IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No. 80,663

ROBERT GARNER JETT,

Respondent.

_____/

ON CERTIFIED QUESTION FROM THE
DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA, FIFTH DISTRICT

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

This case is before the court on questions certified to be of great public importance concerning the applicability of a statutory waiver of the evidentiary privilege between the professional and patient in a case involving child abuse and neglect. §415.512 Fla. Stat. (1989). The fifth district reversed and remanded for a new trial in a sharply divided en banc decision and the state seeks review. The certified questions are:

> 1. DOES SECTION 415.512 ABROGATE THE PSYCHOTHERAPIST-CLIENT PRIVILEGE FOR COMMUNICATIONS BETWEEN THE THERAPIST AND CHILD IN ALL SEXUAL BATTERY CASES WITHOUT REGARD TO WHETHER OR NOT THE ALLEGED BATTERER IS A PERSON RESPONSIBLE FOR THE CHILD'S WELFARE AS DEFINED BY SECTIONS 415.503(3) and (11)7.(2), OR
>
> 2. DOES THE ABROGATION OF THE PRIVILEGE ONLY APPLY TO CASES INVOLVING "PERSONS RESPONSIBLE FOR A CHILD'S WELFARE" AS DEFINED BY SECTIONS 415.503(3) AND (11), AND IF SO LIMITED TO SUCH PERSONS, IS THE PRIVILEGE ABROGATED IN ALL SEXUAL BATTERY CASES SUCH AS RAPE AND LEWD ASSAULT WHICH INVOLVES SUCH PERSONS AS BATTERERS WITHOUT REGARD TO WHETHER THE JUDICIAL PROCEEDING RELATES TO CHILD ABUSE OR NEGLECT?

Jett was convicted of two counts of capital sexual battery and two counts of lewd and lascivious assault. (R 1001-1005) §§ 794.011(2); 800.04(1), Fla. Stats. (1987). He was sentenced to two concurrent life terms. (R 1040-1045)[1]

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[1] Certain portions of the trial testimony were transcribed out of order for use in a post-trial motion hearing. Chronologically, the testimony was adduced at trial as follows: record pages 1-174; 784-813; 174-336; 814-837; 336-349; 837-843; 349-489.

The victims in this case are Jett's nieces, ages 7, 8 and 10 at the time of the offenses. In May, 1988, Jett stayed in his sister's home for five days immediately after moving to Florida. (R 135-137) Jett babysat the three girls during that time. (R 136) The girls' mother observed inappropriate behavior, and upon inquiry, the girls gave explicit descriptions of sexual activity with Jett which supports the crimes charged. (R 142-146; 163; 169-171; 796-801) The girls' testimony corroborated each other. (R 163-171; 796-801) Specifically, they testified that Jett performed cunnilingus on each girl in the other's presence.

A timely notice of appeal was filed and the public defender was appointed to represent Jett. Several claims were presented in the briefs; all save one were determined to be meritless. Oral argument was entertained on December 3, 1990.

On June 13, 1991, the panel issued its first decision in this case, affirming Jett's convictions and sentences. Upon timely motion for rehearing and rehearing en banc filed on Jett's behalf, the panel withdrew its prior opinion and substituted another in its place on October 31, 1991. The state then moved for rehearing and rehearing en banc. The en banc motion was granted and the final decision was issued on September 25, 1992. (See petitioner's appendix) Jett v. State, 17 F.L.W. 2219 (Fla. 5th DCA September 25, 1992) Judge Harris wrote the majority decision, joined by Judges Dauksch, Cobb and Peterson. Judge Cowart concurred with a special opinion. Judges Sharp, Griffin, Goshorn and Diamantis dissented. All judges agreed that the certified questions posed by Judge Sharp "...should be certified to the supreme court." Id.

SUMMARY OF ARGUMENT

The en banc decision of the district court below fails to address the state's claim that the issue presented herein was never presented in any manner to the trial court, and as such, was not preserved for appellate review. At no time did the defense suggest to the trial court that any privilege was abrogated by section 415.512, Florida Statutes (1987). It is a basic premise of appellate law that objections not made to the trial court cannot form the basis for appellate review.

Even if preserved, the sharply divided en banc decision ignores legislative intent. The dissent by four judges demonstrates that the statute is unclear, and so legislative intent must be consulted to correctly interpret the statute. Even if the statute is unambiguous, the interpretation given the statute by the district court below fails to follow evident legislative intent, and indeed, acknowledges that the opposing view is "reasonable and practical". The statute at issue cannot be read in isolation, but must be read as part of a statutory scheme designed to prevent harm to a child who is a victim of abuse. By interpreting the statute to abrogate the privilege to report, but as inapplicable to the ongoing treatment after disclosure of the abuse, the legislative intent is satisified. By interpreting the abrogation of the privilege as applying to all treatment, even long after disclosure, the legislative intent to protect child victims is thwarted and the children are in fact harmed. The children's privacy rights are ignored for no good reason. Nothing in the statute or the constitution gives Jett

the right to review the otherwise confidential communications between his child victims and their treating psychotherapists as they try to recover from the psychological harm caused by Jett's abuse.

ARGUMENT

THIS ISSUE IS NOT PRESERVED FOR REVIEW. EVEN IF PRESERVED, THE TRIAL COURT'S RULING THAT TWO VICTIM'S STATEMENTS TO MENTAL HEALTH PROFESSIONALS WERE PRIVILEGED DID NOT INFRINGE UPON JETT'S CONSTITUTIONAL OR STATUTORY RIGHTS.

The psychotherapist-patient privilege, (invoked in this case by the children's mother on their behalf), is set forth in Florida's Evidence Code, section 90.503(2), Florida Statutes (1989). It provides in part:

> A patient has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications or records made for the purpose of diagnosis or treatment of his mental or emotional condition... between himself and his psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist. This privilege includes any diagnosis made, and advice given by the psychotherapist in the course of that relationship.

Jett argues that this privilege is abrogated in this case by section 415.512, Florida Statutes (1987). This section provides:

> 415.512 Abrogation of privileged communications in cases involving child abuse or neglect.--
> *The privileged quality of communication* between husband and wife and *between any professional person and his patient or client*, and any other privileged communication except that between attorney and client or the privilege provided in s. 90.505, as such communication relates both to the competency of the witness and to the exclusion of confidential communications, *shall not apply to any situation involving known or suspected child abuse or neglect and shall not constitute grounds for* failure to report as required by s. 415.504, failure to cooperate with the department in its activities pursuant to ss. 415.502-415.514, or *failure to give evidence in any judicial proceeding relating to child abuse or neglect.* (emphasis added)

Jett contends that the trial court improperly found that statements made by T.F. and C.F. to Doctor Media and Ms. Roberts were privileged under section 90.503, Florida Statutes, (1987)[2] Specifically, he claimed below that this ruling deprived him of his "...constitutional rights to a fair trial and meaningful cross-examination of his accusers." (IB 21) He contended that in this instance, "The prejudice cannot be ascertained retroactively." (IB 21) The state disagrees for several reasons.

