**IN THE SUPREME COURT**
**THE STATE OF FLORIDA**

**ANN ELLIOTT BARBER,**

**Appellant**

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

**v.**

**STATE OF FLORIDA**

**Appellee.**
**_____/**

# AMENDED INITIAL BRIEF ON THE MERITS


**EISENMENGER & BERRY, P.A.**

**_____**
**ROBERT R. BERRY**
**Fla. Bar Number 714216**
**GREGORY W. EISENMENGER**
**Fla. Bar Number 237175**
**8226 North Wickham Road**
**Suite 202**
**Melbourne, Florida 32940**
**(321)757-5211 (office)**
**(321)757-5215 (fax)**
**Attorneys for Appellant**


## TABLE OF CONTENTS

**Page**

**TABLE OF CITATIONS**

(Fla. 1959). 20 et. seq.

## STATEMENT OF CASE AND FACTS

Note: There are extensive references to the trial transcript in the companion case before this Court. Those transcripts were reviewed by the trial judge in making his ruling in the instant case. The State has asked this Court to take judicial notice of the file in SC01-1007, and the Court has granted that request without objection from the Appellant. Thus, "Trial Transcript" citations will refer to the companion case, while "R" citations will refer to the record in the instant case.

The Appellant, Ann Barber, seeks an order from this Court reversing the decision of the Florida Fifth District Court of Appeal in the instant case. The Fifth District reversed a trial court order excluding *Williams* rule evidence the State sought to offer at trial. Ms. Barber is charged with aggravated child abuse in two separate cases, both of which are before this Court for review in separate actions. Ms. Barber was a daycare worker in the infant section of a church daycare center. Two children who were in Ms. Barber's care developed signs of "shaken baby syndrome." In the State's prosecution of these cases, they sought to use what they believed was evidence the Defendant shook the other baby as *Williams* rule evidence in the companion case. In this case the State was prosecuting Mrs. Barber for injuries sustained by A.P. The State sought to offer evidence of injuries sustained by another child, D.T., as *Williams* rule evidence. In the other action, Mrs. Barber is

being prosecuted for injuries sustained by D.T., and the State sought to offer evidence of injuries sustained by A.P. as *Williams* Rule evidence.

Both cases are at different points in the course of their litigation. In the instant case, the Defendant has not gone to trial, and a pre-trial order excluding the proposed *Williams* rule evidence has been entered. The State sought certiorari review of that decision, and the Fifth District reversed the trial court's order, relying completely on their decision in Barber v. State, 781 So.2d 425 (Fla. 5th DCA 2001), which is before this Court for review as SC 01-1007. In that case, the Defendant was tried and convicted in Brevard County Circuit Court, and appealed her conviction to the Fifth District. The primary issue on appeal in that case was the trial court's denial of a pre-admission proceeding where the State would have to present clear and convincing evidence the Defendant actually committed the alleged *Williams* rule acts. The Fifth District ruled that "[t]he 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).

In the instant case, the Honorable Bruce Jacobus, Circuit Court Judge, Brevard County, State of Florida, found, prior to the Fifth District's ruling in the other Barber case,"[t]he totality of all the evidence examined by this court leads this Court to conclude **that the clear and convincing evidence does not suggest the Defendant was the perpetrator of the crime."** ("Order on State's Proffer of Williams Rule Evidence, r.

1402). Judge Jacobus had before him the entire trial transcript in the companion case, as well as live testimony, and other transcribed testimony in these two cases.

The Defendant in this case has, for over two (2) years, requested an evidentiary hearing on the issue of the admissibility of the *William's* Rule evidence in these two cases. Finally, in the instant case, her request was granted. Not surprisingly, at least to the Defendant, upon an evidentiary hearing, the State's offer of alleged *Williams* Rule evidence was denied.

With regard to the offer of evidence regarding injuries sustained by D.T., allegedly at the hands of the Defendant, Judge Jacobus made numerous factual findings justifying his decision. Judge Jacobus relied on the record in the D.T. prosecution as well as on evidence elicited from Defense experts who had not previously testiified.

The State's key medical witness, Dr. John Tilelli, while being cross-examined in the companion case, had the following exchange with Mrs. Barber's counsel:

> "Q (By Mr. Eisenmenger): Well, again, let me back up. Ignore for a moment the mother's report, let's assume the mother never took the baby out of day care, you no longer can consider that in your opinion.
> A: (By Dr. Tilelli): Correct.
> Q: Tell me when this injury occurred.
> A: **I can't**
> Q: So what it comes down to is your whole opinion as to when this injury occurred hinges on the truthfulness of the mother's history that she took the child out of day care because of some episode that you feel is consistent with this loss of consciousness?

