IN THE SUPREME COURT OF THE STATE OF FLORIDA

ANN ELLIOTT BARBER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC01-1006
5th DCA No. 5D00-2797

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

MERITS BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Respondent relies upon the following facts for the purposes of this brief:

On July 22, 1998, the State filed a notice of intent to offer Williams rule evidence in lower court criminal cases 98-7377 and 98-7381, against Ann Barber (Barber). The State provided that the similar fact evidence was relevant as to proof of motive, opportunity, plan, identity, absence of mistake or accident, intent, attitude of the defendant, pattern of conduct, and common scheme. (R 59-65) Barber filed a motion to strike the State's Williams rule notice. (R 67-71) She also filed an amended motion to strike on July 30, 1998. (R 1406-10) A hearing was held on Barber's motion on August 24, 1998. (R 73-77)

At the hearing, Barber asserted that the State could not demonstrate substantial similarity between the injuries and surrounding circumstances to the victim in trial court case number 98-7377, D.T., and the injuries and surrounding circumstances to the victim in trial court case number 98-7381, A.P. (R 83) The court heard argument from both the prosecution and defense counsel on this issue. Defense counsel argued there was no substantial similarity between the two cases because the injuries received by both infants were similar to those received by all infants in "shaken baby" cases. He then argued that A.' injuries were different from those seen in shaken baby syndrome and were therefore different from D.s injuries. (R 95-101) The State asserted that the only thing these two infants had in common in their lives was the defendant. The day care where Barber worked had only seven infants registered, only four of which could be cared for at any one time. With two of the infants demonstrating shaken baby syndrome within a less-than-two-week period, the similarity between the two cases became apparent. The infants had the same day care,

were in the same room, had the same care giver, were of similar ages, and both had brain hemorrhages, broken legs, and broken ribs. The State also asserted that the cases were inextricably intertwined, noting that the police were led to A. while initially investigating D.'s injuries. (R 102-09, 143)

On September 3, 1998, the trial court entered an order finding that the only similar fact evidence which was admissible was that contained in paragraphs one and two of the State's notice. The court found the evidence regarding the injuries to both babies was sufficiently similar as to qualify as Williams rule evidence. (R 84-93, 149-55) Barber filed a motion for rehearing on September 9, 1998, which was set for hearing just prior to D.'s trial. (R 1412-13) The trial judge refused to hear the motion, declining to visit motions previously decided.

Barber filed a motion in limine on the Williams rule issue on March 6, 1999, and a motion for rehearing on the Williams rule issue on June 28, 1999, in lower court case 98-7381, involving A.' injuries. (R 1415-18)

On April 14, 2000, the State filed an objection to Barber's motion for rehearing of the Williams rule issue. The State argued that this issue had already been ruled upon and that relitigation of this same issue was barred by the doctrines of collateral estoppel and res judicata. (R 157-66)

On July 24, 2000, during pretrial motion hearings prior to the retrial of Ann Barber in case 98-7831, involving A.P. as the victim, defense counsel again requested the court exclude the similar fact evidence from trial. (R 171-72) That same day, the State filed an objection to the relitigation of the State's intention to present Williams rule evidence. The State based its objection on grounds of collateral estoppel, res judicata, and law of the case. (R 208-15) The State argued that this

motion had already been ruled upon and relitigation of this issue was barred by the principles of collateral estoppel and res judicata. (R 171-72) Without ruling on the issues of collateral estoppel or res judicata, the trial court allowed defense counsel to present the testimony of two defense witnesses based upon the fact that they had each traveled from out of state for the hearing. (R 202-04)

On August 7, 2000, the trial court entered an order sustaining the State's objection to relitigation of the Williams rule issue. (R 1420-27)

On August 10, 2000, the State filed a supplemental notice of intent to offer similar fact evidence. (R 1429-32)

Retrial of this case was scheduled to commence on August 21, 2000. On that morning, the State filed a written motion in limine to prohibit the relitigation of any issues involving injuries to D. in the case involving A. This motion was denied by the court on August 22, 2000. (R 231-34) Immediately prior to jury selection, defense counsel advised the trial judge and State that they had received the Fifth District Court of Appeal's order granting rehearing and additional oral argument in the appeal regarding D. T.. The trial judge noted that the Fifth District Court of Appeal's order allowing additional oral argument in the appeal of lower court case number 98-7377 changed his mind, and that he would now revisit the issue of the admissibility of the Williams rule evidence. (R 222-23)

In a hearing held August 22, 2000, the trial judge found that the appellate court's order granting additional oral argument in the appeal wherein D.T. was the victim gave Barber the right to have an evidentiary hearing on the admissibility of Williams rule evidence in A. case; the principle of collateral estoppel did not bar the court's rehearing of the Williams rule matter. (R 239, 240-41) In the interest of

judicial economy, the court and both parties agreed to rely on the transcribed testimony of pertinent witnesses, for the most part, rather than having to bring in all the witnesses to present live testimony. (R 261)

On August 24, 2000, the State filed its first proffer of Williams rule evidence, listing the testimony for the court to review. (R 269-73) A brief hearing was held on August 24, 2000, to coordinate the presentation of the few live witnesses needed to supplement the written record for the Williams rule hearing. At this time, the State again objected to the court's rehearing of this matter, basing its objection on collateral estoppel. (R 283) Defense counsel also filed an amended proffer of transcribed testimony for the Williams rule hearing. (R 296-97)

On August 25, 2000, the court took live testimony regarding the issue of admissibility of ... Williams rule evidence. (R 299-384) The State presented Meredith Thiebes (relative to paragraph 6 of the State's original notice), who worked with Barber at the day care. Ms. Thiebes testified that she had seen Barber get frustrated with the infants in her care. Thiebes gave specific examples of Barber's frustration. She could not think of a time when Barber seemed relaxed with the infants, only frustrated. She further testified about a particular incident where Barber "threw" a child into a crib inappropriately. Thiebes did state that she had never seen Barber physically abuse an infant. (R 314-322, 368-370)

Relative to paragraph 4 of the State's original notice, the State presented the testimony Elizabeth Lovan, the director of the day care. Ms. Lovan testified that Barber began working in the infant room of the day care around July or August of 1997; Barber was a full-time employee. Barber was originally happy to be there, but began to have less patience with the children. Barber's frustration level with the

children increased tremendously after Christmas of 1997. (R 323-34) After Christmas, Lovan would have to go into the infant room to assist Barber in calming down a child more often than she had before Christmas. (R 332-34) Lovan gave two examples of parents complaining to her about Barber. (R 337-39)

The State also presented, relative to paragraph 5 of its original notice, the testimony of Nicole Carluccio, who also worked at the day care. She testified that Barber usually had the door to the infant room closed and the lights off, although Julie Dixon, who worked with the infants in the afternoons, kept the door open and the lights on. (R 347-49) Carluccio stated that the babies would cry and try to get away from Barber. Barber stated to Carluccio that she could understand how parents could tape kids' mouths shut. (R 350) Additionally, Carluccio related that one time she saw Barber, who was sitting in a rocking chair, holding A. by her shoulders. A. head was bobbing back and forth, but Barber was not rocking the chair. A. was crying. Although Carluccio could not put a specific time frame on this event, she did state that it occurred at a time when A. was too young to be able to hold her head up on her own or shake her head. (R 351-52, 355)

Julie Dixon, Barber's afternoon relief-person at the day care, testified on behalf of the State, relative to paragraphs 3 and 4 of its notice, as to several examples of curious behavior between Barber and the infants in her care. (R 359-60) Barber's attitude was dependent on whether or not she was tired. Dixon did not note the same frustration in other co-workers. Barber seemed to take the infants' reactions personally. (R 361, 363)

On August 28, 2000, the defense called Dorothy Dickey to testify. Ms. Dickey stated she was aware of only one time when A. was taken to the hospital after

being in day care. Dickey had seen A. in day care earlier that day and noted that A. seemed stuffy and congested. (R 393-97) When Dickey testified on September 14, 1998, she stated that A. seemed groggy when she saw her. Barber replied that A. had just awakened. (R 851-52) Dickey had never seen Barber abuse or strike either A. or D. (R 398-99)

The defense also called Lilly Yoder, who testified that she saw A. with Barber on February 6, 1998. Yoder remarked to Barber that A. did not sound or look well. Yoder later found out that someone had to do CPR on A. later that same day. Yoder never saw Barber treat A. inappropriately. Yoder admitted on cross-examination that she had never previously disclosed this information, that she had attended parts of both previous trials and Barber's sentencing, and only remembered these facts after speaking to Barber's husband after the earlier proceeding. Yoder worked for Barber's husband and considered him a personal friend. (R 403-17)

At the conclusion of the hearing, the State argued that the oral and written proffered testimony demonstrated that the evidence regarding the injuries to both infants was sufficiently similar to be admissible as Williams rule evidence. The similar fact evidence was relevant to demonstrate identity, the pattern of criminality, the context of crime and in order to cast light on the character of the crime of which Barber was accused. The State specifically set forth how the two cases mirrored one another. (R 427-38) The State also informed the court that Doctors Pattisapu and Tilelli both agreed that one could not make a diagnosis based just upon films; one would also need to know the clinical symptoms to make a proper diagnosis. (R 516) Defense counsel countered that there was nothing unique about two children suffering from shaken baby syndrome and that there were "major differences between these

children and how [the doctors] interpret the same symptomatology...". (R 474-75).

