COMMONWEALTH V. WILLIAM G. HAVENS, JR. - CASE REPORT

The following major criminal case, tried by Harry F. Bosen, Jr. in 2006, was presented by Mr. Bosen at the International Conference on Law and Mental Health in June of 2007 in Padua, Italy. Three experts (a psychiatrist and psychologists) also followed Mr. Bosen in presenting psychiatric and related issues raised in this case. The case was featured in articles published by the American Bar Association (Mental & Physical Disability Law Reporter, Vol. 30, No. 2, March-April 2006), The Virginia Lawyers Weekly, The Virginia Trial Lawyers Association and it has been reported and written about in various psychological and psychiatric publications.

Its import and impact on the issues of *false vs. recovered memory, mental retardation and false confession* has been significant. It is an example of legal tenacity and inquisitiveness that resulted in preventing a completely innocent, but borderline retarded, man from being imprisoned for up to life for a heinous crime that he confessed to, but which he did not commit and which was proven by the evidence in court to have never have actually happened.

TRIAL REPORT

Type of Case:	Criminal
Charge:	Rape (Sec. 18.2-61) (sexual intercourse with a child under 13 yrs. of age) Possible punishment - Five (5) years in prison to Life in prison
Case Name/Court:	Commonwealth v. William Garland Havens, Jr. Bland County Circuit Court / Case No. CR04-41
Presiding Judge:	The Hon. Robert M. D. Turk, Judge
Trial by Judge or Jury:	Jury
Trial Date(s):	March 2-3, 2006
Verdict:	Not Guilty
Defendant's Attorney:	Harry F. Bosen, Jr. **HARRY F. BOSEN, JR., P.C.** P. O. Box 1028 Salem, VA 24153

Prosecuting Attorney: Janine Myatt, Assistant Commonwealth's Attorney - Specially Designated
P.O. Box 1058
Bristol, VA 24203-1058

Plea Bargain Offer: None offered, none requested.

Case Summary and Information

William ("Bill") G. Havens, Jr. was charged with raping his then four or five year old cousin in his mother's home. Per the evidence adduced at trial, the allegation would have occurred sometime

in the spring of 1992. At that time, defendant would have been age 23. It was alleged that the prosecutrix, Kacie Havens, claims she began "remembering" details of this occurrence sometime around Thanksgiving of 2003. She testified at trial that she told her boyfriend after that recollection that "someone" had raped her or sexually abused her at age five; later she told him it was Bill Havens, her cousin who lived with his parents in Bland County at that time in 1991 or 1992.

On May 14, 2004 the mother of Kacie Havens purportedly found a journal on the floor in Kacie Havens' room in their home in Pulaski County and she read the journal and found a story written by Kacie Havens which contained an assertion that she had been sexually abused as a young child. The story had comments written in the margin by Kacie Havens's teacher expressing sympathy for her having been sexually assaulted/abused as a child. The mother confronted Kacie Havens that day and was told by Kacie Havens that Bill Havens was the person that did this to her sometime when she was four or five years of age and that it happened at the home where Bill Havens resided with his parents at that time and while Bill Havens' mother was providing day care at her home in Bland County then for her while her mother worked.

The mother testified at trial that since she was a "reporter" she had no choice but to take Kacie to the Bland County Social Services Department and Kacie Havens was taken to the Wytheville Headquarters of the Virginia State Police where an investigation was launched by Special Agent (Trooper) T. S. Savard. Savard interviewed Kacie Havens and then wrote down her verbal description of what had supposedly happened in 1992 . After her detailed story was written down by Savard, he went over it with Kacie Havens and she had him correct and make by interlineations and various wording being substituted.

The written statement of Kacie Havens was graphic in not only detail about the rape, but even as to minute details, such as Bill Havens' mother had left her with Bill while she went to feed the chickens; that he took her to his bedroom which smelled of alcohol and smelled musty and was chilly; that he told her to sit on the floor and he undressed her; he unzipped or unbuttoned his pants; he jumped when they heard something; he took his tee shirt off which was a dark color; his penis was hard, and when he inserted it in her vagina and she "felt a sharp pain start in my vagina and spread to my abdomen; " he started to go back and forth," "was real tense, then relief as his penis came out;" that he used a white shirt or towel to wipe blood off her and then he took her to the bathroom and she "could see blood on my legs and stomach;" he put rubbing alcohol on her and she screamed and he told her to be quiet; he then washed the blood off of her in the bathtub and he dried her and: "[h]e went out and got some *different* clothes" and "dressed me." The DSS worker was present during Savard's interview and recorded this story essentially the same as what Savard wrote and Kacie confirmed this and directed the corrections Savard made to the statement. This statement of Kacie Havens' was discovered in the DSS records subpoenaed, but Savard had read it at the preliminary hearing when asked to on cross examination. On the last page of a copy of this document which Savard provided to DSS, he inserted a note on a separate page: "Doctor Shaeffer

(sic) June 14, 2004", referring to Kacie Havens having what turned out to be a gynecological appointment. This appointment with Dr. Shaeffer also showed up on the DSS records, and proved pivotal in the defense at trial in this case.