A: Yes"

(Trial Transcript in 5D99-218, page 930).

The medical testimony of the four primary medical witnesses supports Mrs. Barber's position, and the trial court exercised its right to rely on this testimony, and reject the testimony of the parents. The trial court, in its order on the State's proffer, stated:

> "The most compelling evidence considered by this Court is that each of the Doctors Tilelli, Pattisapu, Cook, and Strausberg found in both infants that there was a collection of old blood in their heads, suggesting subdural hemotomas that existed for some time. Clearly, there is a dispute in the evidence between the doctors as to how long the old blood had been there. There is substantial evidence that the old blood predates either of the children being at the First Baptist Daycare. The totality of all the evidence examined by this court leads this court to conclude that the clear and convincing evidence does not suggest that the Defendant was the perpetrator of the crime."

(R. 1402). Additionally, Judge Jacobus found significance in the testimony of Dr. Jay Cook, a defense expert. Dr. Cook testified that D.T. experienced an unusual increase in his skull size from August to November 1997, where his head size moved from the second to the fiftieth percentile. Cook further testified that:

> "From reviewing the records it's my opinion that what was referred to gastroesophageal reflux by his physicians most likely was due to an acute subdural that occurred in November (1997)".

(R. 1089). Judge Jacobus noted Dr. Cook's opinion that "this was indicative of some type of pressure in the skull and that

that condition predated D.T.'s first contact with Mrs. Barber by several months.

Dr. Cook testified on direct examination in part as follows:

> "Q: (By Mr. Eisenmenger) I want you to assume for the purpose of this question the defendant, Ann Barber's first contact with D.T. was February 3, 1998, approximately a month before this [CT] study was done. Could any action by Ann Barber have resulted in the findings depicted on that particular study?
> A: (By Dr. Cook) No.
> Q: Why is that?
> A: The timing is just wrong. One would not have seen enough resolution, and I've seen enough subdurals over time and I think the literature documents it.
> A Subdural even a month old you would not get this accommodation of the sulci and gyri pattern the way you have in the ventricular accommodation.
> Q: Thank you.
> A: Can I make one other point --
> Q: Sure
> A: --is where the head circumference really comes in helpful. By following over time we see there's an acute change and then it starts growing again. That's when this would have occurred, between November 24th [1997] and January 10th [1998]."

(R. 1095-1096). Interestingly, according to even his mother, D. was brought to the doctor during early January, 1998 following a week of vomiting/spitting up between Christmas and New Years. (Trial Transcript, pages 110-14). Although Ms. Thimlar indicated the child was only spitting up, her credibility was certainly at issue. And the distinction begs the question: if spitting up means the normal spitting up of all infants, why did D.'s spitting up warrant medical attention at all? On cross-examination, she indicated she

could not remember if she told Dr. Arnold, her son's pediatrician, whether D. had been vomiting or spitting up. (Trial Transcript, pages 183). It is certainly consistent with the defense's theory of the case that Mrs. Thimlar would attempt to minimize the significance of these doctor visits.

There is a strong factual basis to question the veracity of the two mothers in this case, as Judge Jacobus reliance on the medical evidence of the mother's testimony indicates. Before D.T. was ever brought to the First Baptist Church Day Care, he had a history of health problems. He had experienced repeated episodes of vomiting during the months leading up to his hospitalization. In fact, during the eight-day period beginning around Christmas 1997, D.T. vomited for eight (8) consecutive days before he was finally taken to a doctor. The State alleged in its amended information that Mrs. Barber injured D. somewhere between February 5, and February 11, 1998. There was no purely medical evidence adduced determining the injuries occurred during the time the child was in the care of Mrs. Barber, only speculation by the State based entirely on the history given by the mother, who had a poor recollection of her own child's medical history at trial. (See cross examination of Brenda Thimlar, TT. 171-220, 231-232). Ms. Thimlar did concede that on November 24, 1997, D. had been taken to the Emergency Room at Wuesthoff Hospital in Rockledge, Florida because of discomfort when he was laid on his back and vomiting. (TT. 177). At that time, she gave personnel at the hospital

