OA 10-887

A-no
Ct'd

IN THE SUPREME COURT OF FLORIDA

FILED

JUN 8 1987

CLERK, SUPREME COURT
By

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 69,976

RONNIE S. LAW,

Respondent.
_____/

# PETITIONER'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

GREGORY G. COSTAS
ASSISTANT ATTORNEY GENERAL
# 210285

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FLORIDA 32399-1050
(904) 488-0290

## TABLE OF CONTENTS

## TABLE OF CITATIONS

## TABLE OF CITATIONS
Cont'd

## TABLE OF CITATIONS
Cont'd

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

V. CASE NO. **69,976**

RONNIE S. LAW,

Respondent.

## PETITIONER'S BRIEF ON THE MERITS

### PRELIMINARY STATEMENT

Ronnie S. Law, the criminal defendant and appellant below, will be referred to herein as Respondent. The State of Florida, the prosecution and appellee below, will be referred to herein as Petitioner.

The record on appeal consists of one bound record volume and five transcript volumes, all of which are sequentially numbered. Citations to the record on appeal will be indicated parenthetically as "R" with the appropriate page number(s).

The opinion of the lower court is reported as Law v. State, 502 So.2d **471** (Fla. 1st DCA **1987).**

## STATEMENT OF THE CASE AND FACTS

By indictment filed June 4, 1985, Respondent was charged with the first degree murder of Louis James Dees, IV from a premeditated design or while engaged in the perpetration of, or in an attempt to perpetrate, aggravated child abuse, in violation of §782.04, Fla.Stat. (R 890). A jury trial was held on October 14-18, 1985 (R 10-888).

At the trial it was not disputed that Louis James Dees, IV, "Little Jim, " died on Sunday, February 10, 1985, in his home in Escambia County, as a result of a subdural hematoma caused by blunt trauma to his head (R 330, 333, 338). At least 25 separate bruises were found on his body (R 326). As a result, the prosecution concentrated on proving that Little Jim's death was not an accident and that Respondent was guilty of causing the death as charged. Essentially, the evidence was as follows.

Carol Free, Little Jim's mother, testified that she and Respondent met in May of 1984 and started going together. Somewhere around January 11, 1985, she moved in with Respondent in a house he rented in Innerarity Point. Her three children, Robert Hornbrook, age 9; Amanda Dees, age 6; and Little Jim, age 3, moved in with them (R 122-123). Carol worked as a clerk at a Circle K Store during evening and midnight shifts (R 123-124). Her testimony reveals that she first learned Respondent was spanking Little Jim from her son Robert and upon her subsequently

discovering bruises on his butt (R 125). After discussing the intensity of the bruises with the children's babysitter, Donna Cook, she decided to confront Respondent. She called him at work and requested he come straight home, instead of going to a gymnasium to wrok out with weights, because she needed to talk to him. Respondent came home, walking rather slow, started crying and said that he "didn't mean to spank Little Jim that hard, he didn't realize he had spanked him that hard, and then he said that he was hoping that they [the bruises] would go away before [she] saw them." He promised not to spank the children or Little Jim anymore (R 127). Notwithstanding the promise, Ms. Free testified she subsequently saw Respondent pushing Little Jim into a corner so that his forehead would bounce off the wall (R 128). In general, she stated, the reasons for Respondent spanking Little Jim were the little boy's constant crying and because he smacked his lips while eating. Ms. Free related how on occasion Little Jim had to eat in another room to prevent Respondent from getting upset when Little Jim smacked his lips (R 130).

Approximately three weeks into the Respondent-Ms. Free relationship, Carol Free requested her employer that she be placed on the midnight shift because she no longer trusted Respondent with her children (R 131, 796-c).

Concerning the events immediately preceding Little Jim's death, her testimony reveals that Ms. Free worked Saturday night

and arrived home early Sunday morning around 8 a.m. or 8:30 a.m. After shortly talking to Respondent she went to bed (R 132). She got up around 11:30 or 12:00 noon, argued with Respondent as to his going over the girl's house next door, started drinking wine, took a shower, and around 1:30 or 2:00 p.m., they (the entire family) went to Johnson's Beach, She continued drinking wine and while at the beach the kids played in the sand dunes. Back home, the family (including Respondent) sat in the front yard and the children started raking and picking up leaves as ordered by Respondent. Respondent played with Little Jim, throwing him up in the air, She stated that apparently he had caught the little boy wrong as he came down, because the child began to cry. Subsequently Ms. Free advised Respondent she had drunk too much wine and wanted to go to bed and asked that he call her employer to inform she would not be at work that night. She then went to bed (R 132-36, 138). At about 10:30 or 11:00 p.m. that Sunday night she woke up, went into the kitchen where she found Respondent by the refrigerator kind of pacing and was asked to check on Little Jim because he was making wheezy noises. She walked halfway into his room, listened for any noises, heard none and so reported to Respondent (R 135-136, 280). Respondent paced a bit more, looked kind of nervous and said that he was going to bed. However, instead of going to bed, he turned around, went back into Little Jim's bedroom, remained in the room 15 minutes without turning on the lights, came out

and stated that he was going to bed (R 136-138). Ms. Free stayed up watching T.V., took some sinus pills and she too went to bed around 11:15 or 11:30 p.m. (R 138).

