IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No.: 79,233

CHARLES R. PHILLIPS, SR.,

Respondent.

_____/

PETITIONER'S BRIEF ON THE MERITS

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STATE OF FLORIDA,

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PETITIONER'S BRIEF ON THE MERITS

Preliminary Statement

Petitioner, the State of Florida, appellee in the case below and the prosecuting authority in the trial court, will be referred to in this brief as the state. Respondent, CHARLES R. PHILLIPS, SR., appellant in the case below and defendant in the trial court, will be referred to in this brief as respondent. References to the opinion of the First District contained in the attached appendix will be noted by the symbol "A," and references to the record on appeal will be noted by the symbol "R." All references will be followed by the appropriate volume and page number(s) in parentheses.

STATEMENT OF THE CASE AND FACTS

The state seeks review of the decision of the First District in which that court reversed respondent's convictions for two counts of sexual battery on a child under 12 years of age and remanded the case for a new trial.

On March 15, 1990, the state charged respondent with two counts of sexual battery under **Fla. Stat. §** 794.011(2) on N.M. and one count of lewd and lascivious behavior under **Fla. Stat. §** 800.04 on N.M. (R 563). On July 30, 1990, the state filed a notice of its intent to use hearsay statements of child witnesses (R 578-85). Also on July 30th, the state failed a notice of proof of other criminal offenses committed by respondent (R 586). On October 8, 1990, the state moved for the use of closed circuit television at trial or the videotaping of the child witnesses' testimony (R 588).

On October 19, 1990, the jury found respondent guilty as charged (R 594-95). On January 30, 1991, the trial court adjudicated respondent guilty, and sentenced him to life imprisonment on each count of sexual battery, to run concurrently, each carrying a 25 year minimum mandatory, to run concurrently, and to 22 years' imprisonment on the lewd and lascivious count (R 630-36). Respondent moved for a new trial, and pursuant to a stipulation by the state and

defense counsel, on February 13, 1991, the trial court granted a judgment of acquittal as to count 3 (lewd and lascivious) of the information (R 675). On February 25, 1991, the trial court denied respondent's motions for judgments of acquittal on the other counts (R 676). Respondent timely filed his notice of appeal on February 27, 1991 (R 677).

In his initial brief to the First District, respondent raised five issues: (1) The trial court erred in allowing the testimony of psychologist Michael DeMaria, over objection, explaining the characteristics of a pedophile; (2) the trial court erred in admitting, over objection, the child victim's prior consistent statements; (3) the trial court erred in not granting a judgment of acquittal as to count 2 of the information; (4) the trial court erred in allowing the child witnesses to testify via closed circuit television and outside the presence of the jury; and (5) the trial court committed the following cumulative errors: (a) in allowing the prosecutor to improperly vouch for the credibility of a state's witness and to attack the personal integrity of respondent's attorney; (b) in failing to allow respondent's attorney to bring out exculpatory parts of a statement made by respondent to a deputy sheriff after the latter had testified to inculpatory parts of the same statement; (c) in prohibiting respondent's attorney from

arguing that proof beyond a reasonable doubt is proof to a moral certainty; and (d) in allowing the state to impeach respondent's wife with respondent's prior statement. The state filed an answer brief, in which it addressed the five issues presented by respondent and propounded a sixth issue on cross-appeal concerning the trial court's denial of a state's motion in limine.

On November 4, 1991, the First District reversed respondent's convictions based strictly on its consideration of the first issue presented -- the pedophile profile evidence. The First distinguished its decision in Flanagan v. State, 586 So.2d 1085 (Fla. 1st DCA 1991),[1] finding that, "[i]n Flanagan, the profile testimony was not linked to the defendant, whereas in this case, the prosecutor argued at length that [respondent] met the characteristics of the profile." (A 5). Regarding the state's issue on cross-appeal, the First found that the trial court committed no error in permitting respondent to introduce evidence that the victim charged that another man committed similar illegal acts upon her, citing to State v. Savino, 567 So.2d 892 (Fla. 1990) (A 2).

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[1] Flanagan is currently pending in this Court, case number 78,923.

