IN THE SUPREME COURT OF FLORIDA

WILLIE RAFORD,)
)
Petitioner,)
)
vs.) CASE NO.SC01-379
) L.T. No. 4D98-4341
STATE OF FLORIDA,)
)
Respondent.)
)

PETITIONER'S INITIAL BRIEF ON THE MERITS

On review from the Circuit Court
of the Seventeenth Judicial Circuit,
In and For Broward County, Florida
[Criminal Division].

CAREY HAUGHWOUT
Public Defender

STEVEN H. MALONE
Assistant Public Defender
Attorney for Willie Raford
15th Judicial Circuit of Florida
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(561) 355-7600
Florida Bar No. 305545

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS i

AUTHORITIES CITED ii

PRELIMINARY STATEMENT viii

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 2

SUMMARY OF THE ARGUMENT 10

ARGUMENT 11

Point 1.

THE FELONY CHILD ABUSE CONVICTION MUST BE VACATED BECAUSE IT IS NOT A LESSER OFFENSE IN THIS CASE 11

Point 2.

THE STATE FAILED TO PROVE A CRIME WAS COMMITTED 26

Point 3.

MISINSTRUCTION OF THE JURY ON AN UNCHARGED CRIME WHICH WAS MISREPRESENTED AS A LESSER OFFENSE REQUIRES REVERSAL 39

CONCLUSION 49

CERTIFICATE OF SERVICE 49

CERTIFICATION OF COMPLIANCE 50

AUTHORITIES CITED

CASES CITED PAGE

A.J. v. State, 721 So. 2d 761
(Fla. 2d DCA 1998) 14, 20

Abbate v. State, 745 So. 2d 409
(Fla. 4th DCA 1999) 44, 45

Adams v. State, 681 So. 2d 917
(Fla. 4th DCA 1996) 44, 46

B.R. v. Dep't of Health & Rehabilitative Serv.,
558 So. 2d 1027 (Fla. 2d DCA 1989) 32

City of Jacksonville v. Cook, 765 So. 2d 289
(Fla. 1st DCA 2000) 11

Coronado v. State, 654 So. 2d 1267
(Fla. 2d DCA 1995) 37

Delgado v. State, No. SC88638, 2000 WL 1205960
(Fla. Aug. 24, 2000) 27

Dept. of Insurance v. Keys Title, 741 So. 2d 599
(Fla. 1st DCA 1999) 11

E.A. v. State, 599 So. 2d 251
(Fla. 3d DCA 1992) 37

Fong Foo v. United States, 369 U.S. 141,
82 S.Ct. 671, 7 L.Ed.2d 629 (1962) 48

Gaines v. State, 652 So. 2d 458
(Fla. 4th DCA 1995) 44

Goodwin v. State, 751 So. 2d 537
(Fla. 2000) 20

Greene v. State, 714 So. 2d 554
(Fla. 1st DCA 1998) 46

Griffin v. State, 705 So. 2d 572
(Fla. 4th DCA 1998) 38

Herbert v. State, 526 So. 2d 709
(Fla. 4th DCA 1988) 29, 31, 32, 34

Hubbard v. State, 24 Fla. L. Weekly D2600
(Fla. 5th DCA 1999) 40, 45

Hubbard v. State, 751 So. 2d 771
(Fla. 5th DCA 2000) 40

Hunt v. State, 613 So. 2d 893
(Fla. 1992) 46

Ingleton v. State, 700 So. 2d 735
(Fla. 5th DCA 1997) 44

J.C. and S.C. v. Dept. of Children and Families,
773 So.2d 1220 (Fla. 4th DCA 2000) 34

Jackson v. State, 736 So. 2d 77
(Fla. 4th DCA 1999) 19, 28

Jones v. State, 666 So. 2d 960
(Fla. 3d DCA 1996) 45

Joshua v. Gainesville, 768 So. 2d 432
(Fla. 2000) 35

Kama v. State, 507 So.2d 154
(Fla. 1st DCA 1987). 12, 13, 15, 16, 18-20, 22, 28-31, 36,47

Ladd v. State, 714 So. 2d 533
(Fla. 1st DCA 1998) 45

Long v. State, 92 So. 2d 259
(Fla. 1957) 45

Lowery v. State, 641 So. 2d 489
(Fla. 5th DCA 1994) 33

M.O,, McC. v. Dept. of Health & Rehabilitative Serv.,
575 So. 2d 1352 (Fla. 2d DCA 1991) 33

Mars v. Mounts, 895 F.2d 1348
(11th Cir. 1990) 48

Marshall v. Reames, 32 Fla. 499, 14 So. 95
(1893) 19

Maximino v. State, 747 So. 2d 448
(Fla. 4th DCA Dec. 15, 1999) 47

McKnight v. State, 492 So. 2d 450
(Fla. 4th DCA 1986) 37

Moakley v. State, 547 So. 2d 1246
(Fla. 5th DCA 1989) 32, 36

Mohammed v. State, 561 So. 2d 384
(Fla. 2d DCA 1990) 14, 20

Moore v. State, 496 So. 2d 255
(Fla. 1st DCA 1986) 44, 46

Nurse v. State, 658 So. 2d 1074
(Fla. 3d DCA 1995), *rev. denied*,
667 So. 2d 775 (Fla. 1996) 45

Overway v. State, 718 So. 2d 308
(Fla. 5th DCA 1998) 14, 20

O'Bryan v. State, 692 So. 2d 290
(Fla. 1st DCA 1997) 44, 46

Pizarelli v. Rollins, 704 So. 2d 630
(Fla. 4th DCA 1997) 20

Price v. Georgia, 398 U.S. 323, 90 S.Ct. 1757,
26 L.Ed.2d 300 (1970) 47, 48

R.S.M. v. Dept. of Health & Rehabilitative Serv.,
640 So. 2d 1126 (Fla. 2d DCA 1994) 32, 34

Raford v. State, 4D98-4341, 26 Fla. L. Weekly D246
(Fla. 4th DCA Jan. 17, 2001). 1, 9, 16, 18, 20, 24, 27, 28,40

Ray v. State, 403 So. 2d 956
(Fla. 1981) 44, 46

Rollins v. Pizzarelli, 761 So. 2d 294
(Fla. 2000) 19, 28

Shearer v. State, 754 So. 2d 192
(Fla. 1st DCA 2000) 43

Simpson v. State, 418 So. 2d 984
(Fla. 1982) 46

State v. Coffman, 746 So. 2d 471
(Fla. 2d DCA 1998) 13, 20

State v. Dufresne, 26 Fla.L.Weekly D288, 2001 WL 55921
(Fla. 4th DCA Jan. 24, 2001) 23, 33, 35

State v. Espinosa, 686 So. 2d 1345
(Fla. 1996) 35, 36

State v. Fuchs, 769 So. 2d 1006
(Fla. 2000) 23, 33, 35

State v. Wilder, 748 A.2d 444, 2000 WL 212183
(Me. Feb. 24, 2000) 29

Tolbert v. State, 679 So. 2d 816
(Fla. 4th DCA 1996) 24, 25

Viveros v. State, 699 So. 2d 822
(Fla. 4th DCA 1997) 36

Wilson v. State, 744 So. 2d 1237
(Fla. 1st DCA 1999) . . . 1, 10, 15, 18, 20, 27, 29-31, 36

Zwick v. State, 730 So. 2d 759
(Fla. 5th DCA 1999) 45

OTHER AUTHORITIES

FLORIDA STATUTES

Chapter 415 33
Section 415.503(11) 33
Section 415.503(13) 34
Section 827.03 . . . . 14, 22
Section 827.03 (2)(b) 11, 40, 43
Section 827.03(1) 14, 41
Section 827.03(2) 23, 45
Section 827.03(2)(c) 15, 37, 41, 43
Section 827.03(3)(a) 21
Section 827.04 . . . . 18, 21, 22
Section 827.04 (1) 21
Section 827.04(2) 21
Section 921.022 45

FLORIDA RULES OF CRIMINAL PROCEDURE

Rule 3.650 48

FLORIDA RULES OF APPELLATE PROCEDURE

Rule 9.030(a)(2)(A)(vi) 2

FLORIDA CONSTITUTION

Article I, Section 21 . . . . 25, 38, 48
Article I, Section 22 . . . . 25, 38, 48
Article I, Section 23 38
Article I, Section 9 . . . . 25, 38, 48

UNITED STATES CONSTITUTION

Fifth Amendment 25, 38, 48
Fourteenth Amendment 25, 38, 48
Sixth Amendment 25, 38, 48

LAWS OF FLORIDA

Chapter 88-151, Section 4 19

Florida Standard Jury Instructions (Criminal)
P. 365 13

The Florida Bar News, Sep. 15, 2000
at 6 23

PRELIMINARY STATEMENT

Petitioner was the defendant at trial and the appellant in the Fourth District Court of Appeal. Respondent was the prosecution and the appellee.

