IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

TOBY LEE HENRY — APPELLANT

VS. — NO. 2008-KA-1648-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: W. GLENN WATTS
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

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VS. **NO. 2008-KA-1648-COA**

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BRIEF FOR THE APPELLEE

PROCEDURAL HISTORY:

On August 28, 2008 , Toby Henry, "Henry" was tried for felony child abuse by a Lowndes County Circuit court jury, the Honorable Lee Howard presiding. R. 1. Henry was found guilty and given a twenty year sentence in the custody of the Mississippi Department of Corrections. R. C.P. 56. From that conviction he appealed to the Mississippi Supreme Court. C.P. 70.

ISSUES ON APPEAL

I.

WAS THIS ISSUE WAIVED, AND WAS HENRY DENIED HIS RIGHT TO COUNSEL?

II.

WAS HENRY DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL?

III.

WAS THIS ISSUE WAIVED, AND WAS HENRY'S CONSTITUTIONAL RIGHT TO DUE PROCESS DENIED BY THE FELONY CHILD ABUSE STATUTE AS INTERPRETED BY CASE LAW?

STATEMENT OF THE FACTS

On May 11, 2007, Henry was indicted for felony child abuse on or about February 25, 2007 by a Lowndes County Grand jury. C.P. 1.

On August 28, 2008 , Henry was tried for felony child abuse by a Lowndes County Circuit court jury, the Honorable Lee Howard presiding. R. 1. Henry was represented by Mr. Joseph Sams. Jr. R. 1.

The record indicates that during voir dire Henry briefly entered the court room with a baby in his arms. R. 51. The trial court stated that the potential jurors who indicated that seeing this brief event would prejudice their impartiality were removed from the panel. R. 75.

The record reflects that trial counsel objected to the amendment of the indictment to show that the date of the offense was not February 22, 2007 but February 25, 2007. R. 71.

Mrs. Montie McCoy testified that she was the grandmother of Christian. She testified that Christian, the alleged child victim, was three at the time of trial. He was only two when she saw him with deep bruises covering much of his body. This was when she was assisting him in the bathroom. Mrs. McCoy also noticed a big bump on his head. After seeing the extensive bruising over his body she took him to the police to be examined for child abuse. R. 120-124.

Keith McCoy, M.D. was accepted as an expert medical witness. R. 93. He testified that on the evening of February 25, 2007 he examined Christian Andrews. R. 93. He testified to finding extensive bruises on the male child. R. 94-95. Dr. McCoy also testified that the extensive physical bruising and bite marks on the child's inner thigh resulted in temporary disfigurement of his skin, the largest organ in the human body. R. 103-104.

Dr. McCoy testified that his findings were not compatible with the child having been spanked three times with someone's open hand. R. 103-104.

Deputy Mark Miley testified to taking the photographs of the child at Baptist Memorial Hospital emergency room. He observed extensive bruises on the child's body, as well as what appeared to be bite marks. R. 133-138. He testified that the color photographs were taken around 11:30 P.M. He testified that the lights from the emergency room, and the camera bleached out some the bruises. He believed the actual bruises which were seen in the hospital were worse than what is shown in the photographs.

See manila envelop marked "Exhibit," which contains color photographs of the victim, Christian Andrews. They were taken on February 25, 2007 by Officer Mark Miley. R. 132-133. Officer Miley testified that the color photographs were a fair and accurate representation of the condition of the two year boy as seen on the date in question. R. 96-102.

Photograph one shows a bruise on the left temple as well as two red scrape marks on the top of Christian's fore head. Two-a shows bruises on Christian's left upper arm. Two-b shows bruises on his right upper arm. Three-a, b and c shows bruises on the thighs, buttocks, hips and back of the child. Four-a and b shows bruises on his inner left thigh. R. 96-103.

