IN THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI

AMY MARIE LENARD — APPELLANT

VS — CAUSE# 2008-KA-1930

STATE OF MISSISSIPPI — APPELLEE

REPLY BRIEF FOR APPELLANT
APPELLANT REQUESTS ORAL ARGUMENT

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INTRODUCTION

Defendant Amy Lenard hereby propounds and submits her Reply Brief on Appeal of a conviction on the charge of Felony Child Neglect in which she is aggrieved. In her original Brief, she propounded six issues of error which she here incorporates by reference, together with the entire brief.

In an effort to be concise, Appellant will not readdress every issue. Instead, (by counsel), she will reply only to certain points asserted by the State in its Response Brief. However, the Court should not interpret this promise of brevity as a waiver or default of any prior argument.

Ms. Lenard asserts that this matter, to date, has been replete with reversible error. Particularly since it involves the rights of a parent to control her child's healthcare, (a fundamental right under the U.S. Constitution), Ms. Lenard urges this Court to closely scrutinize the law and the facts herein.

SUMMARY OF THE ARGUMENT

As the recent Mississippi Bar Committee on Restoring Confidence in the Legal System has reported, the Mississippi bar and bench have been injured by a "hard-line" approach to recusal taken by some trial judges. Such is the situation in the instant case.

Defendant's attorney, Stewart Guernsey, was a frequent adversary of Honorable James McClure, III, prior to Mr. McClure's ascent to the Circuit Bench. Like all such adversarial relationships, there were ups and downs, occasional spats, overstated accusations, but general good will prevailed. Then in the early 2000's, Guernsey took a case which resulted in a Judgment against the McClure law firm. The judgment was rendered in 2004. Due to a new job, Guernsey did not litigate against McClure again.

In or about 2007, due to the ascension of Honorable. Ann Lamar to the Supreme Court, a vacancy opened on the Seventeenth Circuit bench, which Mr. McClure was appointed to fill. In early 2008, Judge McClure was appointed to the instant case.

Due to Defendant's past (brief) experience with Judge McClure, Defendant initially resisted moving to recuse. As trial approached and conversations with the state continued, Ms. Lenard, on advice of counsel, permitted the motion to be filed.

Two days prior to trial and with the agreement of the State, the motion was heard. The Judge denied the motion on two grounds: 1) untimeliness, and 2) he acknowledged the judgment against his old firm, but denied any personal knowledge or impact.

Appellant contends that the right to an unbiased Judge is constitutional, statutory, regulatory, and based in case law. The Code of Judicial Conduct eschews even the "appearance" of bias. This standard is the only one known to this writer based on appearance or perception

only.

The Rules of Professional Conduct imply disqualification to a member of a law firm which would be disqualified. Surely a trial judge should be required to meet a more strenuous standard than a lawyer with a waivable conflict.

During opening arguments, Defendant attempted to set up an "empty chair" defense. The reason for the defense was to establish that Ms. Lenard's absent Co-Defendant had proximately caused the injuries to the child in question, with the acts and omissions of Ms. Lenard being not the cause of the injuries in question. The Judge, on the State's objection, denied the defense to Ms. Lenard. He later compounded this error by denying Jury Instructions as to Ms. Lenard's chosen defenses.

In pre-trial motions, the Judge had denied dismissal on the basis of vagueness and overbreadth of the statute. He admitted no flaw in the mens rea requirements or lack of them, found in the Felony Child Neglect statute, despite the fact that the proscribed behavior is undoubtedly within an area of fundamental constitutional protection. Nor did he find any ambiguity in the phrase "substantial bodily harm." Finally, he effectively overruled a precedent, (one of a very few relating to this statute), that required the criminal law to be read "in pari materia" with the Youth Court Act. He did so in the face of the State's failure to get a proper disclosure order from the Panola County Youth Court, which had jurisdiction of the matter before the Circuit Court gained jurisdiction. Ironically, the Judge later applied the disclosure statutes previously ruled irrelevant to prohibit Defendant's calling a witness at sentencing.

Defendant will briefly address two denied jury instructions, one as to Mistake of Fact and one as to Culpable Negligence. The Judge never instructed the jury as to mens rea, "guilty

knowledge," willfulness, or intent. Defendant will further point to entreaties for such instructions.

The Court erroneously allowed law enforcement agents to testify as to lay opinions of the nature of stains found on clothing and bed clothes. The Judge admitted graphic photos, printed on a different machine than the camera used to take the photos. Cumulatively and individually these errors demand reversal.