The following is a summary of the evidence proffered through prior recorded testimony regarding the Williams rule issue which the trial court reviewed prior to making its ruling:

A.P.'s mother, M.C., testified that her daughter, A., was born on November 21, 1997. A. was delivered by a planned Cesarean section birth with no complications. Ms. C. was able to stay at home with A. for approximately ten weeks. Ms. C. returned to work as a bank teller on January 26, 1998. (R 547-48; TT 511, Vol.8)[1]

For her return to work, Ms. C. made arrangements for A. to be placed in day care at the First Baptist Church Day Care on Mondays and Fridays. P.P., A.' father, watched A. on Wednesdays and Thursdays. (R 548-49; TT 512, 514 Vol.8)

A. started at the day care on Monday, January 26. Prior to this time, A. was a normal, happy, healthy baby with no severe breathing problems. (R 549; TT 514, Vol.8) Ms. C. took A. in for normal, well-baby visits. On December 10, Ms. C. took A. to Pediatrics of Brevard for a well-visit, but she was also concerned that A. was spitting up (not vomiting) and a bit fussy. (R 549-52)

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[1]"TT" refers to the trial transcript in the case wherein D.T. was the victim. In making the ruling currently on appeal, the trial judge referred to selected testimony taken during D.'s trial. D.'s case is currently on review in case number SC01-1007. Respondent has filed, contemporaneously with this brief, a request for this Court to take judicial notice of its own record in appeal SC01-1007. See Hillsborough County Board of County Commissioners v. Public Employees Relations Committee, 424 So. 2d 132 (Fla. 1st DCA 1982)(appellate court may take judicial notice of its own records);Buckley v. City of Miami Beach, 559 So. 2d 310 (Fla. 3d DCA 1990)(same). Judicial notice is appropriate in this instance since D.'s trial transcript was considered by the trial and appellate courts in making their rulings.

The next doctor's visit was on December 23 because A. had a stuffy nose. (R 552) A. was given an over-the-counter medication for several days at the recommendation of the pediatrician, Dr. Arnold. After a few days, the medication was discontinued because A. stuffy nose was better. (R 553-54) A. was again taken to the doctor's for a stuffy nose on January 27, because her stuffy nose had started again one or two days before A. started at day care. (R 555)

A. was usually dropped off at day care around 8:30 a.m. and would usually be picked up between 4:30 and 5:00 p.m.. Prior to February 6, A. had been to day care three times. (R 555-56) She had never been to any doctors other than those at Pediatrics of Brevard. (R 556)

On February 6, A. was dropped off at day care at 8:30 a.m. Ms. C. gave A. to Ann Barber. Ms. C. informed Barber that A. had a stuffy nose, but was doing better. If additional medication was needed, it was in the baby's bag. Barber was to call Ms. C. if A. needed more medication. That morning, A. was her normal, happy, smiling self. She was not acting sick or having breathing problems. She was not having any problems being responsive to Ms. C.. Ms. C. left A. at day care and went to work. (R 559-60; TT 515, Vol.8)

Approximately one and one-half hours after arriving at work, Ms. C. saw an ambulance heading down the street. She next received a phone call and learned that something was wrong with A. and she was to return to the day care at once. Once at the day care, Ms. C. learned that A. had stopped breathing, but was now doing better; she breathing on her own. Ms. C. noticed that A. was completely pale, non-responsive and not her normal self. (R 561-62) A. was

taken to Wuesthoff Hospital by ambulance. (R 564; TT 515-516, Vol.8)

When Officer Caruso first responded to the day care, he saw A. on the changing table; her face was blue. He cleared traffic for the ambulance. (R 712-13) Scott Bynum and Michael Tymann, fire-fighter/paramedics, responded to the scene at the day care. (R 719-21, 732-33) When Bynum arrived, the baby's eyes were open, and she was not in any distress. The baby was being administered oxygen. (R 724-25) He was informed that the baby began choking when she was taking a bottle. A woman picked up the baby, cleared her airway, gave a couple of rescue breaths and the baby began to breathe on her own. No chest compressions had been given. The baby's nose was suctioned for congestion. The baby was then transported by ambulance to Wuesthoff Hospital. (R 724-25, 734-35) Tymann saw the baby having difficulty breathing, secretions around the mouth and nose, and some cyanosis from lack of oxygen. (R 734)

Robert White, another firefighter/paramedic, was told by a woman on the scene that the baby was sitting in a baby chair when the woman discovered the baby was not breathing. (R 754)

From the emergency room, Ms. C. was instructed to take A. to her pediatrician. (R 565; TT 515-516, Vol.8) Ms. C. and Mr. P., who had met at the emergency room, took A. to the pediatrician. (R 566, 681, 684) The doctor instructed Ms. C. to administer Tylenol or PediaCare to A. if needed. At this time, A. was doing fine as far as her stuffy nose. The parents were to monitor A. closely for the next 24 to 48 hours. If A. registered a fever or had trouble breathing, Ms. C. was to call the doctor immediately. (R 566)

The parents took A. straight home. A. was very uncomfortable and

fussy that evening. She would cry and scream when she was picked up underneath her arms. It also bothered A. to have her legs moved when her diaper was changed. She had never exhibited this discomfort before. Also, this cry was different than the way A. normally cried; it was more of a scream. (R 566-67, 570-71) A. was not her normal self; she was fussy, cried a lot, and spit up. (R 568)

At 2:00 a.m., Ms. C. got up with A. due to the child's fussiness. At this time, Ms. C. noticed that A. felt very warm. A.' temperature was 102E. Upon calling the doctor, Ms. C. was instructed to give A. Tylenol for her fever, which she did. (R 568)

The next day, Saturday, February 7, Ms. C. took A. back to the pediatrician. A.' fever had come down, but she was still extremely fussy and would cry a lot. It still bothered A. to be picked up underneath her arms. (R 569-70) Based upon her pediatrician, Dr. O'Hern's recommendation, A. was taken to Cape Canaveral Hospital and admitted. (R 571-72)

A. stayed in the hospital for three days. She continued to be very fussy and had continued pain with her legs and under her arms. A. was also throwing up, not the normal spitting up, but projectile vomiting. A. had never exhibited this behavior before. (R 572-73; TT 517, 532, Vol.8)

A. was discharged on Monday. Ms. C. took her home immediately and stayed at home with her until that Friday. A. appeared to be improving and was on a special formula. She was still uncomfortable when picked up or moved for changing her diaper, but was slowly getting back to her normal self. (R 573-74; TT 517, 532, Vol.8) A. went to see Dr. O'Hern on Tuesday, the day after she was discharged. (R 574) She had another appointment on Friday, but the doctor

had to cancel it so that he could appear in court; Ms. C. made an appointment for the following week. (R 575)

On Friday morning, February 13, A. was doing better, but was not 100%. (R 575) Ms. C. dropped A. off at the day care around 8:30 a.m.; she was picked up around 5:00 p.m.. (R 576) A. was doing much better over the weekend. (R 575-76) A. was taken to the doctor that Monday; he was pleased with her progress. (R 576-77; TT 517, 532, Vol.8) During the weekend, A. had had no difficulty with her breathing. (R 577)

On Tuesday, February 17, A. was taken to day care. (R 577-78) Ms. C. dropped A. off that morning at 7:59 a.m.. (R 580-81) A. was doing much better; she was back to her normal self. (R 581) Ms. C. called to check on A. around 10:30 or 11:00 a.m. that day. (R 582-83; TT 521, Vol.8) Barber informed her that A. had not eaten much that day and had been sleeping mostly since being dropped off. Ms. C. called Barber again around 1:00 p.m. Barber again stated that A. was sleeping a lot and not eating. (R 583; TT 521, Vol.8) Ms. C. said this was not like A. (R 583; TT 521, Vol.8) This was also different from the way A. had been acting the week before when she was at home. (R 583-84)