In the brief, the parties will be referred to as they appear before this Honorable Court.

STATEMENT OF THE CASE

Petitioner was charged with the second degree felony of aggravated child abuse under Section 827.03(2)(b), Fla. Stat. (1998). R4. He was convicted of a lesser offense of child abuse at jury trial, and the court orally entered judgment for the third degree felony of child abuse under Section 827.03(1), Fla. Stat. (1998)[1]. ST 11; R31. The court sentenced petitioner as a violent career criminal, habitual felony offender, and orally to five years as a Prison Releasee Reoffender, ST13, but to fifteen years PRR on the sentencing form. R37-39.

The conviction was affirmed on appeal in a written opinion, but the case was otherwise remanded to correct sentencing errors. *Raford v. State*, 4D98-4341 (4th DCA Sep. 20, 2000). Appellant filed a motion for rehearing or certification, and the court issued a corrected opinion January 17, 2001, *Raford v. State*, 4D98-4341, 26 Fla. L. Weekly D246 (Fla. 4th DCA Jan. 17, 2001), certifying conflict with *Wilson v. State*, 744 So. 2d 1237, 1240 (Fla. 1st DCA 1999). Notice to invoke discretionary jurisdiction was timely filed.[2]

---

[1] The trial court's written judgment, however, refers to "child abuse" under section 827.041, Fla. Stat. (1998), R31, which was misdemeanor child abuse until October 1, 1996, but since that time is the first degree misdemeanor of contributing to the delinquency or dependency of a child. The Fourth District found the written judgment was a scrivener's error, and remanded for correction. *Raford*.

[2] This Court should accept jurisdiction. Art. V, §3(b)(3)

STATEMENT OF THE FACTS

The child's natural father, Juan Lara, Sr., testified he is a paramedic. T229. His child, F. L., was living with his ex-wife, another of his children, J.L., Jr., and petitioner. T229. On January 4th, he picked up his children from the mother's residence at about 9 a.m. T230-31. The children's mother was not there, but petitioner was. T231. The children told him what happened. T232. His son F. had "[b]lack and blue bruises on his buttocks, legs, and lower back." T232. He took pictures. T233. He drove the children to the police station about 10 a.m. T234, spoke with the officers, as did his child, and the police took pictures. T236.

On cross, the father agreed there was nothing unusual at the house at the time he picked up his children. T237. When this incident occurred the child had a problem defecating in his pants, though he didn't anymore. T237. The father now has custody of the children, which he was awarded in January, and he and the mother divorced in June. T238. He knew petitioner had been living with the mother for several months before this happened. T238.

F.L., the child complainant, testified he was eight years old. T240. In January he lived with his mother, petitioner, and his brother. T241. He went to a party where petitioner hit him because he pooped in his pants. T241. That used to happen to

---

and (4), *Fla. Const.*, Rule 9.030(a)(2)(A)(vi), *Fla.R.App.P.* *See Clark v. State*, 26 Fla. L. Weekly S69 (Fla. Feb. 8, 2001)("`[T]he very act of certifying conflict creates confusion or uncertainty that should be resolved by the Court'").

him sometimes. Appellant used a belt to hit the child on "my butt, my back, and my leg." T242. They were at his cousin's house. It felt bad when he got hit; it hurt and he cried. T242. He told his brother. He showed his dad what happened the next day, but it did not still hurt the next day. T243.

On cross the child said sometimes he would poop his pants, at school or at a party or when he was playing with kids and got excited. T244. The day he got hit, his brother was playing with the phone, and the child was with him. T244. There was a bathroom at the house, but the child did not use it. T245. The child had to stay in the room until his mom got home, and after that he had some ice cream. T245. Then he went home with his mom and petitioner. T245. He did not tell his mother that night what happened, and didn't tell his dad until his brother mentioned something. T246.

J.L., F.'s ten year old brother, testified they had been at a party about an hour when he heard his brother in a room screaming. Later he saw him, and F. showed him the bruises and told him how he got them. He told his dad the next day. T248-9.

On cross, the witness said F. sometimes had a problem with pooping, and he had that day. T249. The day of the incident he and his brother had been playing with the phone, and he was going to call 911, though he had been told not to do that. T250. This was before he heard his brother scream. Their mom picked them up later, and they had ice cream and went to bed. He did not say anything to his mom about what happened. T250. It wasn't until

the next day when their dad picked them up and his dad saw the bruises that he said anything about it. T251. F. had not said anything up until that point.

A deputy testified he met with the child and his father on January 4th at about 12:35 p.m.,observed some marks on the child's body and photographed them. T252-4.

Detective Kaminsky testified he met with the father and took taped statements from petitioner, and others. T257. In his statement, petitioner relates that on January 3d he had to pick up some cakes for a party. His girlfriend had gone to work, and he was keeping the kids. T262. There were a lot of kids at the party. When petitioner came back from getting the cakes, the kids said F. had messed his pants and was playing on the phone, saying he was going to call the police. T262. Petitioner asked F. if he did "poo-poo" in his pants and was playing on the phone about calling the police, and he said yes. T263. So petitioner took him to the room to discipline him. He hit him with the belt about three times, and told him to stay in the room until his mom came home. T263. He made him stay in the room because he was playing on the phone, talking about calling the police, and had "shitted" his pants. T263. Petitioner told the mom when she came home. She spoke with the child F. and he admitted what happened. Petitioner said not to worry about it, he had already spanked him, and for him to go out and play. T263. The child then came down and played with the rest of the kids. Petitioner had hit him with a belt two or three times while the child was on his knees.

The child has had the problem with bowel movements since petitioner has known him, about seven months, and petitioner has been working with him on the problem. T264-266. The two were in another room alone when petitioner hit him with the belt, across the back and on the buttocks. T266. He hit him because he was playing on the phone, talking about calling the police, and then had a bowel movement in his clothes. T266. The child would have been able to go to the bathroom because they had one there. T267.

On cross the detective said he spoke with the child's father first, T268, became aware of the problem with bowel movements, and that the father was not present when the incident occurred. During his statement the child did not say he had pooped his pants. T271. The detective did not examine the child. T271.

The state rested, T272, and appellant moved for a judgment of acquittal because there was no proof the punishment was malicious, and there was no torture. T274. The state said it was proceeding on the malicious punishment theory. T275. The court looked at the photos, found the definition of malicious met, and denied the motion. T275.

At the charge conference the defense requested the lesser of misdemeanor battery, and the state asked for child abuse. T278. The court agreed to the state's requested lesser of child abuse over defense objection, and to the defense requested lesser of battery over state objection. T285.

During closing, the defense pointed to an inadequate investigation, T293-94, and invoked the parental privilege to the

greater and lesser charge. T296.

In the final instructions, the court accidentally read the alternative uncharged theory of aggravated child abuse, that "the defendant caused F.L. great bodily harm or permanent disability of permanent disfigurement" instead of the "lesser" offense of felony child abuse. T317-18. After some deliberation, the jury returned with questions regarding the definition of great bodily harm, and what constituted legal justification or excuse as it related to the definition of malicious punishment. T329-30. As the trial participants reviewed the instructions, the court realized it had read the wrong instruction, and had instructed the jury on the second degree felony of aggravated child abuse under an alternative theory, instead of the third degree felony of child abuse. T333-336. The court suggested eliminating the element requiring the jury find the defendant caused great bodily harm, permanent disability or disfigurement, which are not required for felony child abuse. T337. However, petitioner's counsel pointed out that would negate everything he said in closing argument about the "lesser",[3] and then urged the court to tell the jury "to refer to the law and send them back, or start this thing over." T337. The prosecutor asked if counsel was going to ask for a mistrial, and the court said it would tell them to follow the law as instructed. The court then told counsel if the jury came back with

[3] Counsel had argued against conviction on the "lesser" of felony child abuse in part because there had been no showing of great bodily harm, permanent disability or permanent disfigurement. T295-96.

child abuse as defined, it would be a second degree felony. T338. There was additional discussion in which the state said the crime did not exist and pointed out the charge instructed on was not a lesser offense. T 338.