When Ms. Free got up the next morning at around 5:45 a.m., Respondent was already up, was again pacing a bit in the kitchen, and immediately left home stating he had to go to work. She started fixing breakfast, requested her daughter Amanda to get the boys up, and upon twice being advised that Little Jim would not get up Ms. Free went into his bedroom. Little Jim was laying on the bed, he was real still and his lips were blue. She shook him several times but he would not get up. Hysterically she run to the neighbor's house, asked them to call an ambulance and then ran back home where she shook and shook Little Jim some more. Paramedics arrived and she later was informed that Little Jim wa dead (R 140-142).

Later that day (February 11) Respondent and Ms. Free went to the paramedic's home to pick up her other children and then went to his mom and dad's home. There, as Respondent and Ms. Free were in a bedroom talking about Little Jim's death, Robert and Amanda went in. She asked Robert "'honey', I said, 'do you know what was wrong with Little Jim?" I says, 'Did anything--' I says, 'Did Ron Spank Little Jim or anything happen?' . . .And he says yeah. And then Ron said 'Don't you remember us playing,' and stuff like that. And then Robert looked down and he says,

'Why, I don't know what happened.'" (R 144-146). It was Ms. Free's testimony that during the few days following Little Jim's death, she had not believed Respondent had harmed her boy and had thought perhaps some of Little Jim's prior accidents and falls had something to do with his death and had so indicated to other people when the subject of the death came up. However, she stated that she later had changed her mind when informed by investigators about circumstances of the death, and upon viewing pictures depicting the many bruises (R 147, 156-162, 203, 209-210, 267). During cross-examination she admitted Little Jim had sustained prior accidental falls. She stated, however, all these accidental falls occurred before the weekend of Little Jim's death, but could not remember dates (R 157-164).

Robert Hornbrook, Little Jim's brother, testified that during the period he lived with Respondent, the man spanked and shoved Little Jim into a corner either because he cried or smacked his lips. (R 218-219, 246, 248). He testified that on thalt Sunday night, while he and his sister were watching T.V. he saw Respondent and Little Jim playing in his room, and that subsequently he saw Respondent spank Little Jim on his butt and had asked the boy to clean up his room. He stated, however, that he saw nothing further since Respondent had then closed the door (R 219-221, 241-243), but that he could still hear Little Jim crying. By the time he was asked by Respondent to go to bed, he noticed that Little Jim was already in bed laying on his back

with his hands to his side, his lips top and bottom were black, although not as black as the following morning, and that he was making some kind of wheezing noise, He stated that Respondent had then remarked to him that Little Jim was "just playing asleep. He's just pretending he's asleep." (R 220, 222, 223, 245). During cross-examination Robert Hornbrook admitted that while he, Little Jim and Amanda played on the beach on Sunday running up and down the sand dunes, Little Jim fell and rolled over the sand (R 234). He also admitted that Little Jim had apparently hit some barbells on Saturday, the day before his death (R 235).

Corinne Mitchell testified that Carol Free went to her house early Monday morning, screaming and banging on the door saying that her baby was stiff and that she needed some help. Her roommate called an ambulance and she called Respondent at work per Ms. Free's request. She stated that when he got on the phone she told him that there was an emergency with one of his children, that an ambulance was on the way and that he needed to go home. She said that he responded that he could not go home because he had just gotten to work but he wanted to talk to Carol, The conversation ended when Ms. Mitchell told Respondent he could not speak with Carol because she was hysterical and could not get to the phone. She further testified that she saw Little Jim the day before his death and noticed nothing unusual except for a cut under his nose (R 250-251).

Decca Jo Matthews, with the Innerarity volunteer fire department, testified she call Respondent at work on that particular morning. When he got on the phone she identified herself and told him there was an emergency at home and he was needed there. But Respondent just kept saying that "I can't get off." "I just got off last week and they're all up and down my case because I'm taking too much time off." She asked him whether he cared anything about his girlfriend to which he answered "yeah." Ms. Matthews again told him that he needed to get home because there was an emergency. When he did not respond she finally told him that "her baby was dead" and that he needed to get home. Respondent just said "What?" and hung up the phone (R 254-260).