ISSUE ONE: RECUSAL

The roots of the doctrine of recusal can be found in common law, the U.S. and Mississippi Constitutions, statutory and case law, and in the Code of Judicial Conduct. An impartial jurist is necessary for a just and equitable legal system.

In recent years, due in large part to the ever-increasing cost of political campaigns, a new focus on economic interests of the Judge has permeated recusal law. The focus has taken the form of new rules permitting motions for recusal when a party or attorney is a "Major Donor" to the Judge's campaign.

Canon 3 of the Code of Judicial Conduct requires that "A Judge Should Perform the Duties of His Office Impartially and Diligently." This caveat is instructed by Canon 2, "A Judge should Avoid Impropriety and the Appearance of Impropriety in All His Activities," The Disqualification portion of Canon 3 is found in Section E. Canon 3(E) (2) permits the above-mentioned motion to disqualify where a "Major Donor" is involved. We cite Canon 3(E) (1) for the standard for recusal:

> E. Disqualification.
>
> (1) Judges should disqualify themselves in proceedings in which their impartiality might be questioned by a reasonable person knowing all the circumstances or for other grounds provided in the Code of Judicial Conduct or otherwise as provided by law, including but not limited to instances where:
>
> Commentary
>
> Under this rule, a judge should disqualify himself or herself whenever the judge's impartiality might be questioned by a reasonable person knowing all the circumstances, regardless whether any of the specific

rules in Section 3E(1) apply.

A judge should disclose on the record information that the judge believe the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

Appellant's contention is that a judgment against a lawyer or his firm is more likely to cause bias than a donation to his political campaign. There is an element of "sting" that has no cognate in a political donation. When combined with the "appearance of impropriety," the standard for disqualification is met. As mentioned in the post-trial hearings, a number of lawyers "polled" thought that a reasonable person knowing all of the facts would question Judge McClure's impartiality. If and when the "Imputed Disqualification" found in the Rules of Professional Conduct is added to the equation, the propriety of recusal is established. It is further buttressed in the instant case by Judge McClure's differential rulings in the case.

One final note as to this issue. The last error cited by Appellant regards the doctrine of cumulative error. In the instant case, the application of the doctrine sought by Defendant is that the cumulative errors in this case not only exceed the individual errors, but that they also go to show bias on the Judge's part.

ISSUE TWO: DEPRIVATION OF DEFENSE OF CHOICE

In discussing this issue, the State responds that the defense would be "unavailing" since proof of the Co-Defendant's guilt would not acquit Ms. Lenard. That was not Defendant's chosen approach. Ms. Lenard's theory was based in the concept of "proximate cause."

If the Co-Defendant, Shannon Caine, were guilty of the abuse of which he was initially charged, then it was the abuse, not the "deprivation" which caused the injury. Without "showing Defendant's hand" (in case of remand and retrial), Caine's post-abuse acts could have prevented Defendant from taking the child for treatment. (There is testimony to that effect by Caine's mother).

In point of fact, the defense could have gone in multiple directions with an "empty chair" defense. No severance was ever granted and the chair was quite literally empty. Furthermore, Mr. Hale's protestations notwithstanding, (TR. 66-68), Shannon Caine has never been brought to trial on this charge.

Nevertheless, the fact remains that from the very beginning of the trial, Defendant was deprived of her chosen defense. Combined with the other errors herein, the effect was to deprive Defendant Lenard of a fair trial. An ancillary effect was to show the Judge's bias.

One final note in reply to the State's brief at page 15, fn.4, is called for. The State urges that Defendant has cited no authority for the proposition that "a defendant has the right to be tried with his co-indictee." Defendant has been prejudiced by this "severance" as shown above. What is the State's authority to show that the prosecution may sever co-defendants without a motion?

ISSUE THREE (A): MOTION TO DISMISS

In responding to Appellants' brief the State cites to Wright v. State, 236 So.2d 408, 413-14 (Miss. 1970) for the proposition that statutes "which do not require 'guilty knowledge' have been generally held to be constitutional [citation omitted] unless such laws invade some specific constitutional right," (Appellee's Brief, p.21).

Defendant directs the State to her allusion to Planned Parenthood v. Casey, 505 U.S. 833 (1972) for the propositions that : 1) It is a "fundamental right of parents to direct the health care of their children," and 2) Therefore, the statute must be "strictly scrutinized" to assure that it is narrowly tailored to impinge on that fundamental right as little as possible. Such is not the case here.