Defense counsel told the court since the crime was not a lesser he was requesting the court instruct the jury that child abuse was no longer a charge for their consideration, and that they should find the petitioner guilty as charged or guilty only of battery. T339. He pointed out he had objected to this lesser being given, and that it was given at the state's request, over his objection. T339. He had only requested battery. The court told counsel since the parties thought it was a lesser, but one element too many was given, if the jury returned a lesser on that count, the court would treat it as a third degree felony. Counsel said "I would have a hard time saying I was prejudiced by that one." T340. The state then complained that resolution would require it to prove an additional element. The court said it was charged with the responsibility to correctly instruct, but it was pretty hard for the state to object. The court said it could not tell the jury to disregard the element because the defense had relied on its absence in its closing argument. T341. Defense counsel then said the court should just instruct them they had heard the law. The court did. T342.

The jury then returned a verdict of guilty of the "lesser" offense of child abuse based on the inaccurate instruction, as reflected on the verdict form. T347; R30.

In its decision affirming petitioner’s felony child abuse conviction, the Fourth District summarized the facts:

> Appellant, in attempting to discipline an eight-year-old child of the woman he had been living with for several months, struck him approximately three times with a belt, leaving welts which were visible the next day. He was convicted of third degree felony child abuse. He appeals, arguing that he was convicted of a crime with which he was not charged as a result of improper jury instructions and that he had a parental privilege to punish the child as he did. We affirm his conviction, but reverse the multiple sentences imposed.
>
> In a statement appellant gave the police, which was in evidence, he related that he had been living with the eight-year-old victim and his mother for months. The victim had a bowel control problem which would cause him to defecate in his pants when he got excited. Appellant told the police he had been attempting to discipline the victim in order to teach him to control this problem in the past, and this time he hit the victim with a belt about three times. The victim had also been playing with the telephone, which he was not allowed to do. The victim's mother was not home when appellant inflicted the punishment, but appellant told the mother what had happened when she came home.
>
> The victim's father picked him up the next day, and after being told what happened, took him to the police station where photographs were taken. The photographs show textured bruises on the boy's buttocks, leg, and back, approximately two inches wide, which were consistent with being struck three times with a belt. There was no indication of bleeding.

Raford, slip op. at 1.

SUMMARY OF THE ARGUMENT

Point 1.

The third degree felony child abuse upon which judgment was entered is not a lesser offense in this case because the circumstances involve parental discipline, so the judgment must be vacated and reduced to a misdemeanor or discharge. *Wilson v. State*, 744 So. 2d 1237 (Fla. 1st DCA 1999), with which the case at bar is certified to be in conflict, was correctly decided.

Point 2.

Because the evidence shows petitioner's conduct is exempted from criminal conduct by the parental privilege, or does not otherwise meet the definition of felony child abuse, he must be discharged. The decision of the Fourth District holds that the parental disciplinary privilege does not apply to felony child abuse, which is also certified to be in direct conflict with *Wilson*.

Point 3.

The jury was accidentally misinstructed on an uncharged theory of aggravated child abuse in place of the offense of simple felony child abuse. This is fundamental error.

ARGUMENT

Point 1.

THE FELONY CHILD ABUSE CONVICTION MUST BE VACATED BECAUSE IT IS NOT A LESSER OFFENSE IN THIS CASE

In this case the state charged aggravated child abuse by malicious punishment. The state sought and received an instruction on the lesser offense of felony child abuse, over defense objection,[4] and the trial court entered judgment for felony child abuse. Since felony child abuse is not a lesser of the offense of aggravated child abuse in this parental discipline case, the Fourth District's decision must be vacated[5], and petitioner discharged.

The state charged aggravated child abuse under Section 827.03 (2)(b), Fla. Stat. (1998) R4, and at trial the state said it was traveling only on the "maliciously punish" theory of the statute. T275. The defense at trial was that petitioner was disciplining the child. T296.

The parental discipline privilege originally derived from the common law[6] was articulated in *Kama v. State*, 507 So.2d 154 (Fla.

---

[4] However, the trial court read the wrong instruction to the jury, using the definition of an alternative, uncharged crime of aggravated child abuse to describe what it told them was the lesser offense. This related issue is addressed in point 3.

[5] The standard of review of statutory construction is *de novo*. *Dept. of Insurance v. Keys Title*, 741 So. 2d 599 (Fla. 1st DCA 1999); *City of Jacksonville v. Cook*, 765 So. 2d 289 (Fla. 1st DCA 2000).

[6] "The parents' fundamental right to discipline their children" also derives from the right to privacy provision of the Florida Constitution. *J.C. & S.C. v. Dept. of Children and Families*, 773 So. 2d 1220, 1222 (Fla. 4th DCA 2000)(*citing Beagle*

1st DCA 1987):

> Although a person who spanks a child technically commits a battery, the parties do not dispute the well established principle that a parent, or one acting *in loco parentis*, does not commit a crime by inflicting corporal punishment on a child subject to his authority, if he remains within the legal limits of the exercise of that authority. The determination that a parent, or one standing in the position of parent, has overstepped the bounds of permissible conduct in the discipline of a child presupposes either that the punishment was motivated by malice, and not by an educational purpose; that it was inflicted upon frivolous pretenses; that it was excessive, cruel or merciless; or that it has resulted in `great bodily harm, permanent disability, or permanent disfigurement'. Otherwise, persons in positions of authority over children would have no way to judge the propriety of their conduct under the criminal standard.

(Footnotes omitted).[7]

Since *Kama*, and before the child abuse statute was changed in 1996[8], the courts held that battery, and that both misdemeanor and

---

v. Beagle, 678 So. 2d 1271, 1276 (Fla. 1996))("we hold that the State may not intrude upon the parents' fundamental right to raise their children except in cases where the child is threatened with harm").

[7] *See also Marshall v. Reams*, 32 Fla. 499, 14 So. 95, 97 (1893)("We do not desire to be understood as denying the right of a parent, or one standing *in loco parentis*, to moderately chastise for correction a child under his or her control and authority....").

[8] Section 827.03, Fla. Stat. (1995) previously defined the second degree felony of aggravated child abuse:

> (1) "Aggravated child abuse" is defined as one or more acts committed by a person who:
> (a) Commits aggravated battery on a child;
> (b) Willfully tortures a child;
> (c) maliciously punishes a child; or
> (d) Willfully and unlawfully cages a child.

Section 827.04(1), Fla. Stat. (1995) previously defined third degree felony child abuse:

felony child abuse could not be a lesser offense of aggravated child abuse by malicious punishment when the circumstances involved parental discipline of a child. *Kama*; *State v. Coffman*, 746 So. 2d 471 (Fla. 2d DCA 1998)("We agree with *Kama*, as there is no authority indicating that simple battery is a lesser-included offense of aggravated child abuse based on malicious punishment. *See Fla. Std. Jury Instr. (Crim.)* P. 365. In fact, there are no necessarily or permissible lesser-included offenses indicated in the standard jury instructions for aggravated child abuse under any provision of section 827.03, Florida Statutes (1995")). *Accord*, *A.J. v. State*, 721 So. 2d 761 (Fla. 2d DCA 1998); *Overway v. State*, 718 So. 2d 308 (Fla. 5th DCA 1998); *Mohammed v. State*, 561 So. 2d 384 (Fla. 2d DCA 1990)(felony child abuse by culpable negligence not lesser).

In the significant statutory rewriting of the child abuse laws in 1996, the legislature created felony child abuse, and defined it as follows:

> (1) "Child abuse" means:

> Whoever, willfully or by culpable negligence, deprives a child of, or allows a child to be deprived of, necessary food, clothing, shelter, or medical treatment, or who, knowingly or by culpable negligence, inflicts or permits the infliction of physical or mental injury to the child, and in so doing causes great bodily harm, permanent disability, or permanent disfigurement to such child, . . .

Section 827.04(2), Fla. Stat.(1995) defined misdemeanor child abuse the same as 827.04(1), Fla. Stat. (1995), except the conduct must not have caused great bodily harm, permanent disability or permanent disfigurement.

> (a) Intentional infliction of physical or mental injury upon a child;
>
> (b) An intentional act that could reasonably be expected to result in physical or mental injury to a child;
>
> (c) Active encouragement of any person to commit an act that results or could reasonably be expected to result in physical or mental injury to a child.
>
> A person who knowingly or willfully abuses a child without causing great bodily harm, permanent disability, or permanent disfigurement to the child commits a felony of the third degree....