On November 18, 1991, the state moved for certification of the same questions certified in Flanagan, and on December 26, 1991, the First District granted this request (A 6-7). On January 15, 1992, the state filed its notice to invoke this Court's discretionary jurisdiction. On January 16, 1992, the state moved this Court to recall the mandate issued by the First on January 13, 1992; this motion is still pending. On January 21, 1992, this Court postponed its decision on jurisdiction, and established a briefing schedule. This brief follows.

SUMMARY OF THE ARGUMENT

As to Issue I:

Although respondent objected in the trial court to introduction of the pedophile profile evidence, he did so solely on relevance grounds. Under Glendening, such an objection was insufficient to preserve for appellate review his arguments that the jury would place too much emphasis on Dr. DeMaria's testimony and might infer that Dr. DeMaria was vouching for the credibility of N.M. Accordingly, the First District erred in reaching the merits of this issue.

As to Issue II:

Pedophile profile evidence does not constitute expert scientific evidence which must pass the Frye test before being admitted. Because Dr. DeMaria testified strictly as to general profile information/aspects, the "new scientific techniques" requirement of Frye simply was not implicated.

SUMMARY OF THE ARGUMENT (Continued)

As to Issue III:

The trial court did not abuse its discretion in admitting the pedophile/child sex offender evidence, because the state presented the evidence to anticipatorily rehabilitate the testimony of N.M. and because its probative value outweighed any prejudice. If this Court finds that the trial court erred in admitting this evidence, any such error was clearly harmless in light of the other substantial, unchallenged evidence of respondents' guilt presented by the state.

As to Issue IV:

The First District erred in finding no abuse of discretion by the trial court in its denial of the state's motion to restrict defense counsel from asking the victim whether she had been sexually abused by anyone other than respondent. It is clear that Hattenback's alleged commission of sexual battery on N.M. had nothing to do with respondent's commission of the instant charged offenses, and thus was not relevant.

ARGUMENT

Issue I

WHETHER RESPONDENT PRESERVED THE ISSUE OF PEDOPHILE PROFILE EVIDENCE FOR APPELLATE REVIEW BY THE FIRST DISTRICT COURT OF APPEAL.

By addressing the merits of respondent's pedophile profile issue, the First District overlooked one very significant fact: Respondent failed to preserve this issue for appellate review. Defense counsel below objected to the profile evidence solely on relevance grounds (T 133). Therefore, the only issue preserved before the First District was relevance. Instead of arguing relevance, however, respondent argued that the jury would place undue emphasis on such an expert's testimony and might infer that the expert was vouching for the credibility of the victim.

Glendening v. State, 536 So.2d 212 (Fla. 1988), cert. denied, 492 U.S. 907 (1989), is instructive on this point. There, defense counsel objected to expert testimony only on the basis of relevance, not, as argued on appeal, that the expert was improperly vouching for the credibility of the victim. Declaring that the point was not preserved, this Court stated that the issue argued "must be the specific contention asserted as the legal ground for the objection below." Id. at 221 (emphasis in original) (citing Steinhorst v. State, 412 So.2d 332 (Fla. 1982)).

Accordingly, the First District should not have addressed this point.

Issue II

CERTIFIED QUESTION NO. 1: IS EXPERT SCIENTIFIC TESTIMONY WHICH DOES NOT MEET THE TEST OF FRYE V. UNITED STATES, 293 F. 1013 (D.C. CIR. 1923), FOR ADMISSIBILITY OF NOVEL SCIENTIFIC EVIDENCE OTHERWISE ADMISSIBLE AS BACKGROUND INFORMATION IN A CRIMINAL TRIAL?

A. Rephrasing the question, does pedophile profile evidence constitute expert scientific evidence which must pass the Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), test before being admissible in a sexual battery case?

The state respectfully suggests that the question posed by the First District is inaccurately worded, as it labels the instant pedophile profile evidence as expert scientific evidence before it asks whether it must meet the Frye test, which governs the admissibility of scientific evidence, not expert psychological opinion. Further, it reaches beyond the facts of the instant case. The First District certified the instant question because it did so in Flanagan v. State, 586 So.2d 1085 (Fla. 1st DCA 1991). But, in Flanagan, the plurality opinion of the court specifically declined to "speculate . . . [o]n whether scientific acceptance of such testimony will come in the future, thereby meeting the exacting standards first laid down in Frye," because the pedophile profile evidence was admitted only as background information and was, in any event harmless. Id. at 1100. Accordingly, the state suggests, and addresses, the above question in its stead.