Further, the State seeks to analogize the statute in this case to MCA § 97-3-7, which withstood scrutiny on the basis of "serious bodily injury." The State fails to note that the adjective "serious" does not partake of the ambiguity inherent in the word "substantial." The problem with the word "substantial" is that it has effectively opposite meanings in different uses, (see Appellant's Brief-in-Chief, p. 34). The meanings vary from "real... not imaginary" to "considerable, ample, large."

Defendant contends it is impossible to know which of these opposing meanings was relied on by the jury. Did Defendant's alleged deprivation cause slight, but not imaginary, harm? Is this what the legislature meant? Since we have no record of "legislative intent" we cannot know for sure.

If a parent spanks her child, leaving a red mark on the child's buttocks, is she thereby liable for felony neglect in the absence of medical care? If the 'not imaginary" definition of

"substantial" is intended, it would seem that she may, indeed, be guilty. Hence, the statute is unconstitutional for overbreadth in that it covers a multiplicity of constitutionally protected parental behavior. See City of Seattle v. Johnson, 58 WN. App.64, 68 (Wa.C.A. 1990), cited with approval in Richmonds v. Corinth, 816 So2d 373,377 (Miss. 2002).

The Supreme Court of Mississippi has defined "overbreadth":

> "Under the 'overbreadth doctrine' a statute may be invalidated if it is fairly capable of being used to regulate, burden, or punish constitutionally - protected speech or Conduct. [Cite omitted]: Richmonds, op cit, at 379.

Under the statute as it stands, given the differing meanings of "substantial" as found in the dictionary, there is little doubt that the statute is "fairly capable of being used to regulate, burden, or punish constitutionally protected speech or conduct." Because of the differing meanings, of the word "substantial," the felony portion of M.C.A. § 97-5-39 (1) (b) is, by definition, overbroad. The felony portion should be stricken by this Court as being overbroad on its face.

Alternatively, the Court may "strictly scrutinize" the law, since it may fairly be said to burden the rights of parents to control their children's health care. If the court finds that the law is not "narrowly tailored to serve a compelling state interest," it must strike the statute as overbroad and, therefore, unconstitutional. See Clingman v. Beaver, 544 U.S. 581(2005). See also Troxel v. Granville, 530 U.S. 57 (2000) for a parents fundamental right to rear her children. For a more recent discussion of ambiguity and vagueness, see Mayor & Board of Aldermen v. Welch, 888 So2d 416, (Miss. 2004).

In order to remain true to Defendant's promise of brevity, having broadly established the

parameters of the constitutional challenge and the rationale for it, Defendant will here abate this discussion. Perhaps the Court will permit time for further discussion at oral hearing.

ISSUE THREE (B): MOTION IN LIMINE: DHS, LAW ENFORCEMENT, AGENCY RECORDS

In its Response Brief, the State indicates a basic misunderstanding of Defendant's argument on this point. While Defendant has specifically cited the "lead" statute on disclosure, MCA § 43-21-261, in her statement of issues in her initial brief and in the body of the initial brief, Defendant further cited surrounding statutes, MCA §§ 43-21-255, 257, and 259.

So when the State, in its Response refers to Defendant's "motion in limine to exclude the DHS records, it does not accurately reflect, (except in the most technical terms), the intent of the motion. Of course, § 261 (1) provides that any and all "records involving children" are subject to the statute, not just DHS records. The statute specifically includes "Law enforcement agencies," "the county attorney," "the district attorney," and "agency records." Subsection (16) specifically provides a "pass" to the district attorney on the initial disclosure order. It provides that: "however, no identifying information concerning the child may be released to the public by such agency as otherwise provided herein."

In other words, Defendant sought to prohibit introduction of law enforcement records identifying the child, "other agency" records, (such as hospital records), DHS records, and any testimony in open Court that would identify the child. Defendant continues to assert that the State failed in its duty to get the order required in § 261 (2):

> "Any records involving children which are disclosed under an order of the youth court or pursuant to the term of this section and the contents thereof shall be kept confidential by the person or agency to whom the record is disclosed unless otherwise provided in the order. Any further disclosure of any records involving children shall be made only under an order of the youth court as provided in this section." [Emphasis supplied].