Section 827.03(1), Fla. Stat. (1998). Amended section 827.03(1), Fla. Stat. (1998) makes child abuse a third degree felony where the person knowingly or willfully abuses a child without causing great bodily harm, permanent disability, or permanent disfigurement to the child" in the manner described. This crime can be a lesser where the main charge is brought under Section 827.03(2)(c), Fla. Stat. (1998), which punishes the person who "knowingly or willfully abuses a child and in so doing causes great bodily harm, permanent disability, or permanent disfigurement to the child." However, where the crime charges a parent or a person acting as one with "maliciously punish[ing]" the child, the exemption described in *Kama* must apply to both the main charge as well as the lesser. The First District agreed in *Wilson v. State*, 744 So. 2d 1237, 1240 (Fla. 1st DCA 1999)

In *Wilson*, the court reviewed the new statute and held

> This new crime of felony child abuse was enacted well after our *Kama* decision as part of the legislature's 1996 revision and amendment of the criminal child abuse

> statutes. See Ch.96-322, *Laws of Florida*; 827.04(2), Fla. Stat. (1995). The above statute does not define or refer to the parental privilege of corporal discipline, and we have found no cases that address this felony child abuse offense in interaction with it. By its express terms, however, the statute clearly excludes those actions that constitute aggravated child abuse and includes actions that constitute simple battery. We stated in *Kama* that a simple battery, which consists of actions ranging from an intentional unconsented to touching to the infliction of bodily harm, occurring in the administration of discipline by one in authority over a child is privileged by law. *Kama v. State*, 507 So. 2d at 158. This privilege thus extends to simple or felony child abuse.

Wilson, 744 So. 2d at 1240.

In denying relief, the Fourth District disagreed with the First District's reasoning in *Wilson*, and certified conflict with it. The Fourth District concluded that the parental disciplinary privilege was no defense at all to felony child abuse, as that privilege had been legislatively restricted to protect only a "typical spanking," and that felony child abuse was a lesser included offense of aggravated child abuse even in a case involving parental discipline. *Raford*, *id.*

The Fourth District concluded that petitioner's status as a live-in boyfriend afforded him protection of the privilege, but that legislative changes in the session following *Kama* significantly limited its reach. The Fourth District wrote:

> Our resolution of this issue depends on whether a lesser included instruction should have been given and whether appellant could have been convicted of a lesser included offense. Appellant's argument is grounded on the parental privilege to discipline a child and is based on *Kama v. State*, 507 So.2d 154 (Fla. 1st DCA 1987), in which a stepfather was charged with inflicting injuries including bruises consistent with being struck by a belt.

The stepfather's conviction of aggravated child abuse was affirmed, and the court addressed parental privilege[.]

[quotation omitted]

The *Kama* court held that, based on the statutes in effect at that time, there were no lesser included offenses of aggravated child abuse. At the time *Kama* was decided, the legislature had, so far as parents were concerned, only criminalized aggravated child abuse by prohibiting corporal punishment that was malicious or amounted to aggravated battery. § 827.03, *Fla. Stat.* (1985). Although the crimes of third degree felony or misdemeanor child abuse existed, they were only applicable to third persons, not parents or those standing in the shoes of parents. *Kama*, 507 So.2d at 159. The *Kama* court arrived at that conclusion because, under [then numbered] section 827.04, third degree and misdemeanor child abuse were defined as being committed by a person who "permits the physical or mental health of the child to be materially endangered." The *Kama* court held that those statutes were not applicable to persons who "inflicted" injury. *Id.*

We agree with appellant that he was in such a relationship with the mother and child, which included the authority to discipline, so as to enable him to raise the parental privilege as an affirmative defense. *Kama* discussed the privilege in terms of "a parent, or one standing in the position of a parent." Id. at 156. *See also, State v. Coffman*, 746 So.2d 471 (Fla. 2d DCA 1998). We do not agree, however, with appellant's argument that *Kama* precludes conviction for a lesser included offense.

Appellant's argument fails to recognize that shortly after *Kama* was decided in 1987, the legislature amended third degree felony and misdemeanor child abuse, as defined in section 827.04, by substituting "inflicts or permits the infliction of" for the prior statutory language which only said "permits the infliction of." Ch. 88-151, § 4, *Laws of Fla*. Accordingly, since 1988, a parent or the equivalent could be convicted of lesser included offenses. We thus disagree with the appellant that, under *Kama*, he cannot be convicted of the lesser included third degree child abuse. We interpret the 1988 legislative changes following *Kama* as eliminating the parental privilege recognized by *Kama* under the pre-1988 statutes except for simple battery, e.g., a typical spanking. 507 So.2d at 156.

> Appellant also relies on a case decided after he was convicted, *Wilson v. State*, 744 So.2d 1237 (Fla. 1st DCA 1999), in which the first district adhered to its analysis in *Kama* that there are no lesser includeds applicable to a parent or equivalent charged with aggravated child abuse. In *Wilson*, however, the first district failed to recognize that the legislature had, in 1988, materially changed the statutes on which the *Kama* rationale was predicated. We thus disagree with *Wilson* and certify direct conflict with it.

Raford, slip op. at 2-4 (footnotes omitted).

In a footnote, the court explained its disagreement with *Wilson*:

> In *Wilson* the mother of a six year old was being prosecuted for a single open-handed slap across the face which left a red mark. Although we may not think that this should be criminalized, we cannot agree with the first district that, under the statutory scheme, Wilson could not have been guilty of third degree child abuse. Section 827.03(1)(a) makes the `intentional infliction of physical or mental injury' a third degree felony, and the legislature has not made an exception for the parental privilege.

Raford, slip op. at 4, n.3.

The Fourth District's decision improperly narrows the parental privilege, and reads the legislative changes too broadly. *Kama* recognized the parental discipline privilege, and though reference is made in that decision to the language of the child abuse statute then in existence, the legislative change from "permitting infliction" to "inflicts" did not at all alter its recognition that "[a]ggravated child abuse is a unique statutory creature which does not appear to have a lesser included offense when the offender is a person entrusted with the care and discipline of the child victim." *Kama*, 507 So. 2d at159. The Fourth District correctly

concludes the 1988 legislative change modified misdemeanor child abuse under then section 827.04, Fla. Stat. (1988), to permit prosecution of one who inflicts, not just permits, physical or mental injury. Ch. 88-151, Sec. 4, *Laws of Fla*. But this change undermines only the alternative reasoning of *Kama,* that the legislative scheme did not define a lesser for child abuse in the parental discipline context. It did not undermine its holding, that the parental privilege excludes lesser offenses when the person prosecuted is a parent engaged in reasonable discipline.

The legislative change from "permits infliction" to "inflicts" does not reveal any obvious legislative intent to change the common law rule of parental privilege. *Kama* articulated a common-law parental privilege. *See also Marshall v. Reames*, 32 Fla. 499, 14 So. 95, 97 (1893). The Fourth District's pronouncement that a one word legislative change in the statute resulted in erasure of at least a century of the parental privilege is in conflict with the statutory construction principle that "a court will presume that a statute `was not intended to alter the common law other than by what was clearly and plainly specified in the statute.'" *Jackson v. State*, 736 So. 2d 77, 83 (Fla. 4th DCA 1999)(*quoting Ady v. American Honda Fin. Corp.*, 675 So. 2d 577, 581 (Fla. 1996). Any statute in derogation of the common law must be strictly and narrowly construed. *Rollins v. Pizzarelli*, 761 So. 2d 294, 300 (Fla. 2000). Put another way, if the Florida legislature wants to abolish the parental privilege except for simple spanking,

"it well knows how to express itself." *Rollins*, *quoting Pizarelli v. Rollins*, 704 So. 2d 630, 633 (Fla. 4th DCA 1997). *See also Goodwin v. State*, 751 So. 2d 537 (Fla. 2000)(concluding Criminal Appeals Reform Act language relating to harmless error not intended to change prior decisional law). The legislature did not clearly express a determination to so substantially narrow the parental privilege in 1988, and there is no basis for concluding it did.

A reading of the 1988 legislative changes does not reflect any reference to the parental privilege at all, or otherwise bear out the Fourth District's conclusion that "[a]ccordingly, since 1988, a parent or the equivalent could be convicted of lesser included offenses." *Raford*, slip op. at 3. There is no case which agrees with that conclusion, and a number have been decided under post-1988 prosecutions. In fact, other cases decided after the 1988 legislative change in wording agree with *Wilson* that there are no lessers in the context of parental discipline. *Coffman*; *A.J.*; *Overway* (all 1998); *Mohammed* (1990).

In any event, the post-*Kama* legislative changes discussed by the Fourth District were made to a statute which plainly applied to a parent or other caregiver. That former statute lumped together the physical or mental injury language with other language clearly applying only to a parent. It could only be a parent or other caregiver who "willfully or by culpable negligence, deprives a child of, or allows a child to be deprived of, necessary food, clothing, shelter or medical treatment, . . ." Section 827.04, *Fla.*

Stat. (1995). The prohibition of physical or mental injury in the subsequent language contained in the same statute also presumed parental participation. The standard jury instruction reflected this fact, requiring instruction as an element of the offense for either neglect or physical or mental injury that "3. (Defendant) [was a parent] [had assumed responsibility for the temporary or permanent care and maintenance of (victim)." West's *Standard Jury Instructions*, **Child Abuse** F.S. 827.04 (1) and (2) (1995).

