21-6635

No. 20-14178

SUPREME COURT OF THE UNITED STATES

LARRY ALONZO **GIBBS**, JR.,

Petitioner,

vs.

STATE OF **FLORIDA**,

Respondent.

On Petition for a Writ of Certiorari to
the United States Court of Appeals for the Eleventh Circuit
Case No.: 20-14178-E

AMENDED PETITION FOR WRIT OF CERTIORARI

ORIGINAL

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QUESTIONS

Question One

Does the State of Florida violate a defendant's right to confront witnesses when they allow the State to introduce evidence that a minor suffered from genital herpes because the evidence was irrelevant, the test administered to the minor was not reliable, and the evidence was hearsay?

Question Two:

Does the State of Florida violate a defendant's rights to cross-examine a witness and fully present his defense?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

State Direct Appeal: -*Gibbs v. State of Florida,* 156 So.3d 1078 (Fla. 1st DCA 2015)

State Collateral Proceeding: -*Gibbs v. State of Florida,* 187 So.3d 1236 (Fla. 1st DCA 2016)

-*Gibbs v. State of Florida*, 222 So.3d 1206 (Fla. 1st DCA 2017).

-*Gibbs v. State of Florida*, 237 So. 3d 273 (Fla. 1st DCA 2017).

Federal Collateral Proceeding: -*Gibbs v. Secretary, Florida Department of Corrections,* Case No.: 3:17-cv-766-J-32-JBT (M.D. Fla. September 30, 2020)

Federal Collateral Proceeding Appeal: _*Gibbs v. Secretary, Florida Department of Corrections,* Case No.: 20-14178-E (11th Cir. June 9, 2021)

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IN THE
SUPREME COURT OF THE UNITED STATES

Amended Petition for Writ of Certiorari

Petitioner, Larry A. Gibbs, an inmate currently incarcerated at Graceville Correctional Facility in Graceville, Florida acting *pro se* respectfully petitions this Court for a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals, Atlanta, Georgia, being Petitioner's court of last resort which conflict with the decisions of other the United States Supreme Court.

Opinions Below

The opinion of the United States Court of Appeals appears at Appendix: A to the petition and is unpublished at this time. The opinion was issued on June 9, 2021.

The opinion of the United States District court appears at Appendix: B to the petition and is unpublished. The opinion was issued on September 30, 2020.

Jurisdiction

The date on which the United States Court of Appeals decided Petitioner's case was June 9, 2021.

No petition for rehearing was filed in petitioner's case.

The jurisdiction of this Court in invoked under 28 U.S.C. § 1254

Constitutional and Statutory Provisions Involved

The core guarantee of the constitutional right to confront witnesses is that the government cannot use the hearsay statements of non-testifying witness against a criminal defendant at trial.

Daubert provides that "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."

Statement of the Case and Facts

Case Procedural Posture

Petitioner Gibbs is a state prisoner in Florida, serving a life sentence. Gibbs was convicted after proceeding to trial for three counts of sexual battery upon a child under 12 years of age and two counts of lewd an lascivious molestation.

Gibbs timely appealed both the judgment and conviction to the state appellate court, raising four grounds. The court Per Curiam Affirmed without a written opinion.

Gibbs timely filed his post-conviction relief motion, rule 3.850, however, the motion was summarily denied. Gibbs timely appealed and the state appellate court agreed with the post-conviction court issuing a Per Curiam Affirmed without written opinion.

Gibbs timely filed his petition for writ of habeas corpus, (2254) where the district court reached the merits of all grounds and denied relief. Gibbs timely objected and was denied. Gibbs timely filed an application for a certificate of appealability in the federal district court but was denied. Gibbs then timely appealed to the Eleventh Circuit Court of Appeals and filed another application for a certificate of appealability where the court denied. Gibbs timely filed this instant petition, this Court's Order, dated July 19, 2021 (Order List: 594 U.S.).

Argument Posture

The State charged Petitioner over 18 years of age, with three counts of sexual battery upon C.S., a child under 12 years of age. It also charged Petitioner with two counts of lewd an lascivious molestation. The State charged the molestation occurred in Nassau County when C.S. Was at her paternal grandfather's home, and when her family lived temporarily with a friend named Trina. The State introduced *Williams Rule* evidence to show Petitioner also molested C.S. When the family lived with her grandmother T.W. In Jacksonville, Duval County. The following is a summary of the evidence introduced at trial.

C.S., 14 years old at the time of trial, had two sisters: M.J., 12, and M.G., 9 years old at time of trial. Her mother was K.G. And her real father was V.S. Petitioner was her stepfather, and the only father figure she knew. Her maternal grandmother was T.W. Her aunt was S.E., and her paternal grandfather was Larry Gibbs, Sr.