A. ISSUE IS NOT PRESERVED

The claim raised on appeal was not presented to the trial court and as such, is not preserved for appellate review. At no time did the defense claim at trial as they do on appeal that the privilege under section 90.503 is abrogated by section 415.512, Florida Statute (1987). It is a basic principle of appellate law that in order for a claim to be cognizable on appeal, the objection on the same specific grounds that are argued on appeal must have been presented to the trial court. Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Occhicone v. State, 570 So.2d 902 (Fla. 1990). It is not enough that an objection was made on different grounds; the new issue is not preserved for appellate review. Tillman v. State, 471 So.2d 32 (Fla. 1985)

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[2] The state suggests that section 90.5035, Florida Statutes, (1987) also renders these statements privileged.

The written motion below requested the court to permit discovery of the medical records of the treatment of T.F. and C.F. by Dr. Medea Woods and Carol Roberts, or alternatively, to preclude their testimony. (R 996-997) Hearings on this motion were conducted February 24 and 28, 1990. (R 503-589, 1007) The objections below were that the state failed to lay a proper predicate that these persons were licensed, that the statements were not made for the purpose of diagnosing a mental or emotional condition, and other predicates to the applicability of the privilege had not been satisfied. (R 543-549, 553, 556-558, 571, 575-576) For example, quoting from the last record reference, counsel stated, "I would request that the Court rule that the psychotherapist privilege under 90.503 has not been established in that a predicate under all the various definitions and conditions that fall within that particular rule of evidence have not been established by competent substantial evidence at this hearing." In response to this specific objection, the court noted that the state had established that Woods was licensed and Roberts was acting under the direction of someone who was licensed and that they were engaged primarily in the diagnosis and treatment of emotional or mental disorders. (R 576) He further held that the witnesses had described the children as patients with the definition of the statute. (R 576) The trial court correctly ruled upon the argument presented below.

In response to the court's overruling his objection, the defense contended that his due process rights were violated because the privilege had been asserted for two of the victims,

but waived as to the third victim. (R 582-584) Since this was a multi-count information and since the state provided notice that it would use similar fact evidence, rendering severance pointless, the defense objected. This argument was premised on the theory that the privilege was "partially waived". The state responded that each of the children had been counseled individually, and waiver of one child's privilege did not constitute a partial waiver of the other children's rights. (R 585) The court then stated that he could not rule on the motion at that point. (R 585-586) Defense counsel persisted, stating that he wanted to depose the doctor before trial, and the court responded, "I will deny your motion for purposes of discovery. You can raise it again either at trial or in a motion for new trial if you need to." (R 586) At trial, Roberts did not testify; Woods was called as a state witness to relate hearsay statements from E.F., and to describe generally delay in disclosure of sexual abuse, or post-traumatic syndrome. (R 205-245) After much discussion as to the exact nature of Woods' expertise, the state essentially withdrew this witness.

The state suggests that the trial court was never presented with the specific objection raised on appeal, that the privilege was abrogated by section 415.512, Florida Statutes (1987). Therefore, this claim is not preserved for review.

As recently as last week, this court held that "(A)n appellate court will not reverse int he absence of an objection unless the comment is so prejudicial as to be fundamental error." Jones v. State, Case No. 78,160, slip opinion, p. 6 (Fla.

December 17, 1992). See also, Tillman v. State, 471 So.2d 32 (Fla. 1985).

A specific, timely objection was necessary to preserve this issue for review, and without presenting the claim to the trial court, it was waived. This error is not fundamental error, which can never be harmless. See, State v. DiGuilio, 491 So.2d 1129 (Fla. 1987); Chapman v. California, 386 U.S. 18 (1967). If it is not fundamental error, it is either plain error or constitutional error, both of which can be waived by failure to make a specific, timely objection. Ray v. State, 403 So.2d 956 (Fla. 1981). Alleged discovery violations are not fundamental error. The right of confrontation is a trial right and does not embody a constitutional right to pretrial discovery for preparation of cross-examination. Pennsylvania v. Ritchie, 480 U.S. 39 (1987). Even if viewed as a violation of the right to confrontation at trial (which the state does not concede), the error can still be harmless. Delaware v. Van Arsdall, 475 U.S. 673 (1986). Therefore, an objection was necessary to preserve this error for appellate review. Absent a specific objection, the issue has been waived.

The state contended from the first time this issue was raised that it was not preserved, and maintained that position throughout. The district court did not address the argument that no objection was made below to preserve this novel claim. The state respectfully requests this court to find the merits were reached in error as the claim was never presented to the trial court to preserve the issue for appellate review.

B. SECTION 415.512 DOES NOT APPLY IN THIS CASE

Even if preserved, no error is presented. Section 415.512 applies only to proceedings pursuant to chapter 39, child neglect, or prosecutions pursuant to section 827.07(8), Florida Statutes (1989). In re E.H. v. Department of Health and Rehabilitative Services, 443 So.2d 1083 (Fla. 3d DCA 1984).

Judge Sharp would interpret the statute to limit the abrogation of the privilege to those cases involving "child abuse or neglect".

"The goal of getting child abuse and neglect cases promptly reported and prosecuted is served by waiving the traditional privilege at issue in this case (i.e., the psychotherapist privilege). But this in not a child abuse/neglect case or proceeding. Jett was charged and brought to trial for capital sexual battery and lewd and lascivious assault. The abrogation of the psychotherapist privilege provided for in chapter 415 for child abuse and neglect cases is not expressly applicable to cirminal prosecutions for sexual battery and lewd assault. It only applies to proceedings 'relating to child abuse or neglect.'[3]

"Chapter 415.503(3) defines child abuse as 'harm or threatening harm to a child's physical or mental health or welfare by the acts or omissions of the parent or other persons responsible for the child's welfare.' Child abuse may be charged

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[3] §415.512, Fla. Stat. (1989)

in criminal cases[4] or it may be a relevant issue in dependency or termination of parental rights case.[5] However, simply because sexual battery may form the basis for a child abuse charge does not convert all sexual battery cases involving children into child abuse cases.[6] If so construed, a close relative who rapes a child will have the benefit of requiring disclosure of the child's statements to his or her psychotherapist, but a stranger who rapes a child under similar circumstances will have no such right. Such an anomalous and unequal application of the law should be avoided." Jett v. State, 17 F.L.W. at 2220.(J. Sharp, concurring in part and dissenting in part.)(footnotes in the original)

