FILED
SID J. WHITE
JAN 8 1993
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellee/Petitioner,

vs.

ROBERT GARNER JETT,

Appellant/Respondent.

CASE NO. 80,663

ON QUESTIONS CERTIFIED TO BE OF GREAT PUBLIC IMPORTANCE FROM THE FIFTH DISTRICT COURT OF APPEAL, STATE OF FLORIDA

RESPONDENT'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

LARRY B. HENDERSON
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 0353973
112-A Orange Avenue,
Daytona Beach, FL 32114
(904)252-3367

ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

	PAGE NO.
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
WHETHER THE PSYCHOTHERAPIST/PATIENT PRIVILEGE SET FORTH IN SECTION 90.503(2) IS ABROGATED BY SECTION 415.512 FLORIDA STATUTES IN CASES OF KNOWN OR SUSPECTED CHILD ABUSE OR NEGLECT?	
CONCLUSION	10
CERTIFICATE OF SERVICE	11

TABLE OF CITATIONS

	PAGE NO.
CASES CITED:	
Blount v. State 102 Fla. 1100, 138 So. 2 (1931)	5
Brown v. State 515 So.2d 211 (Fla. 1987)	4
Delaware v. Van Arsdall 475 U.S. 673 (1986)	4
Englewood Water District v. Tate 334 So.2d 626 (Fla. 2d DCA 1976)	5
Jett v. State 17 FLW D2219 (Fla. 5th DCA September 25, 1992)	7, 8
Pennsylvania v. Ritchie 480 U.S. 39 (1987)	4
Richardson v. State 246 So.2d 771 (Fla. 1971)	4
S.R.G. Corp. v. Department of Revenue 365 So.2d 687 (1978)	5
Smith v. State 500 So.2d 125 (Fla. 1986)	4
Thayer v. State 335 So.2d 815 (Fla. 1976)	5
OTHER AUTHORITIES CITED:	
Amendment I, United States Constitution	6
Amendment V, United States Constitution	2
Amendment VI, United States Constitution	2, 6
Amendment XIV, United States Constitution	2
Section 90.503, Florida Statutes (1987)	2
Section 90.503(1), Florida Statutes (1987)	1
Section 90.503(2), Florida Statutes (1987)	4
Section 415.512, Florida Constitution (1987)	4, 6, 10
Webster's Third New International Dictionary p.6 (1981)	6-7

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Appellee/Petitioner, vs. ROBERT GARNER JETT, Appellant/Respondent.	CASE NO. 80,663

RESPONDENT'S BRIEF ON THE MERITS

STATEMENT OF THE CASE AND FACTS

Jett was charged with two counts of capital sexual battery and two counts of lewd and lascivious assault. (R954-55). Jett's defense counsel was precluded from taking the deposition of counselors who discussed the alleged sexual abuse with each of the victims. Prior to trial, the State moved for a protective order to prevent Jett from deposing two of the victims because the victims were undergoing psychotherapy. (R970). The State's motion for a protective order was granted. (R971).

Jett then attempted to take the deposition of the children's counsellors and those counselors asserted the statutory psychotherapist-patient privilege set forth in Section 90.503(1), Florida Statutes (1987). Jett moved to compel their testimony, alleging in his motion that "The witnesses are not qualified to assert the privilege and the requested testimony is not privileged." (R978-79). At the hearing on that motion, the State argued that the burden to disprove the privilege is on those who dispute it (R508), and stated:

> Under the definition of psychotherapist, Carol Roberts does not fall in that category. The privilege is the patient's. I can't say any statement made to Carol Roberts wouldn't be privileged under that portion of the statute. When the children are claiming the privilege, it's obviously up to the children and we are left in the position of having to claim the privilege because we don't have any other way. You know, we can't make the decision by ourselves when it's --- privilege is a legal conclusion. It's up to the whoever is claiming the privilege. We don't have a release. We have to assume they are invoking the privilege.

(R509-510).

The mother waived the privilege as to the youngest child, who was found to be incompetent to testify due to her youth, but not waived for the two oldest children. (R566;569-572). Defense counsel argued that allowing the State to assert the privilege as to two children yet waive it as to the third denied due process and confrontation of witnesses guaranteed under the Fifth, Sixth and Fourteenth Amendments. (R582-5484). The court denied Jett's motion to compel the testimony of the counselors. (R586;988-989). The trial court prepared a written order and expressly ruled that, "The communications of the victims and their mother with Carol Roberts were made in confidence and were not intended to be disclosed to third persons. Such communications are privileged under Section 90.503, Florida Statutes." (R988)

SUMMARY OF ARGUMENT

The State caused this problem by preventing Jett's attorney from taking the deposition of two workers employed by the Department of Health and Rehabilitative Services (HRS) who talked with the three children and the children's mother about alleged acts of sexual abuse committed by Jett. There is no statutory psychotherapist/patient privilege in cases involving known or suspected child abuse or neglect because the statute which creates the confidentiality in the communications between psychotherapist and patient has been expressly abrogated by the Legislature in cases of known or suspected child abuse or neglect. The statute is clear and its expressly stated purpose is to abrogate the confidentiality of communications concerning known or suspected incidents of child abuse or neglect.