According to C.S., Petitioner molested her four times. It started when C.S. Was nine and it ended when she was 11 years old. C.S. Did not tell anyone until June of 2012. At the time of the disclosure, C.S. Lived with her maternal grandmother T.W. She had lived with T.W. Since October of 2011, when her mother gave up custody of her and her siblings because the parents were not

working and could not take care of them.

In June 2012, C.S. Disclosed both to her grandmother T.W. And her aunt S.E. T.W. Called the police and the Department of Children and Families investigated. C.S. Was interviewed by many people after that. She talked to the Department of Children and Families investigator, to the Child Protection Team Interviewer, and she was physically examined as well. Prior to moving in with her grandmother, C.S. Had been in contact with several people from the Department of Children and Families as they were investigating neglect and other issues, but C.S. Admitted that although she had the opportunity, she never disclosed the molestation to them.

According to C.S., the first time Petitioner molested her, all of her family lived in Jacksonville with grandmother T.W. on Old Plank Road. C.S. And her two siblings were asleep, and Petitioner came in and touched her in her vaginal area. Petitioner took out his penis and rubbed it on her legs and on her vagina. C.S. Was nine years old. C.S. Recalled Petitioner took her sleeping pants off, but she could not remember if petitioner put his penis inside of her vagina. Petitioner's penis was nasty and gooey and he told her not to tell anyone because it would ruin the family.

After living at Old Plank Road with grandmother T.W., the family moved to Nassau County, and lived with petitioner's father. According to C.S., the house was located on Sunshine Drive. She was 10 years old. At this home, Petitioner

molested her twice.

C.S. Testified one time her mom and sister went to a doctor's appointment during the day, and she home and in the bed with her little sister M.G. Who was watching Sponge Bob. C.S. Explained with specificity the Petitioner removed her clothing and put his hands on her vaginal area. Petitioner took out his penis and rubbed it on her vagina and then put it inside of her vagina. Petitioner told her that if she told it would ruin the family.

C.S. Testified that subsequently, the family moved in with a friend named Trina who lived in Nassau County. C.S. Testified petitioner molested her when they were staying with Trina. C.S. Did not remember how old she was but she was either 10 or 11 years old. Trina had two sons who had their own rooms. C.S. And her parents and sisters had one room and Trina slept on the couch. There were also air mattresses around or pallets in the living room.

C.S. Could not recall the exact time when the family lived with Trina but stated it was probably summer time, and when her mother was in the hospital because of kidney stones. C.S. Recalled the abuse took place in the living room either on an air mattress or on the pallet. She did not remember.

The family was in the living room watching a movie. Trina fell asleep on the couch, and Petitioner took off his pants and rubbed his penis on her vagina and her

legs, and then inserted his penis in her vagina. It hurt.

Thereafter, the family moved back to Petitioner's father's home on Sunshine Drive. During her second stay at the grandfather's home, Petitioner molested her again. C.S. Testified this molestation was prior to her moving in with her grandmother in October of 2011, and she did not remember if it happened before or after she was 12 years of age. She thought she was less than 12.

This last time when petitioner molested her, they were all in the room again watching TV, and Petitioner pulled out his penis, pulled down her pants, and put his penis on her legs and on her vaginal area and inserted his penis into her vagina. C.S. Did not remember where her mother and sisters were. The only thing C.S. remembered about this experience was that it hurt worse then the previous times. Once again, according to C.S., Petitioner told her not to tell anyone because it would ruin the family, he further advanced that he did not want to lose her mother and that he will carry the secret to his grave.

C.S. Could not describe Petitioner's penis and admitted she never saw it. The best she could testify was that it was black and pointed at the end and it was wet and sticky-oozy, and gooey looking. C.S. Related however that other then her vagina hurting after Petitioner molested her, she suffered physical problems, mainly that she had contracted herpes. She noticed red bumps on her vaginal area

which itched and she was taking medication for herpes. C.S. Testified she went to see her family doctor, Dr. Peterson, because she had an outbreak. The symptoms were the same, red bumps. Dr. Peterson did a culture of her red bumps.

On cross-examination, C.S. Admitted giving in consistent statements as to the facts of the molestation. She admitted she told her her grandmother and her aunt that petitioner only rubbed his penis on her leg, that he had not touched her vagina and that he had not penetrated her during the first incident. C.S. Also admitted to the inconsistent statements she made to Lori Armstrong, the Child Protection Team interviewer, when she indicated to her that she did not remember if Petitioner's penis penetrated her because she was half asleep during the molestation.

S.E. was C.S.'s aunt. Her brother-in-law, was 29 years old. Her nieces, C.S. And her siblings, lived with her mother in No Road, Jacksonville, since October of 2011, at which time her sister gave up custody of her children to her mother. C.S. And her siblings lived with her at the time of trial because her mother became ill. S.E. Was responsible for C.S.'s care and C.S. Took the medication Zovirax for genital herpes.