Donna Cook, the children's babysitter, testified she went to Respondent and Carol Free's home one afternoon and witnessed him spank Little Jim three times. It was her testimony that when she arrived at their home, Respondent and the three children were in the yard raking pine straw. The children were assigned to different tasks, Little Jim being in charge of picking up straw and putting it in a basket. He picked up his straw for a while, wandered off and played and Respondent spanked him twice across his butt telling him to get back on his job. Three similar spankings occurred at that one occasion. Although Respondent's actions had not caused her any alarm, she stated she was surprised to see the bruises on Little Jim's buttocks the very

next morning when Carol Free had shown them to her (R 296-297, 306). She also testified that on Wednesday afternoon prior to Little Jim's death, she went to their home because Respondent had not brought the children over to her as he had been doing. At the home she found Respondent who informed her he was taking care of the kids because he had been off sick. While at the home, Carol came in with Amanda and Little Jim--Robert was still at school. Amanda and Little Jim gave her a hug and went off to the playroom. Little Jim came back out and wanted a glass of water to which Respondent stated "Just a minute, go play." And Little Jim backed up and started to shake and went back into the playroom. A little later on, Little Jim came out again and kind of peaked out, and not seeing Respondent or Carol, asked her (Ms. Cook) if he could have some water. She gave him a glass of water, he spilled it on his shirt and then started to cry. She changed his shirt at the time and did not see any bruises on his upper body at all (R 299-300, 307). Ms. Cook also testified that she overheard a conversation between Respondent and Carol Free regarding Little Jim. She stated that one afternoon she heard Carol telling him that she will take care of Little Jim and his punishment and that Respondent could punish Robert and Amanda. Respondent had agreed because he "couldn't take Little Jim's constant whining" (R 302, 303).

Mary Roundy, a member of the Innerarity Fire Department and a former paramedic technician, testified that she responded to

the call the morning Little Jim died and had subsequently taken Robert and Amanda (the other two chldren) home with her. It was her testimony that around 8:00 a.m. February 11, Carol Free and Respondent went to her house to pick up the children. When the children saw their mother, they got up from the table where they were having breakfast to greet her. As Robert was heading to his mother Respondent intervened, grabbed him by his shoulders, shook him a bit, put his face into his and whispered something to the child. Robert looked extremely terrorized and started to cry for the first time that day at which time the Roundys intervened. Respondent then let the child go and led him back to the table. She additionally testified she asked Carol Free whether Little Jim had been injured in the prior last few days and that she had responded "No." (R 313-315, 317-318).

Pathologist Everett Havard conducted the autopsy of the body. He testified that at the time of the autopsy lividity appeared fixed and rigor mortis had set in. He calculated death had occurred before 4:00 a.m. and possibly as early as 10:30 p.m. (R 322, 323, 340, 358). Twenty-five separate bruises were found on the body. Three of the bruises were on the scalp, two appearing very fresh, the one on the front of the scalp perhaps a little older but he could not be sure (R 326, 329, 330). Other bruises were found on the arms, chest, back and buttocks (R 326). It was Dr. Havard's testimony that the majority of the bruises did not show any yellowish discoloration which led him to

the conclusion that the bruises were at least less than two days old and possibly much fresher (R **332).** He also observed some mild inflammatory changes in the airways of the lungs which would go along with a chronic bronchitis and respiratory infection (R **330).** A drug screen of Little Jim's urine revealed hydrocortisone which substance, if not injected or topically applied, may be associated with stressful stimuli such as fright and pain (R **337, 345-346, 367).** The cause of death was determined as a subdural hematoma resulting from blunt trauma to the head (R **331, 333, 365-366). Dr.** Havard indicated that it was possible for a child receiving such a fatal injury to have been saved if prompt medical attention was given because if a hematoma is promptly diagnosed there were surgical procedures that can decompress the blood clot **(R 341).** It was further his conclusion that after seeing all the bruises it did not appear to him they were bruises sustained while playing and that based on the pattern, number, and degree of the injuries the manner of death had been homicide (R **355, 359).** And finally he testified he sent the eyes to Dr. Reeves, a forensic pathologist with special expertise in evaluating child abuse and injuries, in order for him to determine whether there were any changes in Little Jim's eyes due to the chronic injuries (R **343, 373, 392).**

Dr. Reeves indicated that he received a request to examine Little Jim's eyes from Dr. Havard. Along with the eyes he received a considerable amount of information, including some **50-**

plus photographs of the body taken at the scene and at the time of the autopsy, autopsy reports, investigative reports, etc. (R 397-398). He stated that at Dr. Havard's request he prepared a report which indicated his opinion as to the cause and manner of death. It was Dr. Reeves' conclusion that Little Jim died as a result of sustaining multiple blunt trauma, primarily to the head (R 400, 429); and that in his opinion, the manner of death was homicide inasmuch as the characteristics and symmetry of the injuries themselves were indicative of abuse (R 401-425, 430, 440).