Ms. C. went to pick A. up at approximately 4:50 p.m. When she walked in, Barber, Elizabeth Lovan and Julie Dixon were huddled around A.; the women looked very concerned. A. was pale, non-responsive and crying. (R 584) A. would not look at her mother, but appeared to look through her. A. was having trouble breathing and was very lethargic. This was in direct contrast to how A. was acting when she was dropped off at day care. (R 584-85, 586; TT 521-

523, Vol.8)

Virginia Tate was also at the day care on February 17, working with the four-year-olds. (R 764) When Tate had seen Barber with A. that morning, there was nothing about A.' appearance which gave Tate reason for concern. (R 766)

Ms. C. called A.' doctor and then took her to Cape Canaveral Hospital. (R 585; TT 521-523, Vol.8) A. was still having difficultly breathing. After many tests, A. finally responded to the emergency room doctor when he tilted her at an upright angle - her feet up in the air and head toward the floor. At this point, she began to cry a bit. A. had appeared unable to get her cries or screams out up until this time. (R 586-87)

A. was admitted to the hospital; blood work and CAT scans were performed along with other tests. (R 587-88) Prior to admitting A., the doctor had explained to Ms. C. that the baby's fontanel, her "soft spot" was extremely full. This is something Ms. C. had not seen before. A.' condition worsened in the emergency room. (R 588) The hospital monitored A. through the night. In the morning, she was transferred to Arnold Palmer Hospital (APH) because her brain was bleeding. (R 589)

At APH, Ms. C. and Mr. P. met with Dr. Tilelli. At this time, A. was still very fussy. Many tests were conducted on A. (R 592-93) A. was at APH for ten days; the first five days she was in the children's intensive care unit, the next five days she was in the special care unit. (R 595) A. appeared to improve at the hospital; the shunt placed in her head appeared to help. (R 596-97; TT 523-525, Vol.8)

Since being taken home, A. has not had any episodes where she has had

difficulty breathing, or stopped breathing. (R 597) Neither Ms. C. nor Mr. P. has ever handled A. forcefully or seen anyone handle her forcefully. (R 598, 684-85)

Upon cross-examination, Ms. C. testified that A. was jaundiced at birth and was checked out for a heart murmur. When A. was 19 days old, Ms. C. told the doctor that when A. got upset, she would breath harder than normal. (R 602-04)

Ms. C. also testified as to one incident where she saw Barber pick A. up out of her car sear as though she were a rag doll and without releasing the handle of the car seat, causing A. to hit her head and arm. (R 819-20) (This testimony is the subject-matter noticed in the State's supplemental notice on Williams rule.)

Cecelia Dandurand, who worked at the day care, testified that on February 6, she came into the infant room for a moment and saw Barber trying to get A. to sleep. The baby seemed fine. About 10 to 15 minutes later, the ambulance arrived for A. (TT 567-570, Vol.8) Tonya Shearer also testified that on February 17, A. appeared "out of it." The baby was "looking through us." A. was totally still. (R 798-99) Nicole Carluccio also testified that on February 6, she was working from 7 a.m. until 4 p.m., with the exception of 10 a.m. to 12:30 p.m. when she was gone for a doctor's appointment. (R 811) On neither February 6, nor February 17, did Carluccio have any contact with A.. (R 811-12) On February 18, when Carluccio returned to work, Barber asked Carluccio if Carluccio had turned her in. (R 813)

Julie Dixon, Barber's relief at the day care, testified that she did not work on February 6, the day the ambulance came to get A.; she did not handle A. that

day. (R 825-27) On February 17, Dixon worked the afternoon shift, beginning at 1:00 p.m. (R 828-29) She first helped in the one-year-old room, getting them ready for their naps. Barber was in the infant room with A. and one, maybe two, other infant(s). (R 787-89)

After the older children were awake and outside playing, Barber was inside with A., the other child had gone home. (R 830-31) While Dixon was inside talking with a parent, Barber came up, held A. out to her, and stated that she was acting funny. Barber then walked away. Barber may have mentioned that A. was breathing funny. (R 831-32)

A. seemed to Dixon to be a little groggy. The parent to whom Dixon had been talking had some medical background and noticed that A. appeared to be breathing funny. If A. was held in a certain way, her breathing improved. (R 832-33) Dixon went to sit in a rocker with A. in the infant room. Her condition was worsening; A.' breathing was erratic - slow one minute, fast the next. A.' body would tense and relax. Her eyes were not focusing right. (R 833) Several people, including Barber, Lovan, Barber's husband, and Tonya Shearer had come into the room. They all decided to place A. on the changing table to check her out. A. was not crying which seemed strange to them. (R 833-34) A. was not responding to any stimuli. (R 834)

A.' mother arrived shortly thereafter and immediately called the pediatrician. A. was then taken by her mother and Dixon to the emergency room. (R 835) During the ride, A. was in her car seat, but still tensing and relaxing. Her breathing seemed better, but she was still not focusing or crying. (R 836) Prior to Barber handing A. over to Dixon that afternoon, Dixon had not handled A. that day.

Dixon never handled A. in a forceful manner. Barber was the only person working in the infant room at the time Dixon arrived. (R 840-41)

Christie Carr testified that her 20 month old son, Taylor, attended day care at First Baptist Church from February 10 to February 17. On February 17, she was picking up her son when she began talking to Julie Dixon, who was holding an infant. When Dixon stated that the infant did not look "right," Carr took a look at the child. Carr noted an absence of movement and an "eerie stillness" to her. She thought the child was not breathing or in a seizure. The baby was not crying and there was no eye movement. (R 867-71)

Carr told Dixon to hand her the baby. As soon as the baby was in an upright position, she resumed movement and her eyes opened. Carr could also hear breathing and congestion. She passed her back to Dixon. Carr did not handle A. forcefully. (R 871)

Ann Barber testified at the trial involving A.' injuries that she began working in the infant room of the First Baptist Day Care in July of 1997. She had previously been employed at the day care two other times, once to work with the 3 and 4 year olds, and once to work with the 1 and 2 year olds. She had left both times for jobs which paid more. (R 1182-85)

With regard to February 6, Barber stated that A. had seemed very congested that day. After giving A. a bottle around 10:15, Barber rocked the infant to sleep and then placed her in her car seat, because A. could not sleep in a flat position. Barber placed the car seat in one of the cribs. As Barber began to fold laundry, she noticed A. kicking and flailing her arm. Barber checked on A.. A. had a panicked look on her face and was a blue/purple color. (R 1227-29)

Barber picked A. up and took her to the changing table; during this time A. became unconscious. Barber could not get a response, did a finger sweep of her mouth and felt mucus on the back of A.' throat. Barber tried to give A. resuscitation breaths, but had no response. Barber took A. to Lovan for help; Lovan called 911. Barber turned A. on her side pursuant to 911 instructions and a little milky mucus came out of her mouth; she again tried breaths which worked. The paramedics arrived and took A. to the hospital. Barber did not do anything to hurt A. that day. (R 1227-30, 1238)

Barber next saw A. on February 13; A. seemed fine. (R 1238-42)

On February 17, A. was sleeping when she arrived in the morning. Barber stayed past the end of her shift that day to help out. At 3:00 she became a floater. A. had been sleeping all day and had not taken much formula; she seemed groggy. Sometime after Barber became a floater, she handed A. to Dixon and went to get her husband to go home. When Barber came back, Dixon had A. and said she was acting weird. A. was tensing and relaxing her body. Lovan called for A.' mother; at that time the mother arrived. The mother called the pediatrician and then took A. to the emergency room. (R 1242-56) Barber stated she never shook A. that day or did anything of a violent nature to her. (R 1256-57, 1295-96)

Dr. John Tilelli testified that A. was admitted to Arnold Palmer Hospital (APH) on February 18, while D. was still a patient. (TT 966, Vol.10) Upon arriving at APH, A. was irritable and lethargic, but otherwise in no acute distress. She had a bulging fontanelle and no external signs of injury. A bulging fontanelle may be a sign of increased pressure inside the skull. (TT 966-967, Vol.10)