Three days after the Kacie Havens' gynecological exam and one month after her account told to Savard, Savard called Bill Havens at his parents' home where he still resided and asked him to come down to the State Police Station in Wytheville. He would only tell Bill it was about "something too bad" to discuss on the telephone. Havens had been up all night and for over twenty hours without any sleep (he worked second shift doing bridge repair manual labor). Bill Havens arrived at the Police office at approximately 2:40 p.m., if not sooner (figured per Savard's trial testimony), and at 2:55 p.m. Savard read his Miranda warnings and had Mr. Havens sign the form. Thereafter he questioned Bill about the allegations, and per Savard's testimony at the preliminary hearing and confirmed by him at trial, he responded to defense counsel when asked if he had told Bill about what Kacie had alleged by saying: "Oh, I told him exactly what she had alleged, yes, sir." The Commonwealth was to argue at trial that the defendant knew all the details, so he must have done it, but the Commonwealth never rehabilitated Savard about that word "exactly".

He used normal police techniques in questioning a suspect and Savard admitted that he learned Bill felt close to Kacie and her family and that Bill cared for her and that he probably told Havens on several occasions that he should confess to the crime if "he wanted to help Kacie;" "You want to help Kacie don't you?" Savard also admitted that Bill told him at least three times that he did not "do it," or that he otherwise used words of denial of the offense, but a denial was only written down one time in Savard's notes (which he produced at both the suppression hearing and at trial). After more than an hour, he asked Bill if he would take a polygraph. Bill agreed and Bill was then passed off to Special Agent Steve Taylor.

Trooper Taylor interviewed and questioned Havens, Havens repeatedly denied the allegations and then Taylor supposedly administered a polygraph exam, which Taylor said Bill failed. Taylor then used harsh verbal confrontational techniques to get Bill to "tell the truth," and told him in response to more denials that "You are lying, I have all the proof I need right here," pointing to the polygraph results. Taylor admitted that he too had entreated Bill probably several times to confess if he "wanted to help Kacie." Taylor admitted that Bill told him he had worked and been up all night and that he had not slept in over twenty hours before he arrived at the Police station. Then, after more than three hours with the police, and believing he could then just go home and get some sleep, Bill confessed to Taylor.

Havens was passed back to Savard who asked him leading questions evidencing the details of the alleged crime and Havens responded mostly in short, one word answers such as "yes" and "no," and when asked as to how he felt about the crime after it happened, he stated "Bad" and asked how he felt now he said "Bad." Then Savard asked the defendant if he wanted him (Savard) to write the questions and answers down and Bill said for Savard to write it; and Bill then signed the statement in that Q & A form. The time that was written down on the statement at its beginning was 5:45 p.m. Bill was immediately arrested and taken to the magistrate where a warrant was procured by Savard and he was incarcerated. At no time during any of the interrogations by Savard and Taylor was a recorder used, and at no time during the so-called confessions was one used.

The defense purposely did not file a motion for discovery in the Circuit Court after indictment to avoid giving the Commonwealth any expert reports, documents relied on, etc. Defendant did subpoena Kacie Havens' school records and her medical and psychiatric and psychological/counseling records, and, most importantly, her gynecological records. These latter records came as part of a second blanket subpoena effort based on review of the first records

received from Lewis-Gale Center for Behavorial Health (one month stay in 2002) and Southwestern Virginia Mental Health Institute (2 stays in 2002, one following the Lewis-Gale discharge totaling approximately a month, and another 17 days after her first discharge from that facility, this second stay being for about three weeks.) Each subpoena for records was met with a motion to quash from the Commonwealth, and the Pulaski County School Board also filed a motion to quash. Eventually the Court ruled that the defendant and his experts were entitled to view the records, unseal them when looking at them at the Clerk's office where the returns were made and make copies, except for school records which were limited to include any and all counseling records and any and all records of complaints made about boys sexually molesting Kacie Havens at school and any investigation records associated therewith. By the time a ruling was made on the school records there were few left, the defendant having learned from a source that they were mostly purged well before the preliminary hearing was held and likely when the charge against the defendant came out. It took two hearings just get access to these records, with restrictions placed on disclosure by the Court. It should be noted that only one of the healthcare providers, etc., that sent their records in sent in an authentication thereof as called for in 8.01-413, second par. Counsel for the defendant could not get the Commonwealth to agree to authentication, causing defense counsel to issue a subpoena for record keepers/releasers to appear at trial for authentication purposes. The Commonwealth would not even agree to a post-return authentication by the record keepers or releasers, telling defense counsel and the Judge during a telephone conference held a few days before trial that she would "not agree to anything that would make the job of the defense any easier." Several providers sent in a post return authentication, but the Commonwealth still would not agree that that could serve as authentication under 8.01-413 since they were not simultaneously sent with the return.