Another reason why the abrogation of the privilege is inapplicable in this case is because to do so would violate the children's right to privacy under the Constitution of Florida. Art. I, § 23, Fla. Const. This provision has been interpreted in a variety of situations, although admittedly not in the exact context advanced herein. See, e.g. In Re T.W., 551 So.2d 1186 (Fla. 1989); Shaktman v. State, 553 So.2d 148 (Fla. 1989). The state suggests that interpreting section 415.512 in the manner suggested by the majority below subverts not only the legislative

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[4] §§382.703; 827.04; 827.05, Fla. Stat. (1989)

[5] § 39.40-39.409;§§ 39.46-39.468, Fla. Stat. (1989)

[6] Sexual battery clearly may be the basis for a child abuse charge, but all sexual battery prosecutions involving child victims do not become child abuse cases within the context of chapter 415, or the other statutes cited above.

intent of the statutory scheme as argued below, but also is a violation of the children's right to privacy.

C. LEGISLATIVE INTENT IS SUBVERTED BY THE MAJORITY DECISION

Even if the statute is clear and unambiguous as the majority decision contends, it subverts the clear intent of the statute. Although the state agrees that unambiguous statutes must be given their plain meaning, the dissent of four judges below demonstrates that the statute is not clear. Reasonably well-informed judges were capable of understanding two different interpretations of the statute, and hence, it is ambiguous.

Even if unambiguous, Judges Griffin and Diamantis correctly point out that legislative intent must be given effect even though it may contradict the strict letter of the statute "if, from a view of the whole law, or from other laws in pari materia the evident intent is different from the literal import of the terms employed to express it in a particular part of the law, that intent should prevail, for that, in fact is the will of the Legislature." Forsythe v. Longboat Key Beach Erosion Control District, 604 So.2d 452, 454 (Fla. 1992), quoting Van Pelt v. Hilliard, 75 Fla. 792, 798-799, 78 So. 693, 694-695 (1918). This court held in Griffis v. State, 356 So.2d 297, 299 (Fla. 1978) that "where the context of a statute taken literally conflicts with a plain legislative intent clearly discernible, the context must yield to the legislative purpose, for otherwise the intent of the lawmakers would be defeated." Id., quoting Beebe v. Richardson, 156 Fla. 559, 23 So. 2d 718, 719 (1945). Section

415.512 cannot be read in isolation from the statutory scheme of which it is a part. State v. Webb, 398 So.2d 820 (Fla. 1981). This statute is one of several statutory provisions enacted to provide "comprehensive protective services for abused or neglected children." Ch. 79-203 Laws of Fla.

The dissenting opinions find that the express legislative intent is to require reporting of suspected child abuse. Since, as here, the child abuse had been reported before the time that the children were referred to the psychiatrist for treatment, the statute's goal has been achieved.

> [T]he salutary purpose of the statutory scheme has been accomplished and thus, there no longer exists any compelling public policy reason or necessity for abrogating the privilege between the psychologists and their patients....The legislature obviously did not intend to negatively impact the child's psychological evaluation and treatment by requiring unlimited disclosure of confidential communications involving personally sensitive and traumatic experiences when there is absolutely no need to do so. The reasonable and evident legislative intent was to abrogate the privilege to the extent necessary to accomplish the legislative policy of insuring that child abuse be reported. Jett v. State, 17 F.L.W. at 2222, (J. Diamantis, dissenting)

Judge Griffin's interpretation of the Legislature's intent is as follows:

"The legislative intent in enacting 415.502-415.514 is set forth in section 415.502:

> The intent of ss. 415.514 is to provide for comprehensive protective services for abused or neglected children found in the state *by requiring that reports* of each abused or neglected child *be made to*

> *the Department of Health and Rehabilitative Services in an effort to prevent other harm to the child* or any other children living in the home and to preserve the family life of the parents and children, to the maximum extent possible, by enhancing the parental capacity for adequate child care.

Within the statutory scheme, the function of section 415.511 and 415.512 is to overcome the twin legal excuses for failing to report suspected child abuse: exposure to civil liability and the obligation of confidentiality. A broad construction of this confidentiality waiver to permit a criminal defendant accused of sexual battery of a child to discover the child's communications with his or her treating psychiatrist or psychologist could have no conceivable child-protective function and may very well be damaging to the child's treatment and recovery.

"I am further convinced that the legislature never intended this waiver to extend beyond the specific object of the legislation--the reporting of known or suspected child abuse. The legislative intent is plain: 'to provide for comprehensive protective services for abused or neglected children found inthis state by requiring that reports be made to the Department of Health and Rehabilitative Services.' This statute overrides the privileges otherwise available under Florida law, but only (as the statute says) as to any situation involving *known or suspected* child abuse, including reporting, cooperation with HRS in carrying out its duties of documentation and investigation of such abuse reports, and the giving of evidence in any judicial proceeding arising out of the reporting of known or suspected abuse.

"I concede that two other cases which have considered this confidentiality waiver have (apparently) not perceived the waiver to be this limited, Carson v. Jackson, 466 So.2d 1188 (Fla. 4th DCA 1985); E.H. v. Dept. of HRS, 443 So.2d 1083, 1084 (Fla. 4th DCA 1984), but there is no suggestion this interpretation was directly raised in those cases. In fact, in Carson, (then) Judge Barkett observed:

> [T]he legislature, in passing ection 415.512, weighed the desirability of encouraging treatment for child abusers against the desirability of *discovering* them and decided that the latter was more important than the former. (emphasis added).

Carson, 466 So.2d at 1191. *Anyone* who hears of or suspects child abuse is obligated under this statutory scheme to report it. This includes physicians or psychiatrists, even if they learn of it while treating the abuser or the abused child. No privilege can interfere with the duty to report abuse except the privilege to communicate with one's lawyer or clergy. But this statute was not intended to expose anyone, whether victim or abuser, to ongoing discovery of communicaitons with their treating psychiatrist after disclosure of the abuse. Such a result not only would be manifestly unfair to victims, as in this case, but it is also not fair to the abuser who seeks treatment for his or her mental disorder. Post-discovery treatment would seem impossible when any communication to a treating psychiatrist would be admissible in evidence against the patient in any civil, criminal or other proceeding. It is inconceivable that a health

care professional could ethically accept communications from his or her patient without first disclosing that any such communications would be available as evidence against them in any civil or criminal case. The purpose of the section 415.512 statute has been met once the abuse has been discovered and reported. I do not suggest the statute applies only to the first person to report abuse; several reports by several persons may be involved. However, after the abuse is known to HRS the abuser and the abused can seek treatment without interference from this statute.