According to S.E., from 2008 to 2011, C.S. And her family moved a lot. S.E. kept track of where they were because she visited the children during the

weekends. C.S. And family lived with her mother off and on. The family also lived in Nassau County on Sunshine Drive and in a trailer park with a friend named Trina.

In June 2012, C.S. Told her step father molested her. Her mother was present. C.S. was not able to disclose all the details before the mother called the abuse hotline. C.S. was very upset and was crying. No one suggested to C.S. what she needed to say to the police when they arrived to investigate.

Sheryl Wood worked for the Nassau County School District and supervised the department that maintained the school records which were introduced into evidence. The records showed C.S. was enrolled at Callahan Intermediate School beginning December 10, 2008 and attended until the end of that school year. During the 2009/2010 school year, C.S. did not attend Nassau County schools. During the 2010/2011 school year, C.S. attended from August 30, 2010, until the last day of the school year in 2011. In the 2011/2012 school year, C.S. attended from August 15, 2011, until October 14, 2011. C.S. withdrew officially from school on October 21, 2011.

Karen McQueen was the office manager for the University of Florida, Dunn Avenue Family Practice. She searched the records and concluded that Petitioner was a patient at the facility. The records did not show that he had been tested for

herpes. McQueen also looked at the records and determined that C.S. was a patient of the facility. C.S. was tested for herpes. Over objection, McQueen testified the test was administered October 1, 2012. The test, which was introduced into evidence, showed that C.S. was positive for the herpes virus, however, it did not show if it was type 1 or 2.

Kristi Green worked for the University of Florida First Coast Child protection team as an advanced nurse practitioner. She performed the physical exam on C.S. She testified she got the history mainly from Lori Armstrong, the forensic interviewer, and her understanding was that C.S. had engaged in penile/vaginal intercourse. Her physical examination findings were normal, however, she saw partially healed transections at the three and six o'clock positions on the hymen. Her conclusion was that the history plus her findings were clear evidence of blunt force or penetration. However, at the time of her examination, C.S.'s hymen was intact.

Green testified, however, that when her supervisor reviewed the findings, he reached a different conclusion. Dr. Bruce McIntosh concluded the transections she found could also be naturally occurring notches and therefore, the finding was not conclusive that C.S. had been penetrated. Therefore, the Child Protection Team was of the conclusion that the physical evidence neither confirmed nor negated the

history that she had been penetrated. Green did not communicate the change of her findings to anyone, nor did she write a supplemental report. However, because of the discrepancy, Dr. McIntosh implemented a new procedure whereby he reviewed all of the positive findings, including the photographs taken during the exam.

Green testified when she examined C.S., the child disclosed she had bumps intermittently in her vaginal area and when they appeared, her urination was painful. Even though the child reported that the bumps were not open score or blisters, Green elected to order a blood test for the Herpes antibodies. Green explained that there were two types of Herpes antibodies. Type 1 was common, and was called the cold sore on the mouth herpes; and Type 2, was the one associated with genital Herpes. Herpes Type 1 was not sexually transmitted, while Herpes 2 was. Sixty percent of the U.S. Population had Herpes 1, while only 1.6 percent had Herpes 2. According to Green, the best test to perform to determine if a person has a Herpes 1 or 2 is to make a culture test during an outbreak. There was also a test called PCR which will differentiate if a person has the Type 1 of Type 2 antibody. In this case, Green only ordered the general screen test.

Over objection, Green testified C.S. tested positive for the Herpes antibody, and testified that the most common drug treatment for that was Zovirax. Green was asked to view the test performed by the Family Practice on October 1, 2012,

and testified, that in that test, C.S. also tested positive for the Herpes antibody.

Green admitted several things could cause the appearance of bumps on the genital area. For example, shaving of the genital area or a yeast infection could cause bumps to appear in the vaginal area. Yeast infections were not sexually transmitted, were not contagious, they reoccurred, and could cause the same symptoms especially the painful urination. Moreover, the test she performed could not specify the source of the virus.

Lisa M. Riggs was employed as an LPN for the Nassau County detention Center. In that capacity she collected a blood sample from Petitioner. The blood sample was sent to LabCorp for analysis.

Stephanie Annette Burks worked with LabCorp doing testing and chemistry serology. Burks tested Petitioner's blood and found it positive for the Herpes virus. This test was a screening test only which reflected a positive/negative result. It did not specify if the antibody was Herpes 1 or Herpes 2.

Douglas Hernandez worked for LabCorp as a senior laboratory technician. He conducted the reflex test on petitioner's blood and his test revealed that petitioner was positive for the Herpes 1 virus. Petitioner was negative for Herpes 2 virus.