Pre-Trial Issues

The defendant had two other pre-trial issues that were raised, argued and briefed. First, at the first hearing on records subpoenaed from Lewis-Gale and SWVMHI, discussion was had on the record about scheduling a trial. No date was ever set, nor was a date agreed to or requested to be set thereafter by the Commonwealth. The banter at the end of the hearing was about a fall 2004 or a November trial date, to which defense counsel agreed generally ("That sounds about right", time wise) and the Court stated on the record that it would have his secretary call counsel and set the date. When the statutory period passed in July of 2005, and when the Commonwealth thereafter decided to call defense counsel, a motion to dismiss for speedy trial was filed by defense counsel and later overruled after a hearing and after briefs were filed. The Judge ruled that defense counsel's general agreement to a "fall/sometime in November trial date" was sufficient to be a waiver, despite numerous authorities to the contrary. In argument I blamed the Commonwealth, but also referred to the Court's having undertaken the duty. Counsel also argued that it was the Commonwealth's duty to raise the issue when the Court did not follow up on its assumed duty, that it was not the defendant's duty to do anything (but count the days).

Also, a motion to suppress the defendant's statements (written and oral) was filed and at the hearing held thereon, Dr. Alan Katz, of Roanoke, Virginia, the defense expert clinical licensed psychologist and clinical neuropsychologist, was qualified as such and testified. The defendant and his father also testified. The issue was the defendant's mental capacity to make an informed waiver of his Miranda rights/warnings. Dr. Katz reviewed on the record the data he gathered from various sources, including interviews with family and one family friend, what school records of the defendant that could be obtained and which had not been purged, the clinical interview of the defendant, the extensive testing he performed on the defendant and what that evidenced as to the

defendant's limitations intellectually, etc. He also testified as to sources and books he read on false confessions and studies and treatises he reviewed as to police interrogation techniques (the nine step process). That testimony essentially showed that this defendant presented with a reduced level of cognitive functioning, a long-standing learning disability and features of a dependent personality disorder, that his full-scale IQ was 70, which was in the lowest two percentile for his age in the United States, his reading level was in the eighth percentile (7th grade equivalent), his arithmetic was at the 0.8 percentile (or a third grade equivalent). He opined that the test scores showed that he was particularly vulnerable to persuasion, intimidation and suggestion, he had a level of verbal comprehension and global compromise in his intellectual status, and the testing provided documentation that Bill Havens scored near the borderline range of mental retardation and that he would be expected to have great difficulty dealing with complex, threatening or potentially ambiguous situations. His processing speed is substantially reduced and notable impairments were documented in the areas of fine motor speed, constructional capacity, reading, spelling, math, etc. He also had a long-standing vulnerability to suggestion that stemmed from an intense desire to please and to be accepted by others. He found no evidence of malingering and no markers of psychopathology or a predisposition toward sexual deviancy. His diagnoses included long-standing learning disability, borderline mental retardation and mixed personality disorder with dependant and avoidant features. All the history, test results, factors and facts including those adduced from the Special Agents involved in the interrogation and confession(s), including the use of the polygraph as a means to exert pressure to finally induce the confession they wanted, the lack of sleep, the absolute and complete inexperience with the judicial system, the police playing on Bill's desire to help Kacie if only he would confess, etc., were put to Dr. Katz in the form of a hypothetical and his response was essentially that this hypothetical person with the same clinical findings, history and

test results would wholly lack the intellectual capacity (1) to understand the Miranda warnings; (2) to understand he could have left the interrogation at all, much less at any time he desired; (3) to repel the continued pressures under the totality of the circumstances; and (4) to give a voluntary confession. This motion was briefed and overruled by written opinion, the court finding it was admissible for whatever weight the jury gave it. The Court commented on the defendant's testimony at this hearing where Bill repeated what his father and legal counsel had been regularly and repeatedly telling him as to what he should have done, i.e., should have called your father, should have gotten an attorney, should have just left, etc. The Court noted that what Dr. Katz had testified to was nearly the same as what the defendant said at the hearing. The Court ignored the fact that much of what the defendant said about the interrogation he had actually just heard from the two Troopers' testimony at the hearing, and he ignored the fact that Bill would certainly have been refreshed by counsel and by his father as to facts he had previously reported in preparation for his hearing testimony. If defense counsel could do it all over again, the defendant would not have testified at the hearing at all.