One of the critical aspects of this issue is the actual holding of the Flanagan plurality opinion. It did not approve the wholesale admissibility of pedophile profile evidence; rather, it held that such evidence was properly introduced as background information, or in the alternative, improperly introduced, but harmless under the facts of this case. Such a position is eminently wise, as the issue concerns a new, evolving area of the law, one which should be decided based on the unique facts of cases where the issue is dispositive. This Court should not commit itself to a firm rule of law based on a hypothetical issue.

The other district courts of appeal have followed this approach. In Erickson v. State, 565 So.2d 328 (Fla. 4th DCA 1990), Dr. Mandri testified that, in his opinion, the defendant suffered from pedophilia and antisocial behavior, and was not truthful during the interview. The Fourth District held that, because the defendant's mental condition was not at issue, the expert should not have been allowed to testify as to this information. Compare Francis v. State, 512 So.2d 280 (Fla. 2d DCA 1987) (such evidence was inadmissible under section 90.404 because the state did not offer it to rebut an issue raised by the defendant). However, the court concluded that its admission was harmless under the facts of that case.[2]

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[2] Respondent cited to both Erickson and Francis in his

Important, although not discussed in Erickson, is the information actually related by Dr. Mandri. He in fact offered an opinion as to whether the defendant was a pedophile, which made his testimony expert. See also Francis, 512 So.2d at 280 (the state's expert child psychologist testified that, in his opinion, the defendant had a personality characteristic of being attracted to children). In the instant appeal, however, Dr. DeMaria never related an opinion as to whether respondent fit the profile. His testimony was strictly informational, and as such, was not an expert opinion, thereby not implicating Frye. See People v. McDonald, 37 Cal. 3d 351, 690 P.2d 709, 208 Cal. Rptr. 236 (1984). See also Comment, The Admissibility of Expert Psychological Testimony in Cases Involving the Sexual Misuse of a Child, 42 **U. Miami L. Rev.** 1033, 1060 (1988) ("An expert testifying as to general facts obtained through the application of traditional research methods is not applying new scientific techniques. The expert, instead, is testifying as to facts within either personal knowledge of contained in learned treatises reasonably relied upon by experts in the field. Therefore, the Frye test is inapplicable in such a situation."); People v. Gray, 187 Cal. App. 3d, 231 Cal. Rptr. 658 (1986) (where

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brief to the First District, without noting that neither absolutely precludes the admission of such evidence and without noting that the Erickson court actually found the evidence harmless there.

doctor called to testify concerning child sexual abuse accommodation syndrome, evidence properly admitted without applying Frye because it was not admitted for purposes of establishing diagnosis or rendering opinion, but for description of traits and characteristics); Flanagan, 586 So.2d at 1110-11 (Ervin, J., dissenting) ("Presumably, Frye was not discussed [in Glendening] because the expert provided strictly personal opinion testimony.").

This Court should not be persuaded by Judge Ervin's dissent in Flanagan, which contains a fatal flaw: Judge Ervin concludes that Frye applies because the expert there based her testimony on "certain studies of child sexual abusers and their victims." Flanagan, 586 So.2d at 1111. Under the terms of Frye itself, such an observation in no way invokes the Frye test. Further, such an observation is inconsistent with other areas of the law in which studies are relied upon, but which have not been mandated to comply with Frye, for example, experts testifying about a defendant's insanity. See Flanagan, 586 So.2d at 1109 (Ervin, J., dissenting) (noting that Frye has been applied in the past only to test the reliability of new scientific physical procedures, like hypnosis, lie detector examination, and voiceprint identifications, not to new psychological procedures); Flanagan v. State, Case No. 87-871, proposed panel opinion attached to order dated Nov. 20,

1990 at 61 (Wentworth, J., dissenting) ("Neither Bundy [v. State, 471 So.2d 9 (Fla. 1985)] nor Stokes [v. State, 548 So.2d 188 (Fla. 1989)] extends the Frye test to general syndrome evidence such as is involved in the present case. Indeed, [Judge Ervin] recognized this with regard to Bundy, expressly rejecting the application of Frye to syndrome evidence in his partial concurrence and dissent in Hawthorne v. State, 470 So.2d 770 (Fla. 1st DCA 1985).").