Following this testimony, the State rested and defense counsel moved the court for a judgment of acquittal. Said motion was denied (R 484).

The defense then presented several witnesses who basically testified as to Respondent's politeness, his good character; his good relationships with Carol Free's children--bathing, feeding and taking care of them--and how the kids roughhoused a lot; Carol Free's alleged alcoholism, drug use and neglect of her children; Carol Free's statement to Respondent's sister, father and mother, that Respondent had nothing to do with the death and that the police were after she and Respondent and that if she didn't turn against him they were going to prosecute her; Little Jim having cuts around his nose on Saturday night; Carol Free's subsequent turning against Respondent after seeing some pictures

and talking to the police; Respondent and Carol Free going to consult an attorney about possible criminal charges; Carol Free being forgetful and allegedly suffering from blackouts; alcoholics in general suffering loss of memory and blackouts (by a psychiatrist); Respondent's statement after taking the polygraph that he couldn't believe he had failed the test since he had not done anything; and, testimony as to Respondent leaving work the morning of Little Jim's death **(R 485-499; 498-522; 534-546; 551-557; 561-565; 575-580; 593; 597-599; 603-614; 618-621; 625-670; 674-680).**

Finally, Respondent himself gave lengthy testimony in his own behalf (R **684-759).** During cross-examination, however, Respondent admitted he never told the police that he had heard Little Jim crying after he had gone to bed (R **760).** He denied causing the injuries to Little Jim although he admitted that he might have caused the injuries to his chest (R **761).** He stated that the injuries on Little Jim's butt might have been caused when he fell at the beach (R **761),** although he admitted he had very lightly spanked the boy that night (R **733).** He admitted not seeing or hearing Little Jim hit the bunkbed that Sunday night **(R 762).** He denied spanking Little Jim when he would not rake leaves (R **765).** He stated that his boss had probably forgotten that Respondent had told him that Corinne Mitchell had said the child was on its way to the hospital (R **756).** He stated Mary Roundy's account as to his confronting Robert at her house never

indeed happened (R **773).** He stated Carol Free wanting to be on midnight shift because of his spanking Little Jim was purely fabrication (R **782).** And finally he denied but subsequently admitted spanking Little Jim because he smacked his lips (R **769, 787).**

Two rebuttal witnesses were presented by the State. Corinne Mitchell was recalled and testified that when she had called Respondent at work he had not indicated at all that he had to ask permission from his boss (R **797).** David Van Dreal, Carol Free's supervisor, testified that Carol asked to be put on the midnight shift on January 10, **1985,** because she was concerned that the gentleman she was living with was beating her child and she wanted to leave her children with him at night when they were asleep **(R 796-C).**

The court denied Respondent's renewed motion for judgment of acquittal (R **796-F).** The jury found Respondent guilty of second-degree murder **(R 887).** Respondent filed an alternative post-trial motion and memorandum of law for judgment of acquittal, for a new trial and/or to adjudge him guilty of third-degree murder or manslaughter (R **942, 972).**

The trial court sentenced Respondent to 17 years imprisonment with credit for **160** days served (R **967-970).**

On direct appeal, the lower court reversed the cause holding

that the trial judge had erred in denying Respondent's motion for judgment of acquittal. Law v. State, supra at 473. In so ruling, the court did not address the remaining issues on appeal. Id at 472.

By Order dated May 12, 1987, this Court accepted jurisdiction and set the cause for oral argument. Petitioner's brief on the merits follows.

## *SUMMARY* OF ARGUMENT

Petitioner argues that the lower court reversibly erred in employing an improper standard of review to strike down the trial judge's denial of Respondent's motion for judgment of acquittal. Petitioner further argues that application of the correct standard of review to the case at bar demonstrates that the trial judge's denial of the motion was not erroneous.

## ARGUMENT

### ISSUE

THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL HEREIN MUST BE REVERSED BECAUSE THE COURT APPLIED AN INCORRECT STANDARD OF REVIEW IN REVERSING THE TRIAL JUDGE'S DENIAL OF RESPONDENT'S MOTION FOR JUDGMENT OF ACQUITTAL.

