, and we were down home quite a bit to my mother's home during the day.

page 89 } Q. Now, what do you know, of your own personal knowledge, concerning anything that may have happened to Rusty from the time your husband got home on Friday, December the 2nd, until this December the 6th, when he went to school?

A. What do you mean, from—

Q. Anything that you know at all about Rusty's physical condition during that period of time.

Mr. Massie: Your Honor, she has testified to that on direct-examination, that he was merely nervous.

Mr. McKee: She said at the time prior to the second of December that he was merely nervous. She has not testified anything that may have happened that had taken place from December 2nd through the 6th. I asked her if she knew of anything about him before Mr. Harbaugh arrived home. I am now inquiring as to December the 2nd, only.

The Court: I thought your discussion was around the time in question.

Mr. McKee: I started with when he arrived home that Friday evening, the 2nd of December.

The Court: All right, go ahead.

Gladys Harbaugh

By Mr. McKee:

Q. Did you notice anything about Rusty's physical condition at any time from December the 2nd through the 6th?

A. He was nervous, I will say that.

page 90 } Q. Did you ever observe his body at any time during that period?

A. From the 2nd through the 6th? Yes, I did.

Q. When was that?

A. That was Sunday night.

Q. And why was that?

A. Because when I pulled him up on my lap he was so sore that he could not sit back on my lap, he had to sit forward.

Q. You say Sunday, December the 4th?

A. That's right.

Q. And did you have occasion to examine him at that time?

A. I did. I took him out in the hall—we had company at that time—I took him out in the hall and examined him.

Q. What did you find?

A. I found his buttocks bruised.

Q. Now, where were you on the 6th of December, the morning, the last day that Rusty went to school?

A. I was at my mother's.

Q. What time did you leave for your mother's?

A. I was down there overnight.

Q. Oh, you had stayed overnight the night before?

A. That's right.

page 91 } Q. So the last time you had seen Rusty was when, the 5th?

A. Monday.

Q. And what was his condition on Monday?

A. He was still sore.

Q. Now, on the 6th you received word, I assume, concerning the fact that Rusty had been taken to the hospital, had been taken by the Welfare Department, or something of that nature, did you not?

A. I did not know it the day they took him, because my mother was on her deathbed.

Q. When did you find out?

A. I didn't find out until the next morning, because Mrs. McHale said not to—

Q. Don't repeat what anybody said to you.

A. All right.

Q. When was the next time you saw Rusty?

A. I didn't see Rusty any more until they brought him down here to court.

Q. That was back in January?
A. That's right.
Q. And Rusty is back in your home now, is that correct?
A. That is correct.
Q. Mrs. Harbaugh, have either you or your hus-
page 92 } band, since Rusty returned to your home, discussed these charges with him, talked with him about it?
A. No, we have not.

Mr. McKee: Your witness.

CROSS EXAMINATION

By Mr. Bennett:
Q. Mrs. Harbaugh, you said you checked—you were bothered somewhat by the child's condition on Sunday night. Was this the night, Sunday night, December 4th, that you said you examined and took him out in the hall?
A. That's right.
Q. Did you do anything to ease his pain, if there was any then? Did you put any medication on?
A. No, I didn't know you could do anything for bruises.
Q. They were just bruises?
A. He was bruised badly.
Q. Whereabouts?
A. On his buttocks.
Q. Anywhere else?
A. On his legs.
Q. But these weren't severe enough for you to bother about doing anything more about them?
A. Well, I just don't know of anything you can do for a bruise. I bruise very easily myself, being a red-
page 93 } head, and I never bothered to do anything to put any medication on it.
Q. I see. Then there was no torn skin, then, or anything?
A. No, but there was spots on his buttocks.
Q. I show you this photograph, particularly Commonwealth's Exhibit No. 2 and No. 3 and ask you to look at them and ask you if that is the same condition that he was in on that Sunday night that you examined him.
A. It showed very similar to that.
Q. (Handing another photograph to the witness.)
A. When was this taken?

Q. Both of those were taken the day after he was taken to the hospital.

A. Day after he was taken to the hospital?

Q. That's right, taken to the hospital the 6th, and these were taken on the 7th.

Q. Any bruises any other places not shown by Exhibits 2 and 3?

A. No, I would say not.

Q. Between December 2nd and that Sunday night, December 4th, was your husband at home; that is, that Friday to that Sunday night?

A. Yes, he was home.

Q. He was home the entire time?

page 94 } A. Sunday night? Yes.

Q. Referring your attention again to those pictures, were any of these spots raw on that Sunday night?

A. Broken, you mean?

Q. Yes, ma'am.

A. No.

Q. They were not?

A. No.

Q. The skin was wholly intact?

A. Yes.

Q. Did you tell your husband about the bruises the boy had?

A. No, I did not.

Q. You didn't tell him at all?

A. No.

Q. So you just simply weren't worried about these bruises, it appeared they were all right, there was nothing further you could do?

A. I was concerned about the child, of course, but, as I say, my mother was very ill, and that's one thing that I had my mind on, too, you know. I had that—

Q. I understand that. You left home, went to visit your mother again. Did you say you left on Monday morning?

A. I was staying there.

page 95 } Q. You were staying at your mother's?

A. That's right.

Q. You left Rusty there with Mr. Harbaugh?

A. Where?

Q. At the home?

A. Yes, in the daytime, yes.

Q. In your home?

Gladys Harbaugh

A. My mother's home.
Q. Were they there by themselves?
A. Beg your pardon?
Q. Were Rusty and his father there by themselves?
A. No, not at my home, my mother's home, no. We were all together.
Q. This is your home in Frederick County?
A. Clarke County, I am speaking of. My mother's home, I said.
Q. So let's see if I understand it there. On December 4th, Friday, through Sunday—December 2nd through Sunday, December 4th, you, your husband, and Rusty were all at your mother's home?
A. We were at my mother's home during the day.
Q. During the day?
A. That's right.
Q. And would you go back to your home in
page 96 } Frederick County at night?
A. Yes.
Q. To take Rusty?
A. Yes, he had to put him in school.
Q. Did he take him back on that Sunday night?
A. Yes.
Q. After you had looked at him?
A. Yes.
Q. You stayed there at your mother's?
A. That's right.
Q. And they went back home to Frederick County?
A. That's right.
Q. He and his adopted father. And when did—you say you first saw the child on the 6th or 7th, the same day or the day after that he had been taken to the hospital?
A. I did not see Rusty from the 5th until the trial came up here.
Q. Well, now, the 5th was on Monday, I believe? And you saw him on Monday again?
A. I saw him Monday, yes.
Q. Monday night?
A. No, not at night. They went home at night.
Q. You saw them during the daytime after school, I presume?
page 97 } A. Yes.
Q. How was his condition then?
A. I didn't look at it then.

Gladys Harbaugh

Q. You didn't notice any limp, anything, he didn't seem to be bothered?
A. Yes, he was limping, that is true.
Q. He was limping. Was he limping on Sunday night?
A. Yes, that was one of the reasons I examined him.
Q. But you did not bother to tell Mr. Harbaugh about it?
A. No, I said—

Mr. McKee: If the Court please, she has already testified she did not tell Mr. Harbaugh. He is just going back over it and over it.

By Mr. Bennett:
Q. Did Mr. Harbaugh tell you—mention anything to you about the boy's condition?
A. When?
Q. After you found out that he was ailing, that he was bruised?
A. Did I tell my husband?
Q. Did he say anything to you about it?
A. Did my husband—Sunday night, you mean?
Q. Yes, ma'am, or anytime before Tuesday.
A. No, he did not.
page 98 } Q. Let's see, now, you are presently in hopes of adopting this child?
A. That's right.
Q. How old are you, Mr. Harbaugh?

Mr. McKee: If the Court please—
The Witness: That is permissible? Do I have to say?
The Court: What is the significance of the inquiry?
Mr. Bennett: Just trying to determine precisely the difference between the child's age and hers for my own ends.
The Witness: I didn't think a woman had to state her age.
Mr. McKee: Will you withdraw that question?
Mr. Bennett: I withdraw that.
I am through.
Mr. McKee: Thank you.

(Whereupon, the witness retired from the stand.)

Mr. McKee: Ask Mrs. Lanham to come in, please, Beatrice Lanham.

Whereupon,

BEATRICE LANHAM was called as a witness on behalf of the Defendant and, being first duly sworn, was examined and testified as follows:

page 99 } DIRECT EXAMINATION

By Mr. McKee:

Q. What is your name, ma'am?

A. Beatrice Lanham.

Q. Where do you live?

A. I live at Swimley Station.

Q. Is that in Clarke County?

A. Yes.

Q. Now, I direct your attention to Sunday, December the 4th, 1966. Did you have occasion on that day to see Rusty Harbaugh?

A. Yes, I did. He was at my house.

Q. About what time of day was that?

A. Why, I guess it was about 12:00.

Q. And what, if anything, took place?

A. Well, he was standing on the step, on the second step up, pulling a stick up, and the dog come out of the house, and he got overbalanced, and he fell back on this rock.

Q. Did he complain?

A. Yes, he cried a good bit.

Q. Did you notice anything unusual about him after that?

A. Well, he did limp.

Q. And what time did he leave your home that day?

A. I guess it was about 8:00 o'clock.

Q. And who came to get him?

page 100 } A. His mother and father—his father taken him home and his mother was staying with me. Mother was very sick.

Q. Her mother was?

A. Yes.

Q. Was her mother staying at your home?

A. Yes.

Mr. McKee: I see. Your witness.

Beatrice Lanham

CROSS EXAMINATION

By Mr. Bennett:

Q. Excuse me, would you state your name, please?

A. Beatrice Lanham.

Q. Hannam?

A. Lanham.

Q. On this rock you say he fell on, what sort of a rock was it?

A. It was a flat rock. It was right in front of the *stip,* but it was kind of rough. It wasn't real flat.

Q. Was flat?

A. Yes.

Q. And not jagged?

A. No, not too bad.

Q. And where did he fall from?

A. Off the second step from the bottom.

Q. Second step from the rock?

page 101 } A. Yes.

Q. *Tell* two steps, then?

A. Yes.

Q. How high were the steps?

A. Oh, I reckon it was 6, 8 inches high.

Q. About like that (indicating)?

A. Yes.

Q. Two of those?

A. Yes, two.

Q. What did you do after you saw him fall?

A. I picked him up and comforted him. He was crying.

Q. Did you try to treat him in any other manner?

A. No; I told his mother when she come, and she looked after him.

Q. When did you tell her?

A. As soon as she come back from church.

Q. This was on Sunday?

A. Yes, about 2:00 o'clock she got back.

Q. Did she examine him then?

A. I don't really know. I don't know.

Q. Well, she didn't when you were there, when you told her?

A. Yes. Yes.

Q. Yes, she did not examine him?

page 102 } A. She did.

Q. She did examine him?

A. Yes.

Q. May I ask this: Are you related in any way to Mr. and Mrs. Harbaugh?
A. No, only a foster sister.
Q. Foster sister?
A. Yes.
Q. To whom?
A. To Mrs. Harbaugh.
Q. Mrs. Harbaugh?
A. Yes.
Q. What did the child do after you comforted it and everything? Did he continue to play around?
A. Not too much.
Q. What time of day or night was this?
A. Well, it was about 1:00 o'clock.
Q. In the afternoon?
A. Yes.
Q. Were you there the entire afternoon, then?
A. Oh, yes. I live there.
Q. You live in the Harbaughs' home?
A. No, I live in her mother's home. She raised me. Her mother raised me.

page 103 } Mr. Bennett: I think that's all.
Mr. McKee: That's all, ma'am. You may go back out if you would, please.