State's exhibit 7 was admitted into evidence as Henry's post **Miranda** inculpatory statement. Henry admitted that he "spanked him with my hand two or three times." He also admitted that "I was a little upset at the time when I spanked him." He also admitted that "the bite marks were done while we were playing."

At a bench conference, the prosecution sought admissions of testimony about other abuse of the victim by Henry. This was to show evidence of a continuing pattern of abuse. Trial counsel successfully argued against the admission of evidence of other alleged abuse against the child victim. This was on grounds of being more prejudicial than probative. R. 160-166.

During a bench conference, the prosecution successfully argued for the possible use of

impeachment evidence should Henry testify. Trial counsel objected to its admission. R. 170. The trial court agreed to its possible admission if made relevant during Henry's testimony.

A motion for a directed verdict was denied. R.175; 182.

After being advised of his right to testify in his own behalf, Henry decided not to testify. R. 182.

Henry was given a lesser included misdemeanor child abuse instruction. C.P. 40.

Trial counsel argued that if Henry was guilty of anything, it was for spanking a child too vigorously. This was something that allegedly many other parents or care givers would have been guilty of having committed. This would make him guilty of misdemeanor child abuse. R. 197-202.

Henry was found guilty and given a twenty year sentence in the custody of the Mississippi Department of Corrections. R. C.P. 56. Henry through counsel filed a general motion for a new trial which was denied. C.P. 67; 82.

From this denial of relief Henry appealed to the Mississippi Supreme Court. C.P. 70.

SUMMARY OF THE ARGUMENT

PROPOSITION I

THIS ISSUE WAS WAIVED. AND HENRY WAS NOT DENIED ACCESS TO COUNSEL.

This issue was waived for failure to raise it with the trial court. R. 1-214; C.P. 67. It was also waived for failure to provide evidentiary support for the factual premises used as a basis for this inopportune argument. **Haddox v. State**, 636 So. 2d 1229, 1240 (Miss. 1994). There are no affidavits from trial counsel, or appeal counsel as to the factual matters asserted concerning trial counsel's administrative status with the state bar association.

The record reflects that trial counsel was a licensed member of the bar who represented Henry in the instant cause. R. 1-214. Whether his status with the Mississippi State Bar was active or inactive at the time of trial would be an administrative matter for the bar association to investigate. There is no record evidence and no affidavits from anyone included in the record concerning this issue. The appellee would submit that this is not a basis for granting Henry a new trial. Nor was it a basis for finding trial counsel rendered ineffective assistance which relates to proposition II.

PROPOSITION II

HENRY RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

This issue is lacking in merit. The record reflects that trial counsel defended Henry effectively given the overwhelming corroborated eye witness, forensic and photographic evidence as well as the admissions by the appellant in the record. R. 155-156. At a bench conference, trial counsel was effective in arguing against the admission of other alleged abuse against the child victim in the past as part of a continuing pattern of child abuse. R. 160-166.

There are no affidavits in support of any of Henry's claims. **Lindsay v. State**, 720 So. 2d 182, 184 (¶6) (Miss. 1998). The appellee would submit that the record indicates a lack of evidence of either deficient performance or of prejudice to Henry's defense. This would be his defense against the charge as a result of trial counsel's representation before the jury. **Johnston v . State**, 730 So. 2d 534, 538 (Miss. 1997). The jury's verdict would not have been different because of trial counsel's actions or lack of them, given the evidence against Henry. This issue is lacking in merit.

PROPOSITION III

THIS ISSUE WAS WAIVED. AND HENRY WAS PROVIDED WITH DUE PROCESS AND A FAIR TRIAL.

This issue was waived for failure to raise it with the trial court. R. 1-214; C.P. 67. **Haddox, supra**.

In **Buffington v. State** , 824 So. 2d 576, 580 (¶15) (Miss. 2002), the Mississippi Supreme Court adopted "the permanent or temporary disfigurement" standard for application under the felony child abuse statute. The appellee would submit this case indicates why the majority did so. It provided support for felony abuse convictions where there were no broken bones, or permanent disfigurement. This prevents defendants from beating a child black and blue and then claiming that he merely spanked the child for some alleged petty offense.