Issue III

CERTIFIED QUESTION NO. 2: IS PEDOPHILE/ CHILD SEX OFFENDER PROFILE EVIDENCE ADMISSIBLE IN A CRIMINAL TRIAL?

Again, the state submits that the above question is inaccurately presented, as it in no way reflects the issue as addressed in the trial court and First District. This Court should not reach beyond the facts of this case, where it is clear that the evidence was not used to show that respondent was the offender.

Further, this question seeks a definitive answer to a question which concerns an evolving area of the law and is therefore most appropriately treated on a case-by-case basis. As Justice Shaw aptly noted in a different context:

> If we maintain the Bundy [v. State, 471 So.2d 9 (Fla. 1985), cert. denied, 479 U.S. 894 . . . (1986)] per se rule, as slightly modified by the decision here, evolution and experience, as it applies to criminal proceedings, cannot take place in Florida. This and other Florida courts will be bystanders awaiting incremental directions from the United States Supreme Court which may well result in numerous reversals of Florida convictions or, in the case of acquittals, the denial of relevant hypnotically recalled evidence. I would adopt the approach outline in Judge Ervin's thoughtful examination of the issue in Brown v. State, 426 So.2d 76 (Fla. 1st DCA 1983), of which we spoke approvingly in Bundy v. State, 455 So.2d 330 (Fla. 1984). Briefly, the approach calls for a threshold determination by the trial judge of the reliability and

> relevant of the hypnotically recalled evidence based on the specific circumstances of the hypnotic session(s), novelty and want of general scientific acceptance being only one facet in the court's relevancy analysis. Thereafter, assuming the evidence is admitted, the jury should be instructed on the potential shortcomings of the technique and the parties should be permitted to attack or defend the technique using available authorities and evidence. In essence, the issue at this stage becomes one of weight and credibility for the jury.

Morgan v. State, 537 So.2d 973, 977-78 (Fla. 1989). Accordingly, the state suggests and addresses the following question:

> WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING THE PEDOPHILE/ CHILD SEX OFFENDER PROFILE EVIDENCE.

The controlling question here, as with all evidence, is relevance. Fla. Stat. §90.402 (1987); Bryan v. State, 533 So.2d 744 (Fla. 1988), cert. denied, 104 L.Ed.2d 200 (1989). Once deemed relevant, the probative value of the evidence must outweigh any possible prejudice. If that hurdle is overcome, the evidence is properly admitted. Fla. Stat. §90.403 (1989).

In this case, the evidence was relevant[3] to anticipatorily rehabilitate the victim's testimony.

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[3] Despite the First District's "mounting trepidation" concerning such evidence, Flanagan, 586 So.2d at 1100, even

Respondent's theory of defense was as follows: The case against respondent only "came to light" because David Hattenback "had been doing some sexually molesting things to [the victim]." (T 39-40). Thus, according to respondent, in later interviews, the victim said respondent did the same things to her.[4] (T 40). This defense fully manifested itself during cross examination of the victim, when defense counsel questioned the victim extensively about Hattenback (T 197, 199-201) and "things [she saw her] mom doing that [she] didn't want to tell about in the bedroom with men" (T 199). Further, Dr. DeMaria's testimony was offered only for educational/informational purposes, and in no way pointed to respondent as the perpetrator.

If this Court determines that the admission of the profile evidence was erroneous, the state submits that such an error was harmless because the state presented other substantial, unchallenged proof of respondent's guilt. See Duley v. State, 56 Md.App. 275, 467 A.2d 776 (1983) (while child battering profile deemed "totally irrelevant," court

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Judge Ervin noted that such evidence can be relevant. Id., 586 So.2d at 1109 n.19.