The 1996 legislative changes broke out the language relating to child neglect by a caregiver from Section 827.04(1), *Fla. Stat*. (1995), and created a separate crime under Section 827.03(3)(a), *Fla. Stat*. (1998). This subsection specifically criminalizes the conduct of a caregiver who neglects a child. The same changes also carved out felony child abuse from the misdemeanor language previously used in the same statute covering neglect, Section 827.04(1) & (2), *Fla. Stat*. (1995). In that successor subsection though, the legislature no longer required it be the caregiver of the child who was the only person subject to prosecution. Any "person" could be convicted of felony child abuse. Section 827.03, *Fla. Stat*. (1998). These changes from the earlier versions of the statute entirely alter the range of persons toward whom the statute is directed: felony child abuse, unlike the previous misdemeanor child abuse of Section 827.04, *Fla. Stat*. (1995), is not necessarily directed toward the conduct of only a caregiver.

The 1996 felony child abuse statute also broadens conduct

which may be eligible for conviction of felony child abuse: it criminalizes conduct which could "reasonably be expected" to result in physical or mental injury, and specifically provides that: "A person who knowingly or willfully abuses a child without causing great bodily harm, permanent disability, or permanent disfigurement to the child commits a felony of the third degree, ..." Section 827.03, *Fla. Stat*. (1998). This language overlaps and thus includes the definition of battery, which the courts have agreed is subsumed in the parental discipline privilege. The overlap requires exclusion of felony child abuse as a lesser in cases involving parental discipline, as the court concluded in *Wilson*, and consistent with the parental privilege of *Kama*, 507 So. 2d at 158.

These 1996 legislative changes thus reinstate (if it was ever discontinued) a statutory scheme which permits prosecution of a parent for aggravated child abuse by "malicious punishment," "willful torture" or "unlawful caging", or what is essentially aggravated battery, Section 827.03(2), *Fla. Stat*. (1998), but of no lesser offense when parental discipline is in issue.

Further support that felony child abuse is not a lesser offense of aggravated child abuse is found in the publication of the proposed instructions of the Supreme Court Committee on Standard Jury Instructions in Criminal Cases. *The Florida Bar News*, Sep. 15, 2000 at 6. The committee proposes the following comment to its instructions on aggravated child abuse:

> This instruction is based on section 827.03(2), Florida Statutes (1999). The definition of malice as used in this statute is from *State v. Gaylord*, 356 So. 2d 313 (Fla. 1978); *see also Young v. State*, 753 So. 2d 725 (Fla. 1st DCA March 21, 2000). Note also that battery and child abuse are not lesser included offenses of aggravated child abuse if the act in question was committed in the course of disciplining the child, and if the defendant is the parent of the child or a person entrusted with the care and discipline of the child. *See Kama v. State*, 507 So. 2d 154 (Fla. 1st DCA 1987); *see also Wilson v. State*, 744 So. 2d 1237 (Fla. 1st DCA 1999).

Even if felony child abuse can be a lesser in some cases of parental discipline, it could not be here. In *State v. Dufresne*, 26 Fla.L.Weekly D288, 2001 WL 55921 (Fla. 4th DCA Jan. 24, 2001), the Fourth District reversed itself and found the "mental injury" component of the felony child abuse statute constitutional after issuance of this court's decision in *State v. Fuchs*, 769 So. 2d 1006 (Fla. 2000). Under *Dufresne* and *Fuchs*, the felony child abuse statute must be read to breathe into the physical and mental injury elements of felony child abuse the definitions contained in related statutory schemes. As discussed more fully in point 2, below, because of caselaw excluding bruising from the definition of temporary disfigurement, this case, involving only bruising, cannot be a lesser offense.

"It is well settled that `[a] defendant may not be convicted of a permissive lesser included offense where the charging document is silent as to an essential element of that offense, absent a waiver, affirmative conduct, or other exceptional circumstances." *Tolbert v. State*, 679 So. 2d 816, 818 (Fla. 4th DCA 1996)*(en*

banc)(quoting Pierce v. State, 641 So. 2d 439, 440 (Fla. 4th DCA 1994)). The information does not allege any elements of the lesser offense, and the evidence here does not support it.

The Fourth District also erred in concluding the issue was waived when counsel acceded to entry of third degree felony child abuse if the jury returned a verdict based on the improper instruction. *Raford*, 2001 WL 40265, 3. This issue was preserved, as petitioner did not request the felony child abuse lesser; it was given at the state's request. T280-81. Counsel argued to the jury it did not apply. T295-98. While defense counsel said he did not see how he would be prejudiced if the court entered judgment on the third degree felony though the jury was instructed on an uncharged second degree felony theory, this is not sufficient to constitute a waiver or affirmative conduct. *Tolbert.* Petitioner must be discharged or the crime reduced to battery.

The conviction and sentence violate article 1, sections 9 (due process), 16 (rights of accused; notice; right to present defense), 21 (access to courts), 22 (trial by jury), 23 (right to privacy) of the Florida Constitution, fifth (due process, former jeopardy), sixth (confrontation; notice; right to present defense; fair trial; jury trial), and fourteenth (due process, equal protection and incorporation) amendments to the United States Constitution, and Florida law.

Point 2.

THE STATE FAILED TO PROVE A CRIME WAS COMMITTED

The state's case showed petitioner was in a position of parental authority and therefore privileged when he punished the child. He did not commit the crime of felony child abuse as it is defined, and must be discharged.[9]

Petitioner had been living with the mother and child for several months and was taking care of the children the day this occurred, T229, 230, 237, 238. The next morning the child had "[b]lack and blue bruises on his buttocks, legs, and lower back," though it did not hurt at that time. T229, 232, 243. The testimony showed the injuries were inflicted in the course of discipline. T241, 244,263, 266.

The Fourth District agreed petitioner was acting in the position of a parent in disciplining this child, and the parental privilege applies in this case.[10] The Fourth District did not directly address petitioner's claim that the state did not prove a crime was committed (Point 3 of Initial Brief). However, that court found no parental privilege applied to felony child abuse, in

---

[9] Judgment of acquittal issues are reviewed *de novo*. *State v. Williams*, 742 So. 2d 509 (Fla. 1st DC 1999); *State v. Smyly*, 646 So. 2d 238 (Fla. 4th DCA 1994).

[10] *Raford, slip op. at 3.(* "We agree with appellant that he was in such a relationship with the mother and child, which included the authority to discipline, so as to raise the parental privilege as an affirmative defense. *Kama* discussed the privilege in terms of `a parent, or one standing in the position of a parent.' *Id*. At 156").

disagreement with *Wilson*:

> In *Wilson* the mother of a six year old was being prosecuted for a single open-handed slap across the face which left a red mark. Although we may not think that this should be criminalized, we cannot agree with the first district that, under the statutory scheme, Wilson could not have been guilty of third degree child abuse. *Section 827.03(1)(a) makes the `intentional infliction of physical or mental injury' a third degree felony, and the legislature has not made an exception for the parental privilege.*

Raford, slip op. at 4, n.3 (emphasis supplied). The Fourth District also noted that "[n]o Florida case has characterized the parental privilege as an affirmative defense; however, we can see no distinction between the parental privilege and the privilege to enter a building, which is an affirmative defense to a burglary charge. *Delgado v. State*, No. SC88638, 2000 WL 1205960 (Fla. Aug. 24, 2000)(*citing State v. Hicks*, 421 So. 2d 510 (Fla. 1982)." *Raford*, slip op. at n.2. Though the parental privilege was continually pressed at trial and on appeal, the Fourth District did not address whether the conduct in this case established the privilege defense to the felony child abuse charge, whether the state's evidence here overcame it, or was otherwise sufficient in the context of this parental discipline case. Even if the Fourth District is correct and felony child abuse is a lesser offense here, petitioner must be able to defend against that charge by arguing his conduct falls within the parental disciplinary privilege.