additional medical history that the child had been crying incessantly for four solid days. (TT. 178). She brought D. to see Dr. Arnold for treatment on January 2, 1998. While her trial testimony was that D. was "spitting up" during the week prior to the doctor visit, she could not remember whether she told Dr. Arnold D. was "vomiting" or "spitting up." (TT 182-3). She did not believe reviewing medical records of Dr. Arnold indicating she reported vomiting would refresh her memory as to what she told Dr. Arnold, even though she is an EMT and thus familiar with medical procedure. (TT 183). Ms. Thimlar conceded that her testimony was inconsistent with medical records regarding doctor visits. (TT199). Ms. Thimlar testified she brought D. for treatment at Pediatrics of Brevard on Monday, February 9, 1998 because of vomiting. (TT 205). Again, she would not confirm the medical record report of the history she gave doctors. (TT 205). She could not recall what history she gave. (TT 206). She ten took D. again for treatment at Pediatrics of Brevard on Wednesday, February 11, 1998. (TT 206). She again could not recall what history she presented the physician with. (TT 206). Generally, it was her position that Pediatrics of Brevard's medical records were not complete. (TT 197-8). Mrs. Thimlar also testified that on February 6, 1998, she noted yellow rings around D.'s eyes. However, on cross examination, she conceded the medical records from the February 6, 1998 visit were inconsistent with her testimony on this point. (TT page 221). She also conceded her testimony

regarding crepitus (a popping sound in the back) being reported by her on February 6, 1998 and observed by medical personnel was not supported by the medical records. (TT 189-199).

Dr. Tilelli, the State's expert, also admitted he had at one time opined he could not medically date the injuries. (Tr. 904). Specifically, Tilelli testified that based on the x-rays, the radiographs only, the window for the injuries sustained by D. was between January 1, 1998 and February 7, 1998. (TT 904). Even the State in their original petition for certiorari to the Fifth District had to concede that one of their own witnesses, Dr. Pattisapu indicated the older injuries were between three and six weeks old (R. 1057, 1058, 1061-1064), which means those injuries to D. occurred before D. T. had any contact with Ann Barber.

Tilelli further conceded that this window would include the time period when Mrs. T. brought D. for treatment after his spitting up/vomiting episodes in late 1997 and early 1998. (TT 903-4). He further admitted he was relying on the history given by the mother for his opinion they happened while D. was in day care. (TT.902-903, 904). The child had a history of "spitting up and fussiness" during the weeks prior to February 5. (TT. 912). Without adding undue length to this recitation of fact, the Appellant would refer the court to the cross examination of Dr. Tilelli, where extensive questioning occurs regarding the contents of the various medical records reviewed by Dr. Tilelli, and the comparison's

made with Ms. Thimlar's testimony. (TT 902-954). Tilelli also testified it would concern him as a pediatrician that a parent did not seek medical attention for a child for a period of eight days with daily vomiting. (TT 950). He further testified that it was a possible indicator of abuse, given the fact that some parents may have waited for the symptomology to resolve prior to seeking treatment. (TT 950).

On February 2, 1998, the other child, A.P., stopped breathing while with Mrs. Barber at First Baptist Daycare. Mrs. Barber immediately got help from co-workers and EMT's. The infant was resuscitated and revived by Mrs. Barber, and was taken to the Wuesthoff Hospital, where she was released shortly thereafter.

On February 17, 1998, A. was again taken to the hospital after being left at day care. She was subsequently found to have suffered injuries consistent with "shaken baby syndrome." There was no purely medical evidence presented indicating the injuries had to have occurred during a time period when the children were in the care of Mrs. Barber. As indicated elsewhere, the medical evidence makes it clear the injuries could have well been sustained long before the child ever came to be cared for by Mrs. Barber. Dr. Tilelli testified he could not pinpoint the date of her injuries based on medical evidence alone. (TT page 998). He was willing to opine on dates when presented with a lengthy hypothetical that relies on the accuracy of the history supplied by A.' mother, who had significant difficulty remembering her child's

medical history as well. (See cross examination of Michelle Champaigne, TT 525-531). Furthermore, the child had a history of congestion prior to ever coming into contact with Mrs. Barber. (TT 526). Champaigne had left a device with Mrs. Barber at her first visit to assist with suctioning the child because of her congestion. (TT 526-7). This problem continued through February 6, 1998 when the breathing episode occurred. (TT 526). Ms. Champaigne testified on one hand that on February 7, 1998, she observed A. exhibiting signs of intense pain when picked up, but does not recall whether she related that fact to her pediatrician Dr. O'Hern when she presented A. for treatment on February 7, 1998. She testifies to continuing to observe this discomfort on February 10, 1998, but again not reporting this fact to Dr. O'Hern. (TT 528-529). She described the cry of pain when she picked her baby up as "unlike anything [her] daughter had ever done before in her life." (TT 529), but did not report this fact to any physician. (TT 530). Likewise, when she saw Dr. O'Hern again on February 15, 1998, she did not report this observation of pain. (TT 530). It was the State's position at trial that these heretofore unreported incidents of pain were the result of rib injuries inflicted by the Defendant on the minor child.