Defense counsel filed three pre-trial motions in limine which were disposed of as follows on the morning of the trial before jury selection took place:

(1) a motion directing the Commonwealth to refrain from referring to Kacie Havens as the "victim" - *denied* (defense counsel argued that whether she was the victim or not was for the jury to decide ultimately and that was the essential fact as to whether the crime was committed at all);

(2) a motion to preclude the Commonwealth and any of its witnesses from referring in any way to the purported polygraph and its purported result - *granted*; and

(3) a motion to preclude the Commonwealth from using and/or referring in any manner to the testimony of the defendant at the suppression hearing, with the exception of the use of same for

impeachment of the defendant at trial - *granted*.

One problem the defense counsel had was trying to explain to this defendant the meaning of all of the plea questions the judge would ask him. While that was done before trial and again the morning of trial, and done with the mentality of a sixth grader being considered and used as a reasonable base, counsel is still not sure how much, if any, understanding he had of any of it. But there was no way during this case's pendency that the defense was going to assert incompetency and let the state stick him in a mental institution for forty-five or sixty days, or more, or risk they keep him in there. Bill Havens had been beaten up repeatedly while in the New River Valley Regional Jail until he was granted bail.

Trial

Sixty prospective jurors were summonsed for the trial. Defense counsel relied upon the defendant's family, friends, and other lay persons that counsel and/or the family knew to review and to provide information on each prospective juror and these sources proved invaluable in the end. A number of jurors were left on the ultimate panel that the defense knew would make the case be proved as called for under the law even where there had an accusation of such a heinous offense and an apparently clear confession. Contrary to defense counsel's worries before trial, and a concern taken up with the court at trial before voir dire, no juror that expressed they or member of their family had been the victim of a criminal act of any kind had to be questioned further in camera. And, unbelievably, because Bland County has a small population (5,000 - 6,000), only three persons were excused for cause. Jury selection only took about one hour and thirty minutes. One lay person in Bland had opined to defense counsel about one person who was summonsed as potentially being the jury foreman if he was on the final panel, and this actually happened. This person, it had been learned, actually was not fond of the police and he would certainly follow all of the facts of a case

and the applicable law as given by the Court.

In opening, the Commonwealth spoke only for a short period of time and hammered home their view of the case and that it was an open and shut case, essentially: *she says he did it and he admitted he did it*, *he confessed*.

Defense counsel immediately told the jury "All that glitters is not gold", referring to the prosecution's case. Counsel told the jury what the defense was and that it was diametrically opposite of what they were just told by the Commonwealth. Counsel told them that the story reported by Kacie Havens was either an intentional false story or was a false memory that she actually believed, but, that in either case, there had in fact been no crime at all and accordingly, the purported confession by Bill Havens was also a false confession. Counsel then explained who the expert witnesses were that the defense would call and what they would testify to. One critical fact document was held out of the opening so as to not alert the Commonwealth in case it turned out to be a surprise.

The Commonwealth called as witnesses in order, to-wit: Special Agent Savard, Kacie Havens' mother Tammie Havens, and Kacie Havens.

Savard was stiffly and effectively crossed to re-pin down all police pressure tactics, the suggestions made to the defendant, playing on the defendant's closeness to Kacie and her father, Darrell, etc., that had been elicited from him at the preliminary hearing and the suppression hearing and he remained consistent whenever he saw a transcript pulled out and could essentially see where the question was coming from. He was also questioned on cross about Kacie Havens' statement and how that went down procedurally, but he was only asked to confirm he wrote down what she told him and what she corrected on review. He testified about verbal statements of Bill Havens and the written confession. He affirmed that on the question to the defendant if he had an erection (when

this happened), the defendant said "No". He affirmed that on the question as to how far he put his penis in Kacie Havens, that the defendant held his right hand up and displayed his forefinger and thumb one inch apart. He confirmed that he only wrote one time in his notes that the defendant denied the accusation. He admitted that no tapes were used to record either his questioning or Trooper Taylor's questioning of the defendant, and that was his policy unless the Commonwealth's Attorney specifically told him to tape a session.

The mother of Kacie Havens testified that, in the time frame in question in the charge (January, 1991- January,1993), she had defendant's mother watch her daughter while she and Kacie's father worked. She testified as to how she found the journal and confronted Kacie and that Kacie told her Bill Havens had assaulted her.