[4] In establishing his theory of defense during opening statements, defense counsel said of the victim: "I can't tell you what she's going to tell you today, and the prosecutor can't either, because every time she tells a story, it's told different[ly]. But what we submit to you is that she's not telling the truth about [respondent]." (T 40).

found its admission harmless in light of other sufficient evidence); State v. Loebach, 310 N.W.2d 56 (Mn. 1981) (even though defendant did not place his character at issue, admission of battering parent profile harmless in light of overwhelming evidence of guilt); Sanders v. State, 251 Ga. 70, 303 S.E.2d 13 (1983) (admission of battering parent profile erroneous but harmless due to overwhelming evidence and fact that it had been covered in other unchallenged evidence).

Specifically, the state introduced respondent's admissions to Officer Elswick, which were quite incriminating: Respondent admitted to knowing the victim for several years, and to having baby-sat her very often, occasionally alone (T 84). He told Elswick that he could not think of any reason why the victim would want to get him in trouble (T 84). Respondent wondered, if the victim's accusation were true, "what in the world" was happening to him (T 85). He admitted to kissing the victim all over, including placing his tongue in her mouth (T 86); to kissing the victim's genital area, and that it scared the devil out of him (T 87-88); and to watching a movie depicting sexual relations between adults and children, and to reading books on the same subject (T 91-92). Respondent also admitted to having fantasies about sexual relations with children (T 92-94).

The state's first witness, Belinda Norred, testified that the victim said respondent put his penis in her mouth (T 48). Deborah Cannon, an HRS worker, related the victim's statements to her: Respondent put his mouth on her "front private part"; respondent's pants were down and he forced the victim to touch his "thing"; and these activities occurred more than once at respondent's house (T 57-59). The victim told another witness the same thing (T 76). The victim testified via closed circuit television, stating without hesitation that respondent touched her "on her private" and that respondent made her put her mouth on his private (T 190-91). She described where and how respondent kissed her, and stated that he taught her the phrase "French [kissing]." (T 193). Thus, there is no reasonable possibility that the pedophile profile evidence affected the jury's verdict. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

Issue IV[5]

WHETHER THE FIRST DISTRICT ERRED IN UPHOLDING THE TRIAL COURT'S DENIAL OF THE STATE'S MOTION IN LIMINE.

On cross-appeal, the state contended that the trial court erred in denying its motion to restrict defense counsel from asking the victim whether she had been sexually abused by anyone other than respondent (T 480-81). Although the prosecutor stated that she would not offer evidence of physical injury to the victim (T 481), the trial court denied this motion (T 20) while acknowledging the relevance problem (T 18).

The First District found no abuse of discretion by the trial court and cited to Savino. However, in Savino, the Fourth District certified, and this Court answered, the following question:

> May a defendant show that someone other than himself committed the crime for which he is charged by introducing evidence that another person with an opportunity to commit the crime charged, committed a similar crime by similar methods. . . .

567 So.2d at 893 (emphasis supplied). It is clear from the record in this case that Savino does not apply.

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[5] The state presents this issue pursuant to **Fla. Stat. §** 924.37 (1989).

Defense counsel never argued to the trial court that Hattenback committed the charged offenses. Instead, he observed:

> The acts . . . with Mr. Hattenback are much closer in time to the time of her complaint and are exactly those that she complains that Mr. Phillips did. I mean, I think it's completely incredible that two separate people are doing the exact same thing to this child and not acting in concert and not aware that the other is doing it. I mean, it goes to her complete credibility.

(T 19). Such an argument strains the bounds of relevance and Savino, as the evidence concerning Hattenback has nothing to do with the charged offenses.[6] Whether Hattenback also committed sexual battery on N.M. does not absolve respondent of a similar offense.

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[6] Such an argument also makes clear that respondent actually sought to introduce dissimilar and irrelevant reverse-Williams v. State, 110 So.2d 655 (Fla.), cert. denied, 361 U.S. 847 (1959), rule evidence. Assuming Hattenback, the live-in boyfriend of N.M.'s mother, sexually battered N.M., the incident involved penetration or simulated intercourse. In contrast, the crimes at issue involved the baby-sitter's husband and occurred at his home. The incidents began with kissing "all over," but did not involve penile/vaginal contact, penetration, physical injury, or simulated intercourse.