While the minority opinion in **Wolfe** raises important issues, the appellee does not think there are applicable, given the well documented facts in this particular case. Henry's "spanking" and "playful" biting defense is contradicted by testimonial and pictorial documentary evidence. R. 155-156. See photographs in Exhibits volume.

This issue was not only waived it is also lacking in merit.

ARGUMENT

PROPOSITION I

THIS ISSUE WAS WAIVED. AND HENRY WAS REPRESENTED BY COMPETENT COUNSEL.

Counsel for Henry argues that he lacked proper licensed counsel. He argues that Henry's trial counsel, unknown to him at the time of trial, had applied for and allegedly was granted inactive status with the State Bar Association. He believes trial counsel's administrative status with the bar association prevented him from being properly represented. He also opines that the alleged infirmities of trial counsel interfered with his ability to competently assist Henry in his defense to the felony child abuse charges. Appellant's brief page 10-14.

To the contrary, the record reflects that this issue was never raised with the trial court. R.1-214; C.P. 67.

In **Haddox v. State**, 636 So. 2d 1229, 1240 (Miss. 1994),

the Court stated:

> Because these arguments are not preserved for appeal, this Court cannot reverse based upon them. The assertion on appeal of grounds for an objection which was not the assertion at trial is not an issue properly preserved on appeal. **Baine v. State**, 606 So. 2d 1076 (Miss. 1992); **Willie v. State**, 585 So. 2d 660, 671 (Miss. 1991); **Crawford v. State**, 515 So. 2d 936,938(Miss. 1987);...

The record also reflects there is no record evidence in support of any of the factual assertions made on behalf of Henry included with this appeal.

In **Mason v. State**, 440 So. 2d 318, 319 (Miss. 1983), the Court stated that it did not accept assertions about facts not proven and placed in the certified record of the cause on appeal. .

> We have on many occasions held that we must decide each case by the facts shown in the record, not assertions in the brief, however sincere counsel may be in those assertions. Facts asserted to exist must and ought to be definitely proved and placed before us by a record, certified by law; otherwise we cannot know them. **Phillips v.**

State, 421 So. 2d 476 (Miss. 1982); **Branch v. State**, 347 So. 2d 957 (Miss. 1977);...

In addition, to there being no factual or documentary evidence in the record in support of appeal counsel's argument, Henry has no legal precedent from this legal jurisdiction in support of his argument.

In **In Re Willamson, and Miller**, 838 So. 2d 226 (Miss. 2002), relied upon by Henry's counsel, the court upheld the trial court's denial of Miller's pro hac vice application. It did so because there was evidence that Miller violated a pro hac vice prohibition. This was a prohibition for out of state attorneys admitted to practice in this state. There is a prohibition against making more than five appearances in twelve months. This was in violation of M. R. A. P. 46(b)(6) -(8).

The record in that cause indicated that Williamson, and Miller were both licensed legal practitioners in a medical malpractice case. It was filed in LeFlore County before Judge Ashley Hines. There was no issue raised about their administrative status with the state bar association. This would be in terms of their being active or inactive, or suspended members of the bar.

In **State v. Joubert** 847 So. 2d 1023, 1025 (Fla. App. 3 Dist. 2003), relied upon by Henry, the Florida Court pointed out that it was not dealing with a situation where a licensed attorney with a suspended license conducted a trial. As stated by the Court: "We emphasize that we are not here dealing with a person who merely failed to comply with some administrative requirement prerequisite to membership in the Florida Bar." Id. 1026.

The court pointed out on two prior occasions it had found no violation of the right to counsel merely because an attorney conducting a trial was suspended from their practice for failure to pay bar dues.