It is the public disclosure, as in an open court that offends the statute. But it is clear that the statute requires an order from the Youth Court to make any such public disclosure.

While the State argues that any error as to DHS records was harmless due to the State's not seeking to admit DHS records, the State fails to note that law enforcement records and testimony, medical records are under the same stricture. The Court erroneously permitted the introduction of all of these records, resulting in prejudice to Defendant, to wit, conviction. See MCA § 43-21-261 (16).

On an ancillary note, Defendant asserts that the trial court erred in effectively overruling Matthews v. State, 126 So.2d 245, (Miss. 1961), reaffirmed by Payton v. State, 642 So.2d 1328, 1334 (Miss. 1994), as binding precedent. Matthews stands for the proposition that the predecessor to the felony neglect statute currently in place must be read in pari materia with the Youth Court Act and its definitions and procedures. The trial Judge ruled it did not apply.

It should be pointed out that Defendant does not contest the jurisdiction of the Circuit Court in this matter. It is the total neglect of the State to follow the salutary confidentiality and subsequent disclosure provisions of the law as to minor children. The state was on notice of these laws, but chose to ignore them. As this Court said in Windham v. State, 800 So.2d 1257, 1260 (2001): "The authority to release records is vested in the discretion of the youth court judge." See also URYCP 5(b). This case must be reversed.

ISSUE FOUR: JURY INSTRUCTIONS

By the time of argument on jury instruction, the issue of men s rea was clearly before the court. It had been touched on in the Motion to Dismiss, reasserted immediately before trial, and touched on in Instruction D9. Defendant implored the Court to give an instruction on the quantum of "guilty knowledge" required. (TR. 306-310).

Not only did the Court refuse to grant an instruction defining "willful," (part of the statute), but it also granted the State's "elements" instruction without so much as the appearance of the word "willful." While the indictment contained the word, "willful", the jury instructions do not. The Court's instructions repeatedly instruct the jury to follow the jury instructions, not the indictment. The "elements" instruction, S-1, is fatally flawed for deleting the "willfulness" instruction. For that reason alone, this case must be reversed.

The State responds to the absence of any mens rea instruction by citing the law on malum prohibitum. It is undoubtedly true that some "crimes," like tax evasion or possession of controlled substances, require no mens rea. This is not such a crime. The statute itself contains the element of "willfulness." Mens rea is a prerequisite to this crime and the trial court committed plain error by denying a mens rea instruction and by permitting S-1 without any mention of willfulness or intentionality. Collins v. City of Hazelhurst, 709 So.2d 408, 413 (Miss. 1997). As to malum prohibitum, see Blue v. State, 716 So.2d 567 (Miss. 1998), and Salman v. State, 879 So.2d 474 (Miss.C.A., 2004).

The argument is simple: the statute uses the work "willful," the indictment includes the word "willful," willfulness" is an element of the crimes of misdemeanor and felony neglect. Therefore, as Defendant argued at trial and continues to argue, the jury was improperly instructed

and this case must be reversed.

While the result and circumstances of the cases are quite different, the rule of Lester v. State, 692 So.2d 755, 789-90 (Miss. 1997) adheres:

> **THE JUDGE COMMITTED REVERSIBLE ERROR IN OVERRULING LESTER'S OBJECTION TO THE JURY INSTRUCTION WHICH OMITTED INTENT FROM THE ELEMENTS OF THE CHARGE ON CHILD ABUSE.**
>
> Lester asserts that Instruction S-1 failed to instruct the jury that it must find that Lester intentionally caused injuries to Shadai in order to hold that Lester committed felonious child abuse. Instruction S-1 did require the jury to find that Lester "did wilfully, unlawfully, and feloniously engage in the commission of felonious abuse and/or battery of Tiffany Nicole Shadai Sanders." Lester argues that this instruction omitted the element of intent from the charge of felonious child abuse, thus allowing the jury to find that Lester was guilty of child abuse if he negligently caused the injuries to Shadai.
>
> This argument fails by common sense analysis. The instruction does require finding