(Whereupon, the witness retired from the stand.)

Whereupon,

CHARLES H. HARBAUGH, JR. was called as a witness on his own behalf and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. McKee:
Q. Mr. Harbaugh, what is your name?
A. I am Charles H. Harbaugh, Jr.
Q. And where do you live, Mr. Harbaugh?
A. We live at—near Swimley in Clarke County.
Q. Mr. Harbaugh, you are in the process of adopting this child, Rusty, is that correct?
A. We have two children we dearly love.
Q. Mr. Harbaugh, I want to direct your attention to the

week-end beginning December 2nd, 1966. What was the—let me ask you, who was in the home on that week-end?

A. My son and I were staying at Clearbrook overnight. We were spending the—

Q. Which night was that?

A. All nights. Every night.

page 104 } Q. That's your home in Frederick County?

A. Our home in Frederick County. We were spending the entire days with my wife and her family and with the exception of the time that Rusty was in school— or over the week-end, this was.

Q. He was attending Stonewall School?

A. Attending Stonewall School, yes.

Q. Did you at any time during that week-end before the morning of Tuesday, December the 6th, observe anything unusual about Rusty?

A. I was only with him a very short time during that period. Sunday afternoon, I don't remember whether he took a nap or not, but I didn't see too much of him. He was playing around, and then we had to go to Berryville Sunday evening to get medicine for Mrs. Moorehead, and we took him along. And my wife's cousin was there and his wife, and he took us to Berryville. Three of us went, and we came home and ate afterwards, and we didn't get off to back to Clearbrook until fairly late, I will say 9:00 or 9:30, possibly. Way past his bedtime, I remember that.

Q. Now, the last night that he spent in your home in Frederick County was the night of Monday, December the 5th, is that correct?

A. Monday—Monday morning I took him—I

page 105 } sent him to school. Monday afternoon my wife went to Clearbrook to get him and brought him back to the farm, and I was in Baltimore. I got back about 8:30, I ate dinner at the Mooreheads, and we went straight on back to Clearbrook, and we went straight to bed, both of us.

Q. Now, Tuesday morning what took place when you arose Tuesday morning?

A. Tuesday morning our normal schedule, get up at 7:00 o'clock. We did that. Rusty dressed himself, and I did, too, myself, and I went down and I made breakfast.

Q. Your wife was not in the house at the time?

A. No, my wife was staying with her mother. Her mother was dying, obviously. We don't know how she lived as long as she did.

Charles H. Harbaugh, Jr.

Q. What happened?
A. Just a minute.
Q. You were at breakfast.
A. Well, 7:30 was normal time for breakfast, and we were both there at 7:30. I am sure we were both on time, and we had breakfast, and Rusty was slow in eating, and I finished and I went on back upstairs, and I was running the house, I made the beds, and my wife had a standard procedure of calling her sister at 8:00 o'clock each morning, and when she went down to her mother's to stay, I continued
page 106 } that, and I was talking to my wife.
Q. That was right around 8:00 o'clock that morning?
A. Right around 8:00 o'clock. And I perhaps lost track of time, and I saw the school bus go by, and I knew Rusty wasn't on it.
Q. Where does he normally catch the school bus?
A. Right in front of the house.
Q. And he goes out and gets on it?
A. I slipped up on time, no question about that, but Rusty can tell time and he knew what time he was supposed to be out there. And I came back down, and he was still eating. He had been at it for 40 minutes. And I asked him what about missing the bus, and I said, "You automatically get a spanking for missing the bus." And he said, "Yes, sir," and I spanked him.
Q. What did you spank him with, Mr. Harbaugh?
A. I spanked him with my hand, Mr. McKee.
Q. And how many times did you hit him, do you know?
A. Oh, I don't know exactly. I have always, when I had to spank him, which is very, very seldom, I have tried to spank him in multiples of three and wait a few minutes and then three more. I'd say something like 10 or 12 times.
Q. This is with your hand?
A. With my hand, yes, sir.
page 107 } Q. How would you describe the force that was used?
A. Well, I'd say I spanked him fairly hard that morning.
Q. What, if anything did he do?
A. He *creid.*
Q. Then what did he do?
A. Well, I let him cry for a while, because I had to take him to school, and I wasn't in any great hurry, and then when I was talking to him when I called him upstairs to wash his

face and he said his bottom hurt, and I looked at it, and it had reason to hurt, because serum was oozing out on it considerably.

Q. Now, when you looked at his bottom, at that time was it in a condition similar to this (handing photograph)?

A. Well, you may call it similar. It wasn't, I don't think, as great as that by any manner of means. The spots were very small.

Q. Now, what did you do when you observed this condition?

A. Well, I put *merthiolate* on the actual breaks in the skin, and we had some Ben Gay ointment there. I rubbed that all around the rest of him.

Q. And then what did you do?

A. Well, I got out a clean pair of pants and put on him and dressed him back up. He undressed himself. I

page 108 } just told him to put on clean pants.

Q. Now, he was dressed for school when you initially *spaned* him?

A. Yes. Yes, he should have been on the bus.

Q. When you initially spanked him, did you take his pants down, or did you spank him with his pants up?

A. No. No, indeed, I didn't take his pants down. I didn't have any reason to take his pants down.

Q. Then after you took him upstairs and observed this condition and applied this medication, you then had him put a clean pair of shorts on and put his pants back on and he left, is that correct?

A. No, I took him to school.

Q. You took him?

A. I took him to school. I didn't hurry, because it wasn't any hurry. I am not for sure now, but I think they were on time if they were there at 5 or 10 minutes till 9:00.

Q. And he arrived at school about what time?

A. About that time.

Q. When was the next time you saw Rusty after you took him to school that morning?

A. I saw him Thursday in the hospital.

Q. Thursday. And under what circumstances did you see him then?

A. Well, I went up there to see him, and he was in the hall, and I had heard all this commotion then, of

page 109 } course, all the time, and the warrants had been served on me. The child had been detained, and I wanted to see what was wrong with him.

Charles H. Harbaugh, Jr.

Q. Now, did you have occasion after—well, let me ask you this before I get to that: You saw him that Thursday in the hospital. Did you see him any other time?

A. No, every time I went there after—

Q. Just answer yes or no. Don't go into the trouble that you had.

A. No, I didn't.

Q. All right, now—

A. I never saw him after that.

Q. Now, did you examine any articles of his clothing around the house at any time subsequent to the 6th of December?

A. Well, I didn't—I didn't look for anything. As I say, I had made the beds and I had thrown his pajamas under his pillow.

Q. This was on the Tuesday morning you are talking about?

A. Tuesday morning, yes, sir. And I—sometime later on, I don't know when, I went back looking for his pajamas.

Q. These are his pajamas?

A. Yes, wore Sunday and Monday night.

Q. Did you find those pajamas?

page 110 } A. Yes, sir.

Q. Did you also find the—

Mr. Massie: May I see those?

Mr. McKee: (Handing pajamas to Mr. Massie.)

By Mr. McKee:

Q. —find the underpants that the child wore that Monday?

A. Yes.

Mr. McKee: (Handing underpants to Mr. Massie.)

By Mr. McKee:

Q. (Handing underpants to witness) Can you identify these?

A. Yes, sir. These are his underpants.

Q. When was he wearing those?

A. When I spanked him.

Q. And the pajamas?

A. They are the ones he wore to bed that night.

Q. You are talking now about Monday night?

A. Monday night, yes, sir, as far as I know, Sunday night, too.

Mr. McKee: I'd like to have these introduced in evidence, Your Honor, as Defendant's Exhibits 1 and 2. like to make the pajamas 1 and the pants 2.

page 111 } (The pajamas in question were *were* received in evidence as Defendant's Exhibit No. 1.)

(The underpants in question were received in evidence as Defendant's Exhibit No. 2.)

By Mr. McKee:

Q. Mr. Harbaugh, did that child have those pajama pants on at any time after he got dressed for school on Tuesday morning?

A. No, sir.

Q. Did you at any time from the second of December, when you got home, to the morning that you spanked him, did you have occasion to discipline him at any time during that week-end?

A. No, sir, this little boy is the finest little boy you could want.

Q. Just answer the question, Mr. Harbaugh.

A. I hadn't spanked him for months.

Mr. McKee: I think that's all, Your Honor. Your witness.

CROSS EXAMINATION

By Mr. Massie:

Q. Mr. Harbaugh, how old are you?

Mr. McKee: If the Court please, again, I don't see what materiality the man's age has.

Mr. Massie: It has a lot to do with his judg-
page 112 } ment, his mental make-up.

The Court: I think possibly the Court erred in sustaining the objection to the same question to the wife of the accused. The jury is entitled, as is the Court, to know something about the capacity of the principals in the story that's being related, the witnesses who take the stand.

Mr. McKee: I withdraw my objection.

The Court: And it lends a lot of weight to the jury's consideration of the credibility of his testimony and the maturity of his judgment and the opportunity to know whereof he speaks, and everything else. So objection is overruled.

Mr. McKee: The objection is withdrawn, Your Honor.

By Mr. Massie:

Q. Mr. Harbaugh, how old are you?

A. I am 46.

Q. How old is your wife?

A. She is 56.

Q. Mr. Harbaugh, when you spanked this boy on Tuesday morning, did you have any knowledge of the condition of his buttocks before you spanked him?

A. No, I did not.

Q. No one had told you about it?

A. No one had told me.

page 113 } Q. As far as you knew, he was perfectly well and all right?

A. I had only seen him briefly, and I hadn't noticed anything wrong with him, no, sir.

Q. When you say you had seen him briefly, you spent the night in the house with him?

A. I put him to bed as soon as we came home.

Q. And you picked him up down at your mother-in-law's that day?

A. Monday evening after 8:00 o'clock. I remember distinctly of getting there around 8:00 o'clock.

Q. How about Sunday evening, did you pick him up then, too?

A. I have testified that we were there Sunday all day.

Q. All day Sunday you didn't notice anything wrong with him?

A. I testified that I did not.

Q. All day Monday evening you didn't note anything wrong with him?

A. I testified the child was playing around Sunday.

Q. And he was playing around on Monday, too, when you picked him up?

A. I wasn't with him Monday.

Q. Monday evening when you picked him up?

page 114 } A. Monday evening he was—I don't know what he was doing while I was eating dinner. I was only there long enough to eat and he—

Q. And he didn't complain to you of any illness or physical discomfort?

A. He never complains.

Q. Now, Mr. Harbaugh, when you say that you observed

his buttocks after you had whipped him on Tuesday morning, you put *merthiolate* on him?

A. I did.

Q. Is that a red *merthiolate?*

A. Yes, sir.

Q. And you put it over the skin and the sore part of his buttocks?

A. I put it on the open wounds, yes, sir.

Q. You say that those open wounds were wet and damp?

A. They were seeping with serum, yes, sir.

Q. Would you say that they appeared as they do in the photographs, in the photographs here today?

A. I say they are not as big as that.

Q. Not as big as that?

A. No, sir.

Q. Can you account for how they grew in size from the day you whipped him until the next day?

page 115 } A. I think something has happened to him at the school.

Q. Oh, you think somebody at the school whipped him?

A. I think so.

Q. Have you got any idea who you want to put the finger on?

Mr. McKee: I don't think the Commonwealth's Attorney is entitled to use this discourtesy.

The Court: The witness has said he thinks somebody else did it.

Mr. McKee: I think the manner in which it is asked is deliberately insulting, "put the finger on someone." He can be a little bit more dignified.

The Court: I don't think the objection has any great merit. It's an expression that is fairly commonly used in pointing out the culprit or person.