The State took exception to the ruling by Judge Jacobus, and in a timely manner, sought certiorari review by the Fifth District Court of Appeal, State of Florida. Thus, at the same time, both the companion case and the instant case were up for

review by the Fifth District. The Fifth District chose to rule on the companion case first, and stated in that case:

> "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)." (emphasis added).

The Fifth District then took this holding, applied it to the instant case, and overturned Judge Jacobus' ruling, despite the fact that the cases were based on completely different factual records.

The Appellant sought review of the decision in the instant case, and on November 20, 2001, this Court accepted jurisdiction and directed briefing on the merits.

## SUMMARY OF ARGUMENT

The Fifth District Court's decision in the instant case relies on its decision in Barber v. State, 781 So.2d 425 (Fla. 5th DCA 2001), which was based on a substantially different factual record, and which was clearly a factual determination by the trial court that the State did not factually show by clear and convincing evidence the Defendant committed the alleged *Williams* rule acts. Ironically, the issue in the case relied upon by the Fifth District was whether the State had to satisfy the "clear and convincing evidence' standard of admissibility set forth in such decisions as Smith v. State, 700 So.2d 446 (Fla. 1st DCA 1997); State v. Audano, 641 So.2d 1356 (Fla. 2d DCA 1994); Dibble v. State, 347 So.2d 1096,Fla. 2d DCA 1977); and Malcolm v. State, 415 So.2d 891 (Fla. 3d DCA 1982); Smith v. State, 743 So.2d 141 (Fla. 4th DCA 1999); as well as this Court's decision in State v. Norris, 168 So.2d 541 (Fla. 1964). When the Defendant was given the opportunity (i.e. in the instant case) to put the State's evidence to the test outlined in these cases, the trial court made a factual determination that the State had not met its burden and determined therefore the evidence was inadmissible.

**T**he Fifth District incorrectly ruled there was no entitlement to a pre-admission determination regarding the *Williams* rule evidence, and went as far as to say that mere notice of intent to put on *Williams* rule evidence is sufficient to sustain its admissibility.

**ARGUMENT: THE FIFTH DISTRICT ERRED IN RELYING ON ITS DECISION IN BARBER V. STATE, 781, So.2d 425 (Fla. 5th DCA, 2001) IN DECIDING THE INSTANT CASE.**

On a different factual record, the Fifth District applies its decision in Barber v. State, 781 So.2d 425 (Fla. 5th DCA, 2001) to the instant case, with no comment on the fact that it is relying on a different factual record. The decision relied upon by the Fifth District asserts two propositions of law, both of which have been rejected by every other district court in this State as well as by this Court.

The Fifth District proposes there is no requirement the proponent of *Williams* rule evidence establish by clear and convincing evidence, prior to its admission, that the act constituting the proposed evidence was actually committed by the accused. The Fifth District further proposes that mere notice alone is sufficient for admission of this highly prejudicial type of evidence. Specifically, the Fifth District 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)." (emphasis added).

The position asserted by the Fifth District constitutes an express and direct conflict with this Court's decision in State v. Norris, 168 So.2d 541 (Fla. 1964). In Norris, this Court endorsed the proposition that "evidence of a collateral

crime is inadmissible unless accompanied by **evidence** connecting the defendant therewith." Therefore, contrary to the Fifth District's assertion, there is clearly a predicate requirement of proof that goes beyond mere notice.

The holding in Norris has been followed by the Florida First District Court of Appeal in Smith v. State, 700 So.2d 446 (Fla. 1st DCA 1997) when that Court held "as a **condition precedent to admission** of the evidence the trial court was **required** to determine that there was **clear and convincing proof** that the appellant committed the prior abuse."

Similarly, the Florida Second District Court of Appeal, in State v. Audano, 641 So.2d 1356 (Fla. 2d DCA 1994), held "**[b]efore** evidence of a collateral crime can be admitted under the *Williams* Rule, there must be clear and convincing evidence that the former offense was actually committed by the defendant." In Dibble v. State, 347 So.2d 1096 (Fla. 2d DCA 1977), the Second District held that "prior to evidence of an independent crime being admissible, it is essential to show that the former crime was committed and committed by the person on trial."