But the Fourth District concluded that it was interpreting "the 1988 legislative changes following *Kama* as eliminating the

parental privilege recognized by *Kama* under the pre-1988 statutes except for simple battery, e.g., a typical spanking." *Raford*, slip op. at 3. As petitioner argues in Point 1, the 1988 legislative change from "permits infliction" to "inflicts" does not reveal any legislative intent to change the common law rule of parental privilege, so it should not be so interpreted, *Jackson*, 736 So. 2d at 83, and any statute in derogation of the common law must be strictly and narrowly construed. *Rollins*, 761 So. 2d at 633. The Fourth District's decision at bar must mean petitioner cannot even raise the privilege as a defense to felony child abuse, whether it is called an exemption or affirmative defense. This interpretation does not comport with the common, constitutional or statutory law.[11]

In light of the 1996 amendments to the child abuse statute, th parental disciplinary privilege articulated in *Kama* precludes conviction on the theory of crime with which petitioner was charged. *See Herbert v. State*, 526 So. 2d 709 (Fla. 4th DCA 1988). *See also State v. Wilder*, 748 A.2d 444, 2000 WL 212183 (Me. Feb. 24, 2000)(discussing parental justification laws and state's burden of proof). Relief is required her for the same sound reasons stated

---

[11] If the Fourth District did determine the parental privilege cannot be raised to defend against felony child abuse, application of that retrospective rule removing appellant's defense would violate due process and ex post facto provisions of the state and federal constitutions. *Bouie v. City of Columbia*, 378 U.S. 347, 353 (1964)("an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law"); *State v. Snyder*, 673 So. 2d 9 (Fla. 1996). *See State v. Rogers*, 992 S.W.2d 393 (Tenn. 1999), *cert. granted*, *Rogers v. Tennessee*, 120 S.Ct. 2004 (May 22, 2000)(relating to retrospective application of judicial removal of defense).

in *Wilson*, with which the Fourth District certified conflict.

The *Wilson* court reviewed the partial denial of a motion to dismiss where the mother had originally been charged with aggravated child abuse by malicious punishment. In a dismissal motion the mother admitted that she slapped her six year old once across the face with an open hand to discipline him, leaving a bruise and red mark on the boy's face. However, there was no broken skin or blood and the child had not required medical attention. "She argued that these undisputed facts did not establish a prima facie case of either aggravated or the lesser offense of felony child abuse in light of a parent's right to administer nonexcessive corporal punishment." *Wilson*, 744 So. 2d at 1238. The trial court found the facts could not constitute aggravated child abuse, and reduced the charge to felony child abuse. The mother pled to this charge, reserving the right to appeal.

On appeal, the *Wilson* court reviewed the 1996 legislative changes in the definition of child abuse, and concluded "the statute clearly excludes those actions that constitute aggravated child abuse and includes actions that constitute simple battery." *Id.* The court recalled its analysis of the required definition of that crime in light of the parental privilege it had recognized in *Kama*: "It is because the law permits, by privilege, a simple battery in the administration of discipline by one in authority over a child that the offense of aggravated child abuse must be so

defined." *Wilson*, 744 So. 2d at 1239, *quoting Kama*, 507 So. 2d at 158. It found that "[u]nder *Kama*, it is clear that the trial court was correct to find that the facts in the instant case did not constitute aggravated child abuse as a matter of law." *Wilson*, 744 So. 2d at 1239. The *Wilson* court further concluded the facts could not constitute felony child abuse either: "[u]nder our analysis and holding in *Kama*, we determine that where the undisputed facts demonstrate that a parent has employed corporal punishment to discipline his or her minor child, as in the instant case, that parent is exempt from prosecution under the felony child abuse statute." *Wilson*, 744 So. 2d at 1239. *Wilson* was correctly decided, and its conclusion has to apply to the instant case as well.

As he was acting as a parent, petitioner's disciplinary conduct is exempted from the definition of felony child abuse. "There have been no cases which state unequivocally that the whipping of a child with a belt *per se* constitutes aggravated child abuse. Nor is there one which says that such punishment can never constitute aggravated child abuse." *Herbert*, 526 So. 2d at 712 (under previous child abuse statute). However, in *Herbert*, the Fourth District court held "we believe a jury question is raised by the evidence adduced in this case which indicated that appellant struck the child severely a number of times and on various parts of his body other than the buttocks." The evidence in *Herbert* showed the mother whipped the seven year old child more than five times,

and "the doctor who examined the boy was unable to determine how many blows had been inflicted because there were several bruises superimposed upon one another." *Herbert*, 526 So. 2d at 712. Here, there is evidence of whipping on parts of the body other than the buttocks; however, there was no medical testimony, and in fact, no need at all for medical treatment, though the child's father was a paramedic. The child admitted the area did not hurt the next day. T243. Bruises were present, but not "superimposed" indicating repeated daily beatings as in *Herbert*. The presence of bruises on the child after 24 hours is not sufficient to show child abuse resulting from parental discipline. *See B.R. v. Dep't of Health & Rehabilitative Serv.*, 558 So. 2d 1027 (Fla. 2d DCA 1989)(agency presumption of excessive corporal punishment when bruise lasts more than 24 hours unlawful) and *R.S.M. v. Dept. of Health & Rehabilitative Serv.*, 640 So. 2d 1126, 1127 (Fla. 2d DCA 1994)("the mere presence of bruises resulting from corporal punishment is not competent, substantial evidence of the excessive corporal punishment or temporary disfigurement that the legislature envisioned in passing chapter 415").

This case did not present a jury question, and petitioner's conduct was privileged, as in *Moakley v. State*, 547 So. 2d 1246 (Fla. 5th DCA 1989), where the court found no malicious punishment where the father struck the eight year old daughter with a leather belt on the buttocks and the hip as discipline for behavioral problems. *Compare Lowery v. State*, 641 So. 2d 489 (Fla. 5th DCA

1994)(discipline with electric cord not privileged where child suffered permanent disfigurement and blood was drawn by parent's disciplinary strikes), and *M.O,, McC. v. Dept. of Health & Rehabilitative Serv.*, 575 So. 2d 1352 (Fla. 2d DCA 1991)(no excessive corporal punishment where child hit four or five "whacks" with paddle so hard it broke, and due to squirming, child hit on shoulder as well as buttocks, and red marks visible the next day).

In *Dufresne*, the Fourth District correctly reasoned that this court's decision in *Fuchs* requires the courts to incorporate the definitions of "physical injury" and "mental injury" found in other the Florida Statutes into the definitions for purposes of criminal prosecution. Legislative importation of the definitions of these terms shows the evidence of petitioner's conduct in this case is insufficient to establish felony child abuse particularly in light of the parental discipline he was engaged in, and that he must be discharged. Chapter 415, Florida Statutes, governing protective services for abused and neglected children, defines mental injury as "an injury to the intellectual or psychological capacity of a child as evidenced by a discernible and substantial impairment in the ability to function within the normal range of performance and behavior, with due regard for his or her culture." Section 415.503(11), *Fla. Stat*. (1998). *See Dufresne*. "Physical injury" is defined as "death, permanent or temporary disfigurement, or impairment of any bodily part." Section 415.503(13), *Fla. Stat*. (1998). The only possible injury shown here, or one "reasonably

likely" to result from petitioner's conduct, is temporary disfigurement[12]. But a number of cases have found bruising in the context of parental discipline was insufficient to establish child abuse in civil child abuse or dependency proceedings. *J.C. and S.C. v. Dept. of Children and* Families, 773 So.2d 1220 (Fla. 4th DCA 2000) (bruise on buttocks resulting from discipline with belt insufficient to show physical, mental or emotional injury). R.S.M. *v. Dept. of Health & Rehabilitative Serv.*, 640 So. 2d 1126, 1127 (Fla. 2d DCA 1994)("the mere presence of bruises resulting from corporal punishment is not competent, substantial evidence of the excessive corporal punishment *or temporary disfigurement* that the legislature envisioned in passing chapter 415")(emphasis supplied).[13] *Compare Herbert v. State*, 526 So. 2d 709 (Fla 4th DCA 1988)("several" bruises inflicted with belt on various parts of body in whipping with belt more than five times, and some bruises superimposed, presented jury question of malicious punishment). These cases, decided prior to the 1996 changes in the child abuse statutory scheme, plainly hold that bruising is not sufficient to

---

[12] There was no evidence of death, permanent disfigurement, impairment of a bodily part or mental injury.

[13] A similar case involving "welts" is not as clear. In *M.O.,McC. v. Dept. of Health & Rehab. Serv.*, 575 So. 2d 1352 (Fla. 2d DCA 1991), the court reversed a hearing officer's finding of child abuse which stated that "red marks or welts" on the child's shoulder constituted temporary disfigurement, *Id.* at 1354, but on the ground that such evidence in and of itself would not be sufficient to constitute excessive corporal punishment. While the Fourth District describes the injuries to the child in this case as "welts" at the outset of its opinion, they are not described as such by the trial participants.

show "temporary disfigurement."[14] [cite]. "The legislature `is presumed to know the existing law when it enacts a statute.'"*Joshua v. Gainesville*, 768 So. 2d 432, 438 (Fla. 2000)*(quoting Schwartz v. GEICO General Ins. Co.*, 712 So. 2d 773, 774 (Fla. 4th DCA 1998), *quoting Williams v. Jones*, 326 So. 2d 425, 437 (Fla. 1975)). Existing law excluded bruising in the context of parental discipline from the definition of temporary disfigurement. Petitioner's conduct here was privileged, the "affirmative defense" of parental privilege was established. In any event, the state's proof of felony child abuse in this disciplinary context was insufficient to show mental or physical injury as those terms are required to be defined under *Fuchs* and *Dufresne*.