Based upon the history he received from the parents, Dr. Tilelli ordered a CT

scan, a bone scan and a skeletal survey. (TT 968, Vol.10) A. had fifteen injured ribs. The bones were injured posteriorly, along her spine. (TT 973-974, Vol.10) Her CT scan showed the presence of fresh blood and an old subdural hematoma. (TT 990, Vol.10) Based upon his examination of A. and the test results, Dr. Tilelli testified that A. exhibited manifestations of whiplash shaken baby syndrome. (TT 992, Vol.10) There were three circumstances which allowed the doctor to determine that A.' brain injuries were the result of trauma. There was a bruise present inside her brain as well as fresh blood; there were clearly two incidents of trauma to A.. (TT 994-996, Vol.10) Radiographically, A.' rib injuries appeared to be between one and six weeks old. Also radiographically, there was a chronic subdural hematoma more than one week old and then an acute subdural hematoma that was less than one week old. An injury to A.' clavicle fit into the rib injury time frame, as did an injury to her tibia. (TT 997, Vol.10) Based upon the factors in the hypothetical posed by the prosecutor which set forth the material facts of A.' circumstances, in Dr. Tilelli's opinion, the old injuries to A. occurred on February 6. (TT 998-999, Vol.10; 1005-1010, 1014, Vol.11) The newer injuries occurred on February 17, based upon the history of the child. (TT 1012-1012, Vol.11)

Dr. O'Hern, a board certified pediatrician with a specialty in child abuse and neglect, testified regarding his treatment of A. (R 885-92) On February 6, Dr. O'Hern saw A. after she had been evaluated at Wuesthoff Hospital's emergency room. At that time, Dr. O'Hern did not believe it was necessary to admit her to the hospital. (R 896-97) He believed the bruise to A.' tongue was fresh and probably caused from resuscitation efforts. (R 897-98) Prior to February 6, according to her records, Dr. O'Hern believed A. to be a thriving baby. Her stuffy nose was

common and did not make her a sickly child. (R 898, 915-96) At that time, he did not have a concern that A.' breathing incident was caused by an abusive event. (R 900)

Dr. O'Hern saw A. the next day because she had developed a fever. There was no swelling and A.' soft spot was normal. (R 900-02) This does not mean that the child could not have had a brain injury, it just indicates that there was not sufficient swelling or bleeding to significantly increase the pressure in the brain. (R 903-04) Based upon the child's age, he initiated a septic work-up to determine if A. was suffering from an infection. (R 905-09) Any prior problems with A.' minor heart murmur could not, in any way, have caused her to stop breathing on February 6. (R 914)

A. appeared normal at her follow-up visits on February 10 and 16. (R 918-20)

On February 17, A. was again taken to the emergency room. At this time, A. did have a tense soft spot. (R 917) She was admitted to Cape Canaveral Hospital. Dr. Philpot, another physician in the practice, called Dr. O'Hern because A.' CT scan was abnormal. (R 918-19) A.' CT scan on February 18, showed subdural hemorrhaging. At this time, Dr. O'Hern began to suspect an abusive incident. (R 923-24) It would be extremely rare for an infant of A.' age to suffer a subdural hematoma other than by a traumatic incident. (R 924-25) A. was transferred to APH on February 18. (R 926)

At APH, A. had a shunt placed in her brain to drain the blood which was present on the February 18 CT scan. The blood re-accumulated and on February 24, she had a semi-permanent ventriculoperitoneal shunt placed in her head to constantly

drain the fluid. She stabilized over the next week or two and was sent home. (R 928-30)

Since A. was discharged from APH, Dr. O'Hern has been her primary care physician. (R 928) A. had the semi-permanent shunt for approximately six months. (R 930) Since her discharge from APH, A. has suffered no further breathing or apneic episodes. Neither has she suffered any additional injuries to her brain, dura, or central nervous system. (R 930-32)

Dr. Jogi Pattisapu testified that he became involved in A.' care in the latter part of February. (R 1021) Dr. Pattisapu testified that a CT scan of A. taken on February 18 showed a large amount of fluid surrounding the brain. Some new blood appeared on the right side as well as in between the two halves of the brain. Blood was also visible on the left side and the top and bottom halves. While he could not date the blood exactly, it was of low density, meaning it could be old blood or spinal fluid. Some of the fresh hemorrhages occurred with a few days. (R 1025-26, 1028) Blood reaches low density after three weeks usually; spinal fluid is always low density. (R 1026) For a complete interpretation of the test results, one would need both the radiograph and the clinical situation put together. (R 1028-29)

Based upon an MRI of A. on February 19, Dr. Pattisapu noted two, perhaps three, different signal intensities: some acute, some subacute and possibly some chronic; he was most comfortable noting the acute and subacute. (R 1029-32)

Although Dr. Pattisapu could not positively state what caused the accumulation of fluid in A.' brain, he did believe that the CT and MRI were highly suggestive of trauma, which is the most common cause for this type of finding. (R 1033) The usual type of trauma seen in a child of A.' age with this type of finding is shaken baby

syndrome. (R 1034) Dr. Pattisapu sees 15 to 20, sometimes 25 cases of shaken baby syndrome in a given year. (R 1034) Dr. Pattisapu believed that separate events caused the injuries seen in A. based upon the different ages of the hemorrhages. (R 1033-34)

CT films taken of A. on February 22 and 23 do not help in specifically narrowing the time frames being discussed. There was no active bleeding as of February 23. (R 1037-39) A film taken April 17 shows the fluid accumulation had resolved itself due to the shunt. No fresh bleeding was noted. (R 1039-40)

Dr. Pattisapu noted that retinal hemorrhages are often caused by violent trauma or shaking. Subdural hemorrhaging itself would usually not cause retinal hemorrhaging. (R 1045)

Whether or not an infant suffers a change of consciousness, and when it occurs, depends upon the severity of the injury. If there is a change of consciousness it is usually immediate or within a few hours. Infants with problems in the brain often present with alternating irritability and lethargy. Changes in respirations also occur. (R 1066)

D. T.'s parents, Brenda and Eugene T. testified that their son, D., was born September 29, 1997. During the first few months of his life, Ms. T. had taken D. to the doctor's office and the hospital several times. During these visits, Ms. T. complained that D. cried when he was laid down, he was congested, and spit up excessively. Zantac and Propulsid were prescribed for the infant. (TT 89-95, 99-106, 110-113, Vol.6)

On January 2, 1998, Ms. T. took D. to the doctor's again because he had been spitting up since Christmas. D.'s medications were increased to his

growth, and the symptoms stopped again. (TT 114-115, Vol.6)

Ms. T. had returned to work on a full-time basis on December 1, 1997. At that time, D. attended a day care center, Bear Hugs, across the street from her office. D. attended this day care five days a week. (TT 115-116, Vol.6) In February, Ms. T. took another position within her company and was able to work from home part of the time. Since Bear Hugs would not take D. on a part-time basis, Ms. T. switched him to First Baptist Church of Cocoa's day care. (TT 116-117, Vol.6)

D. started day care at First Baptist on Tuesday, February 3, 1998. Ms. T. met Barber that same day, when she dropped D. off. Ms. T. told Barber how to get in touch with her on her cell phone as well as at home. On February 4, D. attended day care all day. Ms. T. took D. to day care again on February 5. She had planned to leave D. at day care all day while she worked and ran errands. She signed D. in at 8:30 that morning. Around noon, Ms. T. stopped by First Baptist for an unscheduled visit. She found D. in his walker and stated that he was not his normal, happy self, but that he had been fine when she dropped him off that morning. She described D. as non-responsive and lethargic. (TT 119-122, Vol.6; TT 235, Vol.7)

Ms. T. went back to her car, started the engine and then turned it off again. She walked back into the day care and picked him up because he was "not acting right." (TT 124, Vol.6) Ms. T. placed D. in his car seat and began running her errands. D. slept the entire trip to Melbourne and back, as well as sleeping most of the afternoon at home. When he woke up later in the day, D. was lethargic. (TT 124, Vol.6)

When Ms. T. picked D. up from his "exersaucer" that evening, she heard popping and cracking in his back that she had not heard before. She heard the same noise several other times that evening. Ms. T. stated it sounded like crepitus or bones rubbing together, a sound she had heard from working on an ambulance. (TT 124-126, Vol.6) She also noticed red spots in D.'s eyes that looked like broken blood vessels. (TT 125-126, Vol.6) Since picking D. up from Barber's care, Ms. T. had been the only person with D. She had not noticed any of these symptoms the night before. (TT 126, Vol.6)