> In two prior cases, **White**, and **Dolan**, the Florida Court found that defendants were not denied their right to counsel merely because their respective attorneys had their licenses suspended for failure to pay their bar dues.
> Similarly, in **White**, this Court held that the defendant was not denied his right to

> counsel merely because his court-appointed attorney was suspended from the practice of law in this state for failure to pay bar dues. In fact, this Court in **White** noted that decisions in other courts had uniformly declined to adopt a per se rule that an attorney's suspension from the practice of law gives rise to a constitutional claim of denial of the right to counsel. **White v. State**, 464 So.2d at 186 (citations omitted). This Court stated that it was aligning itself with these decisions. 1025.
> The suspensions in **Dolan** and **White** were unrelated to any disciplinary proceeding. These were violations that were merely technical ones. Reinstatement was purely ministerial.FN2 All the attorney had to do was send a check to the Florida Bar. And as this Court in Dolan emphasized, quoting from **Huckelbury v. State**, 337 So.2d 400, 403 (Fla. 2d DCA 1976), the facts in **Dolan** dealt "with a person who merely failed to comply with some administrative prerequisite to membership in the Florida Bar, ..." **Dolan**, 469 So.2d at 143-44. 1025.

The appellee would submit that this issue was not only waived but it was also lacking in merit. Trial counsel's status as a member of the bar is an issue for the Mississippi State Bar. It is not a basis for claiming that Henry was denied his Constitutional right to counsel. This issue was not only waived, it is also lacking in merit.

PROPOSITION II

HENRY WAS PROVIDED WITH EFFECTIVE ASSISTANCE OF COUNSEL.

Counsel for Henry argues that he was not provided with effective assistance of counsel based upon the record of this cause. He argues that there were numerous examples of trial counsel not meeting the standards required for adequately representing Henry against the charges. This included allegedly orchestrating a spectacle before the jury, not preparing for a **Peterson** impeachment hearing, and not objecting and requesting a mistrial during closing argument. He also argues that trial counsel was allegedly too ill and/or decrepit to properly function as an effective advocate during phases of the trial. Appellant's brief page 14-22.

When an appeal involves post conviction relief, the Mississippi Supreme Court has held, "that where a party offers only his affidavit, then his ineffective assistance of counsel claim is without merit." **Lindsay v. State**, 720 So. 2d 182, 184 (¶6) (Miss. 1998); **Smith v State**, 490 So. 2d 860 (Miss. 1986). The record contains no affidavits from trial counsel, or any person knowledgeable about these numerous claims for relief asserted by appeal counsel. See Appellant's brief and record excerpts.

In addition, the record indicates that there was overwhelming, partially corroborated evidence of guilt. This included eye witnesses who viewed the extensive bruises that covered the child's body. It also included color photographs which documented these deep bruises, cuts and bite marks on the child. R. 98-104; 120-124; 133-135. In addition, Henry provided an inculpatory statement. He admitted to "spanking" the two year old child, as well as allegedly "playfully" biting the child. R. 155-156.

There is a lack of evidence that trial counsel orchestrated the incident mentioned by the trial court in the record. R. 74-75. The record indicates that Henry briefly entered the court room with

a baby in his arms. R. 51. However, there was no indication that trial counsel encouraged or condoned this incident. In addition, the trial court stated that the potential jurors who indicated that seeing this event might prejudice their impartiality were removed from the jury panel. R. 75.

The record reflects that trial counsel objected to the amendment of the indictment to show that the date of the offense was not February 22, 2007 but February 25, 2007. R. 71.

The record reflects that trial counsel was successful in preventing testimony about other wrongs under M. R. E. 404(b) to be admitted into evidence. This was to show evidence of a continuing pattern of child abuse. R. 164-167.

The **Peterson** hearing was to determine if Henry's prior conviction for accessory after the fact of burglary would be admissible for impeachment purposes. This would be the case only if Henry chose to testify. R. 167-174 . The record reflects that Sams objected to the use of this conviction for impeachment purposes. R. 170.