The rules governing review of the sufficiency of evidence of lessers require review of this one.

In *State v. Espinosa*, 686 So. 2d 1345, 1348 (Fla. 1996), this Court held that "a defendant who requests an instruction on a lesser included offense should not be allowed to complain on a sufficiency of the evidence claim on the lesser-included offense when sufficient evidence exists to convict the defendant for the greater offense." *Accord*, *Viveros v. State*, 699 So. 2d 822, 826 (Fla. 4th DCA 1997). This rule does not apply to the instant case because petitioner did not request the lesser offense of felony child abuse, and in fact objected to it, even after it was discovered the wrong instruction was read. T278-80; T337-39. While

---

[14] The parental privilege would also apply to disciplinary conduct "reasonably likely" to result in temporary disfigurement.

counsel later said he could not see how he would be prejudiced by the court entering judgment on the lesser if the jury convicted on the alternative theory of aggravated child abuse, T340, this is not a request for the lesser, or otherwise waiver under *Espinosa*.

If counsel's acquiescence in the court's proposal is deemed a "request" for the lesser under *Espinosa*, petitioner contends the evidence of the greater offense was insufficient. The parental privilege exemption applies equally to the second degree felony of aggravated child abuse by malicious punishment, and the state did not meet its burden of proof on that issue. *Kama; Wilson; Moakley*.

Under the uncharged alternative theory of aggravated child abuse upon which the jury was actually (accidentally) instructed, the evidence is also insufficient. That portion of the statute requires great bodily harm or permanent disability or permanent disfigurement. Section 827.03(2)(c), *Fla. Stat*. (1998). The bruises here are insufficient to establish any of these elements. This child was harmed, but did not suffer great bodily harm. *Coronado v. State*, 654 So. 2d 1267, 1270 (Fla. 2d DCA 1995)("Great bodily harm defines itself and means great as distinguished from slight, trivial, minor, or moderate harm, and does not include mere bruises that are likely to be inflicted in a simple assault and battery," but "facial fracture, numbness, and a great deal of pain around the eye and face" sufficient.); *McKnight v. State*, 492 So. 2d 450, 451 (Fla. 4th DCA 1986)("great bodily harm" shown where "the medical witness concluded that the punch resulted in extremely

serious brain injury to the seventy year old victim"); *E.A. v. State*, 599 So. 2d 251, 252 (Fla. 3d DCA 1992)(beating resulting in "a swollen eye, a swollen jaw, and a mark or scar under one of his eyes," and "loss of consciousness" was great bodily harm). There was no medical testimony here, no evidence of harm besides bruising, and no evidence whatsoever of permanent disfigurement or permanent disability. The state admitted no permanent disability or disfigurement in closing argument. T307. The state did not even see fit to charge this alternative theory of aggravated child abuse, because there is no evidence to support it.

Because the evidence was insufficient, petitioner must be discharged. "A conviction is fundamentally erroneous when the facts affirmatively proven by the State simply do not constitute the charged offense as a matter of law." *Griffin v. State*, 705 So. 2d 572 (Fla. 4th DCA 1998).

The conviction and sentence violate article 1, sections 9 (due process), 16 (rights of accused; notice; right to present defense), 21 (access to courts), and 22 (trial by jury), and 23 (right to privacy) of the Florida Constitution, and the fifth (due process, former jeopardy), sixth (confrontation; notice; right to present defense; fair trial; jury trial), and fourteenth (due process, equal protection and incorporation) amendments to the United States Constitution and Florida law.

Point 3.

MISINSTRUCTION OF THE JURY ON AN UNCHARGED CRIME WHICH WAS MISREPRESENTED AS A LESSER OFFENSE REQUIRES REVERSAL

The state sought and received an instruction on the lesser offense of felony child abuse, over defense objection. However, the trial court read the wrong instruction to the jury, using the definition of an alternative, uncharged crime of aggravated child abuse to describe what it told them was the "lesser" offense of child abuse. The jury returned a verdict convicting on this "lesser" offense, and the trial court tried to cure the error by entering judgment on the lesser offense of felony child abuse. This "cure" cannot take, though, and reversal is still required, because the court's instructions did not define simple felony child abuse, and instead mandated jury consideration of an uncharged offense, upon which the jury convicted. If prejudice is required at all under these circumstances, petitioner was. The misleading and inaccurate instruction deprived petitioner of the exemption of parental privilege as a defense to the actual lesser offense of felony child abuse, resulted in conviction of an unauthorized and inapplicable lesser offense, and deprived petitioner of full jury consideration of the lesser he had sought, which was battery.

The Fourth District denied relief on this claim, holding both that there was no prejudice and that the issue was waived:

> Nor can we agree with the appellant that the manner in which the jury was instructed warrants a reversal. First, the erroneous instruction made it harder for the state to obtain a conviction, because it required proof of a greater injury than would have been required to

> prove third degree child abuse. *Hubbard v. State*, 24 Fla. L. Weekly D2600 (Fla. 5th DCA 1999).(improper instructions not prejudicial because the instructions erroneously placed a higher burden of proof on the state). The error, accordingly, did not prejudice appellant.

Raford, 2001 WL 40265, 4. However, in so ruling, the Fourth District relied on the Fifth District's initial decision in *Hubbard*, though that court completely reversed itself and ordered a new trial based on fundamental error on rehearing.[15] *Hubbard v. State*, 751 So. 2d 771 (Fla. 5th DCA 2000).

In the case at bar the state charged aggravated child abuse by willful torture, malicious punishment, or unlawful caging pursuant to Section 827.03(2)(b), Fla. Stat. (1998). R4.[16] This Information charges a second degree felony. The unusual events of this case began to unfold at the charge conference, where the defense requested the lesser of misdemeanor battery, and the state asked for child abuse. T278. The court agreed to give the third degree felony child abuse over the objection of the defense, T280-81, and battery over objection of the state. T285. In the final instructions, the court introduced the "lesser" included offense of child abuse and defined it to include "*Number two, in doing so, the defendant caused F.L. great bodily harm or permanent*

---

[15] It is not clear if citation to the original *Hubbard* decision was mistaken or intentional on the part of the Fourth District. Petitioner relied on the later *Hubbard* (rehearing)decision in the Initial Brief at 19,and the state also cited, and sought to distinguish, the later decision in its Answer Brief at 11-12.

[16] The state later agreed it was traveling only on the "maliciously punish" theory of the statute. T275.

disability or permanent disfigurement." T317-18 (emphasis supplied). This is not the definition of the third degree felony of child abuse. The lesser offense of child abuse is proscribed by Section 827.03(1), Fla. Stat. (1998), and occurs when the abuse causes physical or mental injury but does *not* cause great bodily harm, permanent disability, or permanent disfigurement. What the judge had defined was an alternative form of the second degree felony of aggravated child abuse under Section 827.03(2)(c), Fla. Stat. (1998).[17]

The court caught the error when the jury returned with questions. T329-30; 333-336. The court at first suggested eliminating the requirement the jury find the defendant caused great bodily harm, permanent disability or disfigurement. T337. Petitioner's counsel pointed out that telling the jury those elements were not required for conviction of the lesser would negate everything he had said in closing argument about that "lesser",[18] and then said to tell the jury "to refer to the law and send them back, or start this thing over." T337. The court then noted that if the jury came back with child abuse as defined, it

---

[17] This confusion was created because the standard jury instructions were never changed when the child abuse statutory scheme was. The standard instructions still define the alternative form of aggravated child abuse under the heading "child abuse F.S. 827.04 (1) and (2)", though those statutory subsections no longer define child abuse. West's *Standard Jury Instructions in Criminal Cases* pp. 1330-31. (1998).

[18] Counsel had argued against conviction on the lesser of felony child abuse in part because there had been no showing of great bodily harm, permanent disability or permanent disfigurement. T295-96.

would be a second degree felony. T338. Defense counsel told the court since the crime was not a lesser he was requesting that the court instruct the jury child abuse was no longer a charge for their consideration, and they should find the petitioner guilty as charged or guilty only of battery. T339. He pointed out he had objected to this lesser being given, and that it was given at the state's request, over his objection. T339. The court told counsel since the parties thought it was a lesser, but one element too many was given, if the jury returned the "lesser" on that count, the court would treat it as the third degree felony. Defense counsel said he "would have a hard time saying I was prejudiced by that one." T340. The state objected and the court said it could not tell the jury to disregard the element because the defense had relied on its absence in its closing argument. T341. Counsel then said just instruct them they had heard the law, and the court did. T342.