CONCLUSION

Based on the above cited legal authorities and arguments, the state respectfully requests this Honorable Court to: (1) find that respondent did not properly preserve the issue concerning the pedophile profile evidence for appellate review, and find accordingly that the First District erred in addressing the issue; (2) answer the certified questions as rephrased by the state in the negative; and (3) find that the First District erred in its disposition of the state's issue on cross-appeal.

Respectfully submitted,

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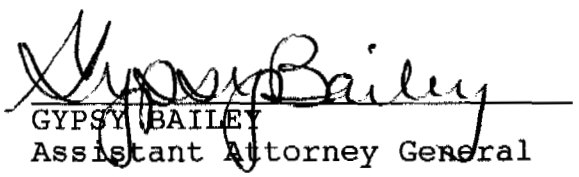
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing answer brief has been furnished by U.S. Mail to LEO THOMAS, ESQ., of LEVIN, MIDDLEBROOKS, MABIE, THOMAS, MAYES, & MITCHELL, P.A., 226 Palafox Street, Pensacola, Florida 32501, and BRENDA NEEL, Assistant State Attorney, Post Office Box 12726, Pensacola, Florida 32575, this 17th day of February, 1992.



GYPSY BAILEY
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No.: 79,233

CHARLES R. PHILLIPS, SR.,

Respondent.

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APPENDIX

Phillips v. State, Case No. 91-659, slip opinion (Fla. 1st DCA Nov. 4, 1991)

Phillips v. State, Case No. 91-659, slip opinion on motion for certification (Fla. 1st DCA Dec. 26, 1991)

91-110420-TLR

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO.: 91-659

CHARLES RICHARD PHILLIPS, SR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CORRECTED p3

FILED 11/22/91

BY JT

Opinion filed November 4, 1991.

An Appeal from the Circuit Court for Escambia County. Frank L. Bell, Judge.

Leo A. Thomas of Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A., Pensacola, for Appellant.

Robert A. Butterworth, Attorney General; Charlie McCoy, Assistant Attorney General, Tallahassee, for Appellee.

SMITH, J.

Appellant appeals his convictions for two counts of sexual battery upon a child less than 12 years of age. We agree that the state was allowed to introduce inadmissible "pedophile profile" testimony as substantive evidence of appellant's guilt

and therefore reverse his convictions and remand for a new trial. Because of our disposition of this point, we do not reach the remaining points raised by appellant. Regarding the state's cross-appeal, we agree that the trial court did not err in permitting the defendant to introduce evidence that the victim in this case charged that another man committed similar illegal acts upon her. State v. Savino, 567 So.2d 892 (Fla. 1990). We write in greater detail in this case to illustrate the improper use of pedophile profile testimony in the hopes that future convictions will not be subject to reversal on this ground.

The victim in this case was under the baby-sitting care of appellant's wife. After she reported sexual improprieties by appellant to the authorities, he was charged with these sexual battery offenses. At his trial, the state presented the testimony of the victim,[1] evidence of her prior consistent statements made to an HRS worker, a member of the Child Protection Team, and a friend of her grandmother, and admissions made by appellant to a deputy sheriff. In addition, the state called Dr. Michael DeMaria, a clinical psychologist, who testified over objection about the profile of a sexual abuser of children, describing, among other things, the two basic subgroups of a pedophile.

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[1] The victim's testimony established the commission of one sexual battery, but not the other.