"If the two professionals whose testimony is in issue in this case had reported the abuse, I would agree with the majority that the broad language of the statute abrogates the privilege, even in favor of the alleged abuser. In the present case, however, the children were referred to these psychologists for treatment after the children had disclosed the abuse to their mother and she had reported it to HRS. In my view, this statutory abrogation of privileges in order to require the reporting of abuse has no application at all to these children's communications with their treating psychologist." Jett v. State, 17 F.L.W. at 2221. (J. Griffin, dissenting).

The majority decision agreed that Judge Griffin's interpretation of the statute was "both reasonable and practical." Jett v. State, 17 F.L.W. at 2219. This interpretation "reasonably balances the public policy of requiring child abuse or neglect to be reported with the policy of protecting hte child's right to have effective treatment after

having victimized and having suffered a very traumatic experience with long-lasting effects." Jett v. State, 17 F.L.W. at 2222 (J. Diamantis, dissenting)

D. NO CONSTITUTIONAL VIOLATION HAS BEEN ESTABLISHED BY JETT

On appeal, Jett likened this ruling to a discovery violation, contending that it unreasonably interfered with his constitutional right to "meaningful cross-examination of his accusers." (IB 21) The state disagrees with the premise that the confrontation clause includes the right to pretrial discovery of the files of the mental health professionals that examined the victims. In Pennsylvania v. Ritchie, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987), in a plurality opinion, the Court held that the confrontation clause embodies two protections for criminal defendants: physically facing those who testify against him and the right to conduct cross-examination at trial. Ritchie contended, as Jett does, that he was entitled to obtain and examine the full contents of the records compiled by the Children and Youth Services (CYS) during their investigation of allegations that Ritchie sexually abused his daughter. He claimed that the state's failure to disclose this material interfered with his right to cross-examine the victim. The Court held that the right of confrontation was a trial right and did not embody a constitutional right to discovery for preparation of cross-examination. The Pennsylvania court relied upon Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), which the Supreme Court distinguished as follows:

> There the state court had prohibited defense counsel from questioning the witness about his criminal record, even though that evidence might have affected the witness' credibility. The constitutional error was not that Alaska made this information confidential; it was that the defendant was denied the right to expose to the jury the facts from which ...jurors could appropriately draw inferences relating to the reliability of the witness'. Similarly, in this case the Confrontation Clause was not violated by the withholding of the CYS file; it only would have been impermissible for the judge to have prevented Ritchie's lawyer from cross-examining the daughter. Because defense counsel was able to cross-examine all of the trial witnesses fully, we find that the Pennsylvania Supreme Court erred in holding that the failure to disclose the CYS file violated the Confrontation Clauses. (citation omitted, emphasis in original) Pennsylvania v. Ritchie, 107 S.Ct. at 1000.

The Court concluded that at most, Ritchie was "entitled to have the CYS file reviewed by the trial court to determine whether it contains information that probably would have changed the outcome of his trial. If it does, he must be given a new trial. If the records maintained by CYS contain no such information, or if the nondisclosure was harmless beyond a reasonable doubt, the lower court will be free to reinstate the prior conviction." Id. at 1002. At most, Jett might have been entitled to an in camera inspection by the court of the file. The state notes that the initial report on "HRS form 454" was reviewed in camera and released to the defense.

E. ANY ERROR IS HARMLESS

Based upon the highlighted portion of the above-quoted passage in Ritchie, the state further disagrees with Jett's

contention that if error occurred, it is per se reversible. Clearly, this court can conduct an harmless error analysis. §924.33 Fla. Stat. (1989); State v. DiGuilio, 491 So.2d 1129 (Fla. 1987).

Even assuming for the sake of argument that this ruling was error, it is harmless at best. In Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1431, 1438, 89 L.Ed.2d 676 (1986), the Court held:

> The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. Cf. Harrington, 395 U.S., at 254, 89 S.Ct., at 1728; Schneble v. Florida, 405 U.S., at 432, 92 S.Ct., at 1059.

Jett was not deprived the opportunity to expose to the jury facts from which jurors could appropriately draw inferences relating to the reliability of the witnesses in violation of Davis v. Alaska, supra. The premise of the defense was that the children fabricated the events of which Jett was accused. To this end, the defense established that T.F. and C.F. initially denied that any abuse occurred when questioned by their mother. (R 146, 152) T.F. and C.F. both testified that they denied any abuse occurred

when initially questioned by their mother. (R 164, 172, 801) C.F. testified that she also denied the abuse occurred when first questioned by "the HRS lady". (R 172-173) T.F. testified that she did not talk about what happened to her until "after I saw HRS." (R 808) She stated that she was unsure of her testimony and had discussed it with her teacher, the prosecutor, her sisters, and Dr. Woods. (R 811)

The defense called Mary Jancovic, the HRS investigator, as their witness. (R 369) She testified that both T.F. and C.F. did not relate their allegations of abuse during her interviews conducted on May 18 and 20. (R 369-370) On cross, the state established that the children later revealed the sexual abuse after other interviews with HRS. (R 371) In closing argument, the defense stressed that the initial reports from these girls denied any abuse, and only after repeated interviews with HRS did their allegations emerge. (R 441, 450-455) See, Seckington v. State, 424 So.2d 194 (Fla. 5th DCA 1983) The inference that HRS implanted the allegations in the minds of the victims who initially and persistently denied any sexual abuse was clearly before the jury such that any error in failing to disclose the contents of their counseling sessions was harmless error at best.

The en banc decision of the district court below fails to address the state's claim that the issue presented herein was never presented in any manner to the trial court, and as such, was not preserved for appellate review. At no time did the defense suggest to the trial court that any privilege was abrogated by section 415.512, Florida Statutes (1987). It is a

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CONCLUSION

Based upon the argument and authority presented, petitioner respectfully requests this honorable court to answer the certified questions in the negative, to quash the decision of the majority below and reinstate the judgments and convictions in all respects.

Respectfully submitted,

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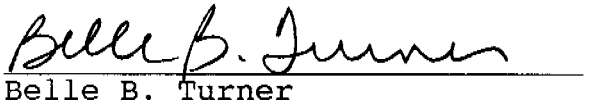
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Brief on the Merits has been furnished by delivery to Assistant Public Defender Larry B. Henderson, counsel for respondent, at 112A Orange Avenue, Daytona Beach, FL 32114, on this 21st day of December, 1992.