The Third District also holds that as a condition precedent to admission of *Williams* rule evidence the trial court must determine there was clear and convincing proof the defendant was the one who committed the alleged *Williams* rule act. Malcolm v. State, 415 So.2d 891 (Fla. 3d DCA 1982). In Malcolm, the Third District endorsed pre-admission review by the Court and stated "[e]vidence of 'collateral crimes' should

be considered presumptively inadmissible and excluded unless the state can affirmatively establish its propriety." With regard to the argument the evidence should be admitted conditionally during trial, the Court stated: "[t]he adoption of a [this] procedure...results in the jury's hearing the clearly prejudicial evidence in question, subject to its being later 'stricken' with only an accompanying instruction -- of legendary ineffectiveness -- that it should be disregarded."

The Fourth District Court of Appeal has held, in Smith v. State, 743 So.2d 141 (Fla. 4th DCA 1999), that "[b]efore evidence of collateral crimes can be admitted under *Williams*, there must be clear and convincing evidence that the defendant committed the crime."

In contrast, the Fifth District's position is not only that *Williams* Rule evidence is presumptively admissible, it is in fact *per se* admissible upon supplying proper notice to the defense, regardless of whether there is any proof the person accused committed the alleged similar crime. Until the Barber decision, there has never been any court in this State asserting such an extreme position. As indicated in the preceding paragraphs, each of the other district courts of appeal has reached an entirely different conclusion than the Fifth District on this issue. The Fifth District's position should be rejected by this Court, as it is neither good law, nor good policy.

The trial court made the factual determination in this case that the State did not meet the burden of presenting

clear and convincing evidence the alleged *Williams* rule acts were committed by the Defendant. Clear and convincing evidence has been defined by this Court, in Inquiry Concerning A Judge No. 93-62, re: P. Kevin Davey, 645 So.2d 398 (Fla. 1994) as an:

> "... intermediate level of proof entail[ing] both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy."

The Davey court cited with approval the Florida Fourth District Court of Appeal decision in Slomowitz v. Walker, 429 So.2d 797, 800 (Fla. 4th DCA 1983), which held:

> "[C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established."

After hearing and reviewing all of the evidence, Judge Jacobus obviously did not have that "firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." The factual determinations of the trial court are not appropriately reviewable by petition for writ of certiorari, where the standard of review revolves around whether the party seeking

the writ can demonstrate a "departure from the essential requirements of law." The Fifth District, in Haines City Community Dev. v. Heggs, 658 So.2d 523, 530 (Fla. 1995), held "the standard of review for certiorari in the district court...is limited to whether the circuit court afforded procedural due process and whether the circuit court applied the correct law....[T]hese two components are merely expressions of ways in which the circuit court decision may have departed from the essential requirements of the law." This Court on several occasions has indicated an appellate court hearing a certiorari petition cannot substitute its view of the facts for that of the lower court or lower administrative body. In fact, the Fifth District, in Maurer v. State, 668 So.2d 1077, at 1078 (Fla. 5th DCA 1996), correctly pointed out that it is itself a departure from the essential requirements of the law to "[reweigh] the evidence and substitute its judgement for that of the [lower court]." Additionally, the Fifth District, in City of Deland v. Benline Process Color Co, Inc., 493 So.2d 26, at 28 (Fla. 5th DCA 1986) held that a "circuit court acting in its appellate capacity which reevaluates the credibility of evidence or re-weighs conflicting evidence before the lower tribunal departs from the essential requirements of law."

In the instant case, the State's petition for certiorari to the Fifth District was one extended request for the Court to reweigh the evidence because of its dissatisfaction with the trial court's performance in doing so. They did not

allege a departure from the essential requirements of law. The State was afforded procedural due process, the trial court applied the proper law, and the decision is supported by competent, substantial evidence. In Maurer, supra., the Fifth District reiterated the proposition that a factual determination will survive if there is "any competent substantial evidence to support the trial court's ruling." 668 So.2d at 1079. Judge Jacobus' ruling certainly withstands that minimal standard

Interestingly, in Pillsbury v. State Department of Health and Rehabilitative Services, 744 So.2d 1040, at 1041 (Fla. 2d DCA 1999), the Second District commented that one cannot merely categorize what "is essentially a factual determination" as a "conclusion of law," adding that the obligation to honor a finding of fact "cannot be avoided by categorizing a contrary finding as a conclusion of law." That is clearly what the State of Florida did throughout their Petition. The State attempted to couch what is clearly a factual determination of the trial court as a conclusion of law to make it fit the standard of review they were aware must be applied.

The testimony in this matter, and the record in this matter, can be fairly neatly categorized into two parts. The first part deals with the parents and other witnesses who had contact with both D.T. and A.P. The
second part deals with medical testimony from both State and Defense experts. It is the conflict between these two

categories of evidence that it fell to Judge Jacobus to resolve.