The record reflects that Henry chose not to testify. R. 182. So evidence of a prior conviction was not admitted before the jury. It did not therefore interfere with Henry's defense to the charge.

Trial counsel also moved for a directed verdict at the conclusion of the state's case in chief. R. 174-175.

The record reflects that Henry made a post- **Miranda** statement in which he admitted to "spanking" the child as well as biting the child "playfully." R. 155-156. Trial counsel can not be faulted for the admissions of his client prior to his representation. Rather, the record reflects that trial counsel did the best he could given this admission on the part of Henry.

This admission provided a basis for trial counsel's argument before the jury about Henry having only spanked the child. He supposedly only spanked a little too vigorously. He argued vigorously that this alleged conduct would not be compatible with felony child abuse. Rather this

would be evidence of only misdemeanor child abuse. R. 91; 197-202.

The record reflects that the prosecution's closing argument about the significance of the photographic evidence was in response to Henry's "spanking" defense. R. 204; 197-202. The photographs corroborated the testimony of Dr. McCoy. R. 103-104. There were extensive bruises over the child's body. This included not merely bruises on the child's buttocks which would be expected from an alleged spanking of a wayward child. Rather there were bruises on the child's upper arms, his back and kidney area, his hips as well as his inner thigh, and forehead. R. 203-204.

Henry was granted a lesser included jury instruction for misdemeanor child abuse. C.P. 40.

For Henry to be successful in his ineffective assistance claim, he must satisfy the two-pronged test set forth in **Strickland v. Washington**, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064-65, 80 L. Ed. 2d 674, 693-95 (1984) and adopted by this Court in **Stringer v. State**, 454 So. 2d 468, 476-477 (Miss. 1984). Henry must prove: (1) that his counsel's performance was "deficient," and (2) that this supposed deficient performance "prejudiced" his defense. The burden of proving both prongs rests with Henry. **McQuarter v. State**, 574 So. 2d 685, 687 (Miss. 1990).

Finally, Henry must show that there is "a reasonable probability" that but for the alleged errors of his trial counsel, the result of his trial would have been different. **Nicolau v. State**, 612 So. 2d 1080, 1086 (Miss. 1992), **Ahmad v. State**, 603 So. 2d 843, 848 (Miss. 1992).

The second prong of the **Strickland v. Washington**,, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) is to determine whether there is "a reasonable probability" that but for the alleged errors of his trial counsel, the result of Henry's trial would have been different. This is to be determined from "the totality of the circumstances" involved in his case.

The appellee would submit that given the substantial, corroborated evidence and admissions

by Henry, the alleged enumerated actions or lack of actions on behalf of Henry would not have resulted in a different verdict.

The appellee would submit that based upon the record we have cited, there is a lack of evidence for holding that there is a reasonable probability that trial counsel erred in his representation of Henry, given the overwhelming evidence against him.

Trial counsel was effective in arguing against the admission of other alleged abusive actions against the child victim in the past as part of a continuing pattern of child abuse. R. 160-166. Trial counsel argued against permitting the indictment date to be altered, and argued against having Henry's prior convictions admissible if he should testify. R. 71; 170.

As stated in **Strickland**: and quoted in **Mohr v. State** , 584 So. 2d 426, 430 (Miss. 1991):

> Under the first prong, the movant 'must show that the counsel's performance was deficient and that the deficient performance prejudiced the defense. Here there is a strong presumption of competence. Under the second prong, the movant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' The defendant must prove both prongs of the test. Id. 698.

Henry bears the burden of proving that both parts of the tests have been met. **Leatherwood v State**, 473 So. 2d 964, 968 (Miss. 1985).

> The burden of proving ineffective assistance of counsel is on the defendant to show that the counsel's performance was deficient and that the deficient performance prejudiced the defense.