Kacie Havens testified and was allowed to ramble on (purposely without objection from the defense) on direct to the point where she added details to her story never before given by her to the DSS or to Savard, and not even to her counseling therapist. She testified how the "memory" came back to her and how the Lord Jesus Christ had come into her life through the efforts of her boyfriend (they are now married and she presented at trial six months pregnant), who was "extremely" religious, and how the recollection of the rape of her by Bill as described by her had "cleansed her" and made all her troubles (past psychiatric problems, suicide attempts, etc.) go away. On cross, she was read by counsel her statement to Savard word for word and she confirmed word for word what Savard had written down and what she corrected. It became readily apparent that the new details she just had added were not included in the written statement. One of the new details was that afterward, when she was taken home by her mother, she had told her mother that her vagina (her word used at trial) was hurting and said that her mother examined her and told her it was probably a reoccurrence of a urinary tract infection. She was not attacked on cross, only painted in the corner.

Defense counsel was able to elicit from her the boyfriend's suggestions to her of her having been molested as a child whenever she was having trouble emotionally, etc. Interestingly, Kacie's mother never testified to the hurt vagina report, nor did the mother say anything about her child coming home in clothes different from those she wore when brought to the Havens' home.

The Commonwealth then rested and Defendant's motion to strike was overruled.

The defense case began with Eileen O, Ryan, D.O. from the University of Virginia Institute of Law and Psychiatry. Her credentials were delved into meticulously, despite the Commonwealth standing up early and attempting to stipulate to her as an expert in forensic psychiatry, which offer was politely declined by defense counsel and described in response as a "trick to keep the jury from ascertaining just how immensely qualified" Dr. Ryan was in fact. Counsel elicited from her facts as to her experience and qualifications as a physician (D.O.), as a board certified forensic psychiatrist, and in child and adolescent psychiatry, adult psychiatry, and also as an expert who was board certified in osteopathic medicine. Care was taken to elicit her experience as the latter expert, without really seeming to expose the significance of qualifying her as such for this case. The Court qualified her in all those fields, without objection. Care was taken to get all of her qualifications, experience, writings and education before the jury, none of whom seeming to be bored as we moved through it quickly, but thoroughly.

Dr. Ryan testified as to everything she reviewed for this case, all records, the statement of Kacie Havens, the defendant's statement, various treatises and scholarly works on repressed memories and false memories and she explained to an attentive jury all about that science issue, beginning from one hundred years ago when the theory of repressed memories first arose in psychiatry. She opined that she did not fully agree with Loftus (the leading scholar and writer on the issue) that the theory is bogus, and Dr. Ryan stated that she believes there could be actual cases

of repressed memory in certain circumstances. She opined that the theory of repressed memories has never been proved nor disproved, and that it is falling out of favor in the psychiatry as a result of case studies, criminal cases, etc. She then proceeded to go into some of the things she found in the numerous psychiatric and psychological and counseling records of Kacie Havens. Highlights showed manipulative behavior, attention seeking, non-suicidal attention getting by cutting of her person in ways to cause minimal damage, but enough to get her mother's attention or that of other hospital residents, as well as getting the attention of the healthcare providers (not real suicide attempts), consistent denials of any past child abuse history, complaints of sexual abuse and sexual harassment by boys at school, the details of which changed over time in both scope and the number of boys involved, which reports went from one or two boys to numerous boys to many members of the high school football team and which harassment and abuse occurred at her locker in the halls of her school and the facts of these assaults which she reported changed in frequency, duration and intensity. At one point she denied to a counselor they ever happened at all and that she had made up the story because her friends would understand her better, but just hours later she stated to a psychiatrist treating her that the abuse had in fact occurred and she did not even mention the previous recantation only hours before. One psychiatrist noted that Kacie needed to "get off the pity potty." She also related Kacie reporting visions and hallucinations, such as seeing children in a room walking around a man hanging by the neck from the ceiling, hearing walls talk to her and giving her weather reports, her waking up from sleep in a different set of clothes from those she went to bed in, etc.

Dr. Ryan was then given hypotheticals (person X) based on the records and other facts set forth and she opined that Kacie Havens' statements were not consistent with the theory of repressed or recollected memory, that they were resultant from suggestions (by one of her Lewis-Gale doctors,

by an art therapist who commented after an art therapy session that the drawing she made suggested child abuse as a young child, and her boyfriend's suggestions in 2003 up to Thanksgiving when she supposedly remembered) and the story/recollection was false, either made up or imagined and possibly believed to be real by her. She ruled out an etiology or consequence based on amnesia or psychotropic drug side effects. She opined as an expert that the sheer detail of the hypothetical story was wholly and medically inconsistent with the memory abilities of a four- or five- year-old child and inconsistent with the ability of such a young child having a subsequent memory recall of such minute detail some eleven years later. She opined that this person X had clear gain for pinning her past recurring difficulties and family trouble on this sexual assault. (It had been noted that she never even mentioned her so-called recollection to her counselor who saw her numerous times between Thanksgiving of 2003 and June, 2004, and only then it was mentioned in passing as an ongoing source of bother to her, since Bill Havens had confessed and then recanted.)