In its simplest terms, the basis of Judge Jacobus' ruling in this case goes to the court's trust in the medical testimony over that of the history related by the parents of the two minor children. It has always been Mrs. Barber's position that she did not injure either of these children, and that any list of likely suspects would certainly include the parents. The State's key medical witness, Dr. John Tilelli, while being cross-examined in the companion case, had the following exchange with Mrs. Barber's counsel:

> "Q (By Mr. Eisenmenger): Well, again, let me back up. Ignore for a moment the mother's report, let's assume the mother never took the baby out of day care, you no longer can consider that in your opinion.
> A: (By Dr. Tilelli): Correct.
> Q: Tell me when this injury occurred.
> A: **I can't**
> Q: So what it comes down to is your whole opinion as to when this injury occurred hinges on the truthfulness of the mother's history that she took the child out of day care because of some episode that you feel is consistent with this loss of consciousness?
> A: Yes"

(Trial Transcript in 5D99-218, page 930).

The medical testimony of the four primary medical witnesses supports Mrs. Barber's position, and the trial court was certainly within its rights to rely on this testimony, and reject the testimony of the parents. The trial court, in its order on the State's proffer, stated:

> "The most compelling evidence considered by this Court is that each of the Doctors

> Tilelli, Pattisapu, Cook, and Strausberg found in both infants that there was a collection of old blood in their heads, suggesting subdural hemotomas that existed for some time. Clearly, there is a dispute in the evidence between the doctors as to how long the old blood had been there. There is substantial evidence that the old blood predates either of the children being at the First Baptist Daycare. The totality of all the evidence examined by this court leads this court to conclude that the clear and convincing evidence does not suggest that the Defendant was the perpetrator of the crime."

(R. 1402). Additionally, Judge Jacobus found significance in the testimony of Dr. Jay Cook, a defense expert. Dr. Cook testified that D.T. experienced an unusual increase in his skull size from August to November 1997, where his head size moved from the second to the fiftieth percentile. Cook further testified that:

> "From reviewing the records it's my opinion that what was referred to gastroesophageal reflux by his physicians most likely was due to an acute subdural that occurred in November (1997)".

(R. 181). Judge Jacobus noted Dr. Cook's opinion that "this was indicative of some type of pressure in the skull and that that condition predated D.T.'s first contact with Mrs. Barber by several months.

Dr. Cook testified on direct examination in part as follows:

> "Q: (By Mr. Eisenmenger) I want you to assume for the purpose of this question the defendant, Ann Barber's first contact with D.T. was February 3, 1998, approximately a month before this [CT] study was done. Could any action by Ann Barber have resulted in the findings

depicted on that particular study?
A: (By Dr. Cook) No.
Q: Why is that?
A: The timing is just wrong. One would not have seen enough resolution, and I've seen enough subdurals over time and I think the literature documents it.
A Subdural even a month old you would not get this accommodation of the sulci and gyri pattern the way you have in the ventricular accommodation.
Q: Thank you.
A: Can I make one other point --
Q: Sure
A: --is where the head circumference really comes in helpful. By following over time we see there's an acute change and then it starts growing again. That's when this would have occurred, between November 24th [1997] and January 10th [1998]."

(R. 187-188). Interestingly, according to even his mother, D. was brought to the doctor during early January, 1998 following a week of vomiting/spitting up between Christmas and New Years. (Trial Transcript, pages 110-14). Although Ms. Thimlar indicated the child was only spitting up, her credibility was certainly at issue. On cross examination, she indicated she could not remember if she told Dr. Arnold, her son's pediatrician, whether D. had been vomiting or spitting up. (Trial Transcript, pages 183). It is certainly consistent with the defense's theory of the case that Mrs. Thimlar would attempt to minimize the significance of these doctor visits.

Even the State in their brief had to concede that one of their own witnesses, Dr. Pattisapu indicated the older injuries were between three and six weeks old (R. 1057, 1058, 1061-1064), which means those injuries to D. occurred

before he had any contact with Ann Barber. The State also argues the leg and rib injuries are not addressed by the testimony of Dr.'s Cook and Strausburg. The logical problem with this is that all of the injuries sustained by these children are being attributed to the Defendant. While it is entirely possible that they were being abused in February of 1998, the fact of the matter is that if they were also being abused in January 1998 (before they ever had an encounter with Mrs. Barber), then it is significantly less likely that any injuries sustained by them in February occurred at the hands of Mrs. Barber.