By Mr. Massie:

Q. Will you answer the question, please, sir?

A. No, sir. I have done a great deal of investigating. I have talked to Mrs. Combs. Mrs. Combs has told me—

Q. I didn't ask you to testify what she said, who you accused.

Mr. McKee: Please the Court, he asked the witness, I want the witness to answer it for him.

The Witness: I will answer the question.

page 116 } By Mr. Massie:

Q. Let me put it this way: Did Mrs. Combs tell you she whipped him?

A. May I answer the first question?

Mr. McKee: Just tell him what Mrs. Combs told you.

By Mr. Massie:

Q. I want the accused—

A. I have found Mrs. Combs has whipped the child continuously since the first of the year.

Q. Do you say Mrs. Combs enlarged the wounds on this child's buttocks?

A. I don't know. I think that is a good guess.

Q. That is your guess?

A. Yes, sir.

Q. And you think that she did this on Tuesday after he came to school after you whipped him?

A. I think there was a possibility that she whipped him on Monday as well as Tuesday.

Q. All right, now, you think that on Monday and Tuesday she whipped this child to the extent that his buttocks were raw?

A. Yes, sir.

Q. Have you any other accusations to make about people in this connection? Anybody else whip him, to your knowledge?

page 117 } A. I didn't see the child after 9:00 o'clock that morning. I don't know what happened to him after that.

Q. Now, you, by these—when you saw these, this clothing that you put in evidence, you say that you saw that on Tuesday morning where the seepage had come into his pants?

A. Yes, sir.

Q. It was after you whipped him you saw that?

A. Yes, sir.

Q. You didn't know it existed before that?

A. No, sir.

Q. When he ate breakfast he sat down, I assume?

A. Yes, he did.

Q. And you say these are the pajamas he wore Monday night?

A. That is the pajamas, yes.

Q. And when he sat down you didn't notice anything wrong with him?

A. I just answered that question, "No, sir."

Q. And when he walked along you didn't notice anything wrong with him?

A. No, I didn't. I didn't know that anything had happened to him.

Q. You didn't see a limp in him that you are aware of?

A. No, I didn't know that he had fallen.

page 118 } Q. You didn't see the limp in him that Mrs. Harbaugh saw?

A. I was only with him a very short time.

Q. Did you put him to bed on Monday night?

A. I didn't physically put him to bed. He is a child capable of putting himself to bed. I told him to go to bed.

Q. You say that you just told him to go upstairs and go to bed, or did you go up with him?

A. I didn't—

Q. You didn't go up with him?

A. I don't think I did. He is perfectly capable of putting himself to bed.

Q. Did you wake him up on Tuesday morning?

A. I did.

Q. Did you get him out of bed?

A. No.

Q. Help him get dressed?

A. No, sir.

Q. Were you with him when he got dressed?

A. No, sir.

Q. And you saw nothing wrong with him?

A. I just testified I wasn't with him when he dressed.

Q. When you were spanking this boy in this sore area that was sore before you spanked him, didn't it cause

page 119 } —give you some cause of concern because of the way in which he behaved?

A. No, sir.

Q. He didn't flinch any more than he had been flinching before, is that right?

A. No, sir; I have said he is not a complaining child.

Q. So he let you whip him to this extent without complaint?

A. He complained after—when I told him to come up to wash his face to go to school, that there was something wrong with him, yes, he complained then.

Q. That's the only time he ever complained?
A. That's the only time he said a word.
Q. And was he crying?
A Well, he usually cried when you spanked him till you told him to stop.
Q. Did you ever spank him with anything besides your hand?

Mr. McKee: If the Court please, I don't see what materiality that has. If we are going to get into a long history, we could be here for quite some time. I suggest the question is not anything that may or may not have transpired some other time but relates to this particular incident.

The Court: I thought he had reference to the page 120 } incident.

Mr. McKee: No, I thought he was talking about something else. I don't know, but he asked him if he had ever at any time spanked him with anything besides his hand, and I think we are now going back into a year and a half.

Mr. Massie: He said this condition existed prior to—I think I have a right to go into why it may have happened, what could have caused it.

The Court: Objection overruled.

Mr. McKee: Exception.

By Mr. Massie:

Q. Now, Mr. Harbaugh, have you whipped him with anything besides your hand?

A. When we first got the child he was beautifully trained. We had him, I think, four to six weeks before he had any disciplinary cause at all. I remember one time he had a temper tantrum, and I spanked him with a paddle at that time.

Q. Did you ever whip him with a belt?
A. No, sir.
Q. Did you ever whip him with a switch?
A. Yes, sir, once.
Q. Mr. Harbaugh, you say that you have never whipped him—hit him or whipped him with a belt?

A. No.

page 121 } Q. May I refresh your memory, going back to January 13th, 1967, at a hearing in this matter. Do you remember testifying on that occasion about whipping him with a belt?

A. I recall very clearly I said we have tried everything.

Q. What did you say after that?

A. And that when anything that you used on the child would cause bruising—

Q. Didn't you testify on that occasion that you had used a belt and that didn't work, because it left marks on him?

A. No; I say again, "we had tried—" My wife has tried,

Q. Did you say that you have—

too.

Q. Did you say that you have—

A. I don't think so. I said "we."

Q. Did you say you had used a switch on him and that cut him?

A. I didn't say—I don't know whether I said whether it cut him or not. I said that we had used it once and it showed on him, and we couldn't use it again. The paddle, I consulted with the Welfare Department, and they approved that. They said that's perfectly all right.

Q. What welfare department? Frederick County?

A. No, sir.

Q. Why are you so emphatic about Frederick County?

page 122 } Mr. McKee: If the Court please, again I think the question is what welfare department he consulted. I think he can answer that.

The Witness: I wrote a letter to the Harrisonburg Welfare Department, and I told the Harrisonburg Department that a paddle had been made, and the answer was, "That's perfectly all right to use the paddle as long as you use it with love."

By Mr. Massie:

Q. Did you receive an answer in writing?

A. Yes, sir.

Q. Where is the letter?

A. (Looking in briefcase.) You will have to give me time to read it.

The Court: Are we consuming a lot of time on a matter that really doesn't have any particular significance?

Mr. McKee: Your Honor, I don't think any of it has any particular significance, and he's got about 20 letters here.

The Witness: I have it.

Mr. McKee: Have you found the letter? I don't believe the file of the correspondence between this man and the welfare department should become an issue in this case.

The Court: I assume that the examination was designed to check the credibility of the witness's story.

page 123 } Mr. McKee: I wonder if he could show Mr. Massie and satisfy him that he did receive some—a letter and avoid getting it in.

Mr. Massie: I will withdraw the question about the welfare giving him that information.

By Mr. Massie:

Q. Mr. Harbaugh, did you paddle this child at any time with a paddle prior to the 6th of January—I mean, December 1966, and within the week before that.

A. From the time school started until that time I was home only on the week-ends, or very brief periods at night. That child was not paddled during that period by us.

A. Now, you say that you talked to Mrs. Combs and that she had convinced you that she had disciplined the child in school. Did she tell you she had whipped it with a paddle?

A. My recollection is she said a board.

Q. And did she say when she whipped it with a board?

A. I found from other children it was almost continuous.

Q. Now, I am talking about Mrs. Combs. You talked to her, now. Did she tell you she ever whipped this child with anything? You said a board. When did she say she whipped it with a board?

A. I talked to her one day briefly in the hall. She told me that she was a strict disciplinarian, she intended

page 124 } to be, and she had been condemned for it.

Q. Did she ever tell you she had whipped this child?

A. That was the only conversation I had with her, I believe.

Q. All right, sir. You have answered the question. Now, Mr. Harbaugh, when you spanked this child on this particular day, did you put him across your lap?

A. I put him across my knee.

Q. Across your knee?

A. Yes, sir.

Q. Were you sitting down?

A. Yes, sir.

Q. And are you right-handed?

A. Yes, sir.

Q. And you beat him with your right hand?

A. I didn't beat him.

Q. Use your right hand to spank him?

Charles H. Harbaugh, Jr.

A. I spanked him with my right hand. I didn't beat him. The child has never needed a beating. He is not that kind of a child.

Q. Now, after the whipping you went upstairs, did you?

A. I did.

Q. Did you take a rest?

A. I believe I went to the toilet.

page 125 } Q. And did you take a rest?

A. If you call it a rest.

Q. Now, did you then drive the child to the school that morning?

A. I did.

Q. Isn't it a fact that you were unhappy with the speed with which the child was eating that morning?

A. I never mentioned it to him.

Q. But you were unhappy about it?

A. No, sir, I can't say that I—

Q. Wasn't that what delayed him getting on the bus?

A. That was the delay, yes, sir.

Q. Now, Mr. Harbaugh, as I understand it, did you ever whip this boy or spank this boy within the last year before this occurrence on December the 6th?

Mr. McKee: If the Court please, what possible relevancy could going back a year have to this case?

Mr. Massie: He testified—

Mr. McKee: He said he hadn't spanked him since the beginning of school.

Mr. Massie: He said he hadn't spanked him since—

The Witness: No, I did not.

Mr. Massie: That's what I want to bring out, when and where it happened.

page 126 } The Court: I don't think under the circumstances of the case at trial that any evidence—assuming for the sake of argument there was a previous whipping, unless it was so near it in time as to have a bearing on this immediate inquiry, that it would even be admissible, because it is not a case where an attempt, and so on, would permit the showing of previous similar offenses.

Mr. Massie: That is personal credibility, impeaching the witness.

By Mr. Massie:

Q. Mr. Harbaugh, had you whipped this child between the

time school started in September and the time of December the 6th, 1966?

A. No, sir, I wasn't with the child the whole period.

Q. Had you ever spanked or beat or whipped the child between June of 1966 and the time school started?

Mr. McKee: If the Court please, going back to the same thing.

The Court: I think the objection is well taken to the last question.

Mr. Massie: All right. That's all.

Mr. McKee: That's all.

REDIRECT EXAMINATION

By Mr. McKee:

page 127 } Mr. Harbaugh, one thing I would like to straighten out, for my own sake. What, precisely, did Mrs. Combs tell you about her conduct?

A. I am trying to think whether she ever said anything about the paddle, the board, or anything, but she said she was a very strict disciplinarian, she intended to be that way and she had been condemned for it.

Q. Now, the other statements that you made with reference to her were based upon information from other sources, is that correct? I mean, I don't want you to go into it, because it's not admissible in evidence, but I just want to straighten it out.

A. I found out the child—

Q. I don't want you to go into it, I just want to know if it's from other sources other than Mrs. Combs. You got information from sources other than Mrs. Combs, is that correct?

A. Yes, sir.

Mr. McKee: That's all.

(Whereupon, the witness retired from the stand.)

Mr. McKee: If the Court please, we would like to call at this time Rusty Harbaugh.

I did forget to inquire of this witness—maybe I could ask him now while they are getting the child.

The Court: All right.

page 128 } Mr. McKee: Mr. Harbaugh, at any time since this child has come back in this home, have you questioned him or talked to him about this trial or about what he has to say or anything else?

Mr. Massie: I object to the question as being improper, because he is trying to set up his own witness by this witness. The jury is going to have to determine that question, not the *witnesss* on the witness stand. It is a self-serving declaration.

The Court: Objection overruled.

Mr. McKee: Have you, sir? Have you talked to him, asked any questions about it to the best of your knowledge.

Mr. Harbaugh: When the child was brought back, we were instructed most emphatically not to talk to him about this. We didn't know how he was going to take it and what was going to happen.

The Court: The question is whether or not you did discuss it with the child.

Mr. Harbaugh? We did not, sir.

Mr. McKee: That's all we want to know, sir.

Mr. Massie: I'd like to ask the defendant a few questions in that connection.

The Court: Come back to the stand.