The lower court, relying upon the standard of review set forth in Fowler v. State, 492 So.2d 1344 (Fla. 1st DCA 1986), held that the trial judge erred in denying Respondent's motion for judgment of acquittal and consequently reversed the conviction, vacated the sentence, and remanded the cause with directions to discharge Respondent. Law v. State, supra. Petitioner submits that the Fowler standard of review for denial of a motion for judgment of acquittal is fundamentally flawed and, consequently, that the lower court reversibly erred in employing that standard sub judice to reverse the trial judge's denial of Respondent's motion for judgment of acquittal.

In Fowler v. State, supra, the court concluded that:

> . . . a circumstantial evidence case should not be submitted to the jury unless the record contains competent, substantial evidence which is susceptible of only one inference and this inference is clearly inconsistent with the defendant's hypothesis of innocence. Evidence that leaves room for two or more inferences of fact, at least one of which is consistent with the defendant's hypothesis of innocence, is not legally sufficient to

> make a case for the jury. [Emphasis original; footnotes omitted].

Id., at 1347, 1348.

This standard of review flies in the face of this Court's well-established test for reviewing the denial of a motion for judgment of acquittal and results in the imposition of an improperly onerous burden upon the State.

In Lynch v. State, 293 So.2d 44 (Fla. 1974), this Court held:

> A defendant, in moving for a judgment of acquittal, admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence. The courts should not grant a motion for judgment of acquittal unless the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law. Where there is room for a difference of opinion between reasonable men as to the proof of facts from which an ultimate fact is sought to be established, or where there is room for such differences as to the inference which might be drawn from conceded facts, the Court should submit the case to the jury for their finding, as it is their conclusion, in such cases, that should prevail and not primarily the views of the judge. The credibility and probative force of conflicting testimony should not be determined on a motion for judgment of acquittal. [Citations omitted] [Emphasis added].

Id., at 45. See also Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); Ramos v. State 12 F.L.W. 173 (Fla.

April 9, 1987); Spinkellink v. State, 313 So.2d 666 (Fla. 1975), cert. denied, 428 U.S. 911 (1976); Mitchell v. State, 493 So.2d 1058 (Fla. 1st DCA 1986); Herman v. State, 472 So.2d 770 (Fla. 5th DCA 1985); Fletcher v. State, 472 So.2d 537 (Fla. 5th DCA 1985); Jones v. State, 466 So.2d 301 (Fla. 3d DCA 1985); Rodriquez v. State, 436 So.2d 219 (Fla. 3d DCA 1983); Kaufman v. State, 429 So.2d 841 (Fla. 3d DCA 1983); Matrascia v. State, 349 So.2d 735 (Fla. 3d DCA 1977). The above-quoted standard of review applies notwithstanding the posture of the cause as a "circumstantial evidence" case.

Black's Law Dictionary, Revised Fourth Edition, West Publishing Co., 1968, defines circumstantial evidence, inter alia, as "evidence of facts or circumstances from which the existence or nonexistence of [a] fact in issue may be inferred" and as "inferences drawn from facts proved." The Lynch test by its terms clearly applies to circumstantial as well as direct evidence cases since it makes provision for the treatment of inferences drawn from evidence adduced. This is an entirely proper result since circumstantial evidence is inherently no different than testimonial or direct evidence as the United States Supreme Court held in Holland v. United States, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150 (1954). Speaking to an issue concerning a jury instruction on circumstantial evidence the Court opined:

> The petitioner's assail the refusal of the trial judge to instruct that where the Government's evidence is circumstantial it must be such as to exclude every reasonable hypothesis other than that of guilt. There is some support for this type of instruction in the lower court decisions [citations omitted] but the better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect. [Citations omitted].
>
> Circumstantial evidence in this respect is intrinsically no different from testimonial evidence. Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccurancy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more. [Emphasis added].

Id., at **99** L.Ed. 166, **167.** This reasoning was followed by this Court in its opinion adopting the Florida Standard Jury Instructions in Criminal Cases where it approved elimination of the instruction on circumstantial evidence concluding that "the giving of the proposed instructions on reasonable doubt and burden of proof, in our opinion, renders an instruction on circumstantial evidence unnecessary." Matter of Use By Trial Courts Of Standard Jury Instructions In Criminal Cases, **431** So.2d **594, 595** (Fla. **1981).**

Equally clear is the fact that the Fowler test places an impermissibly onerous burden upon the State. Lynch requires denial of a motion for judgment of acquittal unless the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law. Fowler, on the other hand requires that a motion for judgment of acquittal be granted unless the circumstantial evidence gives rise to only one inference and that inference must be clearly inconsistent with the defendant's hypothesis of innocence. Put simply, Fowler has dismantled the principle that the evidence be viewed in the light most favorable to the State for purposes of disposition of a motion for judgment of acquittal and has replaced it with the requirement that the State must put on evidence which conclusively eliminates the defendant's hypothesis of innocence in order to survive such a motion. A standard similar to the Fowler test was soundly rejected by this Court in State v. Allen, 335 So.2d 823 (Fla. 1976), because it placed an impossible burden upon the State. The Court held:

> We are well aware that varying interpretations of circumstantial evidence are always possible in a case which involves no eye witnesses. Circumstantial evidence, by its very nature, is not free from alternate interpretations. The State is not obligated to rebut conclusively every possible variation, however, or to explain every possible construction in a way which is consistent only with the allegations against the defendant. Were those requirements placed on the State for these purposes, circumstan-

> tial evidence would always be inadequate to establish a preliminary showing of the necessary elements of a crime. [Emphasis added].

Id, at 826. Indeed, this Court has repeatedly held that in a circumstantial evidence case the question of whether the evidence fails to exclude all reasonable hypothesis of innocence is for the jury to determine, and where there is substantial, competent evidence to support the jury verdict, this Court will not reverse a judgment based upon a verdict returned by the jury. Lincoln v. State, 459 So.2d 1030 (Fla. 1984); Heiney v. State, 447 So.2d 210 (Fla. 1984); Rose v. State, 425 So.2d 521 (Fla. 1983). See also Buenoano v. State, 478 So.2d 387 (Fla. 1st DCA 1985), pet. for rev. dismissed, 12 F.L.W. 177 (Fla. April 9, 1987); Lowery v. State, 450 So.2d 587 (Fla. 1st DCA 1984); Knight v. State, 392 So.2d 337 (Fla. 3d DCA 1981), review denied, 399 So.2d 1143 (Fla. 1981); Tillman v. State, 353 So.2d 948 (Fla. 1st DCA 1978).

At this point, Petitioner notes that the Fowler court was of the view that:

> . . . it is for the court to determine as a threshold matter, whether the state has been able to produce competent, substantial evidence to contradict the defendant's story. If the state fails in this initial burden, then it is the court's duty to grant a judgment of acquittal to the defendant as to the charged offense, as well as any lesser-included offenses not supported by the evidence. This must be so because "the version of events related by the defense must be believed if the circumstances do not show that

> version to be false." McArthur, 351 So.2d at 967. [Emphasis added, footnote omitted].

Fowler v. State, supra at 1347. See also Law V. State, supra at 472. This is clearly an erroneous statement of the law and the court's reliance on McArthur v. State, 351 So.2d 972 (Fla. 1977), in support thereof is entirely misplaced as this Court's opinion in Toole v. State, 472 So.2d 1174 (Fla. 1985), readily demonstrates. The Court held:

> The Standard to be applied to support a conviction based on circumstantial evidence is that the evidence must be "inconsistent with any reasonable hypothesis of innocence." McArthur V. State, 351 So.2d 972, 976 n.12 (Fla. 1977). This determination is for the jury and where there is substantial, competent evidence to support the jury verdict, that determination will not be disturbed by the courts.

Id., at 1176. Not only is the determination of whether the evidence is inconsistent with any reasonable hypothesis of innocence solely within the province of the trier of fact, but the trier of fact may also reject as unreasonable the hypothesis of innocence that has been advanced. Huff V. State, 495 So.2d 145, 150 (Fla. 1986). See also Rugendorf v. United States, 376 U.S. 528, 84 S.Ct. 825, 11 L.Ed.2d 887 (1964), Glisson V. State, 85 Fla. 493, 96 So. 840 (Fla. 1923), Knight V. State, supra, Atkinson V. State, 247 So.2d 793 (Fla. 1st DCA 1971), Miller V. State, 233 So.2d 448 (Fla. 1st DCA 1970), and Darty V. State, 161 So.2d 864 (Fla. 2d DCA 1964), indicating that the trier of fact

is not required to accept the testimony of the defendant even when the testimony is not contradicted.

In view of the foregoing, it is quite clear that the Fowler test is an improper standard of review for the denial of a motion for judgment of acquittal and the lower court's employment thereof in the case at bar constitutes reversible error. Moreover, application of the Lynch test to the evidence adduced at the trial of this cause unequivocally demonstrates that the lower court erred in reversing the trial judge's denial of Respondent's motion for judgment of acquittal.

