IN THE FLORIDA SUPREME COURT

LORETTA REED,

Petitioner,

v. CASE NO. SC01-1238
DCA CASE NO. 1D99-2562

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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______________________	:	

PETITIONER’S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Petitioner was the Appellant/Defendant, below, and will be referenced as “Petitioner” or “Ms. Reed” in the following brief. A three-volume record on appeal will be referenced by ‘R’, followed by the appropriate page number in parenthesis. A three-volume transcript of jury trial will be referenced by “T.’ A one-volume transcript of the sentencing hearing will be referenced by ‘S.’ All proceedings below were before the Honorable Paul S. Bryan and the First District Court of Appeals.

STATEMENT OF THE CASE

By second amended information, Petitioner was charged with, Counts I, II, III & V: aggravated child abuse per **s. 827.03**; and Count IV: neglect of a child resulting in great bodily harm per **s. 872.03(3)(b), F.S.** (1, 2) The cause proceeded to a jury trial on May 11 & 12, 1999, resulting in a verdict of "not guilty" on Counts I-IV, and "guilty, as charged, on Count V (R 277).

The cause proceeded to sentencing on June 10, 1999. A sentencing guidelines scoresheet was prepared in Level Eight reflecting a range of 64.5 to 107.5-months prison (R 347, 348). Petitioner was adjudicated guilty of Count V and sentenced to 107.5-months prison, followed by 5 years probation (S 45).

A timely notice of appeal was filed on June 10, 1999 358). The Public Defender was appointed to represent Ms. Reed on this appeal on June 28, 1999 (R 367).

The state conceded error in its brief, but the First District Court of Appeals affirmed the conviction and sentence by written opinion issued May 1, 2001, but certifying the following issue as one of great public importance:

IS THE GIVING OF A STANDARD JURY INSTRUCTION WHICH INACCURATELY DEFINES A DISPUTED ELEMENT OF A CRIME FUNDAMENTAL ERROR IN ALL CASES EVEN WHERE THE EVIDENCE OF GUILT IS OVERWHELMING AND THE PROSECUTOR HAS NOT MADE THE INACCURATE INSTRUCTION A FEATURE OF HIS ARGUMENT?

See, Appendix.

STATEMENT OF THE FACTS

L.C., a 7-year-old girl, looked at a picture of herself with her arm in a sling and explained that Petitioner, her adoptive mother, had broken her arm (T 67). She further accused Petitioner of whipping her on the back with an electrical extension cord and beating her hands with a shoe (T 68). L.C. identified Petitioner in court (T 69).

Ms. Ward, L.C.'s kindergarten teacher, testified L.C. flinched when she touched her back. L. C. said her back was hurt because her mother pushed her "over a basket." Ward could tell L.C.'s back was swollen by feeling it (T 24). On another occasion, L.C. approached her and held out her hand saying her mother hit it with a shoe (T 24, 25). Ward noticed bruises across the child's palm (T 25). On another occasion, L.C. came to school after a two-day absence with "her shoulder drooping and her arm kind of dangling unnaturally." A note from the child's mother explained L.C. had hurt her own arm, but that she had not yet been able to see the doctor about it, and would Ms. Ward "pleas work with her that day." Ward sent L.C. to the school nurse. Finally, Ward identified Petitioner in court.

Nurse Seelbach testified L.C. "Had a very swollen area at the base of her back." When she called Petitioner to inform

her of the injury, "she hollered out on the phone. She scooped the child up and did not allow me at that time to show her what I deemed as an injury at that time or a problem and took the child out of the clinic." (T 41) On another occasion, when L.C. came to see her, she observed "bruises at the base of every knuckle on the palm." (T 42) When L.C. came in again, this time with a swollen arm, she called Health and Rehabilitative Services (H.R.S.) (T 43). The responding H.R.S. investigator told her he would contact L.C.'s parents.

Detective Roberts of the Columbia County Sheriff's Department introduced photographs (State's Exhibits 1-11) of L.C.'s body and back depicting multiple, circular-type bruises (T 49). Petitioner confessed to abusing L.C. and proclaimed that she (Petitioner) should be punished in the same way in which L.C. was punished (T 56). Finally, Roberts identified Petitioner in court.