Whereupon,

page 129 } CHARLES H. HARBAUGH, JR. was recalled to the stand and, being previously duly sworn, was examined and testified further as follows:

RECROSS EXAMINATION

By Mr. Massie:

Q. Mr. Harbaugh, you say that you have talked to many people about this case before the trial day?

A. I have talked to—

Mr. McKee: If the Court please, I don't see how this is in any way responsive to the question of whether or not he talked to the child. I object to it.

Mr. Massie: What I am trying to show is if he has been so thorough in the investigation in this case, it is up to the jury to know to what extent he has gone to prepare his defense and to know whether or not to believe him on that status.

Mr. McKee: He stated why he had not talked to the child.

The Court: Let's delay the entrance of the child one moment.

Mr. Massie: Take the child back out again.

The Court: Just delay it.

Well, actually, this question, it seems to me, would be renewal of cross-examination of the witness. It page 130 } should have been covered before, but I thought he was put back to cross-examine further on what conversation he may have had or not have had with the child.

Mr. Massie: Yes, sir, but I think it's proper to investigate —I have a right not just to take on face value what he says, but to examine him about what he said and about his demeanor and his attitude about the case and what he has done in regard to the case.

The Court: Couldn't that have been done when he was on cross-examination before?

Mr. Massie: My cross-examination wouldn't have been material, because it is only material to this question.

Mr. McKee: It is not material to this question. The question is a very narrow one—

Mr. Massie: He's been asked whether or not he has talked to a certain witness in this case, and I think he should be prepared to answer how many people he has talked to.

The Court: I think it should have been gone into before, but I am going to let you cross-examine him further, anyhow.

Mr. McKee: If the Court please, I note my exception.

The Court: The Court will note your exception.

By Mr. Massie:

Q. Mr. Harbaugh, have you talked to Mrs. Pitpage 131 } cock about this case?

A. Yes, sir.

Q. Did you express to Mrs. Pitcock that you thought somebody had hurt your son before, or, rather, after you had?

A. I did.

Q. Because the condition of the child was worse in the photograph than you saw it on Tuesday morning?

A. Not in the photographs, at the hospital.

Q. All right, now, did you talk to the witnesses or people in the vicinity of the school?

A. I talked to the *partents* of students in Mrs. Combs' room, yes, sir.

Q. Did you talk with the Welfare people?

A. No, sir.

Q. Did you talk with school people?
A. What school people?
Q. School administration?
A. No.

Mr. McKee: If the Court please, I think he ought to be a little more specific about who he wants to inquire about. Can he name names or something like that?

By Mr. Massie:
Q. Did you talk to the teachers out at the school?
A. I haven't been near the school since they—
page 132 } Q. Did you talk to the neighbors of the principal of the school out there?
A. No, sir.
Q. Did you talk to the neighbor of Mrs. Combs?
A. No.
Q. Did you talk to the neighbor of any of the teachers at Stonewall School?
A. No, sir, not to my knowledge. I don't know where they live.
Q. You say that you only talked to the parents of students in Mrs. Combs' class?
A. That's right.
Q. And people living in the neighborhood of Stonewall School?
A. That's right.
Q. Did you talk to any of the other witnesses called here today? Did you talk to Miss Lanham?
A. Why, certainly, I talked to Miss Lanham. I live there.
Q. Talk to your wife?
A. Why, certainly.
Q. Did you talk to Harrisonburg Welfare Department?
A. Repeatedly.
Q. Did you talk with Clarke County Welfare Department?
A. Continuously.
Q. And yet you never talked to this boy who lives in the house with you, Rusty?
A. I have talked to my boy continuously, yes,
page 133 } sir.
Q. You have talked to him about this matter?
A. No, sir.
Q. You never mentioned the fact that he had been taken from you by the Welfare Department?

Charles H. Harbaugh, Jr.

A. Well, Harrisonburg Welfare Department, I testified, sir, told us, "Do not talk to the child about it." He was severely damaged the month he was taken away from his people and to not talk to him about it. We didn't know what to do when he came back, we were at a loss how to treat him, and we talked to the superintendent there, who was a trained psychologist. He said the best thing to do is to not talk to him about it.

Q. Did you talk to this boy about coming here today?

A. No, Miss Austin talked to him about that.

Q. In your presence?

A. No, sir.

Q. Did your wife talk to him about coming here today?

Mr. McKee: How would he know what his wife did?

The Court: I don't know.

Mr. Massie: If he knows. He can testify page 134 } whether he knows.

Mr. McKee: Frame the question like that.

By Mr. Massie:

Q. Do you know whether your wife talked to him about it?

A. I heard my wife tell him this morning we were going to court. That's about all she said.

Q. Did you bring the boy in here? Did you bring him in to town?

A. I was instructed by the—

Q. I didn't ask you who instructed you, I asked you if you drove the boy to Winchester.

Mr. McKee: If the Court please, I think he can explain what he did and why he did it.

The Court: Let him answer the question. I don't think the interruption is justified, Mr. McKee.

By Mr. Massie:

Q. Did you drive him to Winchester from your hone?

A. I had a long talk with Mrs. Arrington last night—

Mr. Massie: Your Honor, I object.

The Court: Answer the question.

The Witness: I am trying to answer it.

The Court: The question is: Did you bring this child in to Winchester to the court today?

The Witness: Not to the court, no, sir.

Charles H. Harbaugh, Jr.

page 135 } By Mr. Massie:

Q. Did you bring him in to Winchester today?

A. I brought him in to Winchester, yes, sir.

Q. He arrived with you in your car?

A. Yes, sir.

Q. Who else was with you?

A. My wife and Miss Lanham.

Q. Did you talk about why you were coming in here today?

A. No, sir.

Q. That wasn't mentioned in the car?

A. It was not.

Q. Did you tell him why he wasn't going to school today?

A. My wife told him.

Q. What did she say?

A. That we were going to court today.

Q. Did she tell him why you were going to court today?

A. No, sir.

Q. In other words, it wasn't mentioned you were coming in here on your trial?

A. No, sir.

Q. Did you talk to him about it yesterday?

A. No, sir.

Q. Did your wife talk to him about it yesterday in your presence?

page 136 } A. No, sir.

Q. Do you have knowledge that your wife talked to him about it? Did she mention it to you?

A. No; I assume my wife complied with the instructions of the Welfare Department.

Q. In other words, he didn't know anything about changing plans and not going to school today until this morning?

A. Miss Austin talked to him last week and told him that he was going to be in court this week.

Q. How long has he been back in your home?

A. He's been back since the 13th of January.

Q. And in that period of time you have never mentioned to him anything concerning the episode on the 6th of January?

A. I have testified I was instructed not to.

Q. I know you were instructed not to.

The Court: The question is not what you were instructed, the question is whether or not you discussed it with the child.

Mr. McKee: If the Court please, he has answered that over and over.

The Witness: I did not.
Mr. Massie: No, he hasn't.
The Witness: I did not talk to the boy about this.
Mr. Massie: That's all.
page 137 } Mr. McKee: Come on back, Mr. Harbaugh.

(Whereupon, the witness retired from the stand.)

(Whereupon, Charles H. Harbaugh III was brought into the courtroom.)

The Court: Come up here, son, and take this chair right here. Let me ask you something before you answer any questions. Do you promise that any answer that you give to any question here today will be the truth, the whole truth?
Master Harbaugh: (Nodding affirmatively.)
Mr. Massie: Your Honor, perhaps the jury would like to have a demonstration whether or not this child is competent to testify. I object to his testimony until it is proved that he is competent.
The Court: I understood that it was mutually acceptable that the child would testify.
Mr. Massie: Your Honor, there was no acceptance. It was a suggestion at one time, but I think at this time I must interpose an objection to the competence of the child to testify.
Mr. McKee: If the Court please, Your Honor has examined the child at length in chambers. My understanding was the opinion of the Court was the child's testimony should be made available to the jury for whatever weight the jury might choose to give him.
page 138 } The Court: I was going to permit him to testify and let the jury pass upon his capacity and the weight to be put upon it and on the assumption that it was mutually acceptable that the testimony be given for what the jury consider it to be worth. I also voiced the opinion that I didn't think that the child had the maturity to be appreciative of the sanctity of an oath or the significance of an oath and to that extent he is not qualified, but there are plenty of times when children of quite tender years give testimony in a trial of controverted matters, and technically I question his qualification by reason of the fact that I don't think that he is mature enough to appreciate the sanctity of an oath or the significance of an oath, nor the consequences of an oath.
Mr. Massie: May I be heard for a moment, Your Honor?

It was after the Court had examined the child in chambers that the objection on behalf of the Commonwealth is being made. The fact that the child does not know the meaning of the oath certainly means the child doesn't know the difference between right and wrong, the child doesn't know the proper difference, and the child would be incompetent to testify, and so, on that ground we now make the objection.

The Court: There is nothing to keep you from changing your mind about it, but I may have been under a mistaken impression. But whether I was or wasn't, I am page 139 } still saying that I think you have the right to change your position on the matter before the testimony is given and still interpose your objection.

Do you want to be further heard on your objection, Mr. McKee?

Mr. McKee: Your Honor, the only thing I would say is this: Your Honor, of course, examined the child, but my impression was that Your Honor was satisfied that he had a reasonably mature understanding of the difference between a truth and a lie, that the Court was not satisfied that he understood the legal significance of taking the oath.

The Court: Isn't that one of the requirements that are recognized by the authorities to meet the test of competency?

Mr. McKee: Your Honor, as the Court has pointed out, children of very tender years have been permitted to testify. As a matter of fact, I think from your own circuit a four-and-a-half-year-old child was permitted to testify and it was approved by the Supreme Court of Appeals.

The Court: Four and a half years old?

Mr. McKee: A man was sentenced to death on the testimony of a four-and-a-half-year-old about a rape of a 6-year-old child.

Mr. Massie: And, again, the testimony of a six- page 140 } and-a-half-year-old child was thrown out for incompetence. It was that he did not know the significance of the oath.

The Court: I again say that the Court is dwelling under the impression that it was acceptable to both sides to let his testimony come before the jury, and for the jury to attach to his testimony what value they thought it might properly carry. But if you insist on the objection, the Court will sustain the objection, because I don't think he is mature enough to know the significance of an oath.

Mr. Massie: That's one reason we didn't call him.

Mr. McKee: Well, if Your Honor please, I would object and note my exception to the ruling of the Court.

The Court: All right.

Changed our mind about it. We are not going to need you, Son.

Mr. McKee: Might I have an opportunity, after the jury goes out, to take his testimony for the purpose of the record so the nature of it would be known in the event it is necessary?

The Court: I will give consideration to that at the time the jury leaves.

Mr. McKee: Would you see if Mr. Burch has arrived?

Whereupon,

page 141 } RANDOLPH BURCH was called as a witness on behalf of the Defendant and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. McKee:

Q. Would you state your name, sir?

A. Randolph Burch.

Q. And where do you live?

A. Summit Point, West Virginia.

Q. What is your occupation?

A. I work for the Burch Manufacturing Company.

Q. Is that your company?

A. Yeah, I am stockholder in it, yes.

Q. Mr. Burch, on Sunday, December the 4th, 1966, did you have occasion to see Rusty Harbaugh?

A. Yes, sir.

Q. And where was that?

A. At my aunt's, Mrs. Moorehead.

Q. Mrs. Moorehead is your aunt. Is Mrs. Moorehead the mother of Mrs. Harbaugh?

A. Yes, sir.

Q. Now, what, if anything, can you tell us about Rusty's appearance and condition at the time you saw him that afternoon?

A. Rusty walked stiff, and that's about all I

page 142 } noticed about him.