The next day, D. began vomiting. This was full, heavy vomiting, different from when he was just spitting up. (TT 126, Vol.6) Every time they fed him that day (every 2 to 3 hours), within 15 to 20 minutes, D. would lose nearly his entire feeding. New red spots appeared in his eyes, and the old spots turned brown. Additionally, D. developed yellow rings around his eyes. (TT 126-127, Vol.6; TT 236, Vol.7)

Ms. T. took D. to the night clinic for the crepitus, vomiting, bruising and broken blood vessels. She saw a nurse practitioner who prescribed Augmentin. The medication did not help D. He continued vomiting throughout the weekend. D. had not manifested this type of vomiting before February 5. The yellow circles around his eyes turned dark-blue/purple. (TT 127-129, Vol.6; TT 237-239, Vol.7)

Ms. T. took D. to the doctor again that Monday and described D.'s symptoms. No additional medications were prescribed; D. continued on the three medications which had been previously prescribed. (TT 129-130, Vol.6; TT 239-240, Vol.7)

D. returned to First Baptist day care on February 10, and seemed to be

improving. At that time, D. was able to keep down some of his bottles. Ms. T. left D. in Barber's care that day and the next. When D. was dropped off on Wednesday, Ms. T. told Barber that D. had vomited twice since his breakfast and instructed her to call if there were any problems. She picked D. up between 4:00 and 4:15 p.m. When she arrived, Elizabeth Lovan was holding D. and he was vomiting. D. was lethargic and warm. (TT 130-132, Vol.6; TT 240-241, Vol.7)

Mr. and Mrs. T. took D. to the doctor's at 8:30 that evening. Dr. Ulrich admitted D. to the hospital that night; D. continued vomiting. By morning, D. was projectile vomiting. The next morning, Dr. Gonzalez ran some tests. Two CAT scans were performed. On February 14, D. was transferred by ambulance to Arnold Palmer Hospital (APH). (TT 133-139, Vol.6; TT 240-241, Vol.7) D. was placed in pediatric ICU. On February 22, D. was transferred back to Wuesthoff Hospital. He was discharged on February 24. (TT 142-144, 150-152, Vol.6) At home, D. still required medical care. (TT 153-161, Vol.6)

Since his injuries, Ms. T. has noticed that D. does not do as much with his left hand as he does with his right. Additionally, D. has no pincher ability with his left hand. Neither Ms. T. nor her husband has ever handled D. forcefully. She has not seen anyone else handle him forcefully either. (TT 162-164, Vol.6; TT 241, Vol.7)

At the time of D.'s and A.' injuries, Elizabeth Lovan was the director and preschool teacher for the First Baptist of Cocoa day care. As part of her duties, Lovan taught the three and four-year-old class in the morning; hired, scheduled, supervised the other workers; and ran the day care. The school operated four

classrooms, one of which was an infant room. (TT 249-250, Vol.7; R 702-03) According to state guidelines, there needed to be one staff member for every four infants under age one. (TT 253, Vol.7) Barber worked in the infant room five days per week from open until two o'clock in the afternoon, then Julie Dixon would work from two until six o'clock. (TT 254, Vol.7) On some occasions, Lovan would find that Barber had left the infant room for five to ten minutes and no one would know where she was; the infants were left unattended during this time. (R 703-04)

On February 3 and 5, D. was in the infant room of the day care; Barber worked those days from 6:15 a.m. to 2:15 p.m.(TT 273-275, Vol.7) From July of 1997 through February of 1998, Barber worked in the infant room. Julie Dixon worked the 2:00 p.m. to 6:00 p.m. shift in the infant room. (TT 276, Vol.7) No other person was working with or caring for the infants on the morning of February 5, other than Barber. (TT 278, Vol.7) D. arrived at day care between eight and nine o'clock on February 5, but left unexpectedly [when his mother took him home] which upset Barber. (TT 282, 292-293, Vol.7) Lovan never handled D. in a forceful manner, nor did she shake him on February 5, or any other occasion she had contact with him. (TT 293-294, Vol.7)

Nicole Carluccio, Cecelia Dandurand, Danelle Garlock, and Tonya Shearer testified that they never handled D. in a forceful manner, nor did they shake him on February 5, or any other occasion they had contact with him, if they had contact with him at all. (TT 296-298, 299-301, 303-305, 305-307, Vol.7)

Dr. Mary Ulrich saw D. as a patient of her practice with Pediatrics of Brevard. (TT 315, Vol.7) She first saw D. on the evening of February 11, 1998. (TT 316, Vol.7) His parents complained that he was vomiting, fussy, sleeping more

than usual and not eating well. (TT 317, Vol.7) She noted that D. began a "pained sort of cry" as soon as he woke up and that he had some bruising over the right side of his face around the cheek and eye which consisted of petechia. (TT 318-319, Vol.7) She admitted him to the hospital that night and planned an imaging study of his brain if D. did not improve during the night. (TT 322, Vol.7) Dr. Stockett was D.'s primary care physician in the hospital based upon the doctors' rotation schedule. (TT 323, Vol.7)

Dr. Mary Stockett saw D. on February 9 at Pediatrics of Brevard and was his physician after Dr. Ulrich admitted him to the hospital on February 11. (TT 388-389, Vol.7) On the 9th, D.'s parents brought him in, chiefly complaining of vomiting. They also stated D. had some popping in his back and that he was not acting like himself, did not seem to feel well. (TT 389-390, Vol.7) Dr. Stockett noted petechia and that D. seemed to be fussy. At the time, she diagnosed viral syndrome, but no longer believes that was what caused his sickness. (TT 390, Vol.7)

Dr. Stockett next saw D. on February 13; Dr. Gonzalez saw D. on February 12 because Dr. Stockett was not on rounds that day. (TT 393, Vol.7) Dr. Stockett examined D. again on February 13 and found he was still irritable, had bruising of his right eyelid and was still vomiting. (TT 396, Vol.7) D.'s test results on his upper GI series and abdominal ultrasound were normal and did not demonstrate any anatomical problems which would account for his sickness. (TT 406-409, Vol.8) A CT scan of D.'s brain was conducted on February 14. (TT 409, Vol.8). Based upon the results of the scan, D. was transferred to APH to receive intensive care with a pediatric sub-specialty. In this way, D. could receive the close monitoring he required. (TT 435, Vol.8)

Dr. John Tilelli, an expert in the fields of pediatrics and critical care pediatrics, sees all children admitted to [Arnold Palmer] hospital based upon child abuse. (TT 756-757, 769, 771, Vol.9) He became involved in the care of D. around February 16, after being contacted by one of the people from the child protection team. Dr. Tilelli conducted a medical examination, reviewed the medical records and examined D.'s previous radiographs to familiarize himself with D.'s case. (TT 785-787, 791, Vol.9)

Upon examining D., the doctor found him to be irritable and fussy, but not responsive. The soft spot on his head was flat, he had some bruises around his right eye, some pinpoint bruises and a flame-shaped bruise. The external examination was within normal limits. (TT 787, 791-792, Vol.9)

Dr. Tilelli requested an additional CT scan and an MRI scan on D.. D.'s birth history excluded the constellation of injuries he had at the time of Dr. Tilelli's examination. He did take a history from D.'s parents. (TT 793-796, Vol.9)

Based upon his examination, the test results obtained, and the history he received from D.'s parents, Dr. Tilelli arrived at a diagnosis. (TT 839, Vol.10) Dr. Tilelli found fluid underneath the skull around the brain. The fluid appeared at different densities distinguishing old blood from new blood; D. had old and new subdural hemorrhages. Additionally, the tests showed nine rib fractures on both sides up and down the back of the baby. Also, D.'s tibia had a fracture caused by twisting. (TT 852-854, 857, Vol.10) The brain hemorrhages demonstrated that there had been trauma to D.'s brain. The scans showed blood from two separate incidents. The films showed broken ribs in various stages of healing. (TT 858-866, Vol.10)

Dr. Tilelli testified that a chronic subdural hematoma can only be caused by

trauma. The type of trauma that causes this is shaking and impact to the baby. When a baby is shaken, the head becomes a mass that rocks forward and back and, by its mass, is whipped back and forth forcefully. As the head whips back and forth, it drags the spine along with it. The ribs are attached to the spine which actually pulls and snaps the ribs. It was the doctor's opinion that the baby must have been shaken in such a manner that it was sufficient to break the baby's ribs. The fact that the rib fractures were near D.'s spine was significant in that it supported his belief the spine was used as a lever to break the ribs. (TT 866-868, 894, Vol.10) For the tibia to be broken in the fashion of D.'s injury, it had to be because of some twisting force of the distal tibia; the child's leg would be twisted in such a manner that the bone would give way. (TT 868, Vol.10)