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APPENDIX TO PETITIONER'S BRIEF ON THE MERITS

Jett v. State, 17 F.L.W. 2219 (Fla. 5th DCA September 25, 1992)

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mares v. Ocean Bank of Miami, 574 So.2d 1159, 1160 (Fla. 3d DCA), *review denied*, 587 So.2d 1328 (Fla. 1991); *Symons Corp. v. Tartan-Lavers Delray Beach, Inc.*, 456 So.2d 1254, 1258 (Fla. 4th DCA 1984); *Florida Coast Bank v. Mayes*, 433 So.2d 1033, 1036 (Fla. 4th DCA 1983), *review dismissed*, 453 So.2d 43 (Fla. 1984).

* * *

Criminal law—Discovery—Error to refuse to permit defendant to question psychotherapist and psychologist concerning their communications with child victims of sexual battery—Psychotherapist-patient privilege abrogated in cases involving child abuse—Waiver of privilege makes information available to alleged perpetrator as well as victim—Waiver is applicable where actual charges constitute child abuse although defendant is not charged with child abuse—Prosecutor cannot avoid application of waiver by not alleging in information the relationship between abuser and child

ROBERT GARNER JETT, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 90-257. Opinion filed September 25, 1992. Appeal from the Circuit Court for Brevard County, John Antoon, II, Judge. James B. Gibson, Public Defender, and Larry B. Henderson, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Belle B. Turner, Assistant Attorney General, Daytona Beach, for Appellee.

ON MOTION FOR REHEARING EN BANC
[Original Opinion at 16 F.L.W. D1608;
Opinion on Motion for Rehearing at 16 F.L.W. D2768]

(HARRIS, J.) We grant the State's motion for rehearing en banc, withdraw our previous opinion, and substitute the following opinion.

Robert Garner Jett was convicted on charges of sexual battery and lewd and lascivious assault on a child. The young victims, girls who were at the time nine, seven and five years of age, were the daughters of Jett's half-sister. Jett was visiting in the home of the children and was left in charge of them when the alleged offenses were committed. Although Jett's actual relationship with the children meets the definitional requirements of "child abuse or neglect," such relationship was not alleged in the information and is not an element of the charged offenses.

Jett's only point on appeal with merit involves the court's refusal to recognize the section 415.512 waiver of privilege between the professional and the client in a case involving child abuse or neglect.

We find that the law requires this conviction be reversed because Jett was not permitted to question the psychotherapist and psychologist concerning their communications with two of the three child victims; the mother waived the privilege as to one of the girls.

Judge Griffin has discerned a legislative intent behind section 415.512 that is both reasonable and practical. Even if it was not the original intent of the legislature, we commend it for their consideration. It seems to better balance the requirement for reporting and the benefit of remedial counseling than does the present language of the statute.

To construe section 415.512 in accordance with this suggested legislative intent, however, would require us to not only interpret an unambiguous statute (section 415.512)[1] but also rewrite the reporting requirement contained in section 415.504(1):

> Any person . . . who knows, or has reasonable cause to suspect, that a child is an abused or neglected child shall report such knowledge or suspicion to the department.

The reporting requirement is not limited to the first person reporting. Nor does it exempt treating professionals who are brought in to counsel the perpetrator or victim after the child abuse has been reported. The person given the obligation to report may not assume that someone else has or will report; nor can such person rely on the statement by the perpetrator, the victim or parent that the matter has been reported. (It may well be that the perpetrator, victim or parent may not want the matter reported.)

It appears that the legislature contemplated multiple reports of the same abuse.

Section 415.504(4)(a) requires the establishment of a central abuse registry to receive all such reports for the purpose, among others, of monitoring and evaluating the effectiveness of the reporting requirement and to assure compliance with the requirements. It appears that the legislature, in order to assure that the abuse is reported, has determined that everyone who has knowledge of it should report it.

In *Carson v. Jackson*, 466 So.2d 1188 (Fla. 4th DCA 1985) the court considered in a civil context whether the privilege was waived as to a post-reporting, examining (treating) psychologist's communication with the perpetrator of child abuse. The court acknowledged that the purpose of the privilege was to encourage those needing treatment to seek it out; however, the court found the intent of the legislature was to favor discovering child abuse over the perpetrator's need for counseling and held the waiver effective. Although *Carson* dealt with the waiver as it applied to the perpetrator seeking treatment, we cannot read the plain language of the statute to be so patient specific. It waives the privilege both as it concerns the perpetrator and the victim.

We agree with Judge Sharp's dissent that the legislature may not have intended, by enacting section 415.512, to subject the *victim's* statements made to mental health providers discoverable under the criminal discovery rules. Such disclosure appears counterproductive to the legislative scheme of protecting children. However the legislature determined that such children cannot be protected or rehabilitated unless the abuse is first reported. And in order to require the reporting, the reporter had to be protected. Therefore, the privilege was waived.

The waiver statute is clear:

> The privileged quality of communication . . . shall not apply to *any situation* involving known or suspected *child abuse or neglect* and shall not constitute grounds or failure . . . to give evidence in *any judicial proceeding* relating to child abuse or neglect.

The legislature defined "child abuse or neglect" as it relates to this statute in section 415.503(3), Florida Statutes (1991):

> "Child abuse or neglect" means harm . . . to a child's physical or mental health or welfare by the acts . . . of a parent, adult household member, or other persons responsible for the child's welfare, or, for the purpose of reporting requirements, by any person.

We hold that the waiver of the privilege makes the information available to the alleged perpetrator as well as the victim (or State). We further hold that it is not essential that the defendant be charged with child abuse or neglect in order for the privilege to arise; it is sufficient that the actual charges constitute child abuse. Certainly under any interpretation of the statutory definition, sexual battery by a person responsible for the child's welfare would constitute child abuse or neglect. We further hold that the prosecutor cannot avoid the application of the waiver merely by not alleging in the information the relationship between the abuser and the child. The statutory definition makes the relationship itself (the fact not the allegation) sufficient to waive the privilege when the abuser is *in fact* responsible for the child's welfare.

Here the evidence, although not the allegation, indicated that the one responsible for the children's welfare committed child abuse on those children within his care. We hold the privilege was waived by the statute. We urge the legislature to re-examine section 415.512 in light of this decision, and concur with Judge Sharp that her proposed question should be certified to the supreme court.

REVERSED and REMANDED. (DAUKSCH, COBB, and PETERSON, JJ., concur. COWART, J., concurs specially, with opinion in which DAUKSCH, J., concurs. SHARP, W., J., concurs in part and dissents in part, with opinion. GRIFFIN, J., dissents, with opinion in which GOSHORN, C.J., and DIAMANTIS, J., concur. DIAMANTIS, J., dissents, with opinion

in which GOSHORN, C.J., concurs.)