At this point in the trial, it was nearly 6:30 p.m. on the first day and counsel had assured the court that this witness could be completed before adjournment for the night. As noted now, the conclusion of her testimony this night would be critical so that the jury would take home the last record brought up. Dr. Ryan was asked by defense counsel if there was any other record that confirmed her opinion that Kacie's recollections constituted a false memory. Dr. Ryan then pulled out the record of the gynecological examination from the appointment referred to in Savard's note found in the DSS records, as being an exam she had scheduled for June 14, 2004, a date nearly one month from her report to Savard. On that record it was noted by th Dr. on the line for vaginal exam: "no evidence of trauma/scarring - hymenal ring intact". Dr. Ryan testified as to it appearing on the record that the nurse had taken Kacie's blood pressure, height and weight, etc., but that only the physician would have checked the boxes on the exam and only a physician would have written those

findings on the vaginal exam on the record. She also opined that it would be unusual for a physician to have written that on such a record unless he was asked to either confirm or not confirm such findings for some reason, otherwise the record would not reflect whether the hymenal ring was intact or not intact.

Dr. Ryan then was asked to compare the statement of Kacie Havens with the medical evidence just introduced and she opined it was physically and medically impossible for the rape to have happened as Kacie described and there be no evidence of trauma/scarring and such child, then age seventeen having an intact hymenal ring, particularly where the attacker was an male adult in his twenties and Kacie would have only been a five year old child. The jury was transfixed and seemingly stunned at this record and they had been very attentive on all of Dr. Ran's testimony as to the false memory issues. As for that record and its significance, defense counsel later learned that the case was essentially over as far as the jury was concerned and from that testimony on, they all considered that the defendant was not guilty. The trial was adjourned for the night after virtually no real or effective cross examination of Dr. Ryan, save the usual attack on her testimony being paid for by the defense, which elicited the response that this witness gets nothing for her testimony, as she is a salaried employee of the Institute who gets the same pay regardless. Dr. Ryan and I had discussed this possible question three days before trial and had decided the Commonwealth's attorney would surely ask the question.

The next day numerous lay witnesses, parents for whom Bill Havens' mother had provided day care in 1991 - 1993, the defendant's special education teacher and family members testified both about Bill's limitations, confirming Dr. Katz's findings, and about the fact that during the time period in question the defendant's mother kept only the maximum of three children in her home and Kacie Havens was not one of them and that no parent dropping off their children or picking up their

children ever saw Kacie in the home despite the parent going inside when leaving their child and retrieving the child. Anecdotal testimony about Bill's childlike nature, kindness, gullibility, attempts to please and appease other, lack of any violence and care for any and all children, including years where Kacie Havens would run up to him and hug him on family events or visits. The mother and father of the defendant testified about these matters as well.

The defendant's father even explained times when the defendant passed out at the sight of his mother's blood, once when she cut herself while washing dishes when he was about age 4 or 5, and once when she had blood drawn at a hospital while Bill sat on a window sill and he had to be caught by his father before he hit the floor and he was attended to by the nurse who drew the blood.. On another occasion, Bill even passed out at the sight of his own blood when he hurt himself cutting wood at their home. The father told how Bill got his driver's license at DMV, explaining that Bill was in the test room for what seemed to be forever and when he and the tester came out, the DMV agent shook his head at the father and tore up the test and put it right in the trash; then he took Bill outside for the behind-the-wheel driving. When they came back, Bill was given his operator's permit.

The father testified to the son's limitations and confirmed his wife using flash cards and a math record over and over to help Bill learn his schoolwork assignments, as described by the special ed teacher. Both the father and the teacher stated that Bill could not retain the learned facts for long and would have to be taught over and over again, even, per his special education teacher, remembering his home address and telephone number. The father also verified he only recalls Kacie being kept one time for a few hours while her mother went for a job interview and that was after his home had burned down in 1994 and after the new home was built on the same site, but with a vastly different floor plan.

Both the defendant's father and mother testified as to how the mother would have always taken Bill's pay checks and deposited them in his account, then she would write out all his checks to pay his bills and she would have Bill Havens sign the checks. Otherwise, he would spend all of his money frivolously and be taken advantage of by others. When Mrs. Havens got sick, she could no longer handle his money and Bill ended up in bankruptcy after trying to manage his money and bills alone.

