IN THE FLORIDA SUPREME COURT

LORETTA REED,

Petitioner,

v. **SC01-1238**

STATE OF FLORIDA,

Respondent.
_____/

AMENDED SUPPLEMENTAL BRIEF OF PETITIONER

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SUPPLEMENTAL BRIEF

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 Section 827.03, Fla. Stat.; and Count IV: neglect of a child resulting in great bodily harm per Section 827.03(3)(b), Fla. Stat. (R 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 (R 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?

This Court heard oral argument on this cause on January 9th, 2002, whereupon Chief Justice Wells ordered the parties to file supplemental briefs within ten days. This brief is being filed in response those directions.

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 "please 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 stated 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

Petitioner stands convicted of aggravated child abuse, even though the jury never found that Petitioner's actions were committed out of ill will, hatred, spite or an evil intent, as required by **Gaylord**. A conviction for aggravated child abuse without this essential finding amounts to a denial of due process. Hence, this Court should recede from **Morris** to the extent that it found failure to instruct on an essential element of a crime is not fundamental error and remand this cause for a new trial.

ARGUMENT

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?

There is no dispute that, in order for the statute proscribing aggravated child abuse to pass constitutional muster, it must include a definition of malice as meaning that the defendant acted out of ill will, hatred, spite or an evil intent. See, ***State v. Gaylord***, 356 So. 2d 313 (Fla. 1978). The question, then, is whether failure to give the proper instruction on this essential element of the crime constitutes fundamental, as opposed to harmless, error.

As noted by Chief Justice Wells at oral argument on January 9th, 2002, there is precedent that failure to instruct on an essential element may be deemed harmless error. See, ***Morris v. State***, 557 So. 2d 27 (Fla. 1990). Petitioner submits that ***Morris*** is distinguishable, however, in that the child in ***Morris*** was killed, not just beaten. Consequently, the ***Morris*** court concluded that it was beyond reasonable doubt that the jury convicted Morris for striking the child with intent to cause great bodily harm, rather than simply striking the child.

In this case, there was evidence of child abuse, but it is not beyond a reasonable doubt that the jury found Petitioner guilty of malicious abuse (technical malice), but without ill will, hatred, spite or an evil intent (malice, in fact). Morris was the boyfriend of that eighteen-month-old child's mother; but, Petitioner was the adoptive mother of this 7-year-old. Indeed, it was Petitioner's defense at trial that Petitioner applied the punishments as an attempt to manage and discipline this 'special needs' child who had been extremely disruptive at home and at school. It was Petitioner's defense that Petitioner loved this child and, though she went to far and broke the law in her method of discipline, that her intent was to correct and to mold, nonetheless. Hence, this verdict may reflect the jury's determination that Petitioner was guilty of simple child abuse. But, her acts were not committed out of ill will, hatred, spite or an evil intent, a required finding for her conviction of aggravated child abuse. Indeed, this jury acquitted Petitioner of three other counts of aggravated child abuse. See, verdict at R-277. But, such harmless error analysis presumes the error was not fundamental and, hence, not reviewable on appeal.

Petitioner submits that failure to properly instruct on an essential element of the offense is always fundamental error.

To quote Judge Browning's dissent from the decision, below, "[A] conviction based upon a quantum of proof less than that established by the Legislature as necessary 'goes to the foundation of the case' and 'amounts to a denial of due process.'" ***Id.***, at p. 15.

It is a fundamental tenet of the constitutional right to trial by jury that a conviction may only be derived from a jury's verdict. It matters not how overwhelming the evidence, if the jury has not placed its stamp of approval on that evidence. That is why a jury must find the state proved a defendant possessed more than 400 grams of cocaine before the state can secure a conviction for trafficking in cocaine, even where the undisputed evidence at trial demonstrated that the defendant possessed a ton of cocaine. That is why the jury must find the defendant possessed a firearm before the state can secure a conviction for robbery with a firearm, even where the undisputed evidence at trial demonstrated that the defendant shot the clerk. If the Legislature required this proof to obtain the conviction, then a jury must find that this proof was established. Without this requirement, then surely the state would be entitled to a directed verdict at the close of its case.

Petitioner stands convicted of aggravated child abuse without a jury verdict declaring that her acts were done with ill will, hatred, spite or an evil intent. It matters

not how overwhelming the evidence (though it is far from overwhelming on this issue). Hence, this Court should recede from ***Morris*** to the extent that it found failure to instruct on an essential element of the offense was not fundamental error and remand this cause for a new trial with directions to include the proper instructions for aggravated child abuse. In so doing, this Court will not be setting a new precedent; rather, it will be continuing its steadfast protection of the right to trial by jury.

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.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Sherri Rollison, Assistant Attorney General, by U.S. mail to The Capitol, Plaza Level, Tallahassee, Florida, and Loretta Reed, DC# I02875, Levy Forestry Camp, P.O. Box 1659

Bronson, FL 32621-1659 on this ____ day of January, 2002.

CERTIFICATE OF FONT SIZE

I hereby certify that this brief has been prepared using Courier New 12 point font in compliance with the font require- ments of Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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