[redacted]Courts are without power to construe unambiguous statutes in any way which would extend, modify or limit the express terms or reasonable or obvious implications. Steinbrecher v. Better Construction Co., 587 So.2d 492 (Fla. 1st DCA 1991).

(COWART, J., concurs specially.) Sexual battery of a child and lascivious assaults upon a child are child abuse. This fact necessitates a reversal in this case. The term "child abuse" should have one common sense meaning that does not vary with the context or the result.

Courts should give statutes a fair reading and not strain at plain language in order to avoid its application to a particular factual instance that falls within the language of the statute but produces a result that appears to be undesirable. The legislature may, if it chooses, revise the language of a statute to have it exclude circumstances the language includes but which, upon further consideration, the legislature may wish to exclude from the application of the statute. (DAUKSCH, J., concurs.)

(SHARP, W., J., concurring in part and dissenting in part.) Although I disagree with the result reached by the majority opinion, I agree that the interpretation of section 415.512, and its proper application in this case is a matter of great public importance and interest, and should be certified to the Florida Supreme Court.[1] This is a case of first impression in this state.

The appellant, Jett, moved this court for rehearing and reconsideration of our prior opinion. I agree his motion has merit, and that we should withdraw our prior decision. It was based on our view that Jett was not a "child abuser" as defined by Chapter 415, because he was an unpaid babysitter in the child-victims' home when the sexual batteries occurred. I would recede from [redacted]opinion but still reach the same result (affirming Jett's convictions) because I construe the waiver of the psychotherapist privilege[2] as applicable only to "child abuse or neglect cases," not to sexual battery cases.

Jett was convicted of two counts of capital sexual battery and two counts of lewd and lascivious assault. The victims of the crimes were Jett's sister's three daughters, ages nine, seven and five, and the offenses were committed while he was visiting in their home. Jett argues the trial court erred in ruling that his attorney could not depose a psychotherapist and a psychologist who evaluated and treated the children regarding their communications with two of the girls.

The psychotherapist-patient privilege, (invoked in this case by the children's mother on their behalf), is set forth in Florida's Evidence Code, section 90.503(2), Florida Statutes (1989). It provides in part:

> A patient has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications or records made for the purpose of diagnosis or treatment of his mental or emotional condition . . . between himself and his psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist. This privilege includes any diagnosis made, and advice given by the psychotherapist in the course of that relationship.

Jett argues that this privilege is abrogated in this case by section 415.512, Florida Statutes (1989). This section provides:

> 415.512 Abrogation of privileged communications in cases involving child abuse or neglect.—*The privileged quality of communication* between husband and wife and *between any professional person and his patient or client,* and any other privileged communication except that between attorney and client or the privilege provided in s. 90.505, as such communication relates both to the competency of the witness and to the exclusion of confidential communications, *shall not apply to any situation involving known or suspected child abuse or neglect and shall not constitute grounds for* failure to report as required by s. 415.504, failure to cooperate with the department in its activities pursuant to ss. 415.502-415.514, or *failure to give evidence in any judicial proceeding relating to child abuse or neglect.* (emphasis supplied)

Chapter 415 addresses multiple problems in the field of abuse and neglect of the aged, the disabled and children. One problem is getting persons who come in contact with possible victims of such abuse to report it to the appropriate agencies. Accordingly, the statute mandates such reports,[3] and it abrogates some otherwise privileged communications in cases involving abuse, neglect, or exploitation of aged persons or disabled adults and in cases involving child abuse or neglect.[4] It apparently dispenses with the privilege for the suspected abuser's communications *as well as those of the claimed victim.*[5]

The goal of getting child abuse and neglect cases promptly reported and prosecuted is served by waiving the traditional privilege at issue in this case (*i.e.*, the psychotherapist privilege). But, this is *not* a child abuse/neglect case or proceeding. Jett was charged and brought to trial for capital sexual battery and lewd and lascivious assault. The abrogation of the psychotherapist privilege provided for in chapter 415 for child abuse and neglect cases is not expressly applicable to criminal prosecutions for sexual battery and lewd assault. It only applies to proceedings "relating to child abuse or neglect."[6]

Chapter 415.503(3) defines child abuse as "harm or threatening harm to a child's physical or mental health or welfare by the acts or omissions of the parent or other persons responsible for the child's welfare." Child abuse may be charged in criminal cases,[7] or it may be a relevant issue in dependency or termination of parental rights case.[8] However, simply because sexual battery may form the basis for a child abuse charge does not convert all sexual battery cases involving children into child abuse cases.[9] If so construed, a close relative who rapes a child will have the benefit of requiring disclosure of the child's statements to his or her psychotherapist, but a stranger who rapes a child under similar circumstances will have no such right. Such an anomalous and unequal application of the law should be avoided. Accordingly, I would affirm the judgment appealed in this cause.

Judge Harris' opinion expresses concern for therapists who are required to report child abuse pursuant to section 415.504, involving *all* abusers (not just persons responsible for a child's welfare), and all instances not just potential child abuse and neglect cases. He suggests they may be held liable for revealing a confidence, if the "waiver" of the privilege section is construed narrowly as suggested by this dissent. I acknowledge that the reporting provisions are far broader than the waiver, but they cover many categories of persons who have no privileged communication status to start with (for example, school teachers, day care workers, policemen, and nurses). Further, all "mental health professionals" are covered by the reporting requirements as a group, without regard to whether the knowledge of child abuse came to them in the context of a confidential communication made for the purpose of diagnosis or treatment (the only way such communication would be privileged). *See* section 90.503(2), Florida Statutes (1989). However, the answer to this dilemma, which is purely theoretical for purposes of this case, is section 415.511, which grants immunity from civil or criminal liability to *any person* "participating in good faith in any act authorized or required by ss. 415.502 - 415.514, or reporting in good faith any instance of child abuse to any law enforcement agency..."

If the waiver of confidential communications made by a child to a psychotherapist or physician for the purpose of diagnosis and treatment are broadly waived, as the majority opinion holds, the result will be extremely harmful. Either children will not talk freely to their therapists and diagnosis and treatment may be foreclosed to them, or children who do communicate will be deprived of their right to privacy[10] for no good reason. Only child abusers and rapists will benefit from a broad interpretation of the

waiver statute. On balance, I would interpret the waiver as narrowly as possible.