The State also asserted in their Petition to the Fifth District that the issue should be one resolved by the jury, arguing, without supporting case law, that there is no "admissibility" issue, only a "weight of the evidence" issue. It is because of the highly prejudicial effect of this type of evidence that a special set of rules were created just to deal with the **admissibility** issue. This type of evidence is highly prejudicial, that is why it is admissible only in special circumstances. Under the test for admissibility set forth in countless court decisions, the party seeking to admit such evidence must prove the defendant was the perpetrator of the crime by clear and convincing evidence. The State failed to do this, and that is why the trial court made a factual determination that the clear and convincing standard was not met. The trial court afforded the State due process, it applied the appropriate law, and there was competent and

substantial evidence to support the finding of the trial court. The Petition for Writ of Certiorari should therefore have been denied.

The Court ruled the State failed to demonstrate some unique or distinctive characteristic that associates the crime with Mrs. Barber, and made this factual finding a separate and distinct basis for its ruling on the inadmissibility of the proffered evidence and testimony. (R. 1403). With regard to this issue, Judge Jacobus used the following analysis to conclude the evidence was not admissible under the second prong of the test for admissibility:

> "The State urges that both victims were infants at the time of the alleged crimes, both were enrolled at the First Baptist Church's daycare, both were injured at or around the same time, both sustained the type of injury known as "the Shaken Baby Syndrome," and both manifested mental status alteration while at the daycare. However, in examining the facts, most of the facts that are similar are fortuitous. Both were infants, but this is expected because the Defendant is the caregiver of the infant room. One would expect that every child in her care would be an infant. 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 daycare. 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 [sic]. The fact that the children had different parents and manifested mental status alteration while at the First Baptist Church's daycare is unique; however, this Court finds that the facts are not so unique as to point to this Defendant as the perpetrator. The Court therefore concludes that the facts are

> not so sufficiently unique as to be admissible under section 90.404(2), Florida Statutes."

The State's own witness, Dr. John Tilelli, testified there was nothing unique about the injuries sustained by D. T. and A.P. (Testimony of Dr. John Tilelli, pages 1018-1019, transcript filed in this court at 5D99-218). Additionally, D.T. had at least one documented "cyanotic episode" while at Arnold Palmer Hospital. (Trial Transcript, page 935). The State asserts as fact "that the injuries to both infants occurred within a two week period." (State's Brief at page 41). What they continually fail to understand is that not only is that assertion controverted by clear medical evidence, but that exact assertion has been rejected by the trial court as factually unsupported. The trial court's finding to the contrary is supported by competent and substantial evidence.

In support of their argument on the issue of unique characteristics, the State cites this Court's decision in Chandler v. State, 442 So.2d 171, 173 (Fla. 1983). However, in Chandler, the unique characteristics were proven by clear and convincing evidence. In the instant case, only the accusations are unique, not the proof. The State confuses what they have accused Mrs. Barber of with what they have been able to prove. The proof in this case was that these two minor children suffered from Shaken Baby Syndrome, with no unique characteristics. The proof in this case was that these children did in fact have medical histories that didn't

support their parents testimony that they were perfectly healthy babies until they had the misfortune of going to the First Baptist Church daycare. The proof in this case, and in particular the medical proof in this case, does not support the accusation that these injuries occurred while the children were in Mrs. Barber's care. In fact, the proof suggests the opposite, as Judge Jacobus found in his Order.

The kind of proof necessary to meet the test of similarity is set forth in this Court's decision in another case with the name Chandler attached to it: Chandler v. State, 702 So.2d 186 (Fla. 1997), where the Court observed

> "The common thread in our Williams rule decisions has been that startling similarities in the facts of each crime and the uniqueness of modus operandi will determine the admissibility of collateral crime evidence." Id. at 192.

In Chandler, the Court found no abuse of discretion by the trial court when it found the "unique similarities in these two crimes tie the same individual -- Oba Chandler -- to both crimes." What distinguishes Chandler from the instant case is the following, noted by the Court in its decision:

> "In this case, the trial court's detailed order admitting the collateral crime evidence found the following fourteen similarities between the Blair rape and the Rogers' murders:
> 1) All the victims were tourists; 2) the victims were young white females between 14 and 376; 3) the victims were similar in height and weight; 4) the victims met Chandler by chance encounter where he rendered assistance to them: 5) the victims agreed to accompany Chandler on a sunset cruise within twenty four hours of meeting him; 6) Chandler was non-threatening and convincing that he was

> safe to be with alone'; 7) a blue and white boat was used for both crimes; 8) a camera was taken to record the sunset in both crimes; 9) duct tape was used or threatened to be used; 10) there was a sexual motive for both crimes; 11) the crimes occurred in large bodies of water in the Tampa Bay area on a boat at night under the cover of darkness; 12) homicidal violence occurred or was threatened; 13) the crimes occurred within seventeen or eighteen days of each other; and 14) telephone calls were made to Chandler's home from his boat while still embarked either before or after these crimes." Id.