Q. And that was on Sunday, the 4th of December?

A. Yes.

Dr. Warren C. Gregory

Mr. McKee: Thank you, sir.
Your witness.
Mr. Massie: No questions. Thank you, Mr. Burch.

(Whereupon, the witness retired from the stand.)

Mr. McKee: Defense rests.
Mr. Massie: I'd like to call Dr. Gregory.
Mr. McKee: I'd like to know whether the Commonwealth's Attorney or Assistant Commonwealth's Attorney had been talking to Dr. Gregory during the lunch hour.
Mr. Massie: Yes, we asked him if there was any evidence of medication.
Mr. McKee: If Your Honor please, it doesn't make any difference what he asked him. If he inquired as matters under consideration in this courtroom, he should not be permitted to testify, because obviously he goes out and solicits the answers he wants and puts him on the stand, and that is the purpose for excluding witnesses. It's always been a rule in this circuit that once they are excluded the lawyers are not permitted to talk to them, and if they do talk to them, they are not permitted to take the stand. And Mr. Massie, I am sure, is aware of that.
page 143 } Mr. Massie: I am aware of the fact—that is not the rule. I am aware of the fact you can't tell the witnesses what has been testified to. I merely sought to determine whether or not there was any evidence of what the defendant had testified to. He was not informed what the witness had said.
The Court: The objection is overruled.
Mr. McKee: Exception noted, Your Honor.
Mr. Massie: Will you call Dr. Gregory, please.
The Court: Obviously, the sequestration is to deny the witness the opportunity to listen to his fellow witness before he gives his testimony.

Whereupon,

DR. WARREN *C.* GREGORY was recalled as a witness on behalf of the Commonwealth in rebuttal and, being previously duly sworn, was examined and testified further as follows:

Dr. Warren C. Gregory

REBUTTAL DIRECT EXAMINATION

By Mr. Bennett:

Q. Dr. Gregory, a few moments ago I was outside, and I asked you whether or not, when you examined the child on December the 6th, was there any evidence of any medication, either on the boy or on his clothing, and you gave me an answer. Could you tell the Court and the jury what your answer was?

page 144 } A. There was no sign of any medication there. The only—there was some blood-tinged serum on the boy's underpants and the tail of his shirt. All the redness that was around the—surrounding the swollen area was a flare from the trauma that had been inflicted.

Q. But there was no sign of medication?

A. None that I saw—that you could see or smell.

Q. In your professional opinion, Doctor, in directing your attention to the wounds themselves and from having examined the boy from your own personal observation of the child, would you say that the child could have injured himself in the manner and to the degree which you saw on Tuesday by falling on a flat rock—the rock may have been rough but not jagged—but falling on a flat rock from two steps up, each step approximately 6 to 8 inches in height?

Mr. McKee: If the Court please, before that is answered, I would like to object to it on the grounds previously stated, to giving opinion evidence by the physician.

The Court: Objection overruled.

Mr. McKee: Exception noted, Your Honor.

By Mr. Bennett:

Q. What is your opinion?

A. If the rock had been heated to 250 degrees, it might be possible, but ordinary temperature of the day

page 145 } involved, I don't see how it would be possible.

Mr. Bennett: Thank you, Doctor.

The Witness: Even if the boy fell a hundred times.

REBUTTAL CROSS EXAMINATION

By Mr. McKee:

Q. Doctor, when you saw this child, the raw spots on his buttocks, the tissues had just been removed by the removal

of his pants; in other words, there was raw tissue where the fluid had run from the buttocks into the underclothing and then the underclothing had been removed? You observed that, didn't you?

A. Those words are similar to what I stated previously.

Mr. McKee: That's all.

Mr. Massie: That's all, Doctor. Thank you very much.

(Whereupon, the witness retired from the stand.)

Mr. Massie: I'd like to call Mrs. Combs to the stand.

Whereupon,

AUDREY ODESSA COMBS was recalled as a witness on behalf of the Commonwealth in rebuttal and, being previously duly sworn, was examined and testified further as follows:

REBUTTAL DIRECT EXAMINATION

page 146 } By Mr. Massie:

Q. Mrs. Combs, have you ever taken a board and beaten Rusty in your classroom?

A. No, sir.

Q. Have you ever beaten Rusty with any object?

A. No, sir.

Q. Have you ever spanked him?

A. No, sir.

Mr. Massie: That's all. Your witness.

REBUTTAL CROSS EXAMINATION

By Mr. McKee:

Q. Mrs. Combs, you have spanked the children in your classroom, haven't you?

A. Yes, sir.

Q. And what do you spank them with?

A. My hand.

Q. You don't have a ping-pong paddle or anything like that you keep in the classroom?

A. I use my hand when I paddle them.

Q. Have you ever used a ruler?

A. No, sir.

Q. How many times have you had occasion to spank children since the first of the year, to—

Mr. Massie: I object.

page 147 } The Court: The objection is sustained.

Mr. McKee: If the Court please, it's the same thing you permitted him to do to Mr. Harbaugh. Exception noted. That's all.

Mr. Massie: That's all, Mrs. Combs. Thank you very much.

(Whereupon, the witness retired from the stand.)

Mr. McKee: Defense rests.

The Court: The jury will be at liberty while the Court recesses to assemble the instructions in the case.

(Whereupon, the Court and counsel retired to chambers, where the following proceedings were had:)

OBJECTIONS TO PROSECUTION'S INSTRUCTIONS BY COUNSEL FOR DEFENDANT

Instruction No. 1. The Court instructs the jury that a parent or one standing in his place may be criminally liable for assault and battery if he exceeds or abuses his authority to correct a child and inflicts bodily punishment which exceeds the bounds of due moderation in the measure of the punishment on or in the instrument used for that purpose.

In determining whether due moderation was exercised by a parent or one standing in his place in inflicting bodily punishment upon the child, the jury will consider the circumstances attending the punishment with regard

page 148 } especially to the age, size, and conduct, the nature of his misconduct, the nature of the instrument—if any, I think it should be—used for punishment and the kind of marks or wounds inflicted on the body of the child. In other words, the rule of reason applies. The parent has the power to punish within reason under all the circumstances attending.

Mr. McKee: If the Court please, I think we would have to object to that first one. There is no indication what, in Virginia, you can do with your hand, and that instruction also presumes that the marks or wounds

The Court: The Court instructs the jury a parent or one standing in his place may be criminally liable, and so on, if he exceeds or abuses his authority to correct the child and inflicts bodily punishment which exceeds the bounds of due moderation in the measure of a punishment or in the instru-

ment used for that purpose.

Mr. McKee: The words "instrument used for that purpose," there is no evidence of use of any instrument. I think the only thing the jury can go from are the wounds them selves.

Mr. Massie: The jury has got the testimony of Dr. Gregory.

Mr. McKee: He didn't testify to any instrument.

Mr. Massie: No, he said—

page 149 } The Court: What is "due moderation?" What did this come from?

Mr. Bennett: The only Virginia case, Your Honor, I found.

The Court: Is this from the language of an instruction that was passed upon?

Then the jury is going to say, "What is due moderation?"

Mr. McKee: The Court of Appeals says you can't define "due moderation."

Mr. Bennett: The Court attempted to define it.

The Court: Within reason, or under the circumstances. You want the jury to determine from the attendant circumstances, considering the size, age, conduct of the child, nature of the misconduct, nature of the instrument used for punishment, kind of marks or wounds inflicted on the body of the child.

I am going to give the instruction. This will be No. 1 given over the objection of the defense.

Mr. McKee: We object to the granting of Instruction No. 1 on the ground that the language in the instruction is not consistent with the evidence in this case, there being no evidence of the use of any instrument, except the opinion of the doctor that some instrument was used because of the nature of the wounds which he observed. We feel that the

page 150 } use of the word "instrument" is prejudicial and might tend to infer to the jury that the Court felt that the accused had used an instrument other than his hand.

The Court: There is evidence before the jury to the effect that the gravity of the wounds was such as would not be inflicted with the bare hand, something to that effect, and there are circumstances to permit a fair, reasonable inference that something other than the hand might have been used in this case.

Instruction No. 2. The Court instructs the jury that in determining whether due moderation was exercised by the parent or one standing in his place in inflicting bodily punishment upon the child, it shall consider the circumstances attending the punishment with regard especially to the age,

size and conduct of the child, the nature of his misconduct, the nature of the instrument, if any, used for punishment, and the kind of marks or wounds inflicted on the body of the child.

Mr. McKee: We objected to this on the word "instrument" as stated with reference to our objection to Instruction No. 1, and we object to it on the ground that the words "kind of marks or wounds inflicted on the body of the child" presupposes that the marks or wounds found by Dr. Gregory were inflicted by the defendant.

The Court: To be given over the objection of
page 151 } the defense.

Instruction No. 7. The parent, or one standing in the position of a parent, in punishing a child must act in good faith with parental affection and must not exceed the bounds of moderation and must not be cruel or merciless and any act of punishment in excess of such moderation is unlawful. While the physical punishment of a child is permissible, it must not go beyond what the child's reasonable welfare demands.

The Court: I will give it this way. I will strike out the word "limits" and insert "moderation."

Mr. McKee: We will object to that, too.

The Court: That's as far as I will go with you.

Mr. McKee: We will object to the Court's amendment of Instruction No. 7 that is tendered, amendment being by striking out the word "limits" in the fifth line and inserting the word "moderation," on the ground that the instruction as tendered constitutes the majority rule adopted by the Supreme Court of Appeals of Virginia in the case of Carpenter v. Commonwealth, 186 v. 851 at pages 61-62.

If the Court please, for the purposes of the record, I would like to renew my motion to strike the Commonwealth's evidence.

The Court: Motion is again overruled.

(Whereupon, the Court and counsel returned to
page 152 } the courtroom, where the instructions were read
to the jury, and arguments were made by counsel for either side,

page 151 A

ARGUMENT TO THE JURY ON BEHALF OF PLAINTIFF

By Mr. Bennett

Mr. Bennett: May it please the Court, Mr. Potts and Mr.

McKee, gentlemen of the jury: I wish to commend you on the manner in which you have listened to this case. You have listened with attention and with concern. No doubt, it has been very trying for you. You have been here off and on since 10:00 o'clock this morning, and it has been a long vigil for you.

But yours is a heavy duty and a duty which the courts in this land afford every man. You are the tryers of fact, and I know that you will weigh them with the consideration and competence that you have exhibited here today.

I would like to remind you that what I or the other attorneys say is not facts. If we repeat what we think to be facts, it is precisely that, it is the way we remember them. So if we make an error, you correct us in your own mind from the *rememberance* of what the witnesses have said from the stand.

This is a case, as I mentioned in my other statement, of assault and battery by an adoptive parent against his child, and it is a serious case, a very serious case, and it is the sort of case with which we are faced often, but nevertheless it is a serious case.

page 151 B } Now, although the defendant is not the real father, he is entitled to have the same authority and control and right to discipline the child that any natural parent would have. We grant this, and we are glad that this is the way it is.

But the question is, given that authority, given that right to discipline the child, was that punishment administered with due moderation, considering all the circumstances, particularly considering the size of that little boy, the offense, if you might call it that, for which he was whipped, spanked, admitted by the defendant.

But I ask you this: Even though the parent admits spanking, he says, "When I spanked him he was not wounded severely like he was when I saw him in the hospital later that afternoon," or the next morning. I forget when it was he first saw him.

The Commonwealth has shown you through the teachers, beginning with Mrs. Combs, young Rusty's teacher, that she was first taken aback especially by the way he limped, by the way he sat in his chair. It was so much so that her attention was directed right to him simply by his movements. Concern was aroused in her, and she went to the principal. The principal called in the nurse, right on down the line. They all agreed that this child should be seen by Dr. Gregory.