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> that Lester "wilfully" caused the injuries in order to hold that he committed felonious child abuse. "Wilfully or willfully" and "intentionally" have the same meaning, both in ordinary understanding and as legal terms. Black's Law Dictionary defines "willful" as "Proceeding from a conscious motion of the will; voluntary; knowingly; deliberate. Intending the result which actually comes to pass; designed; intentional; purposeful; not accidental or involuntary.: Black's Law Dictionary 1599 (6th ed. 1990) (emphasis added). Black's defines "intentionally" in part as "For purposes of criminal statute means willfully or purposely, and not accidentally or involuntarily." Black's Law Dictionary 810 (6th ed. 1990) (emphasis added) (citations omitted). Webster's defines "**willful** or **wilful** ....2: done deliberately: not accidental or without purpose: INTENTIONAL ...." Webster's Third New International Dictionary 2617 (1986). "[S]ynonymous phrases or interchangeable words may be used in a jury instruction and the jury still be properly instructed." *Lancaster v. State,* 472 So.2d

> 363,367 (Miss.1985) (citing *Erving v. State,* 427 So.2d 701, 703-05 (Miss.1983)). Since the two words are synonymous, no error occurred in substituting "wilfully" for "intentionally" in the jury instructions. The required element of intent was given as part of the jury instruction on felonious child abuse in Instruction S-1. Therefore this assignment of error is without merit.

The Court, of course, will note that S-1 in the instant case has no synonym of "willful" or "intentional." Therefore, this case must be reversed.

ISSUE FIVE: POLICE LAY OPINIONS

To make good on her promise of brevity, Defendant will here show MRE 701. Defendant asks the Court to pay special attention to subsection © and the Commentary. The trial court permitted the exact "avenue for admission" sought to be prohibited by the Rulemaker.

RULE 701 OPINION TESTIMONY BY LAY WITNESSES
RULE OF EVIDENCE
ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

RULE 701. OPINION TESTIMONY BY LAY WITNESSES

If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness,(b) helpful to the clear understanding of the testimony or the determination of a fact in issue, and (c)not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

[Amended March 2, 1987, effective October 1, 1987; April 17, 2000, effective December 1, 200. Amended effective May 29, 2003 to prohibit opinion testimony under Rule 701 based on scientific, technical, or other specialized knowledge within the scope of Rule 702.]

Comment

The traditional rule regarding lay opinions has been, with some exceptions, to exclude them from evidence. Rule 701 is a departure from the traditional rule. It favors the admission of lay opinions when two considerations are met. The first consideration is the familiar requirement of first-hand knowledge or observation. The second consideration is that the witness's opinion must be helpful in resolving the issues. Rule 701, thus, provides flexibility when a witness has difficulty in expressing the witness's thoughts in language which does not reflect an opinion. Rule 701 is based on the recognition that there is often too thin a line between fact and opinion to determine which is which.

The 2003 amendment of Rule 701 makes it clear that the provision for lay opinion is not an avenue for admission of testimony based on scientific, technical or specialized knowledge which must be admitted only under the strictures of Rule 702.

ISSUE SIX: CUMULATIVE ERROR

Defendant will not burden the Court with a recounting of every ruling contrary to her interest. However, the confidentiality and disclosure rules set out in the Code, interpreted by the appellate courts, and distinguished as among and between DHS, other state agencies, the Central Registry, law enforcement agencies, social records, AOC records, mental health records, law enforcement records, OYS records, and "all other records," were improperly ruled "irrelevant" and discarded by the trial court. When Defendant sought the benefit of the same standard at sentencing, the judge denied it. Combined with the other listed errors contained in the record, this indicates bias. Hence, Defendant seeks to apply the "cumulative error" rule to the Court's assessment of the trial judge's bias, for purposes of recusal as well as for purposes of direct reversal.

CONCLUSION

The Panola County Circuit Court committed multiple errors in the case at bar. At least two of these errors: admission of records without an "in camera" inspection first and failure of the Court to properly instruct the jury as to mens rea, are plain. Defendants prays that the case will be reversed and rendered. In the alternative, Defendants prays that the Court will strike down the "felony" part of the neglect statute as void for ambiguity, vagueness, and overbreadth. Alternatively, Defendant prays that the Court will reverse and remand with specific instruction to the trial judge to recuse himself. Alternatively, Defendant prays that the Court will reverse and render on the basis of failure to include the word "willful" or any synonym in Instruction S-1, and its refusal to grant an alternative mens rea instruction. And Defendant prays for general relief.

Respectfully Submitted this 6 day of October, 2009.

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CERTIFICATE OF SERVICE

I, STEWART GUERNSEY, attorney for Amy Lenard, Appellant herein, certify that I have this date mailed, postage prepaid, a true copy of the above and foregoing Appellant Requests Oral Argument to:

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