The test is reviewed under the "strong presumption" that an attorney is competent and his conduct is reasonable, **Vielee v. State**, 653 So. 2d 920, 922 (Miss. 1995). Application of the **Strickland** test is applied with deference to counsel's performance, considering the totality of circumstances, to determine whether counsel's actions were both deficient and prejudicial. **Conner**

v. State, 684 So. 2d 608, 610 (Miss. 1996).

In **Johnston v . State**, 730 So. 2d 534, 538 (Miss. 1997), the Court stated that the burden of showing prejudice could not be met by merely alleging it.

> Additionally, there is a further requirement which Johnston must hurdle, prejudice. Claims alleging a deficiency in the attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. **Strickland**, 466 U. S. at 693., 104 S. Ct. at 2067. However, Johnston fails to make any allegations of prejudice. As in **Earley**, Johnson must affirmatively prove, not merely allege that prejudice resulted from counsel's deficient performance. **Earley**, 595 So. 2d at 433. Johnston has failed on the second prong of **Strickland**. Having failed to meet either prong of the **Strickland** test, we find that there is no merit to the ineffective assistance of counsel claim raised by Johnston.

The record reflects overwhelming evidence of guilt. Trial counsel can not be faulted for Henry's conviction, given the evidence against him. Henry provided no affidavits from his trial counsel. The appellee would submit that he has not prevailed in overcoming the presumption of competence on the part of trial counsel. There has been neither a showing of deficient performance nor a showing of prejudice as a result of trial counsel's actions or representation on Henry's behalf.

Trial counsel argued vigorously that Henry was not guilty of felony child abuse but rather, if guilty of anything, guilty of merely spanking the child a little too vigorously. R. 197-202. This defense was in keeping with Henry's inculpatory statement which was part of the evidence against Henry. R. 155-156.

This issue is therefore also lacking in merit.

PROPOSITION III

THIS ISSUE WAS WAIVED. AND HENRY WAS PROVIDED WITH DUE PROCESS OF LAW.

Henry argues that the interpretation of the felony child abuse statute used by the trial court and prosecution in this case resulted in an improper application of the law to his case. This was the result of the Supreme Court's **Buffington v. State**, **infra.** decision, which he finds appalling for child discipline advocates. Henry argues that the need for a bright line between what constitutes "serious bodily injury" from injuries that are minor. Since the injuries to the child were not permanent, life threatening, and did not result in any "permanent disfigurement", he argues the court's "temporary disfigurement" interpretation of the felony child abuse statute harmed his defense. It allegedly prevented him from being properly considered for what he believes was a more appropriate one year sentence as a misdemeanor child abuser. Appellant's brief page 22-29.

The record reflects that this issue was not raised with the trial court. R. 208-214; C.P. 67; 82. This issue was therefore waived. **Haddox, supra**.

The record reflects there was sufficient credible corroborated evidence for determining that Henry was guilty of felony child abuse. The testimony of prosecution witnesses, including Dr. McCoy, along with the photographs taken of the extensive bruises on the body of the two year old child victim were sufficient for supporting his conviction. There was medical testimony indicating that the extensive bruises and bite marks were not consistent with any spanking or any other form of child discipline. R. 103. There was medical testimony that these extensive visible bruises, and bite marks resulted in temporary disfigurement of the two year old victim's skin.

Dr. Keith McCoy, M.D. was accepted as an expert medical witness. R. 93. He testified that on the evening of February 25, 2007 he examined Christian Andrews. R. 93. He testified to finding

extensive bruises on the male child. R. 94-95. These extensive bruises were not compatible with the child accidentally harming himself through a series of accidental bumps or falls. R. 97-98. The injuries seen on the child were the result of "a strong force." R. 98.

Dr. McCoy testified that his findings were not compatible with the child having been spanked three times with someone's open hand. R. 103-104. Dr. McCoy also testified that the extensive physical bruising and bite marks on the child's inner thigh resulted in "temporary disfigurement" of his skin, the largest organ in the human body. R. 103-104.