It is not the responsibility of a court to determine whether the decision to totally abrogate such communications is wise or unwise. Because the statute does not produce an absurd result when it is applied, it must be enforced as written because the Legislature is assumed to know the clear meaning of the words it uses. The en banc decision of the Fifth District Court of Appeal should be affirmed. The first certified question should be answered in the affirmative. The second should be answered in the negative.

ISSUE

WHETHER THE PSYCHOTHERAPIST/PATIENT PRIVILEGE SET FORTH IN SECTION 90.503(2) IS ABROGATED BY SECTION 415.512 FLORIDA STATUTES IN CASES OF KNOWN OR SUSPECTED CHILD ABUSE OR NEGLECT?

The State's "lack of preservation argument" is without merit. It was not a defense objection which produced this error. Instead, error was caused by the State's argument that a statutory privilege forbade disclosure of the testimony of HRS workers who talked with children and their mother about alleged acts of sexual abuse. The State contends that the error it caused by denying Jett discovery and use of the information contained in those discussions for his defense was harmless error under federal precedent, citing Pennsylvania v. Ritchie, 480 U.S. 39 (1987) and Delaware v. Van Arsdall, 475 U.S. 673 (1986). (State's Brief at p. 9).

Florida's discovery rights are vastly different from those afforded by the federal constitution. The State cannot show that denying Jett the content of the statements between the HRS counselors, the alleged victims and the children's mother, which was done at the State's instance, did not contribute to Jett's convictions. The denial of that information is a denial of discovery. A discovery violation is not subject to harmless error analysis on appeal. See Brown v. State, 515 So.2d 211 (Fla.1987); Smith v. State, 500 So.2d 125 (Fla.1986); and, Richardson v. State, 246 So.2d 771 (Fla.1971). Even assuming that a harmless error analysis is appropriate is appropriately

applied in the context of a discovery violation, reversal is required because intelligent review of the issue cannot be conducted in the absence of the content of the statements between the counselors, the alleged victims and the children's mother. The fact that evidence was produced showing that the children at first denied any impropriety does not conclusively establish that the verdicts would not have been different had Jett been able to show the content of the discussions between the state counsellors and the children's mother.

Bad facts make bad law. A court must refrain from creating substantive legislation when faced with bad facts. The responsibility of enacting laws belongs to the legislative branch of government. A court should not concern itself with the wisdom of an enactment and is instead required to construe the statute in the form enacted. Blount v. State, 102 Fla. 1100, 138 So. 2 (1931). The legislative intent, which is the primary factor of importance in construing statutes, must be determined primarily from the language of the statute. S.R.G. Corp. v. Department of Revenue, 365 So.2d 687 (1978). If the intent of the legislature is clear, it is the court's duty to give effect to that intent. Englewood Water District v. Tate, 334 So.2d 626 (Fla. 2d DCA 1976).

It is apparent that the State and the dissenting judges of the Fifth District Court of Appeal disagree with the wisdom of the statute and they seek to avoid applying it as written based on the forced perception of a legislative intent to restrict the

statute in the situation here presented. However, as did the Fifth District Court of Appeal, this Court should refrain from creating legislation and simply apply the law as written because to do so does not produce an absurd or unconstitutional result. The legislature is assumed to know the meaning of words and to have expressed its intent by the words found in a statute. Thayer v. State, 335 So.2d 815 (Fla.1976).

This statute does not produce an unjust result when it is applied as written. Instead, it promotes a full determination of the facts concerning allegations of child abuse or neglect. All agree that the psychotherapist/patient privilege is expressly abrogated by operation of Section 415.512 in cases involving child abuse or neglect. Judge Sharp takes the position that a case involving capital sexual battery is not a case involving child abuse or neglect, and the other dissenting judges would write language into Section 415.512 so that the abrogated psychotherapist/patient privilege again becomes viable once the alleged child abuse or neglect has been sufficiently reported. This creates an impossible standard to objectively apply and otherwise completely loses sight of the premise that reports of abuse or neglect might be mistaken, false or erroneous. It is respectfully submitted that it is for the Florida Legislature to decide whether a child is best protected by affording a statutory privilege to communications following reports of child abuse or neglect, or whether children are best protected by totally abrogating that statutory privilege.