These injuries could not happen accidentally. (TT 868, Vol.10) Dr. Tilelli's diagnosis was that D. suffered from whiplash shaken infant syndrome. (TT 869, Vol.10) There is no specific set of symptoms that goes along with whiplash shaken baby syndrome. However, a baby with injuries significant enough to cause this set of circumstances (i.e., a chronic subdural hematoma) must have had some alteration of level of consciousness attendant to the shaking. (TT 869-870, Vol.10) Whatever level of change occurred, it would happen immediately after the shaking. (TT 871, Vol.10)

With a subdural hematoma, it is not possible to pinpoint an exact day when it occurred, however, it is possible to say within a few days when the injury was sustained based upon the color of fluid on the brain as is appears on the films. (TT 871-872, Vol.10) If there was a history of alteration of level of consciousness, in the absence of other events which could have caused the injury, it would assist in determining when the injuries were inflicted. (TT 873, Vol.10) Based upon the factors

in the hypothetical posed by the prosecutor, as well as those included by defense counsel, which set forth the material facts of D.'s circumstances, in Dr. Tilelli's opinion, the injuries to D. occurred on February 5. This date corresponds with his medical evidence as well as the infant's history. (TT 877-887, 910-911, 930, 933, Vol.10) The injuries, looking at the x-rays and radiographs only, occurred within a six-week period of January 1 to February 7. (TT 904, Vol.10) The only period of time that brackets both the rib fractures and the old subdural hematomas must have the injuries occurring before February 7. (TT 928-929, Vol.10)

Children who suffer from shaken baby syndrome have some deficiency in motor and/or mental skills. (TT 896-897, Vol.10)

Dr. Tilelli testified that the injuries to D. and A. are very similar in radiographic appearance so as to be almost indistinguishable. Both sets of injuries imply trauma. (TT 1017, 1018, Vol.11) The types of injuries these children received are typical of shaken baby syndrome. (TT 1018, Vol.11)

Rodney Whelan, an officer with the Rockledge Police Department, began investigating the D. T. case on February 17, 1998. He went over to APH to meet with Dr. Tilelli and D.'s parents, the T.. Based upon speaking with the T., Whelan spoke to Elizabeth Lovan at First Baptist day care. Next, he spoke with the workers at the day care. (TT 660-661, Vol.9) Whelan also went to Cape Canaveral Hospital in reference to A. P. and spoke with her parents. (TT 662-663, Vol.9)

Whelan spoke with Barber at the day care. Whelan informed Barber that she did not have to speak with him and Detective Bobay, but Barber consented to an interview. (TT 666-669, Vol.9) With regard to the A. P. incident on February

6, Barber stated that she had A. in the nursery and stepped across the hall to get some laundry. Barber got the laundry and started to fold it while A. was in her crib. About 10 to 15 minutes later, Barber heard A. make a sound like she was gasping for air. When Barber went over to her, she was frolicking and kicking. Barber picked A. up and took her over to the changing table. A.' skin was a bluish color. At that point, A.' body went limp. Barber checked A.' mouth for foreign objects. Barber went and got Lovan. (TT 660-670, 672, Vol.9) Lovan called 911 and Barber gave A. mouth-to-mouth resuscitation. After a short period, A. began to breathe on her own again. (TT 672, Vol.9) Barber stated to Whelan, that "if you think I did this for gratification, you're wrong." (TT 673, Vol.9) A. was the only child in Barber's care that morning.

With regard to the other incidents involving A., Barber stated that she had handed A. over to Dixon around 4:45 and went to look for her husband to go home. Barber stated Dixon stopped her and indicated A. was acting weird and seizure-like. The two of them took A. back into the infant room. A. was tensing up and curling up, and then relaxing, as if she was trying to have a bowel movement. The baby's breathing was labored. A.' mother showed up and took her to the emergency room. (TT 676-677, Vol.9)

When asked about D.'s injuries, Barber indicated that she had seen no inappropriate behavior at the church. (TT 682, Vol.9) Barber indicated to Whelan that, while working at the day care, she had become frustrated to the point where she placed a child in someone else's care. Barber stated she had become frustrated with A. in the past. (TT 701-702, Vol.9)

Dr. Pattisapu first saw D. on February 14. With regard to his films, Dr.

Pattisapu noted a recent contusion or hemorrhage on the left frontoparietal region. (R 1047, 1054-55) Recent bleeding would show as high density; subacute bleeding would show a mixed density. (R 1055) The injuries appear to be from two separate events; one from within a few days, the other anywhere from a few days to a few weeks. (R 1055-56, 1058, 1060-61) The oldest injury appeared to be, based on the MRI, three to six weeks old. (R 1057, 1058, 1060-61) About two-thirds of shaken baby cases also exhibit retinal hemorrhaging. (R 1064)

Both D.'s and A.' injuries are consistent with shaken baby syndrome. The shaken baby cases Dr. Pattisapu has seen are all fairly consistent; there are some minor variances, but no major differences. (R 1073-74)

Dr. David Cook, a child neurologist testifying on behalf of Barber, examined the medical records and test results of both A. and D., focusing, for purposes of the hearing, on February 5, 6 and 17. (R 1079-81) Dr. Cook noted a substantial increase in D.'s head circumference between November 24 and January 10. He opined that this increase could be due to an increase in brain size, a tumor, fluid or a trauma or injury. The increase could be due to a subdural hematoma. (R 1082-83) D.'s records show chronic evidence of blood on the brain. (R 1088) Dr. Cook believes that D.'s gastroesophogeal reflux was due to an acute subdural that occurred in November. (R 1089) The injuries seen in D.'s CT scan of March 3, 1998, occurred at least 4 to 6 weeks before the CT was taken. (R 1091) Dr. Cook believes that Barber could not have caused D.'s injuries if her first contact with him was on February 3. (R 1095) Dr. Cook admitted that D.'s injuries looked like he suffered from shaken baby syndrome. (R 1125)

With regard to A., Dr. Cook testified that she suffered from a subdural

hygroma: a collection of fluid with high protein content, like blood, that for some reason is not reabsorbed by the body. (R 1100) A.' CT scan taken on February 18 showed the presence of some acute blood. (R 1101) Dr. Cook had previously defined "acute" as occurring within the past 24 to 72 hours. (R 1093) A.' injuries, Dr. Cook believes, stemmed from a congenital hygroma present since her birth. (R 1124) Barber could not have caused A.' injuries. (R 1101-02)

Dr. Cook testified he saw no pattern between the injuries suffered by A. and D.. (R 1108) Dr. Cook only examined the infants' medical records and tests, he did not review the testimony of the infants' mothers. (R 1111) Dr. Cook was not saying that the symptoms suffered by A. and D. were not caused by trauma, just that they suffered the cause of their injuries prior to appearing at day care. (R 1124)

Dr. Stuart Strausberg, a diagnostic radiologist with a sub-speciality in neuroradiology testifying on behalf of Barber, reviewed the records of D. and A., focusing, for purposes of the hearing, on the radiological aspects of the injuries around February 5, 6 and 17. (R 1133-36) On D.'s CAT scan from February 14, Dr. Strausberg found a chronic subdural hematoma that was 3-5 weeks old. He also found scars on the scan. Dr. Strausberg testified that scars take from 6-10 weeks to form. Dr. Strausberg also found some fresh blood on the scan. A March 18 MRI of D. shows old blood. D.'s February 15 MRI shows layers of blood, but not acute blood. It was Dr. Strausberg's opinion that the findings present on D.'s February 15 film could not have been inflicted by Barber on February 5. The film showed more than one injury and it was mature. (R 1137-45)

A.' February 19 MRI shows a subdural hematoma that is from 4-8 weeks

old. The MRI shows areas of both increased and decreased signal intensity. A.' films show a laminated appearance of a subdural hematoma. Dr. Strausberg interpreted a mixed lesion showing areas of increased signal activity to probably mean that there had been multiple traumas occurring at different times. The injuries were at least 4-5 weeks old. (R 1150, 1152, 1155-56)

Dr. Strausberg believed that A.' injuries were not consistent with having occurred on February 6 or 17; D.'s injuries were not consistent with having occurred on February 5. It was impossible, in his opinion, for Barber to have been the perpetrator. (R 1159-60)