The record reflects that Respondent was charged with the premeditated first degree murder or, alternatively the first degree felony murder (the felony being aggravated child abuse) of Louis James Deer, IV [Little Jim] (R 90). Consequently, it was incumbent upon the State, in order to survive a motion for judgment of acquittal, to put on a prima facie case that Little Jim was dead, that the death was caused by the criminal act or agency of Respondent, and that the killing was premeditated, or, alternatively, that Little Jim was dead, that the death occurred as a consequence of, and while Respondent was engaged in, the commission of or attempt to commit, aggravated child abuse, and that Respondent was the person who actually killed Little Jim. See jury instructions for Murder-First Degree and Felony Murder-

First Degree, Florida Standard Jury Instructions In Criminal Cases, Second Edition.

Petitioner contends that the evidence adduced at trial was more than sufficient for a jury to reasonably conclude that Respondent had committed the crime charged as well as any lesser-included offense. Petitioner further contends that the evidence adduced was sufficient for the jury to reject as unreasonable all of the hypothesis of innocence advanced by the defense.

First, as argued below, Respondent claimed Little Jim's death was merely the result of accidental falls he had suffered in the past. However, the State's scientific evidence, Respondent introduced none, completely defeated his hypothesis of an accidental death. Although a State expert testified that it could have been possible for the injuries to have been sustained by prior accidental falls all occurring in one weekend, because of the quantity, pattern, symmetry, degree, and the freshness of the bruises, he reached the conclusion that the injuries on Little Jim were inflicted by someone rather than accidentally. For instance, the autopsy of the body discovered three large bruises on his head, all caused by his head having hit some flat surface. One of these bruises, extending all the way to the back of the head, developed a subdural hematoma or blood clot causing the baby to die. Respondent during cross-examination tried as best he could to make the experts admit the hematoma developed

from a fall the boy suffered as far back as December, or from a bruise he allegedly got by falling against some barbells on Saturday noon or from a bruise he allegedly sustained by falling from the top of a bunkbed on the previous Friday also at noon. But Dr. Havard, who performed the autopsy, explicitly indicated that the hematoma could have developed within an hour or so after the injury occurred and that when he did a miscroscopic examination of the blood clot itself and the membrane over the surface of it, he found no deterioration of the red cells therein and no evidence of scar tissue beginning to form which led him to the conclusion that the blood clot was at least less than 48 hours old and as such it could not have been the result of any of the sustained falls (R 364, 366), certainly not the ones Little Jim sustained in December (two months before), or on Friday noon (some 57 hours before). As to the alleged Saturday noon fall against the barbells, Respondent's rather exaggerated version (clearly not as Robert Rornbrook described it occurred) (R 235) was that while Robert, Amanda and Little Jim were playing in the room, Robert, a nine year old boy, pushed Little Jim with such force that the little boy went flying through the air, came down and then slid coincidentally hitting his head against the only flat surface on a weight attached to the side of a barbell. Not only was this explanation found hard to believe, but even assuming it true, the question that remained was the absence of any other bruises consistent with such a fall (R 455-458). But

in addition to that, not only Dr. Havard's statement that the hematoma could have developed within an hour or so contradicted this contention, but also Carol Free explicitly indicated that this alleged fall occurred some time in the past, not that weekend, although she could not remember the date.

Respondent also contended that the fatal injury to the scalp may have occurred when he was playfully swinging Little Jim that very Sunday night. His testimony was that as he swung Little Jim in his room, he had lost hold of him and the boy had flown across hitting his head against the bed's flat surface. During cross-examination he admitted though he had not seen nor heard Little Jim hit the bed. Moreover, he admitted the boy had not cried or complained, and finally had to admit that he guessed the boy did not hit the bed at all (R 761-762). Yet, another explanation as to how this fatal bruise occurred was that perhaps while Respondent and Little Jim were wrestling on the floor again that Sunday night, Little Jim had rolled over and hit his head against the bed's only flat surface. This theory was not strongly pursued inasmuch as Respondent later changed his version to that of Little Jim hitting his head as he was swinging him (R 767).

As to the other bruises the evidence was also overwhelming they were not the result of any accidental mishaps. In fact, during the trial itself Respondent did not claim that the bruises on the arms and those found on the buttocks were the results of

accidental mishaps. Indeed, he could not have done so. He admitted himself, and Robert Hornbrook testified that, Respondent grabbed Little Jim's arm as he inflicted the spanking on the little boy's butt that very Sunday night--he insisted, however, the spanking had not been hard or that he sustained the bruises while rolling on sand dunes (R 761). He concentrated his efforts instead in alleging the bruises on the boy's chest were left there by his own fingers while he was playfully throwing Little Jim up in the air. However, both experts testified the symmetry of those bruises did not indicate that they were sustained in the act of some type of play (R 355, 440).