Mr. Stephens, a child protective investigator from H.R.S., testified L.C. was placed in Petitioner's home on November 22, 1996, and the adoption was final on July 24, 1997 (T 84). He responded to allegations of physical abuse from the child's school nurse (T 85). In an interview with the child, L.C. said "Mom" gets mad with her and hits her. She further stated that her mother was crying on the date of this

interview and told L.C. not to tell Stephens anything (T 87). Petitioner told him that she told L.C. to come to her. When L.C. did not come, she grabbed L.C. by her arm. When L.C. stumbled, Petitioner tried to hold her up by the arm. She said L.C. did not complain, but she noticed the arm had become swollen and applied some type of salve (T 88). She admitted to being angry when she jerked L.C. by the arm (T 89).

During a subsequent interview by Stephens, Petitioner admitted to lying about the cause of L.C.'s injuries (T 92). She state she beat her "all over" with either a sandal or a plastic cake pan strap (T 94, 95). Finally, she admitted to having grabbed L.C. as she sat on the floor and having "jerked her up hard." (T 95) Petitioner said she should be punished the same way she punished L.C. (T 97). Finally, Stephens said the interview and "allegations" all occurred in Columbia County (T 98).

Dr. Weber was qualified as an expert in the area of pediatrics (T 123). Upon viewing L.C.'s injured arm, she said her mother twisted it (T 124). She had a large number ("More than 50 and less than a hundred.") of C-shaped "lash" marks or sores in various stages of healing (T 131). They were consistent with an electrical cord and, in his opinion, were not accidental (T 132). Dr. Weber admitted, however, that a

jury would only see them faintly today, that "they would not be so certain how discernible they were or what might have caused them." (T 139)

The state announced rest and Petitioner moved for a judgement of acquittal on all counts which motion was denied by the court (T 148-155). Petitioner and three other witnesses testified for the defense, none of whose testimony is relevant to the issues on appeal (T 160-236).

SUMMARY OF THE ARGUMENT

Issue I:

The state relied heavily on photographs of the child's injuries taken at, or around, the time of the their infliction. However, the court denied Mrs. Red the opportunity to show the jury present-day photographs of those injuries. Had the injuries completely healed, that evidence may have influenced the jury to believe they were not the result of an aggravated battery, a wilful torture or a malicious punishment. The error deprived Petitioner of her constitutional rights to du process.

Issue II:

Due to the brevity of the argument, the summary is omitted.

ARGUMENT

ISSUE I:

WHETHER THE COURT'S REFUSAL TO ALLOW THE JURY A CURRENT VIEW OF THE CHILD'S WOUNDS DENIED PETITIONER THE RIGHT TO POSSIBLY EXCULPATORY EVIDENCE WHICH MAY HAVE INFLUENCED THE JURY TO BELIEVE THE INJURIES WERE NOT THE RESULT OF AN AGGRAVATED BATTERY, WILFUL TORTURE OR MALICIOUS PUNISHMENT.

The state established the extent of the child's injuries in this aggravated child abuse case through pictures of the injuries taken near the time of infliction. When the defense requested the child victim submit to present-day pictures of the injuries to assist the jury in determining whether they were the result of an aggravated battery, wilful torture or malicious punishment, the state objected ant the court denied Petitioner access to this highly relevant evidence. In doing so, the court violated Petitioner's constitutional rights to be heard, to due process, and to a fair trial. See, Article 1, Section 9 of the Florida Constitution; and Ams. V & XIV of the United States Constitution.

State relied upon photos of child's injuries to prove its case

Count V of the second-amended information charge Petitioner with aggravated child abuse in that Loretta Reed did "COMMIT AN AGGRAVATED BATTERY UPON AND/OR WILFULLY TORTURE OR MALICIOUSLY PUNISH L.C. A/K/A L.R., WITH A STICK AND/OR AN

ELECTRICAL CORD, contrary to Florida Statute 827.03." To prove its case, the state relied heavily upon pictures depicting the wounds at, or near, the time they were made. Surely, the jury used this evidence to assist in its determination of whether the wounds were the result of an aggravated battery, a wilful torture or a malicious punishment. However, the state objected, and the lower court denied Petitioner the same opportunity to show a present-day picture of the child's wounds as possible evidence that they were not lasting or permanent wounds and, hence were not the result of an aggravated battery, wilful torture, or malicious punishment.

Court's have authority to order physical examination upon demonstration of compelling evidence

Petitioner concedes at the outset that there is not constitutional right to discover. See, **Weatherford v. Bursey, 429 U.S. 545, 559, 97 S.Ct. 837, 846, 51 L.Ed.2d 30 (1977)**. Moreover, state witnesses are protected by Article 1, Sections 1, 12 & 23 of the Florida Constitution. See, **State v. Brewster, 601 So. 2d 1289, 1291 (Fla. 5th DCA 1992).** Nonetheless, state constitutional provisions which protect a witness from physical examinations by a criminal defendant will not trump a criminal defendant's federal constitutional

rights to due process. See, Ams. V & XIV of the United States Constitution. State courts have determined that a witness in a criminal proceeding may be ordered to undergo a physical examination in certain circumstances.