Dr. Strausberg defined acute as an injury having occurred no more than five to seven days prior; subacute would be defined as 7 to 14 days; chronic would be defined as an injury occurring more than 3 weeks ago. (R 1162, 1165)

According to Dr. Strausberg, for a shaking to result in a significant brain injury, it would have to be extremely violent. (R 1167-68) Dr. Strausberg also agreed that D. and A. were victims of shaken baby syndrome; he claimed they had suffered multiple incidents. (R 1169-70) Dr. Strausberg also agreed that Dr. Tilelli did a fine job in his clinical evaluation of D. and A., Strausberg just disagrees with Dr. Tilelli's opinion of the mechanisms of injury and timing. (AR 1170-71)

On August 29, 2000, the State sent the judge a letter citing case law in support of the admission of the Williams rule evidence. (R 1384-85)

Also on August 29, 2000, the trial judge ruled that the evidence in D.'s and A.' cases was not sufficiently similar to constitute Williams rule evidence. (R 1387-98, 1400-04) He found that the children were not previously healthy infants as D. suffered from gastrointestinal reflux and A. had a stuffy nose. (R 1391-92,

1402) The judge found that two injuries to infants in a short period was not that unusual since Barber worked in the infant room. (R 1392, 1403)

While the judge noted that all the doctors agreed that there was an accumulation of both old and new blood in both infants' brains, he found that the doctors disputed when the injuries causing the bleeding occurred. (R 1392-93, 1402-03)

The judge found that the facts that both victims were infants, both were enrolled at the same day care; both were injured about the same time, and both suffered from shaken baby syndrome, were merely fortuitously similar. The fact that the children had different parents and suffered altered mental status was unique, found the judge, but not so unique as to identify Barber as the perpetrator. (R 1393-94, 1403)

The judge further found that the evidence of Barber's prior incidents of mishandling with A. were not admissible since they were not similar. (R 1392, 1403)

The court also found that the prejudicial value of the similar fact evidence outweighed its probative value. (R 1403-04)

The court granted a tolling of the running of speedy trial for purposes of the State filing a petition for writ of certiorari. (R 1394-96) The State filed a petition for writ of certiorari with the Fifth District Court of Appeal, with an accompanying appendix. (R 1-54, 55-1432) The Fifth DCA issued an order to show cause to Barber. (R 1436) Barber filed a response to the State's petition. (R 1437-1459) The Fifth DCA issued an opinion granting the State's petition. (R 1465) See State v. Barber, 783 So. 2d 293 (Fla. 5th DCA 2001). Barber filed a motion for rehearing (R 1466-1490) which was denied (R 1499).

Barber filed a timely notice to invoke the discretionary jurisdiction of this court.

(R 1500-01) This Court entered an order accepting jurisdiction and dispensing with oral argument. (R 29) Respondent's brief on the merits follows.

SUMMARY OF THE ARGUMENT

This court should adopt the opinion of the United States Supreme Court in Huddleston v. United States, 485 U.S. 681 (1988) that in determining whether the State has introduced sufficient evidence to meet the statutory requirements for the admissibility of collateral crime evidence, the trial court should neither weigh credibility nor make a finding that the State has proven the conditional fact by a clear and convincing standard. The trial court should simply examine all the evidence in the case and decide whether the jury could reasonably find the conditional fact by clear and convincing evidence.

The Fifth District Court of Appeal properly granted the State's petition for a writ of certiorari. As demonstrated in the case of Barber v. State, 781 So. 2d 425 (Fla. 5th DCA 2001), the facts of the case support a finding that Barber committed the collateral crime by clear and convincing evidence. The opinion of the Fifth DCA should be affirmed.

ARGUMENT

ISSUE

THE DISTRICT COURT PROPERLY DETERMINED THAT THE TRIAL COURT ERRED IN EXCLUDING COLLATERAL CRIME EVIDENCE.

Petitioner, Ann Barber (Barber), asserts that the Fifth District Court of Appeal (DCA) erred in reversing the ruling of the trial court which improperly excluded testimony of collateral crime evidence. Respondent first asserts that this Court lacks jurisdiction to entertain the instant appeal. The decision of the Fifth DCA in Barber v. State, 781 So. 2d 425 (Fla. 5th DCA 2001), affirms the trial court's admission of Williams[2] rule evidence. Specifically, the appellate court stated:

> Barber contends that because no clear and convincing evidence was presented prior to admission before the jury that the former offense was actually committed by her, the court erred by allowing the evidence. We disagree. The State is only required to give notice of its intent to rely on *Williams* rule evidence pursuant to section 90.404(2)(b), Florida Statutes (1997). *Barber responded with a motion to strike, which was heard and denied. That was all that was required by the motions that were filed.* (Emphasis added).

Id. at 427-428. Contrary to Barber's assertion, the opinion of the Fifth DCA does not alter the standard for the admission of Williams rule evidence, nor does it provide that notice alone is sufficient for admission of collateral crime evidence. Instead, the Barber opinion merely states that the trial court acted properly in response to the motions filed by Barber *in this case*. A hearing was held on this motion at which Barber argued against the admission of any Williams rule evidence. Nothing more was

[2]Williams v. State, 110 So. 2d 654 (Fla.), cert. denied, 361 U.S. (1959). Codified at § 90.404(2), Florida Statutes (1997).

required of the trial court, the Fifth DCA found, *based upon the motion filed*. Since the opinion of the appellate court limits itself to the particular facts of this case and does not conflict with any case, Respondent asserts that jurisdiction was improvidently granted in Barber v. State, SC01-1007. Since jurisdiction was improvidently granted in Barber v. State, SC01-1007, Respondent contends that jurisdiction was also improvidently granted in this matter.

An examination of Barber's arguments demonstrates that her position is without merit. Respondent maintains that the district court's opinion in Barber v. State, supra, does not provide that the only thing the State must do to gain admission of collateral crime evidence is give notice pursuant to Florida Statute section 90.404(2)(b). Neither does the court's opinion alter the standard by which collateral crime evidence is to be admitted.

Barber asserts that the Fifth DCA's opinion allows for the admissibility of Williams rule evidence "regardless of whether there is any proof the person accused committed the alleged similar crime." (Petitioner's Merits Brief, p. 23) As Petitioner states, State v. Norris, 168 So. 2d 541 (Fla. 1964), and its progeny stand for the proposition that in order for collateral crime evidence to be admissible, there must be clear and convincing proof of a connection between the defendant and the collateral occurrences. Id. at 543. However, Florida courts have never directly addressed whether the trial court itself must make a preliminary finding that the proponent of the similar fact evidence to be admitted has proved the "other act" by clear and convincing evidence before it submits the evidence to the jury. Ehrhardt, Florida Evidence § 404.9 (2001 Edition) at pp. 194-195.

In Huddleston v. United States, 485 U.S. 681 (1988), the United States Supreme

Court decided, in interpreting the Federal Rules of Evidence, this precise issue. The Supreme Court in Huddleston held that a trial court need not, itself, make a preliminary finding that the Government has proved the "other act" by a preponderance of the evidence before it submits the evidence to the jury. Id. at 682. Instead, the trial judge should be required to determine only whether there is sufficient evidence for the jury to find that the defendant in fact committed the extrinsic offense; such evidence should be admitted if there is sufficient evidence to support a finding by the jury that the defendant committed the similar act. Id. at 685.

> "In determining whether the Government has introduced sufficient evidence to meet Rule 104(b) [Florida's section 90.105], the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact ... by a preponderance of the evidence.

Id. at 690.

The Court in Huddleston rejected the petitioner's contention that because of the danger of improper prejudice, the jury ought not to be exposed to similar act evidence until the trial court has heard the evidence and made a determination under Federal Rule of Evidence 104(a) that the defendant committed the similar act. In rejecting this argument, the Court noted that it was inconsistent with both the structure of the Rules of Evidence and the plain language of Rule 404(b). Rule 404(b), similar to Florida's statute 90.404(2)(b), contains no intimation that any preliminary showing is necessary before similar fact evidence may be introduced for a proper purpose.[3] Such evidence

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[3]Rule 404(b), Federal Rules of Evidence, (1998) provides:

> Other crimes, wrongs, or acts.– Evidence of other crimes, wrongs, or acts is not admissible to prove the character of

is subject only to the general requirements limiting admissibility. Id. at 687-688.