The standard of review is *de novo* upon a claim the court has misstated the elements of a crime. A trial court does not have the discretion to refuse to instruct the jury on an element of the crime. *Shearer v. State*, 754 So. 2d 192, 194 (Fla. 1st DCA 2000).

(A) Retrial is required because the jury was instructed on an uncharged crime, and was misadvised that the crime was a lesser offense.

i. The uncharged crime.

Petitioner was charged with aggravated child abuse by willfully torturing, maliciously punishing, or caging the child, under Section 827.03 (2)(b), Fla. Stat. (1998), but in the guise of

a "lesser" offense, the jury was instructed on the alternative form of aggravated child abuse, requiring great bodily harm, permanent disability or disfigurement under Section 827.03(2)(c), Fla. Stat. (1998). T317-18. This theory of aggravated child abuse was not alleged in the information. R4. The jury returned a verdict of "Child Abuse, a lesser included offense," R30, based on the instruction defining the alternative form of aggravated child abuse. Because the jury was instructed on a crime different from the one for which they convicted petitioner, the conviction must be reversed.

Under settled law, "[a] verdict which finds a person guilty of a crime not charged is a nullity." *Moore v. State*, 496 So. 2d 255 (Fla. 1st DCA 1986). *Accord, Abbate v. State*, 745 So. 2d 409 (Fla. 4th DCA 1999); *O'Bryan v. State*, 692 So. 2d 290 (Fla. 1st DCA 1997); *Gaines v. State*, 652 So. 2d 458 (Fla. 4th DCA 1995)("Where instructions for a different crime from that which the defendant is charged and convicted are read to the jury, the verdict as to that crime is a nullity. . . . The error is clearly fundamental and requires reversal"); *Ingleton v. State*, 700 So. 2d 735, 738 (Fla. 5th DCA 1997); *Ray v. State*, 403 So. 2d 956 (Fla. 1981). *See Adams v. State*, 681 So. 2d 917 (Fla. 4th DCA 1996)(accidental reading of instruction on resisting arrest without violence required reversal of conviction for resisting with violence).

Under similar circumstances in which the jury was instructed on alternative forms of lewd act not charged in the information,

the district court reversed, holding:

> A defendant is entitled to have the charge against him proved substantially as alleged in the indictment or information and cannot be prosecuted for one offense and convicted and sentenced for another, though the offenses are of the same general character or carry the same penalty. *Jacobs v. State*, 184 So. 2d 711 (Fla. 1st DCA 1966).
>
>> [w]here an offense may be committed in various ways, the evidence must establish it to have been committed in the manner charged in the indictment. . . . the indictment or information may have alleged them in the conjunctive and proof of one would have sufficed but if one of the state of facts is alleged, it cannot be established by proof of another.

Long v. State, 92 So. 2d 259, 260 (Fla. 1957) [citations omitted]. *Zwick v. State*, 730 So. 2d 759 (Fla. 5th DCA 1999). *Accord, Abbate*. In *Hubbard*, as discussed above, the Fifth District vacated its original decision, found fundament error and reversed an aggravated child abuse conviction "based on instructions which misstated the elements of both the charged offense and a lesser included offense" of felony child abuse.

The jury was instructed (and convicted) on an aggravated child abuse theory not charged. The verdict is thus "a nullity," and a new trial is required.

ii. The misrepresented lesser.

The court told the jury its definition of child abuse was a lesser offense when it was not, because the crime the court defined carried the same degree and penalty as the charged offense. Both are second degree, level eight felonies. Section 827.03(2), Fla. Stat. (1998); Section 921.022, Fla. Stat. (1998) An offense is

a lesser included offense only if it carries a lesser penalty. *Nurse v. State*, 658 So. 2d 1074 (Fla. 3d DCA 1995), *rev. denied*, 667 So. 2d 775 (Fla. 1996), *receded from on other grounds*, *Jones v. State*, 666 So. 2d 960 (Fla. 3d DCA 1996). *Accord*, *Ladd v. State*, 714 So. 2d 533 (Fla. 1st DCA 1998); *Greene v. State*, 714 So. 2d 554 (Fla. 1st DCA 1998). The court's instruction "gravely misled" the jury which deliberated thinking the definition it received for child abuse described a lesser offense when it did not. "[W]e agree with the defendant that it gravely misleads the jury for a trial court, as here, to instruct the jury on an attempt as a lesser offense when it carries the same penalty as the charged offense." *Nurse*, 658 So. 2d at 1079.

iii. Preservation and Prejudice.

This issue is preserved because the giving of an instruction on an uncharged offense is fundamental error. *Moore; O'Bryan; Adams*. It is preserved because counsel did object to the lesser, continued to object and requested that the court strike the inaccurately instructed lesser offense from the jury's consideration. *See Ray*. The trial court overruled these objections, and the issue was thus preserved,[19] notwithstanding counsel's later observation that he would have a hard time claiming prejudice upon reduction to a third degree felony, which is the basis for the Fourth District's finding of waiver here.

---

[19] It was not necessary to move for a mistrial or to continue the futile gesture of repeated objections. *Simpson v. State*, 418 So. 2d 984 (Fla. 1982); *Hunt v. State*, 613 So. 2d 893, 898 n.4 (Fla. 1992).

If the error is fundamental, it must be prejudicial. But instruction on the uncharged crime as a misrepresented lesser *was* prejudicial. The inaccurate instruction prevented the jury from considering the parental discipline privilege to a simple felony child abuse charge, which would not apply if the defendant actually inflicted great bodily harm, permanent disfigurement or permanent disability. *Kama*, 507 So. 2d at 156 ("The determination that a parent, or one standing in the position of parent, has overstepped the bounds of permissible conduct in the discipline of a child presupposes either that the punishment was motivated by malice, and not by an educational purpose; that it was inflicted upon frivolous pretenses; that it was excessive, cruel or merciless; *or that it has resulted in `great bodily harm, permanent disability, or permanent disfigurement'"*)(emphasis supplied). The inaccurate charge also resulted in petitioner's conviction for a crime which was in fact not a lesser, felony child abuse (as discussed in Point 1), and full consideration of the lesser of misdemeanor battery, or acquittal. *See Maximino v. State*, 747 So. 2d 448 (Fla. 4th DCA Dec. 15, 1999).

iv. Required Relief Under Jeopardy.

The jury's conviction on the lesser offense is an acquittal of any theory of aggravated child abuse raised by the facts, including the uncharged and accidentally instructed one. Conviction of a lesser offense operates as an acquittal of the greater one. *Price v. Georgia*, 398 U.S. 323, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970).

See Fong Foo v. United States, 369 U.S. 141, 143, 82 S.Ct. 671, 672, 7 L.Ed.2d 629 (1962)(jeopardy attaches, precluding retrial even where acquittal is "based upon an egregiously erroneous foundation"); *Mars v. Mounts*, 895 F.2d 1348 (11th Cir. 1990)(jeopardy prohibits retrial even where acquittal based on inadvertent typographical error in statement of particulars relating to date of offense). In addition, the trial court's entry of judgment on the third degree felony of child abuse is an acquittal of the second degree felony of aggravated child abuse even if the verdict itself was not lawfully rendered, *See* Rule 3.650, Fla.R.Crim.P., and petitioner can only be retried on that lesser offense or discharged. *Price*; *Fong Foo*; *Mars*.

The conviction and sentences violate article 1, sections 9 (due process), 16 (rights of accused; notice; right to present defense), 21 (access to courts), and 22 (trial by jury) of the Florida Constitution, and the fourth (unreasonable search and seizure), fifth (due process, former jeopardy), sixth (confrontation; notice; right to present defense; fair trial; jury trial), and fourteenth (due process, equal protection and incorporation) amendments to the United States Constitution, and Florida law.

CONCLUSION

Based upon the foregoing argument authorities, petitioner respectfully requests this Court accept review, reverse the conviction and sentence in this case or provide other relief the court finds appropriate.

Respectfully Submitted,

CAREY HAUGHWOUT
Public Defender
15th Judicial Circuit of Florida

____
STEVEN H. MALONE
Assistant Public Defender
Attorney for Willie Raford
421 3rd Street
West Palm Beach, Florida 33401
(561) 355-7600
Florida Bar No. 305545

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Melynda Melear, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401-2299 this _____ day of March, 2001.

____
STEVEN H. MALONE

CERTIFICATION OF COMPLIANCE

In accordance with the Florida Supreme Court Administrative

Order counsel for petitioner hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

STEVEN H. MALONE