While Dr. DeMaria in his testimony did not directly link the pedophile profile to appellant, the state unmistakably did. In closing argument, the prosecuting attorney stated:

> Going back to what Dr. DeMaria said, you heard he was an expert in his field, particular dealing with sexual victims and their perpetrators. He told you about the two types of pedophiles that there were. There were aggressive pedophiles and fixated pedophiles. The defense will probably tell you that there is no way that this man can do this to these children because he's married. Well, you heard Dr. DeMaria say that one of the pedophiles is the regressed pedophile, and the regressed pedophile is often married. Just because you're married does not mean you're a pedophile -- that you're not a pedophile, excuse me, as the defense would probably have you believe. Then he told you about some of the things that pedophiles do or some of the things they think about. He told you they fantasize about having sex with children. Its constantly on their mind. He told you that they read books about sex with children, they watch movies or videos and that sometimes they need a release for that. Sometimes it can be masturbation and sometimes it can go further, which is the actual touching of the children. He told you that when pedophiles are playing with children, they get sexual feelings from playing with children. He told you that they try to deny their feelings so that they think hey, I'm normal, everybody thinks like this. And he told you they put themselves in situations where they have ready access to children, which is exactly what Mr. Phillips did, opened his home for baby-sitting so he could have ready access to children. And then, once again, as Dr. DeMaria told you with pedophiles it starts out with love, but it crosses the line, and the State submits that's exactly what happened here.

And again, the prosecutor argued:

> As Dr. DeMaria said, they try to generalize their feelings and believe

> that everybody thinks things like that. And when he [appellant] was talking about the sexual feelings, he [appellant] said I imagine they go through anybody's mind. The State submits they don't go through anybody's mind . . .

Significantly, during the state's rebuttal closing argument the prosecutor said:

> And lastly, the defense talks about the fact that anybody -- the State is saying that anybody who just happens to like, have access to children must be pedophiles. That's not what the State said. The State told you that there is a whole set of factors that you look at to determine if a person is a pedophile, not just one, a whole set of factors, those factors being whether or not they fantasize about children, whether or not they read books with children, whether or not they see movies with children, whether or not they have sexual thoughts going through their mind when they are playing with children, whether or not they masturbate when they are thinking about children and fantasizing about children, and whether or not they put themselves in situations where they have access to children. Its not one factor that makes you a pedophile, its a combination of factors.
>
> And the defendant had that combination of factors. . . .

In both the majority and minority opinions in this court's recent decision of Flanagan v. State, 16 F.L.W. D1935 (Fla. 1st DCA July 15, 1991)(en banc), on reh'g questions certified, 16 F.L.W. D2693 (Fla. 1st DCA, Oct. 14, 1991), this court condemned the practice of using pedophile profile testimony as substantive evidence of a defendant's guilt. While five members of the court would have permitted such testimony if

offered for the purpose of providing juror understanding, the remainder of the court was of the view that admission of such testimony was error. However, a majority of the court agreed that admission of such testimony is subject to a harmless error analysis. While in Flanagan this court found the admission of such testimony to be harmless, it is our view that the admission of the testimony in this case cannot be considered as harmless error. In Flanagan, the profile testimony was not linked to the defendant, whereas in this case, the prosecutor argued at length that appellant met the characteristics of the profile. Thus, Dr. DeMaria's testimony was used to show that because appellant met the characteristics of the profile, he committed the crime. Unlike Flanagan, this was trial by pedophile profile, which we find to be reversible error.

Accordingly, appellant's convictions are REVERSED, and this case is remanded for a new trial.

MINER, J., AND WENTWORTH, S.J., CONCUR.

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

CHARLES RICHARD PHILLIPS, SR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO. 1V69

Opinion filed December 26, 1991.

An Appeal from the Circuit Court for Escambia County. Frank L. Bell, Judge.

Leo A. Thomas of Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A., Pensacola, for Appellant.

Robert A. Butterworth, Attorney General; Charlie McCoy, Assistant Attorney General, Tallahassee, for Appellee.

ON MOTION FOR CERTIFICATION

PER CURIAM.

On motion filed by the state, we certify to the Florida Supreme Court the two questions certified as matters of great public importance in Flanagan v. State, 16 F.L.W. D1935 (Fla. 1st

DCA July 15, 1991)(en banc), on reh'g questions certified, 16 F.L.W. D2693 (Fla. 1st DCA Oct. 14, 1991):

> 1. Is expert scientific testimony which does not meet the test of Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) for admissibility of novel scientific evidence otherwise admissible as background information in a criminal trial?
>
> 2. Is Pedophile/child sex offender profile evidence admissible in a criminal trial?

SMITH AND MINER, JJ., AND WENTWORTH, S.J., CONCUR.