Evidence is admissible under Rule 404(b), states the Huddleston court, only if it is relevant. Id. at This finding is completely in keeping with the decisions of this Court in Williams v. State, and its progeny. In Williams, this Court held that "... evidence of any facts relevant to a material fact in issue except where the sole relevancy is character or propensity of the accused is admissible unless precluded by some specific exception or rule of exclusion. This rule applies to relevant similar fact evidence ... even though it points to the commission of another crime." Williams v. State, 110 So. 2d at 663. The Court in Huddleston stated that in a collateral crime context, similar acts evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor. Huddleston v. United States, 485 U.S. at 689.

Respondent asserts that, utilizing the "clear and convincing" standard of proof, the Huddleston standard should apply in Florida. As noted by Ehrhardt, "If

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> a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

§ 90.404(2)(a), Florida Statutes (1997) provides:

> Similar fact evidence of other crimes wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

Huddleston is specifically rejected by the Florida courts; the decision would be contrary to the general maxim that federal decisions interpreting the Federal Rules of Evidence are 'persuasive guidelines' in interpreting a similar provision of the Florida Evidence Code." Ehrhardt, Florida Evidence, § 404.9 (2001 Edition) at p. 195. See Dinter v. Brewer, 420 So. 2d 932, 934 (Fla. 3d DCA 1982). Although the quantum of proof is higher in Florida (requiring "clear and convincing" evidence rather than a "preponderance"), the rationale set forth in Huddleston is equally applicable in Florida.

As in Huddleston, the Florida courts lean toward the admissibility of similar fact evidence. Williams holds that similar fact evidence should be admissible except where its sole relevancy is to prove bad character or propensity; it is a rule of admission rather than a rule of exclusion. Adopting the rationale and holding in Huddleston will not alter the standard of admissibility of Williams rule evidence, but will clarify for the trial courts the precise pre-trial determination necessary.

The Fifth DCA in Barber, found that the collateral crime evidence in this case did meet the "clear and convincing" standard for admission before the jury; the trial court erred in ruling that the evidence of the collateral crime should be excluded. In granting the petition for writ of certiorari, the Fifth DCA noted its opinion in Barber v. State, 781 So. 2d 425 (Fla. 5th DCA 2001), wherein the Fifth DCA found:

> When compared, the details of each incident during which the infants were injured are strikingly similar. Both victims had been entrusted to Barber's care at the same location. Both victims had almost identical symptoms of injury after being cared for by Barber on the first occasion and their health improved after being removed from her care. Both victims again experienced similar and more serious symptoms upon being returned to Barber for daycare at the same location. Both victims received their injuries within the same short period of time. Witnesses placed Barber in

> the same room with both victims with no other adult being present. Both infants were diagnosed as having Shaken Baby Syndrome. Barber admitted having handled A. in a rough manner to an investigating officer. Witnesses testified that she became frustrated while taking care of infants that demanded attention. These details are not merely evidence of general similarity between the charged offense and the collateral crime. "These points of similarity pervade the compared factual situations and when taken as a whole are so unusual as to point to the defendant." (Citation omitted). Surely, two four-month-old infants entrusted to the same daycare worker in the same room of the same daycare center and who experience mental status alteration and violent illnesses on two separate occasions as a result of trauma within the same approximate time period are not merely evidence of a general similarity. Those circumstances are so unusual as to point directly to the same daycare worker and we find those circumstances to be relevant.

Barber v. State, 781 So. 2d at 428-429. In its opinion, the district court set forth the myriad of parallels between Baby D.'s and Baby A.' situations. Specifically noted in the opinion is the fact that Barber was the day care worker to whom both infants had been entrusted during the times of their traumas. Thus, with this litany of similarities, the district court's opinion follows the existing "clear and convincing" standard for admission of Williams rule evidence.[4]

Barber asserts that the clear and convincing standard cannot be met in this case. However, Barber was convicted in the D. T.case, so the State has already proven that Barber was the perpetrator of this collateral act beyond a reasonable doubt. The trial judge who rendered the order excluding the collateral crime evidence did not preside over that trial, and the State submits that he departed from the essential requirements of the law in going behind that jury verdict.

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[4]Respondent notes that Barber does not contest either the relevancy or probative nature of the evidence in her brief.

The trial court departed from the essential requirements of the law in applying an incorrect standard for determining the admissibility of similar fact evidence. It appears that the trial court agreed with the State's assessment regarding points of similarity, i.e., both victims were infants, both were enrolled at the same day care, both were injured at or around the same time, both sustained shaken baby syndrome, and both manifested mental status alteration while at the day care. The court then went on to find that "most of the facts that are similar are fortuitous". These facts are not "fortuitous" - they are tragic and unique when viewed in the context of all infants at day care, rather than two shaken babies at day care.

Two infants who were in Barber's care ended up in Arnold Palmer Hospital within a week of each other, both diagnosed with shaken baby syndrome. Dr. Pattisapu sees but 15-20, maybe 25 cases of shaken baby syndrome a year (R 1034). The trial court found that the "fact that both children exhibited Shaken Baby Syndrome is not persuasive because every child who suffered this injury would exhibit characteristics of Baby Shaken Syndrome". Yes, and every murder victim is dead, but that does not render evidence of a similar murder inadmissible, because it is the facts leading up to the result that are examined. Every child who is dropped off at day care does not exhibit shaken baby syndrome. Here, two infants who were dropped off at the same day care under Barber's care became ill, recovered, and after returning to Barber's care were hospitalized with shaken baby syndrome within a week of each other. This is clearly unique.

The trial court also found "that the injuries occurred at the same time was not in any way controlled by the Defendant, but it depended on when the parents brought the children to the day care." Unfortunately for these parents, they brought their

children to the day care when Barber was working in the infant room. Again, that is what makes these facts unique and points to Barber as the perpetrator. The State never claimed that Barber "controlled" the time frame. Rather, its position has always been that where two incidents of shaken baby syndrome occur within days of each other to two children under Barber's care, this is clearly unique

Both infants regularly visited a doctor, as most infants do, and child abuse was never previously suspected. Within a week of each other, both infants are in Arnold Palmer Hospital with head, leg and rib injuries, diagnosed with shaken baby syndrome. Both infants had previously become ill at day care, recovered, and returned to day care again shortly before they were hospitalized. The common factor between the two infants is that they were both in the care of Ann Barber right before they were diagnosed with shaken baby syndrome. The State contends that this establishes a unique set of circumstances which establishes Barber as the perpetrator of the infants' injuries.

The trial court also found that the prejudicial effect of the evidence outweighed its probative value, but did not explain this finding. Almost all evidence to be introduced by the state in a criminal prosecution will be prejudicial to the defendant, but it is only where the *unfair* prejudice *substantially outweighs* the probative value of the evidence should it be excluded. Amoros v. State, 531 So. 2d 1256 (Fla. 1988). As a general rule, evidence of other crimes, wrongs or acts is *admissible* if it casts light on a material fact in issue other than the defendant's bad character or propensity. Bryan v. State, 533 So. 2d 744 (Fla. 1988). Evidence that is probative of a material fact in issue is not inadmissible simply because it has a tendency to suggest the commission of another crime and thus is necessarily prejudicial to the defendant. Id.

As was demonstrated in the State's petition, the evidence is clearly relevant. The State further contends that the incident involving one other infant, which occurred at the same time as the instant case and resulted in almost identical injuries, is not unduly prejudicial.

Clearly, the evidence set forth by the State meets the Huddleston standard, to a "clear and convincing" standard, to allow the collateral crime evidence to be admitted before the jury. The trial judge, in finding a good deal of the facts "fortuitous," improperly disregarded facts which should have been considered in making its determination of admissibility. "Individual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts." Huddleston, 485 So. 2d at 691 quoting Bourjaily v. United States, 483 U.S. 171, 179-80 (1987). When viewed as a whole, the evidence presented by the State leads to the conclusion, by clear and convincing evidence, that Barber was the perpetrator of the collateral acts. The Fifth DCA properly granted the writ and quashed the order of the trial court excluding the collateral crime evidence. The decision of the Fifth District Court of Appeal should be affirmed.

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully requests this honorable Court find that review was improvidently granted in this matter, or alternatively, affirm the ruling of the Fifth District Court of Appeal in all respects and remand this case to the trial court for further proceedings consistent therewith.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Merits Brief of Respondent has been furnished by U.S. mail to Robert Berry/Gregory Eisenmenger, Attorneys for Petitioner, 8226 North Wickham Road, Suite 202, Melbourne, Florida 32940, this 7th day of February, 2002.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Times New Roman, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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