> Q. What did you find when you examined the child there in the emergency room?
> A.... **I found a child who—the only organ system disfunction that I found on the child were multiple contusions which is a bruising of the skin which involves a busting or a rupture of blood vessels up underneath the skin to cause a bruise which is a dark area that you can see.** R. 94-95.
>
> ...
>
> Q. **Doctor, is there any way in your medical opinion that these injuries can be reconciled with child discipline or anything of that nature?**
> A. **No, sir.**
> Q. **Certainly then–I'm going to ask you would you agree with me that these particular injuries would be inconsistent with a theory or with a stated fact that these were the result of three blows with somebody's hand; is that correct?**
> A. **That is correct.**
> Q. **Now, Doctor, the injuries that you see that were those injuries in fact result in a temporary disfigurement of the organ of the body?**
> A. **Of the skin, yes, sir.**
> Q. **And the skin is an organ, isn't it?**
> A. **Yes, sir.** R. 103-104. (Emphasis by appellee).

Mrs. Montie McCoy testified that she was the grandmother of Christian. She testified that he was three at the time of trial. However, he was two at the time she saw him with deep bruises covering much of his body. Mrs. McCoy also noticed "a big bump on his head." After seeing the extensive bruising over his body she took him to the police to be examined for child abuse. She described the bruises as being "deep blue." R. 120-124.

> Q. All right. And what happened when you got to the house? Explain that for the ladies and gentlemen of the jury.

A. **When I got there-when I got out of the car, I stepped up to the porch, and I noticed a big bump on his head. And it was protruding outside the head**. R. 120.

...

Q. When you saw bruises to his backside, first of all, describe what you saw?
A. From up above his butt down the side of his legs was bruised.
Q. **What color?**
A. **They were deep blue.** R.123.

...

Q....Compare what you're seeing in those pictures to what you saw on the day when you pulled Christian's Pamper down.
A. **To me, in person, the bruising was deeper than it shows in the picture.** R. 124. (Emphasis by appellee).

Deputy Mark Miley testified to taking the photographs of the child at the hospital emergency room. He observed extensive bruises on the child's body, as well as what appeared to be bite marks. R. 133-138. He testified that the color photographs were taken around 11:30 P.M.. He testified that the lights from the emergency room, and the camera bleached out some the bruises. He believed the actual bruises which were seen in the hospital were worse than what was shown in the photographs.

Q. Now, these photographs--first of all, this one in particular, the coloration, explain for the ladies and gentlemen of the jury what happens when you take pictures of bruises and things of that nature.

A. **The light from the room or the light from the camera can actually bleach out a little bit of the bruising. I would say by me viewing the bruises, it was worse than what the camera or what the photograph is actually going to show.** R. 133. (Emphasis by appellee).

Deputy Greg Wright with the Lowndes County Sheriff's Department testified he saw Christian at the emergency room. Deputy Wright was told that the child had possibly been abused. Wright testified to seeing extensive bruises on the child, including his head, backside, lower back and buttocks and the his upper thighs. He testified that "the child looked like he had been beat up pretty bad to me." R. 148.

Deputy Wright also testified that Henry was questioned about his relationship with the child. Henry was the child's step father. Henry admitted that Christian had been in his custody. After

being given his **Miranda** rights, and signing a witnessed waiver, Henry made a statement. In that statement , he admitted that he had allegedly both spanked and bitten the child.