The defendant's sister verified that she was the *only* one who fed the animals, including the chickens which were hers, along with other types of animals (dogs, rabbits), supporting the father and mother in their same assertion. She and others testified they never saw Mrs. Havens leave any of the children she kept alone, or alone with anyone else while she provided day care for other persons' children.

Dr. Katz was called to testify as he did at the suppression hearing, only defense counsel had to carefully weave a path around the polygraph test facts which, at the suppression hearing, had formed part of the evidence of coercion and intimidation leading to the confession. This was done at trial by general references to the police interrogation and other testing data of Bill's in the form of a hypothetical and with a specific emphasis on his clinical findings, also posed later as a hypothetical. Cross examination of Dr. Katz did nothing but reinforce his conclusions which were the same as his hearing testimony. Dr. Katz also opined his belief that a child age five would in no way be able to recall eleven or twelve years later all of the specific and mundane details as Kacie Havens had done in this case, he explained how children at that age level fix short term memories to long term. The Court would not allow Dr. Katz to go into examples of case studies where persons had falsely confessed and where confessions were made to crimes that it turned out had never even happened. He was allowed to state what articles he had consulted and read in preparation of his

testimony, including a book defense counsel bought on line written by the leading authority on false confession, Gudjonnsson, from the London Institute of Psychiatry.

The defense then rested without calling the defendant, a plan settled upon after the judge found him to have intelligently and knowingly waived his Miranda rights and voluntarily confessed. Given his shortcomings, the risks outweighed any possible benefits.

The Commonwealth apparently scrambled all night to rebut Dr. Ryan's testimony and the bombshell of the night before in some meaningful way. The Commonwealth called a rape evidence gathering nurse (an RN) who had had all of *ten* hours training in rape kit evidence gathering and a number of actual rape victim exams. She admitted she had not been called to testify until 11:00 p.m. the night before. (It turned out that she is the wife of a State Police Investigator at the same Wytheville office as Savard and Taylor). She attempted to assert that the defendant could have penetrated a five year old "one inch" without leaving any scaring and leaving an intact hymen. On cross she was grilled as to what the allegations Kacie Havens had made as to the pain all the way up to her abdomen, and all of the blood she described. She reluctantly conceded after several questions that bleeding would be caused by tissue damage and some sort of trauma and that the tissue would likely scar on healing, especially where there had been blood all over, as the event had been described by Kacie Havens. She was then asked to explain how a non-erect penis could be inserted one inch into a five-year-old child, and she was stumped so badly and unable to answer that defense counsel merely waved at her after a couple minutes of silence and stated there were no further questions.

The state then called the counselor of Kacie Havens, Azura Surhio, a licenced clinical social worker. She rambled on without backup in her own records about how Kacie Havens presented as a "classic" victim of childhood sexual abuse, etc. On cross she admitted there was hardly any

mention in her notes about the alleged incident, that she only heard it from Kacie Havens after it was reported to DSS and the police; that she, as Kacie Havens' counselor, had only talked to one person that had treated or counseled Kacie Havens and that was a counselor at the Virginia Baptist home where Kacie Havens stayed in 2002 after her three psychiatric hospitalizations, and she admitted that she had never discussed Kacie Havens with any of her treating physicians, psychiatrists, and that she had not bothered obtaining her patient's psychiatric records to see treatment or diagnoses that would be germane to her counseling. She tried to say that as a counselor she did not need the records or the consults, and stated that she had never had a patient who told her she was abused that in fact was not abused as a child, etc. She then stated in response to a question about the truth of what a patient would tell her that she never did anything to even try to determine if a patient was lying about abuse, as the truth did not matter to her because her treatment was based on what the patient told her and not on what was true or false. It was brought out that on a record of hers from her file on Kacie Havens it had been stated to her by Kacie that she did not want to tell her father about the alleged incident involving Bill Havens because her father "always protected him," that "he was odd" and he "always made mistakes." By the latter stages of her testimony on withering cross she could no longer speak, but would stare at defense counsel in silence for what seemed like minutes and sometimes not even trying to answer. The jury clearly looked on in disbelief at this last minute witness.

On top of the counselor's record about Kacie's thoughts of Bill Havens being odd and making mistakes, the prosecution called Kacie Havens' uncle, Todd Havens, who stated he had known Bill all his life and how he thought Bill was perfectly normal because he played softball, hunted, hung out, drove a car, etc. On cross he had to admit that he was teaching his seven-year-old son how to hunt with a firearm, that he had seen many young children catch a ball or field it, throw

it to a person calling for the ball, run the bases, etc. His testimony resulted in defense counsel in closing referring to his testimony being contradicted by all of the lay witnesses and by Dr. Katz's clinical findings and as being so ridiculous that, "according to Todd Havens, Bill was ready to enroll in Harvard."