The child was taken to Dr. Gregory, Dr. Gregory, as you saw from the stand, was aghast. He said—re-
page 151 C } member his words?—when he was pressed or asked about the degree of punishment that was administered to this child, the wound that had been inflicted on this boy, and we asked him about the degree of those wounds, and he said, "Gentlemen, in all my years, both as a student in college when I saw hazing by fraternities of grown men, practically, then spankings given to children by other parents in my occupation as a doctor," which was 14 years as a pediatrician, he has never seen the punishment comparable to the type received by this boy.

Now, I ask you to consider the doctor's testimony and give it your due consideration. I think it is entitled to tremendous weight. Again, the defense tried to explain this away in two ways. First, they tried to cast aspersions on the first-grade teacher. He intimated that it was she who caused these injuries, because, he says, when the child left his home that morning the sores were not as big or as bad as they were when they were in the hospital.

There is no evidence to show that Mrs. Combs did do this or that anyone else did. In fact, the child was never out of the presence of the teacher. If the teacher had whipped this child and caused him to bleed like this, would she, herself, have taken him to the doctor? That is a matter of conjecture. I don't know, but anyhow, he was taken previously to the nurse. The principal took immediate action to
page 151 D } take care of this boy.

The first way the defendant tried to squeeze out of this is by casting aspersions on the teacher, and the second act, I ask you to remember this, the defense brings witnesses who testified that the child fell on a flat rock and said that he limped. And the most incredible part about this part of the defense's position is the inconsistency between the witnesses.

Mrs. Harbaugh, the adopted mother of Rusty, said she first noticed the wound—the boy, she first noticed something was wrong with the boy when he sat on her lap—they were her words—when he sat on her lap, when the child was sitting down. Then she took him out to the hall to look at him. Didn't do anything about it. She didn't say anything about a limp at all until I pushed her. I said, "You don't remember a limp?" She said, "Oh, yes." She had to throw that in. She was pushed by the attorney for the defense, who asked her what her observations were on December 2nd, and only after the second time did she say, "Oh, yes, I noticed his bottom was

sore, because he sat on my lap," but she didn't say anything about his limping until I pushed her, and then she said, "Oh, yes."

Now, Mrs. Lanham is the one that says she saw him fall on a flat rock. But she says she told Mrs. Harbaugh that the child had limped and she told her that afternoon. Mrs. Harbaugh didn't say this. Mrs. Harbaugh, I submit to you, did not even know that the child was hurt until he did sit on her lap.

page 151 E

Now, there are inconsistencies throughout here. There are no inconsistencies on the prosecution's behalf, but they are just shot full of holes, the defense's position is shot full of these holes and full of these inconsistencies.

About this flat rock: they say this was the thing that caused the injury. You heard Dr. Gregory's testimony. I asked him, I said, "Dr. Gregory, hypothetically, this child fell onto a rock from two steps up, approximately a total of 14 inches. Could it have caused the injury which you found on this child?" He responded,

"Definitely not." He said, perhaps if that stone had been heated some 200, 250 times greater, intimated it should have been boiling, because these type of injuries—all this is relevant, because the issue before you today is whether or not the punishment administered by the father was excessive. If this is not excessive, gentlemen, I ask you, what is?

Another inconsistency which I failed to bring out which I would like to bring to your attention, all these people say that they noticed something was wrong with Rusty, that he was limping, Mrs. Lanham, Mr. Burch, I think his name was, the last gentleman here, and his mother finally said he was limping. But the father, who had to pick this boy up every night, carry him to the car, walk with him to the car, take him home, the home being in Frederick County, ministering—he said he was the housekeeper on these nights when the wife was away, and yet he didn't even notice. He says, "I didn't know anything was wrong until I looked at him."

page 151 F

Now, I ask you, an attentive father which he says he is and which he probably is, if this boy was limping to such an extent that three people were aware of it, I ask you, why wasn't he? I don't know, but there is another inconsistency there. It just does not fit together.

The only thing that does fit together is the case put before you by the prosecution. These severe injuries on this boy are just unimaginable. I think you will agree—hope you will find that they were excesssive, they were not done in modera-

tion. You saw this little boy, 40 1/2 pounds, approximately. Is this the type of punishment that is due moderation? I think you will find that it was not. And if you find that the defendant whipped this boy, or did whip him excessively under all these circumstances, you shall find him guilty of assault and battery, and you shall fix his punishment at not more than $500 fine and not more than 12 page 151 G } months in jail.

I hope you will weigh these facts as they have been presented to you, and I am certain that you will find against the defendant for assault and battery on Rusty. Thank you.

ARGUMENT TO THE JURY ON BEHALF OF THE DEFENDANT

By Mr. McKee

Mr. McKee: May it please the Court, Mr. Bennett, Mr. Massie, gentlemen: Before I give you our position with respect to this evidence, I think we had better get the ground rules straight. This is, as you know, a criminal prosecution, and as the Court has told you and will be stated in your written instructions, this man is presumed to be innocent, and that is a presumption which rests with him until they have proved each and every element in the case against him beyond a reasonable doubt. That is a heavy burden upon the Commonwealth and is there for very good reason.

Second, there is no duty on this man to show you how these injuries occurred. There is no responsibility on an accused to afford an explanation. The sole question is whether you are satisfied from all of the evidence beyond a reasonable doubt that he is guilty of the offense he is charged with.

Now, I have heard some talk from my friend, Mr. Bennett, about these fantastic inconsistencies. Now he page 151 H } wants to make an inconsistency out of the memories of people concerning events which took place while they were keeping the death watch in the home. Now he wants to say that because Mrs. Harbaugh said that she noticed these things when she put the boy in her lap and Mrs. Lanham says she brought it to Mrs. Harbaugh's attention, he says this is very important, these people are liars.

Gentlemen, Dr. Gregory testified that that child was brought to him on the morning of the 6th, the morning. And Dr. Wright and the other witnesses indicated it was 2:00 o'clock in the afternoon before the child was taken there. That

is an inconsistency. Does that mean that they are lying? Of course, they are not.

Now, what have we got? The Court tells you you have got to look at each witness, in determining their credibility and the weight to be given the evidence, you have got to determine their knowledge and their opportunity to know the facts of which they testify.

Now, we have heard—there is no dispute with reference to the nature of the injury, really, except the interpretation of how serious these are. We have heard from each witness who took the stand who examined the child say that these pictures correctly and accurately reflect the extent of the injuries that they found. So Mr. Harbaugh says when he

page 151 I } first examined the child after he spanked him that the spots were not as large.

Now, I don't feel that there is any necessity for arguing with good Dr. Gregory. I think that what obviously has happened, when this child came in and he saw these marks, he became upset and he formed opinions based upon supposition, and he appears determined to see that vengeance is taken on this man. He tells you that never in all of his practice has he seen anything worse than that. You will have to be the judge of how severe this is.

Obviously, this injury here, or this blistering indicates that the child had a fairly traumatic experience. But where did it happen? The doctor assumes it is as a result of this man beating him with a stick. But what evidence is there of that? The only evidence of any corporal punishment is that Harbaugh said that—and this is not contradicted, there is no evidence contrary to this—that on the morning of the 6th when this child missed the school bus and violated the discipline of the home by missing the school bus, he paddled him with his bare hand.

He said afterwards he noticed the serum running. Gentlemen, this exhibit clearly indicates that this child was oozing this serous fluid from these blisters on his buttocks Monday night, the 5th. He had to have been. The last

page 151 J } time he wore these pajamas was the night before his father spanked him.

Now, I don't know how he got these blisters on his buttocks; his father doesn't know. So people saw him fall down. We are not trying to say that's where he got them. We don't know, and there is no duty upon him to come in here and show you how. Children get into all sorts of things, and kids come home with injuries of all kinds and descriptions, and you say, "How did you get that?" They don't know. They are out, they

fall down, they hurt themselves, they pick themselves up and off they go again. That's the issue in this case.

The Court tells you that if you entertain a reasonable doubt whether the accused inflicted the injuries—inflicted these injuries, then you must find him not guilty.

Now, Mr. Bennett tells you that this is a serious case, and it certainly is. He says you have seen this boy, and you have, and we brought him here for you to see. He says that this case is serious. Well, you can be certain that it is. This is an adoption situation. You have seen the child, you have seen the man who plans to adopt him, you have heard all the evidence we have been permitted to put on, and I submit to you that on this evidence there is no proof beyond a reasonable doubt that what you see in that picture was inflicted upon that child by his father; that on the contrary, that these

page 151 K } pajamas and these underpants prove the contrary, that wherever this child got those blisters, he got them before his father spanked him.

Now, there is one other matter that I'd like to dwell on. Mr. Bennett made comment about the defendant's attempt to blame this by casting aspersions upon Mrs. Combs. My own theory about the matter is that these marks increased in size for very obvious reason. The witnesses have testified that when the child was examined at the school that the blistered spots had adhered, the fluid had adhered the underpants to the spots on the boy's buttocks and that when they removed the pants, this tore off a layer of skin.

Well, from the time his father changed his pants that morning when the blisters were smaller, the fluid adhered to this tender skin, and when they took his pants down, of course, there is going to be a bigger place, they tore off more. Also it would tear off the medication his father had put on him that morning. Dr. Gregory says he didn't see any. He didn't see. He didn't examine the child to see whether there was any. There is no testimony that he had underpants and looked at them or had them sent to the laboratory. He was concerned with the injuries that he found, with the blisters.

Mr. Harbaugh was quite upset, of course, taking his child from him, that he went to the teacher. She

page 151 L } told him that she was a strict disciplinarian. There is no denial of that when she gets on the stand, and in his anguish and in his desire to find some explanation for how this could have come about, he *siezes* upon that as a possibility.

But, as I told you before, it is not incumbent upon him to show how it happened, only to raise a doubt in your mind as

to whether he did it, and I submit to you that this is too serious an offense to follow the speculations of Dr. Gregory, especially in the light of this evidence, these pajama pants, which absolutely and completely prove that this happened—however it happened, it was caused before he spanked the child. I will ask you to find him not guilty.

One thing I did forget, Your Honor.

Mr. Bennett told you the teacher would not have—couldn't have spanked him, because if she had she would not have taken him to the doctor. What did this man do after he did spank him? Took him straight to school. Do you think this man, if he had beat this child, would have taken him straight to school if he thought he had done something wrong?

REBUTTAL ARGUMENT ON BEHALF OF THE COMMONWEALTH

By Mr. Massie

Mr. Massie: Please the Court, Judge Potts, Mr. McKee, gentlemen of the jury: We have now come to the final portion of this trial, and the Court has instructed you that the burden of proof is upon the Commonwealth, and the defendant has remarked on that. I shall rebut the argument of the defense.

page 151 M

Now, the interesting thing in this case is the fact that how could a child become so severely injured that its buttocks was swollen twice again—or half again as large as they normally are, that the thighs that were below these buttocks were hard from the beatings—

Mr. McKee: I think there is no evidence of any other beating, and I think that is highly prejudicial and should be stricken.

Mr. Massie: It is argument.

Mr. McKee: Completely immaterial and foreign to this case. It is an attempt to keep the jury—

The Court: I didn't follow the argument of Mr. Massie to which your objection is taken.

Mr. McKee: My objection is taken to the fact that Mr. Massie is intending to imply that his legs were hardened as a result of prior beatings. He said, "the beatings that this child has suffered."

The Court: The inference is the child—he is talking about the beating in question. That's what I take it.

Mr. Massie: Yes, sir.

Mr. McKee: He used the plural of the word "beating."

page 151 N

The Court: Yes. Objection overruled.

Mr. McKee: Exception to the ruling of the Court.