> Q. Go ahead.
> A. It says: I was in the recliner and I reached and got Christian by the diaper and pulled him to me. **His diaper came off, and I laid him on my lap, and I spanked him with my hand two to three times.** I then told him that it was a no-no to hit Christin. I later told Whitney everything that had happened. I do admit that I was a little upset at the time when I spanked him. **I also admit that the bite marks were done while we were playing.** Christian never gave me any indication that it hurt him. R. 155-156. (Emphasis by appellee)

In **Buffington v. State** , 824 So. 2d 576, 580 (¶15) (Miss. 2002), the Mississippi Supreme Court adopted "the permanent or temporary disfigurement" standard This was under the felony child abuse statute standard as had also been adopted by the plurality in the **Wolfe** decision, (743 So. 2d 380, 385 (Miss. 1999)). This decision is what Henry's counsel finds so appalling for child discipline enthusiasts. As stated in **Buffington**:

> Today this Court holds that serious bodily harm means "bodily injury which creates a substantial risk of death, or permanent or temporary disfigurement, or impairment of any function of any bodily organ or function," and thus, we find that the standard espoused in **Wolfe** is an appropriate definition of "serious bodily harm." Id. We do so noting that this is the definition provided for in § 4f of the Model Child Protection Act of the National Center on Child Abuse and Neglect (1977). Id. at 384.

Henry's argument, for the first time on appeal, is an adaptation of "the minority" opinion stated in **Wolfe v. State**, 743 So. 2d 380, 385 (¶32- ¶33) (Miss. 1999). This argument was about the need to avoid "elasticizing" the definition of serious bodily injury. The minority was concerned about the danger of a conviction for "a well deserved spanking." This would be for a situation where a child had allegedly been previously properly disciplined by a parent or guardian.

First, the appellee would submit that this argument is an adaptation of an argument which was a "minority" opinion. The majority did not find that its inclusion of "temporary impairment" as

part of the definition of serious bodily injury under the operable felony child abuse statute was incompatible with proper child discipline. (¶24-¶25).

In addition, while Henry's argument might be a good argument in the abstract, it is not a good argument under the facts of this case. As the testimony of Dr. McCoy indicated, the extensive bruises covering the body of the child victim were not compatible with some legitimate form of child discipline. R. 103-104. These injuries also included bite marks.

See manila envelop marked "Exhibit," which contains color photographs of the victim, Christian Andrews. They were taken on February 25, 2007 by Officer Mark Miley. R. 132-133.

Henry's defense was that he "spanked" the child with his open hand two or three times. It also included his admission of having "playfully" bit the child. R. 155-156.

The record reflects that the jury were given an instruction for a lesser included offense of misdemeanor child abuse. C.P. 40. The record therefore indicates that the jury did consider whether under the facts of this case, given the nature of the injuries to the child, Henry could be found guilty of the lesser included offense of misdemeanor child abuse. C.P. 40.

The Supreme Court found in **Buffington**, **supra**, that its adoption of "temporary disfigurement" as the basis for determining guilt or innocence under the felony child abuse statute was not Constitutionally defective. In short, it was not a violation of Buffington's due process rights under the Constitution of this state. (¶ 26)

In conclusion, the appellee would submit that this is not by any stretch of the imagination, a case for finding a care giver was providing legitimate and appropriate discipline to a child in need of adult supervision. The record reflects the jury did consider whether the injuries to the child were a basis for finding Henry guilty of the lesser included offense of misdemeanor child abuse. C.P. 40. Their decision to find Henry guilty of felony child abuse is fully supported by credible, corroborated

substantial record evidence.

The appellee would submit that this issue was not only waived for failure to raise it with the trial court, it is also lacking in merit.

CONCLUSION

Henry's felony child abuse conviction should be affirmed for the reasons cited in this brief.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: W. Glenn Watts

W. GLENN WATTS
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO[redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

CERTIFICATE OF SERVICE

I, W. Glenn Watts, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Lee J. Howard
Circuit Court Judge
Post Office Box 1344
Starkville, MS 39760

Honorable Forrest Allgood
District Attorney
Post Office Box 1044
Columbus, MS 39703

William P. Starks, II, Esquire
Attorney at Law
Post Office Box 1346
Columbus, MS 39703

This the 2nd day of July, 2009.

W. Glenn Watts

W. GLENN WATTS
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680