In the instant case, Judge Jacobus issued a similarly detailed order outlining the points of similarity put forward by the State, and found them lacking against the test set forth in cases like Chandler.

The State puts forth the proposition that since there is conflicting testimony on the issues in this case, then by definition their Williams Rule evidence should therefore go to the jury for them to weigh the evidence. First of all, this ignores the fact that Section 90.404, Florida Statutes is a rule of admissibility, and the State's argument, if accepted, would vitiate that rule. Second, given the first point, the State is in no position to demonstrate, and has not in fact demonstrated, a departure from the essential requirements of law because they can present no case law in support of their new proposal for dealing with Williams Rule admissibility. The State asserts, in spite of what the trial court found as "clear and convincing evidence" to the contrary, that "the cumulative effect of the numerous similarities between the two

infant's situations, along with the lack of dissimilarities, establishes a unique set of circumstances which establish Barber as the perpetrator of the infants' injuries." (State's Brief at page 44). This statement deliberately ignores the medical evidence which clearly and convincingly, in the trial court's words, refutes the State's position. It further ignores the testimony of their own expert that there was nothing unique about the injuries sustained by these two minor children.

When this case goes to trial, it will be perfectly appropriate for the State to present expert testimony on their attempts to date the injuries to A.P. Likewise, the defense will have the same opportunity to present its experts on the same issue. The State confuses the task of the jury in weighing the evidence regarding injuries to A. P. with the situation before the trial court (and now before this Court). Here, the State seeks to admit evidence of injuries to another child. To do that, they must first prove to the court by clear and convincing evidence Mrs. Barber caused those injuries. They failed to do this. If they had, however, they would then need to further demonstrate the facts surrounding the infliction of those injuries was sufficiently similar to those injuries inflicted upon A.P. to meet the 90.404 admissibility requirement.

At page 45 of the State's Petition to the Fifth District for a writ of certiorari, they assert "Dr. Tilelli...believes each child's injuries occurred during a time when each was in

day care." This is somewhat a distortion of the record. In fact, Dr. Tilelli, in response to a hypothetical based largely on factual assertions of the mothers, stated that if all of the facts in the hypothetical were true, then his opinion would be that the injuries occurred while the children were in day care. Dr. Tilelli never asserted that the medical evidence on its own would lead him to believe that such was the case, but in fairness to the State, Dr. Tilelli in particular would not eliminate the time frame these children were with Mrs. Barber from the range of possible times for these injuries, although the other doctors do.

Beyond the outright rejection of forty years of case law, what is most disturbing about the Fifth District's decision in the instant case is the fact that they reject factual determinations of the trial court and rely on the incomplete record in the previous case to do it. The Appellant is requesting this Court reverse the decision of the Fifth District and restore the Order entered by Judge Jacobus prohibiting presentation of this *Williams* rule evidence by the State of Florida at trial.

## CONCLUSION

Appellant, Ann Eliot Barber, prays this Honorable Court reverse the decision of the Florida Fifth District Court of Appeal in the instant case, and reinstate the order entered by the Honorable Bruce Jacobus, Circuit Court Judge, Eighteenth Judicial Circuit.

## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by U.S. Mail to Robert Butterworth, Attorney General, State of Florida, c/o Ann Phillips, 444 Seabreeze Boulevard, Daytona Beach, Florida 32118 this ___ day of March, 2002.

_____

**ROBERT R. BERRY**
**Fla. Bar Number 714216**
**GREGORY W. EISENMENGER**
**Fla. Bar Number 237175**
**8226 North Wickham Road**
**Suite 202**
**Melbourne, Florida 32940**
**(321)757-5211 (office)**
**(321)757-5215 (fax)**
**Attorneys for Appellant**

## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the requirements of Rule 9.210(a) have been complied with. This brief was computer generated, and a "Courier New 12-point font" was used.

_____

**ROBERT R. BERRY**
**Fla. Bar Number 714216**
**GREGORY W. EISENMENGER**
**Fla. Bar Number 237175**
**8226 North Wickham Road**
**Suite 202**
**Melbourne, Florida 32940**
**(321)757-5211 (office)**
**(321)757-5215 (fax)**
**Attorneys for Appellant**