> Although the confrontation clause of the Sixth Amendment refers to witnesses and does not encompass physical evidence, State v. T.L.W., 457 So. 2d 566 (Fla. 2nd DCA 1984), State v. Armstrong, 363 So. 2d 38 (Fla. 2nd DCA 1978), federal decisions hold that the due process clause of the Fifth Amendment and fundamental fairness entitles a defendant access to relevant and material evidence which is necessary to his defense. Unites State v. Herndon, 536 F.2d 1027 (5th Cir. 1976). "Whether a defendant has been deprived of this right of due process will depend upon the materiality of the evidence, the likelihood of mistaken interpretation of it by government witnesses or the jury , and the reasons for its unavailability to the defense." Herndon, 536 F.2d at 1029. If the trial court were to decide that the need for the examination was so compelling that the defendant would be denied due process without such evidence, then the minor's right of privacy may yield to the compelling state interest to investigate and prosecute the crime. [e.a.]

State v. Farr, 558 So. 2d 437, 438 (Fla. 4th DCA 1990). See, also, **Fuller v. State, 669 So. 2d 273, 274 (Fla. 2nd DCA 1996), citing, State v. Kuntsman, 643 So. 2d 1142, 1143 (Fla. 3rd DCA 1992).**

The privacy intrusion manifested by a few photographs is dwarfed by the jury's right to see whether the injuries were

permanent

To satisfy the defense request, the child victim would have merely been required to remove her blouse, in a private setting, for the taking of a few photographs. She would not be doing anything she had not already done for the state. And at 7 year of age, it is highly doubtful the child would suffer any embarrassment, whatsoever.

Pictures of the child's injuries at, or around, the time they were inflicted were the basis of this conviction. Evidence that they had healed, or were no longer visible, could have influenced the jury in its determination of whether those injuries were the result of an aggravated battery, a wilful torture or a malicious punishment. Under thee circumstances, failure to allow Mrs. Reed present-day photographs of the very injuries which convicted her violated her right to a fair trial. Hence, this Court should vacate the judgement and sentence below and remand this cause for a new trial wherein the child victim will be required to submit to photographs for consideration by the jury.

Preservation and harmless error analysis

Defense counsel motioned for pictures of the child's back during the state's case and during the defense case, but was overruled by the court (T 78, 79, 156).

Pictures of the child's injuries were the state's best evidence in convicting Mrs. Reed. The state can not show, beyond a reasonable doubt, that photographs which showed the wounds had completely healed would not have influenced the verdict. See, **State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986)**. Hence, the error can not be deemed harmless.

ISSUE II:

IS THE GIVING OF A STANDARD JURY INSTRUCTION WHICH INACCURATELY DEFINES A DISPUTED ELEMENT OF A CRIME FUNDAMENTAL ERROR IN ALL CASES EVEN WHERE THE EVIDENCE OF GUILT IS OVERWHELMING AND THE PROSECUTOR HAS NOT MADE THE INACCURATE INSTRUCTION A FEATURE OF HIS ARGUMENT?

Petitioner hereby adopts and advances Judge Browning's dissent for her argument on this issue.

In addition, Petitioner argues that, in light of the state's concession below, she was denied the opportunity to address the court's concerns regarding fundamental and harmless error before it rendered its opinion. The majority opinion of the lower court renders the advocating lawyer's counsel ineffective. Indeed, it obligates lawyers to argue even those issues which are not in litigation and, accordingly, obligates reviewing courts to review those same, perhaps, frivolous issues.

And finally, fundamental error, by definition, can never be harmless. The lower court's majority opinion places its desire for a particular result over the procedural safeguards which were designed for, and are intended to, prevent such result-driven opinions.

CONCLUSION

Based on the foregoing analysis, caselaw and other citation of authority, Petitioner requests this Honorable Court quash the opinion of the First District Court of Appeals, vacate the judgement and sentence and remand for a new trial on Count V of the information.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Sherri Tolar Rollison, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Criminal Appeals Division, Tallahassee, Florida, and a copy has been mailed to petitioner, LORETTA REED, #I02875, Levy Forestry Camp, Post Office Box 1659, Bronson, Florida 32621, this ____ day of July, 2001.

____
JAMIE SPIVEY

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that the foregoing Petitioner's Brief on the Merits has been prepared in Courier New 12 point type.

____
JAMIE SPIVEY