Thereafter, the jury was instructed, with a defense proffered instruction given based on case law and not the Model instructions about the need for corroborative evidence to be provided by the Commonwealth where it relied on the defendant's confession(s).

Closing argument by the defense focused on Kacie Havens' statement, on the experts who were un-impeached, overwhelmingly qualified in their fields, and impeccable and on the bombshell gynecological record. Two instructions were blown up to poster size (burden of proof and the corroboration evidence needed to convict on defendant's statement), as was the said gynecological record, the counselor's record where Kacie described Bill as "odd", "always makes mistakes" and a time line of events from Kacie Havens' birth through the gynecological record and then, three days later, Bill's confession after three plus hours of intense pressure on his limited mind. The jury seemingly liked the blow-ups, most of them no doubt being right-handed. Counsel emphasized that he was proud to represent Bill and his family, and that Bill's mental limitations are not representative of the value of his life, that the jury needed to give him that life, however impaired and however limited because it was his life, and give him back to his family.

Counsel also used a quote (near the end of closing) from the great trial lawyer Clarence Darrow, with a takeoff thereon to fit this case:

"THE FAILURE OF JUSTICE IS MORE DAMAGING TO OUR SOCIETY THAN CRIME ITSELF. (Darrow)

IN THIS CASE, IF WE FAIL TO GIVE BILL HAVENS JUSTICE IT WOULD BE EVEN MORE DAMAGING TO OUR SOCIETY AND TO OUR SYSTEM OF JUSTICE BECAUSE THERE WAS NO CRIME AT ALL. TO NOT ACQUIT BILL WOULD BE NOT ONLY AN INJUSTICE, BUT IT WOULD BE A CRIME ITSELF."

The jury came back in one hour and twenty minutes with a not guilty verdict. Afterwards, five jurors, including the foreman, came up to defense counsel and actually conversed with counsel and some hugged the family and defense counsel and readily discussed the case and their view of it. Since the verdict, a number of jurors have called the defendant's father and several have discussed the case with neighbors and family members. The jury, as stated above, had apparently mostly individually concluded the defendant was not guilty at the end of the first day, and purportedly they decided he was not guilty and filled out their verdict form early on in the deliberation and they thought it prudent to discuss the case further. During the one hour twenty minute period before the verdict was announced, they came out with questions to the judge, which were responded to by stating that they had all of the evidence in the case and may not consider anything outside the evidence. One interesting question they asked the Judge was "why Kacie's husband and her father did not testify, either for or against?" Jurors also told counsel that they had only stayed in the jury room so long so as to not give the judge a reason to believe that they had not properly discussed and considered the evidence, expressing concern the judge could set the verdict aside.

At no time during the trial did Kacie Havens sit in the courtroom except when on the stand.

The family of the defendant had to borrow against their home to pay for counsel (he had a court appointed attorney initially) and to pay for the experts. After the verdict, the defendant wept

along with his family and yet he said he still loved Kacie and her father Darrell and all he wanted was “an apology”, which I advised he would never get. The defendant had never before had a charge against him, not even a traffic citation.

Postscript

The Sheriff advised defense counsel that the husband of Kacie Havens approached the prosecutor when she went to her automobile to leave and told her she had lost because she was not a Christian, that she needed to be saved, etc. It was described as a rather hostile, pushy one way verbal confrontation. Fortunately, he did not approach defense counsel or the Defendant and his family.

Bill Havens subsequently requested that Mr. Bosen have the police and Court records of this charge expunged. That was accomplished within several months. But in 2016 Havens, out of the blue, called Mr. Bosen and told him that his accuser and her family had been going around for the past several years and told people in the community that Bill in fact had committed the crime alleged, including prospective employers of Bill’s. Bill asked what he could do to prove that he had been acquitted of the charge. Mr. Bosen suggested using a certified copy of the Order showing his acquittal to show anyone questioning the truth that he had in fact been found not guilty by a jury who had heard all of the evidence. Since the Court record had been sealed, Bosen sent Bill his copy of the final Order. It seems he must still prove his innocense.

Dr. Ryan is now with the Medical Center at Ohio State University. Dr. Katz still practices psychology in Roanoke County, Virginia and he has helped Mr. Bosen on numerous other cases, both civil and criminal.

Mr. Bosen is planning to write a book about this case and perhaps another case, if and when he ever decides to retire.