Mr. Massie: Now, gentlemen of the jury, I won't be too long, but I do want to go over with you this offense. And I say to you again, how could this child suffer these injuries by falling on a stone, a flat stone, while climbing these steps? You know from your own knowledge when you are an adult and you fall, you don't end up with those injuries from that height.

Here is a child whose buttocks was sore, according to the doctor, very hard. There were white patches on the skin and bruises up above the belt line, and he says that this could have happened by Mrs. Combs. Now, what kind of a defense is that? What would cause that man to claim that she did it? And that's what he is trying to do. He says this to create a question in your minds. She is involved in the education of the Commonwealth, or your county. Of course she didn't do it. It is a fantasy on his part to dream that you reasonable citizens would believe such a fairy tale. I am certain you are not impressed with that.

Now, here is a child who has been severely beaten, and I say to you you can consider that and you can consider whether or not this child had gotten the beating the night before, and you can consider whether this child

page 151 O } had gotten a beating the day before or the night before that. This prospective mother wasn't around, she was down in Clarke County, and he wanted to make this child a marionette, "Stand up, sit down like I tell you to do and do it on time." And that when that child was dawdling through his breakfast it enraged him like a bull. And what did he do? He proceeded to beat the daylights out of that kid.

Now, I know none of you would do such a thing. He said, "I beat the child three times and stopped and three times and stopped, and I did it approximately 12 times," for the simple fact that it was dawdling through its breakfast, that it missed the school bus. And he was in no hurry thereafter to take the child to school.

Consider the demeanor of that man on the witness stand, and I say to you that he did not reveal the full truth of this matter, that this man beat this child unreasonably and unmercifully to the point where this child was injured to the extent that it had to go to the hospital, that it was taken from the hospital by the Welfare Department and placed in a foster home, and I say to you that this man is not revealing the full truth. For this reason, and you have got to consider the testimony and all, and this man testified that he didn't see a thing wrong with that child that morning before he whipped it.

* * * * *

following which the jury retired to consider of their verdict, later returning to the courtroom, where the following proceedings were had:)

The Clerk: Members of the jury, have you agreed upon a verdict?

(The jury nodded affirmatively.)

The Clerk: (Reading) "Three months to serve, plus $250 fine," and the foreman didn't sign.

The Court: Yes. He should sign.

Will you read that again?

Mr. Massie: I was going to make a suggestion to the Court that the verdict be put in the formal wording.

The Court: I think you read, "Three months and $250."

The Clerk: "Three months to serve plus $250 fine."

The Court: I think obviously the verdict is a verdict finding the accused guilty, but it should be put in this language: "We, the jury, find the accused guilty as charged," and I will ask you, Mr. Whitacre, to amend the verdict in that language and let the foreman sign, if that is correct, and read it back to them.

(Whereupon, the Clerk rewrote the verdict and handed it to the foreman, who signed it.)

page 153 } The Foreman: That is correct.

The Court: You do find the defendant guilty as charged and fix his punishment at three months' confinement in jail and fine $250.

If you amend the verdict in that language and then let the foreman sign it and let them confirm the verdict.

The Clerk: "We, the jury, do find the defendant guilty of assault and battery as charged in the warrant and do fix his punishment at a sentence in jail of three months and a fine of two hundred and fifty dollars ($250.)."

The Court: Let the foreman sign, "Foreman, Walter E. Neff."

(Whereupon, the foreman signed the verdict.)

The Court: That is the verdict of all five of you gentlemen, three months' confinement and $250 fine?

(The jury nodded affirmatively.)

The Court: That concludes your duty as jurors today.

(Whereupon, the jury retired from the courtroom.)

The Court: Anything further?

Mr. McKee: Yes, Your Honor. We would move, if the Court please, to set the verdict aside as contrary to the law and the evidence and without evidence to support it, on the ground that the Court erred in permitting certain in-
page 154 } structions and refusing to admit others on behalf of the accused in the form tendered; on the ground that the Court erred in refusing to sustain the motion to strike the evidence made at the conclusion of the evidence of the Commonwealth and at the conclusion of the trial; and on the ground that the Court erred in failing to sustain the numerous motions for mistrial by the accused after introduction of inflamatory or improper evidence; and on the grounds that the Court erred in refusing to permit the testimony of the alleged victim of this assault, after hearing evidence to determine that the child was capable of knowing the difference between truth and a lie and for other errors which we will assign.

The Court: Do you want to be heard more fully on the motion?

Mr. McKee: I wonder if we might defer it until Monday, February 27th, in order that I might get the record up and get some authorities.

One of our assignments of error, which I did not specify is that the Court erred permitting the doctor to testify as to his opinion concerning the cause of injuries, the nature of the injuries, and we would appreciate if the Court would give us some time to get our authorities together on that and perhaps have a transcript prepared so that we would have the benefit of transcript at the time that the motion
page 155 } was argued?

The Court: I think that would be acceptable. Is that acceptable to the Commonwealth?

Mr. Massie: Yes, provided copy of the memorandum is supplied to the attorney for the Commonwealth within a week before.

Mr. McKee: I will supply it to you as soon as I prepare it.

Mr. Massie: By Thursday prior to Monday?

Mr. McKee: I have only got 10 days.

The Court: Let's say we will entertain argument on the

motion to set aside the verdict at the first convenient moment on the 27th day of February, opening day for the Corporation Court for the City of Winchester.

Mr. McKee: Move for the continuation of bail to that date.

The Court: No objection to continuing the bail pending the disposition of the motion to set aside the verdict?

Mr. Massie: No.

The Court: It will be taken up on Monday, the 27th.

(Whereupon, at 5:00 o'clock, p.m., the trial of the above-entitled matter was concluded.)

page 156 } MONDAY, FEBRUARY 27, 1967

MOTION ON BEHALF OF DEFENDANT TO SET ASIDE VERDICT

Mr. McKee: Your Honor, the first ground that I would like to assign is that the testimony of the doctor is inadmissible and should have been stricken or limited, because the doctor was permitted to testify as to the ultimate facts of the case; that is, whether or not this child was beaten or struck with that instrument or beaten beyond due reason. I believe the testimony that is material starts with this question by Mr. Massie:

"Dr. Gregory, would the spanking of a child such as this child with the hand, with clothes on the child, cause this condition to exist?"

There had been a number of objections, and the Court said, "Well, is it the contention of the prosecution that parental discipline would be limited as a matter of law to the use of the palm of the hand?"

Mr. Massie said, "That is a question for the jury, Your Honor, but I think it is a question as to what damage can be done by the palm of the hand or by any other instrument, and I think the Court and the jury should have the benefit of expert testimony as to how this type of injury could develop or could exist or could come about, what kind of severe—what kind of beating, what kinds of injury, what kinds

page 157 } of circumstances would cause this kind of an injury to the child."

And then I object again, saying it would be purely speculative and that that is the crucial issue in the case.

Your Honor asked if there was any such thing as a spanking expert, and Your Honor went ahead to say that "anybody who is familiar with the normal reaction to bodily punishment

would be entitled to express some views as to the normal reaction to bodily punishment." And I said that I felt this would be making everybody an expert.

Then we go on, and finally your Court's ruling is: "I think the doctor is qualified to express an opinion as to how the apparent bodily injury to this child might have been brought about." And the doctor proceeds to testify:

"Mr. Massie, I have seen initiations and hazings and been spanked as a child, I have spanked my own, I have been through high school and college initiations and professional school initiations,"—now, this is a medical man—"and I have never seen anything that resembled this."

I objected, was overruled.

"Q. Could this have happened by the use of the hand?"

"A. It would have had to have been a prolonged and intensive and probably with pants down and not up. That is—

"Q. What would you say would be prolonged and intensive if these injuries were suffered by a hand from another person?

page 158 } "A. Oh, something like a hundred blows to each cheek.

"Q. Can you give us in detail what the condition of each cheek was?" and then he proceeds to repeat what he said.

"Doctor, could this have happened by the use with such as a paddle or a board?

"A. Certainly fewer blows could have produced it from a board.

"Q. You mean, fewer than the hand?"

Then he goes down to say it would be one-fourth of the number, depending upon the strength of the person giving the blows and resistance of the person receiving it, and he said five or ten blows could not produce this amount of blistering, indicating that it would have to be more, I assume.

Then he later testified with respect to the falling on the stone. This question was:

"In your professional opinion, Doctor, in directing your attention to the wounds themselves and from having examined the boy, from your own personal observation of the child, would you say that the child could have injured himself in the manner and to the degree which you saw on Tuesday by falling on a flat rock—the rock may have been rough but not jagged—but falling on a flat rock from two steps up, each step approximately 6 to 8 inches in height?"

Objection.

page 159 } The answer to this is: "If the rock had been heated to 250 degrees, it might be possible, but ordinary temperature of the day involved, I don't see how it would be possible, even if the boy fell a hundred times."

Now, I submit, Your Honor, that this case does fall within the purview of the Strawderman case which Your Honor has mentioned. The permissible extent of medical testimony in this type of case, I think, is set forth in the Johnson case, 111 Virginia 877, which, incidentally, was a murder case arising out of the beating of a child by a school teacher, and in that case the physician who examined the child after she died—the child was beaten and then several days later became quite ill and it died, and they did an autopsy and found that the bladder had been ruptured, and it was a laceration and contusion right above the point in the bladder which had ruptured, and the doctor testified, (1) that the ruptured bladder was the cause of death and (2) that in his opinion the contusion which was above the ruptured bladder was caused by the same blow that ruptured the bladder.

Now, I think that this is getting close to the opening question. It wasn't objected to on that point, incidentally, as to whether it was invasion of the province of the jury, but it was getting pretty close to it, but still that was something which would be the subject of expert interpretation of: here is a series of wounds throughout the body, and whether they were caused by the same force, or without going into what that force was, or without anything of that nature, which the doctor didn't do, he said the same blow which caused the rupture, in his opinion, caused the contusion. He did not go into the question, have anything to do with what the evidence was, it was strictly equivalent of giving a medical opinion as to that fact. And the Court of Appeals said that was permissible.

page 160 }

Your Honor might want to look at that case. I think you are familiar with the Strawderman case. The same thing was dealt with by the Court of Appeals in *Livingston* versus *Commonwealth* whether peritonitis was the cause of death, and they indicated in there that the ultimate fact of this case was murder by beating the fellow up and later found he had ruptured peritoneal cavity, and the cause of death is not the ultimate fact in a murder case. It may be part of the facts, but where the doctor limits his testimony strictly to medical matters, that is, that there was in infection of the peritoneal cavity which was caused by rupture of this cavity by trauma, and this is strictly medical, and I think the doctor is per-

fectly well qualified to testify to that, but in this case we have here Dr. Gregory becoming an expert witness. He, in a sense, said that this type of injury had to be
page 161 } caused by beating, and it would take a hundred blows—he went right to the very thing we had to decide; that is, what happened to this child? And it is my way of felling that is almost directly in point with the Strawderman case, because they attempted to prove the effect of penetration by the physician through examination and interpretation of the injuries on the body of the child, and that's exactly what we did in this case. The doctor examined this child, but the physician interpreted the injuries as having resulted from a great many blows. He even attempted to number the blows. And I think that under the rules that the Supreme Court of Appeals has laid down this is invasion of the province of the jury and is error.

I have a *Virginia Law Review* article out here in the room that deals with this fact at some length. I'd like to get it and let Your Honor examine it, unless Your Honor is already of the opinion—

The Court: No, I want to consider it fully.

Incidentally, the *Law Review* condemned—that is, the annual survey, Virginia survey dealing with criminal law at the time of the decision in the Caricoff case. Professor Laughlin criticized the admissibility of the testimony of this little Linda Warner, and he said he could not find any reasonable way to support the opinion. So it did not influence him in anywise.

page 162 } Mr. McKee: I don't contend that the *Law Review* was the ultimate source of authority.