The Florida Legislature, by enacting Section 415.512, Florida Statutes (1987), chose to "abrogate" all privileged communications in cases involving child abuse or neglect except the attorney/client privilege and the clergy privilege. The reason that the attorney/client and clergy privileges could not be abrogated was because to do so would run afoul of the First and Sixth Amendments to the United States Constitution. There are no other exceptions that preclude abrogating the privilege of confidentiality to those types communications.

The word "abrogate" is commonly understood. It means "to abolish by authoritative, official, or formal action: ANNUL, REPEAL; to put an end to: do away with: set aside." Webster's Third New International Dictionary, p.6 (1981). Section 415.512 does **not** state that, once reported, the statutory privileges it expressly abolished is reinstated. The omission of such language does not produce an absurd result. The Florida Legislature has determined that full disclosure of all information involving an allegation of known or suspected child abuse or neglect serves to protect the rights of the children, and that determination is within the province of the legislature to make.

At what point, under the State's and the dissenting judges' view, does the statutory privilege re-attach after it has been initially abrogated? Judge Griffin believes the statute which abrogates the confidentiality of communications in cases of known or suspected child abuse or neglect "is not intended to expose anyone, whether victim or abuser, to ongoing discovery of

communications with their treating psychiatrist after disclosure of the abuse." Jett, 17 FLW at D2222. What will happen, though, if additional relevant information comes to light during therapy sessions occurring after the initial reports are made? Perhaps such counseling will reveal other abuse, that abuse was committed by an additional person, or that abuse has been committed on other children by other people. There could be an unequivocal recantation by the alleged victim that any acts of abuse really occurred and that he or she was simply mad or doing as had been ordered by a different parent or guardian. Did the legislature intend that such matters be privileged simply because a report has been made to HRS?

How is the treating psychotherapist to know just what acts of known or suspected child abuse or neglect have and been previously reported? The statutorily conferred, privileged nature of psychotherapist/patient communications is abrogated in cases of known or suspected child abuse or neglect, and those who perpetrate such acts and realize that they need psychological help will refrain from getting the needed counseling because what the perpetrator tells the psychotherapist must, by operation of Chapter 415, be reported to the Department of Health and Rehabilitative Services.

Contrary to Judge Griffin's concern, Jett, 17 FLW at 2222, it is very conceivable that health care professionals accept communications from their patients without first telling them that whatever they say concerning child abuse or neglect

will be reported to HRS. The legislature has determined that the benefit of such reports outweighs the detriment of preventing those who abuse children from seeking help lest they be arrested and incarcerated for child sexual abuse. This result also seems not to adequately protect children, but the legislature has weighed the competing interests and made its determination. It is unwise and unnecessary for this Court to create substantive legislation. The responsibility of a court is to enforce the law unless it produces an absurd or unconstitutional result.

Certainly, every responsible person seeks to protect children. There are, however, competing views on how that can best be accomplished. The Florida Legislature has determined that, to protect children, it is necessary to "abrogate" all privileged communications in cases involving known or suspected child abuse or neglect, with the sole exceptions being the attorney/client privilege and the clergy privilege. The language of that statute is not unclear. The privileged nature of the communications between psychotherapist and patient is statutorily conferred. What the legislature gives, it can surely take away. For the foregoing reasons, the decision of the Fifth District Court of Appeal should be affirmed.

CONCLUSION

Based on the argument and authority previously set forth, Respondent respectfully asks that the en banc decision of the Fifth District Court of Appeal be affirmed. The first question certified to be of great public importance should be answered affirmatively because Section 415.512 does not contain language limiting it situations where the alleged abuser is a person responsible for the child's welfare. The second question certified to be of great public importance should be answered in the negative because Section 415.512 abrogates the psychotherapist/patient privilege in all instances of known or suspected child abuse or neglect by any person.

Respectfully submitted,

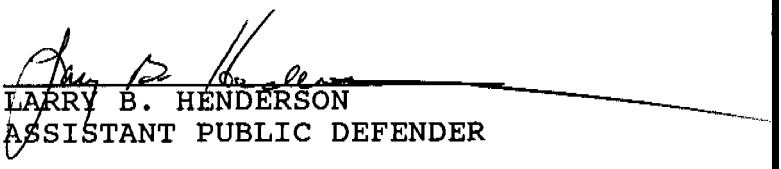
JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

LARRY B. HENDERSON
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0353973
112-A Orange Avenue
Daytona Beach, Florida 32114
(904)252-3367

ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114 in his basket at the Fifth District Court of Appeal and mailed to Mr. Robert G. Jett, #138111, P.O. Box 667, Bushnell, FL 33513-0667, this 6th day of January, 1993.



LARRY B. HENDERSON
ASSISTANT PUBLIC DEFENDER