Part of the non-scientific evidence introduced at the trial included the testimony by Robert Hornbrook who saw Respondent spank Little Jim that night; however, he witnessed nothing further because Respondent conveniently closed the door to the bedroom (R 219-221, 241-243). Nevertheless he stated Respondent spanked Little Jim a lot simply because he cried or he smacked his lips at the table (R 218-219, 246, 248). He related to the jury how when he went to bed Little Jim was already in bed laying on his back with his hands to the side, his lips top and bottom black, although not as black as the following morning, and that he was making some wheezing noise. He additionally stated that Respondent had remarked that Little Jim was "just playing asleep. He's just pretending he's asleep." (R 220-223, 245). As to this latter statement, Respondent claimed Robert was clearly

mistaken (R **776).** Robert Hornbrook also testified that at least on six occasions Respondent had pushed the boy against the wall causing his head to hit the wall's flat surface. Carol Free testified that Respondent had once pushed Little Jim into a corner causing his head to bounce off the wall. To this, Respondent explained that was not true, but there had been an occasion where Little Jim had tripped over some clothes, and had then hit his head against the wall (R **769).** Donna Cook testified that she had seen Respondent spank Little Jim on his butt three different times in one single occasion just because he would not pick up some pine straw (R **296-297, 306).** Respondent stated Donna Cook was also mistaken because he had never spanked the boy merely for not picking up the straw (R **765).** Ms. Cook also testified that she overheard a conversation between Respondent Ronnie Law and Little Jim's mother, Carol Free, whereby they were discussing whose responsibility it was to discipline Little Jim. Specifically, she heard Respondent tell Ms. Free for her to discipline and take care of Little Jim because "he couldn't take his whining" (R **302-303).** Carol Free testified that Respondent resented Little Jim because it was because of him they were fighting all the time (R 148). Respondent testified, however, they never had any arguments, "no, sir, just one, and another time we had a brief discussion, and she was saying, you know, it was something silly, I can't remember exactly what she was talking about" (R **770).** Daniel Law, Respondent's own brother,

testified that in the morning of Februay 10, Respondent had called him and they had talked for approximately one hour. During the conversation Respondent told his brother that he had been right about Carol, that she had been drunk since Friday and that he was stuck with the children, being a father and mother to them, feeding them, bathing them, putting them to bed and everything else (R **575-576).** Respondent stated that those comments had just been "a joking matter" (R **778-779).** True enough, several of the witnesses, including Respondent himself, testified how much he loved the kids, especially Little Jim, and what a good father he was. Yet, this alleged fatherly love was not sufficient to make him get up when he said he heard the boy cry that fatal Sunday night, nor was it sufficient to make him leave work the morning Little Jim died. It took three calls before Respondent left work. During two of those calls, one made by witness Corinne Mitchell and the other by witness Decca Jo Matthews, Respondent just kept on saying when told he was needed home that he couldn't get off, "I just got off last week and they're all up and down my case because I'm taking too much time Off" (R **250-260).**

In addition to Respondent's suggestion that the death was accidental, which was clearly contradicted as illustrated above, Respondent vigorously tried to make the jury believe Little Jim's death had been the responsibility of Carol Free, the mother, or Robert Hornbrook, the **9** year old brother. No matter how hard he

tried to picture Carol Free as a loose woman, with drinking and possibly drug problems, he still had to admit that Carol spanked the boy only once (R 764). He insisted though that after he had gone to sleep, he had heard Little Jim cry and as he rolled over in bed he quickly noticed Carol Free was not there. By this he wanted the jury to infer that perhaps at this time, the hungover and allegedly irritable mother was or had just applied the brutal beating that caused the boy to die. Of course, such a crucial fact as hearing the boy cry was never brought up when the police questioned Respondent shortly after the death (R 760) and in addition to that, not only did Carol Free testify that the children had not cried, but Dr. Havard's conclusion that death could have occurred as early as 10:30 that night clearly defeated Respondent's claim. Moreover, Robert Hornbrook who slept in the same room as Little Jim did not testify as to having heard him cry,

In sum, Petitioner submits that the foregoing evidence, viewed in the light most favorable to the State, more than sufficiently established a prima facie case of the crime charged. The trial judge evidently refused to determine the credibility and probative force of conflicting testimony on a motion for judgment of acquittal and properly denied the motion. The lower court's reversal of that action was error which in turn cannot be permitted to stand.

## CONCLUSION

Based upon the foregoing argument and the authority cited herein, the decision of the First District Court of Appeal should be quashed and the cause remanded for disposition of the remaining issues on appeal.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

GREGORY C. COSTAS
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FLORIDA 32399-1050
(904) 488-0290

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Mr. Paul Shimek, Jr., 311 North Spring Street, Pensacola, Florida 32501, this 8th day of June, 1987.

GREGORY C. COSTAS
ASSISTANT ATTORNEY GENERAL