The Court: I will hear from you.

Mr. Massie: First of all, the Court, in the outset, required a memorandum to be filed by the defense as to the points of law that they wished to argue and the authority supporting that point of view by Thursday of last week, and defense counsel agreed to supply it to the attorney for the Commonwealth by that time, and it was put in the order, and we received no such memorandum, and, consequently—

The Court: Neither did the Court.

Mr. McKee: If Your Honor please, I didn't—

Mr. Massie: We will have to pick it up from there if the Court continues with it. But, anyway, I think the Strawderman case is distinguishable from this case from the factual point of view, because there the doctor limited the injury to one cause and one cause alone, and not having been an eye witness, he couldn't have limited it to anything. It could have

been an instrument, medical instrument or any number of things could have caused the injury.

But here, in this case, you have got the fact that the child is extremely injured and has testified how the child is externally injured, and the question is whether it was severe, whether it was beyond moderation in the admin-
page 163 } istering of the spanking.

When you look at the overall case, the doctor, as an expert, when he is called on rebuttal, says that a fall under the circumstances set forth by the defense couldn't have caused these injuries. He says these injuries had to be caused by an external application of force to the rear end of this child, and he doesn't limit it to any one particular type of instrument. He says it could have been a hand, could have been a board, could have been an application of force but over an extended period of time, that is, more than once, and he says it could have been a hundred times by the hand or it could have been less than that by the board. He doesn't say whether the pants were up or down, but he says it is more likely in his opinion, because of the nature of the injury to the child, and he can tell that from the tissues and the injuries that exist that it was applied to the bare skin.

Now, this is not going into the province of the jury to determine whether or not he was injured, and if this man applied the injury—the man admitted the application of the force. The question is: was it within moderation? And the Court so instructed the jury to determine whether it was within moderation.

And this is the point where we are applying ourselves. The doctor's testimony goes to the fact of how many
page 164 } times. Now, he didn't say, "In my opinion this was beyond the moderate point." He says it had to be a hundred times. Now, is the jury going to say, "Well, if it's a hundred times, is that beyond moderation, beyond what a parent should do in disciplining the child, and that was the issue in this case, and I think the evidence is directed from that point of view; it is not limited to how was the child injured? The child was injured, it was admitted that the child was injured, and the father admitted spanking the child. The testimony from the Commonwealth's point of view was that he admitted doing it. He admitted himself when he took the stand. So the testimony was not prejudicial to the defendant in any respect. It was solely for the purpose of determining the amount of injury that the child suffered, and would this amount of injury come from a moderate application of spanking, or would it come from a prolonged period of spank-

ing instead of a short period or a moderate period, and this is the determination the jury had to make.

But you have to have some testimony from an expert as to the kind of injury suffered, and this was not just a swelling of the surface of the skin or the swelling of the tissues under the skin, but this was the taking of the first layer of skin off the body and leaving it raw and having extreme swelling both at the point of the rawness and below
page 165 } and above it, and that was the extent of the doctor's testimony.

Mr. Bennett had something he wants to say.

Mr. Bennett: As I understand it, Mr. McKee's objection goes to letting the doctor testify as to the cause of injuries. Is that right?

Mr. McKee: Express an opinion as to causation, that is correct.

Mr. Bennett: Right. In this case, like Mr. Massie stated, the ultimate issue for the jury to determine was whether or not the punishment as administered was unreasonable, whether it be by board or by hand. The jury was well instructed that Mr. Harbaugh, as the adopted father, could punish the child as a parent could. A parent may use a board or any other instrument by law, so long as the degree is reasonable.

Now, that's the ultimate issue in our case, whether this punishment was done in a reasonable manner regardless of whether it was done by a hand or a board.

Now, the issue in the Strawderman case was, as I understand it—and that was a rape case—

Mr. McKee: Penetration.

Mr. Bennett: The issue was: did this man penetrate this child with his own penis? The doctor testified as to whether or not he did. In that case the ultimate issue was: Did this man penetrate this child himself? He was
page 166 } allowed to testify that, and the Court overruled it, said it should not be.

Mr. McKee: He didn't say he penetrated, he said the child had been penetrated.

Mr. Bennett: The ultimate issue of fact there for the jury to determine was the penetration made by this man. I could see that the Court was right there.

But here the issue is not whether he used a board or not or what the injuries were caused by or whether they were excessive. I think it was a vital distinction between that case and ours. Here the doctor was not testifying as to the ultimate fact, simply whether or not it was excessive.

Mr. McKee: If you will concede my law is correct, I think I will choose to argue the facts with you, because I think you are dead wrong on the facts.

Mr. Bennett: Now, if you are going to cross over—

Mr. McKee: Our evidence was, No. 1, if the Court recalls, that the injury that child had pre-existed the spanking, that that injury—

The Court: Some other cause.

Mr. McKee: Some other cause. Now, as I argued to the jury, we didn't know what the cause was; we have no way of knowing. It is not incumbent upon us to show what it was.

page 167 } The only question was: before injury, did Charles Harbaugh, on December the 7th, or the 6th, whichever day it was, commit an assault and battery on this child? Now, we conceded that he was paddled that day, but our testimony was that it was just a paddling with the hand. Now, the doctor testified very much like the doctor in the Strawderman case. He testified that this child had been beaten. That was his testimony, the child had been beaten, and then he went on beyond the fact of testifying what had happened to the child but that in his experience he had never seen anything like it. He was quite emphatic about it, and then he proceeded to testify to the number of blows that in his opinion were administered.

Now, obviously, what the doctor was saying was: this man beat this child a hundred times on each cheek with his hand or over 15 or 20 times with a board, and it actually goes further than the Strawderman case. In the Strawderman case the doctor testified that the child had been penetrated but that she had been penetrated to a certain degree.

The only thing the doctor is competent to testify to is the nature of the injury found and that these injuries were quite likely to have resulted from trauma. I think it would be permissible for the doctor to testify as to the types of trauma which would produce a blistering effect, but for the doctor to assume a beating—and he used the word "beating," so did

page 168 } the Commonwealth's Attorney; they change it back and forth—and then to proceed to go into the type of beating is obviously an invasion of the ultimate fact which the jury has to determine, and I think it is on point with the Strawderman that if you read the doctor's testimony in the record he is setting himself up to come down and say just exactly what this man must have done to this child. As a matter of fact, he went back as a rebuttal witness to testify that if he heated the rock to 250 degrees, perhaps the child could have hurt himself this way, but otherwise he'd have to fall a hundred times to get this result.

I mean, this is medical testimony. And I think he went far beyond what is permissible. The doctor was the chief *prosecuter* and, Your Honor, I submit that these cases define the limits, in this Strawderman case, in excess of which he cannot go. And I submit that when you read these cases and examine the record there is no question but what the doctor's testimony exceeded what was permissible.

I would like to get that authority now, if Your Honor will permit me. (Leaving room briefly.)

This is from an article written by Mr. Edward B. Parker of the firm of Bremner, Parker, Neal, Harris, Neal, and Williams in Richmond, on Automobile Accident Analysis, but it does get into—

The Court: Is that Dr. Zook?

page 169 } Mr. McKee: No, sir; it starts general discussion here, invading the province of the jury and ultimate issue—

The Court: Anything further?

Mr. McKee: No, sir, I feel that covers it.

The Court: Let me take a moment to absorb the authorities that are relied on here for the offense, and I will be prepared to pass judgment in a matter of 25 or 30 minutes.

(Whereupon, a short recess was taken, following which the following proceedings were had:)

The Court: The Court has reached the judgment to overrule the motion to set aside the verdict and proceed to enter judgment on the verdict.

It is my impression that the testimony objected to primarily, that is, the testimony of Dr. Gregory, I believe, was not expressed as an opinion to the real point in issue, the ultimate fact in issue. The ultimate fact in issue is whether or not the accused administered the blow that resulted in the excessive injury to the child beyond the reasonable extent of parental punishment. In other words, the testimony of Dr. Gregory was not expressing an opinion that the accused was guilty of the ultimate fact, or his opinion was not based on the ultimate fact that the accused had administered the blows, but he did express some qualification, actually. The Court had used the expression "spanking expert" with

page 170 } some facetious thought about it at the time, but in reality, when the doctor undertook to express his own knowledge, where he even went into the detail of basing some of his conclusion on the fact that after going through high school, society initiations and college initiations

and professional initiations, which carried the plain inference that he, himself, had been exposed to considerable paddling in the process of these initiations, that he was unquestionably more qualified to measure the degree of the blows inflicted from the resulting wounds than would an ordinary person, such as the jurors. In other words, he had in his possession knowledge beyond what is commonly possessed by the ordinary person. To that extent I think he could voice some opinion as to the extremity of it; that is, the resulting injuries, and I think about all he said was that in all of his experience he had never seen the results of any such hazing as his school and college experience exposed him to as was manifested on this little boy's rump.

He further expressed the thought or the opinion, you might say, that it would not or could not—the inference was the injuries were such as would not have resulted from a fall of one or two feet on a fairly flat stone, on a stone step.

By and large I think his testimony is primarily factual testimony rather than opinion testimony, and, in any event,

page 171 } I don't think he could be charged with voicing an opinion on the ultimate fact in issue, and that would be the real ground assigned in support of the motion to set aside the verdict. I believe he was well within the rules of admissible testimony to show his own opportunity to observe the results of spankings and paddlings and whippings, together with his background of medical qualifications that would of necessity have exposed him to traumatic injury to the body of a human being resulting from miscellaneous and many different causes, and that was the substance, the effect of his testimony, was voicing his visible observation of the severity of the wounds and bruises to this little boy's buttocks. And I think that that background would permit him to voice some opinion as to how many blows it would take to bring about a traumatic injury of the type that he observed on this child. I don't mean precisely, and he doesn't undertake to be precise, but he let the jury know pretty plainly that it would have to be quite a large number of blows with the hand and an even still substantial number of blows with a paddle or a board.

There is nothing before the jury to indicate that these injuries could have been brought about by any other means. There is no evidence to that effect, and the Court feels it was a jury question to pass upon the guilt of the accused, and the Court doesn't see fit to disturb the verdict.

page 172 } Mr. McKee: If Your Honor please, we note our objection and exception to that, and as I

indicated earlier, there were a number of other grounds assigned, but at this time we would merely renew our motion on the other grounds assigned for the reasons set forth at the time of the trial, rather than belabor the Court with repetition on those.

Mr. Massie: We had better have the imposition of sentence.

(Whereupon, after discussing bail, the Court and counsel returned to the courtroom, where the following proceedings were had:)

The Court: After hearing argument of counsel on the pending motion to set aside the verdict in the case of Commonwealth against Charles H. Harbaugh, the Court has overruled the motion and is ready to pronounce judgment on the jury's verdict.

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

INDEX TO RECORD

	Page
Writ of Error and *Supersedeas* Awarded	1
Record	2
Warrant of Arrest	2
Notice of Appeal from Judgment of County Court—January 13, 1967	2
Instructions	3
Verdict of Jury	5
Judgment—February 27, 1967	5
Amended Notice of Appeal and Assignments of Error	7
Witnesses:	
Audrey Odessa Combs	10, 93
Roger Koontz	19
Betty R. Barr	23
Melton Wright	29
Dr. Warren R. Gregory	31, 91
Eva Pitcock	47
Roberta James	49
Douglas Tucker	55
Gladys Harbaugh	59
Beatrice Lanham	66
Charles H. Harbaugh, Jr.	68
Randolph Burch	90
Proceedings	15, 50, 57, 88, 94