Because this is a case of first impression concerning the interpretation of section 415.512, pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v) I would certify to the Florida Supreme Court the following questions:

(1) DOES SECTION 415.512 ABROGATE THE PSYCHOTHERAPIST-CLIENT PRIVILEGE FOR COMMUNICATIONS BETWEEN THE THERAPIST AND CHILD IN *ALL* SEXUAL BATTERY CASES WITHOUT REGARD TO WHETHER OR NOT THE ALLEGED BATTERER IS A PERSON RESPONSIBLE FOR THE CHILD'S WELFARE AS DEFINED BY SECTIONS 415.503(3) AND (11)7.(2), OR

(2) DOES THE ABROGATION OF THE PRIVILEGE ONLY APPLY TO CASES INVOLVING "PERSONS RESPONSIBLE FOR A CHILD'S WELFARE" AS DEFINED BY SECTIONS 415.503(3) AND (11), AND IF SO LIMITED TO SUCH PERSONS, IS THE PRIVILEGE ABROGATED IN ALL SEXUAL BATTERY CASES SUCH AS RAPE AND LEWD ASSAULT WHICH INVOLVES SUCH PERSONS AS BATTERERS WITHOUT REGARD TO WHETHER THE JUDICIAL PROCEEDING RELATES TO CHILD ABUSE OR NEGLECT?

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[1]Fla.R.App.P. 9.030(a)(2)(A)(v).

[2]§ 415.512, Fla. Stat. (1989).

[3]§§ 415.103; 415.504, Fla. Stat. (1989).

[4]§§ 415.109; 415.512, Fla. Stat. (1989).

[5]The apparent broad application of this statute may be attributable to careless drafting rather than a legislative intent to abrogate the patient-psychotherapist privilege for victims of child abuse for the benefit of the abuser.

[6]§ 415.512, Fla. Stat. (1989).

[7]§§ 382.703; 827.04; 827.05, Fla. Stat. (1989).

[8]§ 39.40-39.409; §§ 39.46-39.468, Fla. Stat. (1989).

[9]Sexual battery clearly may be the basis for a child abuse charge, but all sexual battery prosecutions involving child victims do not become child abuse cases within the context of chapter 415, or the other statutes cited above.

[10]Art. I, § 23, Fla. Const.

(GRIFFIN, J., dissenting.) The majority concedes that "the legislature probably did not intend, by enacting section 415.512, to subject [a] victim's statements made to mental health providers to discovery under the criminal discovery rule." Nevertheless, the majority contends that this unintended construction must be given the statute because section 415.512 is clear on its face. As the dissent of four judges of this court demonstrates, however, this statute is not clear. "Ambiguity exists when a statute is capable of being understood by reasonably well-informed persons in two or more different senses." 2A Norman J. Singer, *Sutherland Statutory Construction* § 45.02 at 6 (5th ed. 1992 rev.).

Even if section 415.512 were clear, legislative intent must be given effect even though it may contradict the strict letter of the statute. *Vildibill v. Johnson*, 492 So.2d 1047, 1049 (Fla. 1986); *State v. Ramsey*, 475 So.2d 671 (Fla. 1985). *See generally* Singer, *supra* § 45.09 at 42. Section 415.512 is one of several statutory provisions, sections 415.502-415.514, Florida Statutes (1989), enacted collectively to provide "comprehensive protective services for abused or neglected children."[1] Section 415.512 cannot be read in isolation; it must be read as part of the statutory scheme. *State v. Webb*, 398 So.2d 820, 824-25 (Fla. 1981).

The legislative intent in enacting 415.502-415.514 is set forth in section 415.502:

> The intent of ss. 415.502-415.514 is to provide for comprehensive protective services for abused or neglected children found in the state *by requiring that reports* of each abused or neglected child *be made to the Department of Health and Rehabilitative Services in an effort to prevent other harm to the child* or any other children living in the home and to preserve the family life of the parents and children, to the maximum extent possible, by enhancing the parental capacity for adequate child care.

Within the statutory scheme, the function of section 415.511 and 415.512 is to overcome the twin legal excuses for failing to report suspected child abuse: exposure to civil liability and the obligation of confidentiality. A broad construction of this confidentiality waiver to permit a criminal defendant accused of sexual battery of a child to discover the child's communications with his or her treating psychiatrist or psychologist could have no conceivable child-protective function and may very well be damaging to the child's treatment and recovery.

I am further convinced that the legislature never intended this waiver to extend beyond the specific object of the legislation—the reporting of known or suspected child abuse. The legislative intent is plain: "to provide for comprehensive protective services for abused or neglected children found in this state by requiring that reports be made to the Department of Health and Rehabilitative Services." This statute overrides the privileges otherwise available under Florida law, but only (as the statute says) as to any situation involving *known or suspected* child abuse, including reporting, cooperation with HRS in carrying out its duties of documentation and investigation of such abuse reports, and the giving of evidence in any judicial proceeding arising out of the reporting of known or suspected abuse.

I concede that two other cases which have considered this confidentiality waiver have (apparently)[2] not perceived the waiver to be this limited, *Carson v. Jackson*, 466 So.2d 1188 (Fla. 4th DCA 1985); *E.H. v. Dep't of Health & Rehabilitative Services*, 443 So.2d 1083, 1084 (Fla. 3d DCA 1984), but there is no suggestion this interpretation was directly raised in those cases. In fact, in *Carson*, (then) Judge Barkett observed:

> [T]he legislature, in passing section 415.512, weighed the desirability of encouraging treatment for child abusers against the desirability of *discovering* them and decided that the latter was more important than the former. (emphasis added).

Carson, 466 So.2d at 1191. *Anyone* who learns of or suspects child abuse is obliged under this statutory scheme to report it. This includes physicians or psychiatrists, even if they learn of it while treating the abuser or the abused child. No privilege can interfere with the duty to report abuse except the privilege to communicate with one's lawyer or clergy. But this statute was not intended to expose anyone, whether victim or abuser, to ongoing discovery of communications with their treating psychiatrist after disclosure of the abuse. Such a result not only would be manifestly unfair to victims, as in this case, but it is also not fair to the abuser who seeks treatment for his or her mental disorder. Post-discovery treatment would seem impossible when any communication to a treating psychiatrist would be admissible in evidence against the patient in any civil, criminal or other proceeding. It is inconceivable that a health care professional could ethically accept communications from his or her patient without first disclosing that any such communications would be available as evidence against them in any civil or criminal case. The purpose of the section 415.512 statute has been met once the abuse has been discovered and reported. I do not suggest the statute applies only to the *first* person to report abuse; several reports by several persons may be involved. However, after the abuse is known to HRS the abuser and the abused can seek treatment without interference from this statute.

If the two professionals whose testimony is in issue in this case had reported the abuse, I would agree with the majority that the broad language of the statute abrogates the privilege, even in favor of the alleged abuser. In the present case, however, the children were referred to these psychologists for treatment *after* the children had disclosed the abuse to their mother and she had reported it to HRS. In my view, this statutory abrogation of privileges in order to require the reporting of abuse has no application at all to these children's communications with their treating psychologist. (GOSHORN, C.J., and DIAMANTIS, J., concur.)

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[1]Ch. 79-203, Laws of Fla.

[2]The factual predicate is not fully detailed in either opinion.

(DIAMANTIS, J., dissenting.) I respectfully dissent from the majority opinion and join in Judge Griffin's dissent because in my opinion her dissent reasonably balances the public policy of requiring child abuse or neglect to be reported with the policy of protecting the child's right to have effective treatment after having been victimized and having suffered a very traumatic experience with long-lasting effects.

A statute must be construed and applied so as to give effect to the evident legislative intent, regardless of whether such construction varies from the statute's literal meaning "if, from a view of the whole law, or from other laws *in pari materia* the evident intent is different from the literal import of the terms employed to express it in a particular part of the law, that intent should prevail, for that, in fact is the will of the Legislature." *Forsythe v. Longboat Key Beach Erosion Control District*, 17 F.L.W. S377, 378 (Fla. June 25, 1992) *quoting Van Pelt v. Hilliard*, 75 Fla. 792, 798-799, 78 So. 693, 694-695 (1918); *Griffis v. State*, 356 So.2d 297, 299 (Fla. 1978). In *Griffis*, the Florida Supreme Court relied upon its opinion in *Beebe v. Richardson*, 156 Fla. 559, 23 So.2d 718, 719 (1945), in which the Court explained:

> [W]here the context of a statute taken literally conflicts with a plain legislative intent clearly discernible, the context must yield to the legislative purpose, for otherwise the intent of the lawmakers would be defeated. (Citations omitted).

Griffis, 356 So.2d at 299.

The legislative intent and public policy of sections 415.502-415.514, Florida Statutes (1989) is to require that reports of child abuse or neglect be made to the Department of Health and Rehabilitative Services in order to prevent further harm to the child or other children living in the home and to preserve the family life.[1] In the instant case, the child abuse had been reported by the children's mother to HRS *prior* to the time that the children were referred to the psychologists for treatment. Because the child abuse had already been reported, the salutary purpose of the statutory scheme has been accomplished and thus, there no longer exists any compelling public policy reason or necessity for abrogating the privilege between the psychologists and their patients.

If the children were referred by the treating psychologists to other professionals for evaluation or treatment, the majority opinion's literal application of the statutory abrogation of the privilege[2] would result in disclosure of the children's communications to those professionals without balancing the necessity to report the child abuse which had been previously reported. The Legislature obviously did not intend to negatively impact the child's psychological evaluation and treatment by requiring unlimited disclosure of confidential communications involving personally sensitive and traumatic experiences when there is absolutely no need to do so. The reasonable and evident legislative intent was to abrogate the privilege to the extent necessary to accomplish the legislative policy of insuring that child abuse be reported. I submit that we should follow this legislative policy and that we should not unnecessarily and unreasonably expand it.

I concur in certifying this matter to the Florida Supreme Court because it involves questions of great public importance. (GOSHORN, C.J., concurs.)

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[1] 415.502, Fla. Stat. (1989).
[2] 415.512, Fla. Stat. (1989).

* * *

Criminal law—Hate crimes—Statute providing for enhancement of offense if the commission of offense evidences prejudice based on the race, color, ancestry, ethnicity, religion or national origin of the victim is not unconstitutionally vague and overbroad and does not unconstitutionally punish opinion—Language of statute cannot be read to apply to situation in which defendant commits a race, color or religious neutral crime, but during the commission of the offense makes a racial slur—Act of choosing a victim for a crime because of his race or religion is a type of speech that is subject to regulation—Statute is justified because it is narrowly tailored to serve the compelling state interest of ensuring the basic human rights of members of groups that have historically been subjected to discrimination because of membership in those groups

MICHAEL EARL DOBBINS, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 91-1953. Opinion filed September 24, 1992. Appeal from the Circuit Court for Volusia County, Shawn L. Briese, Judge. Jeffrey L. Dees, Ormond Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Judy Taylor Rush, Assistant Attorney General, Daytona Beach, Michael Neimand, Miami, and Richard Doran, Tallahassee, for Appellee. Kenneth W. Shapiro of Berger & Shapiro, P.A., Ft. Lauderdale, for Amicus Curiae, Anti-Defamation League of B'Nai B'rith.

(HARRIS, J.) John Daly, a Jewish youth, in protest to his parents and denial of his religion, joined the "Skinheads", an association openly and vociferously anti-Semitic. Ultimately, when his fellow members learned of his Jewish background, some of them decided to take action.

He was beaten by several members of the association, including Michael Earl Dobbins, appellant herein. During the beating, Dobbins and others made such statements as "Jew boy," and "Die Jew boy."

Dobbins was tried and convicted under the battery statute (Fla. Stat. 784.03(1)(a)) and sentenced under the enhancement provisions of the hate crime statute (Fla. Stat. 775.085).

We find the evidence sufficient to uphold the jury's verdict that Dobbins committed the proscribed act and that the commission of the act evidenced prejudice based on Daly's "ancestry, ethnicity, religion or national origin".

The sole issue that we find merits discussion is the constitutionality of section 775.085, Florida Statutes (1989). We find it to be constitutional.

VAGUE AND OVERBROAD

Appellant first contends that the statute is vague and overbroad. He contends the statute is susceptible of applying to protected speech because it does not require that the prejudice alleged have any specific relationship to the commission of the crime.

This argument seems to concede that if the statute permits enhancement only upon proof, beyond a reasonable doubt, that appellant committed the battery motivated, in whole or in part, because Daly was Jewish, the enhanced penalty would be appropriate.

That is precisely the way we read the statute. Section 775.085 provides:

> The penalty for any felony or misdemeanor shall be reclassified as provided in this subsection if *the commission of such felony* or misdemeanor *evidences prejudice based on the* race, color, *ancestry, ethnicity, religion* or national origin *of the victim.*

Appellant urges that the language can be read to apply to a situation in which the defendant commits a race, color or religious neutral crime (for example, resisting arrest because he thinks he's innocent), but during the commission of the offense makes a racial slur. We do not agree. The statute requires that it is the *commission of the crime* that must evidence the prejudice; the fact that racial prejudice may be exhibited during the commission of the crime is itself insufficient.

In the present case the jury was required to find that the *beating*, based on the background and relationship between the participants *and* the statements made during the beating, *evidenced that Daly was the chosen victim because he was Jewish.* Had the fight occurred for some other reason (over a woman, because of an unpaid debt, etc.), the mere fact that Daly might have been called a "Jew boy" could not enhance the offense.

PUNISHMENT OF OPINION

The more troubling argument made by Dobbins is that the