Dr. Bruce McIntosh was the medical director of the University of Florida

First Coast Child Protection Team, a specialist in child abuse and neglect, and board certified in pediatrics. Kristi Green worked for him as an Advanced registered Nurse. McIntosh testified that most of the time, a trained medical provider could not tell if a child had been penetrated during the alleged abuse, and that only a percentage of children who had been sexual attacked showed evidence of physical trauma. Therefore the option that the physical findings neither confirm nor negate sexual molestation was the most common conclusion even if the exam was normal.

Dr. McIntosh was not present when C.S. was examined. However, he looked at the photographs taken during the exam and could not, by looking at the photographs, tell if C.S., had been penetrated as alleged. He testified the most important evidence to consider in deciding whether a child has been sexually abused is the history, the medical history provided by the child.

McIntosh took issue with Green's conclusion. The issue was that although Green found healed transections at the 3 and 6 o'clock positions of the hymen, those healed transections could also be notches which were normal. And while the transections or notches could be the result of trauma, they could also not be the result of trauma, therefore the findings on the hymen were not definite evidence of penetration. C.S.'s physical findings were consistent with a normal examination.

According to McIntosh, Herpes was not diagnostic of sexual abuse. There are two types of Herpes, both of which could be transmitted by innocent activity and not necessarily through sexual contact. Herpes can be transmitted gestationally from mother to child and during pregnancy. The best test to determine if a person has Herpes 2 is a culture of the infected area during an outbreak, in the absence of that, a blood test could be ordered to determine if the antibody was present. As to this case, McIntosh could not conclude with any degree of medical certainty that C.S. had a sexually transmitted disease.

Investigator Jeff Stull with the Nassau County Sheriff's Department was the lead detective in the case. Petitioner's date of birth was June 16, 1984, and he interviewed Petitioner at the sheriff's department. Petitioner arrived voluntarily. Stull gave him *Miranda* warnings and Petitioner agreed to talk to law enforcement. Petitioner denied touching or molesting C.S. and continued the denial even after he was told that the other children had confirmed. However, according to Stull, Petitioner's demeanor changed when he was confronted with Herpes and was asked how C.S. had contracted Herpes. At that time, according to Stull, Petitioner's posture changed, he slumped and his head went down, and he no longer had eye contact with the detective. Petitioner's statement was introduced and published to the jury.

During the interview Petitioner stated he worked for UPS as a loader and related he lived in Nassau County off and on for about 13 years. Petitioner acknowledged he and his wife and children lived in Jacksonville at one time. At the time of the interview, petitioner lived with a friend in Nassau County and acknowledged all of the children lived in Jacksonville with their maternal grandmother.

Petitioner also acknowledged he and his family lived at his father's home. The father slept in the back room, Petitioner and his wife slept in his old room, and the children slept in his sister's old room. At the time there was a black guy also living with them who slept on the couch. Moreover, Petitioner acknowledged that when his wife was in the hospital, the children slept with him.

Petitioner denied ever touching C.S. and did not know why she reported that he did. Petitioner denied having Herpes and testified that his wife suffered from Herpes but he was checked and he did not have anything. Petitioner gave consent for law enforcement to get all of his medical records. Petitioner had no idea of how C.S. contracted Herpes. However, at the suggestion of law enforcement, Petitioner admitted that once when he was asleep, he woke up to find C.S. trying to touch him and getting on top of him. C.S. was rubbing on him. Petitioner told C.S. not to ever do that again. C.S. apologized. Petitioner thought there was no skin to skin

contact however, it could have been possible that contact took place because he was wearing boxes and she did not have any clothes on.

Petitioner denied anything ever happening in Jacksonville for a visit at the grandmother's home, and that C.S. attempted to kiss him on his checks. Petitioner told her to stop. This happened in front of everyone including his wife. Petitioner continued to insist that he did not touch C.S.'s vagina or rub on her. As the interview concluded, Petitioner was crying.

Lori Armstrong worked for the Child Protection team and conducted a forensic interview of C.S. over objection, Armstrong testified to C.S.'s hearsay statements to her. To this effect, Armstrong related that C.S. told her that her stepfather had molested her four times and that each time, it happened the same way. Specifically, Armstrong related C.S. reported that petitioner put his penis on her vagina and touched her everywhere. She also told her Petitioner penetrated her – all the way inside of her. According to Armstrong C.S. described Petitioner's penis. C.S. told Armstrong Petitioner's penis was sticky and wet when he put his penis on her vagina. C.S. told Armstrong the penis was black and pointy on the end.

Petitioner called Dr. Kevin Peterson to the stand. Dr. Peterson was a family physician and an assistant clinical professor at the University of Florida. As a

family physician, he saw C.S. in August of 2012. C.S.'s guardian suspected a herpes outbreak. Dr. Peterson conducted an examination which also included the collection of several swabs and cultures. Although C.S. indicated that this was a recurring problem, Dr. Peterson did not see any evidence of herpetic lesions. The swabs and Cultures were sent to the lab for analysis. C.S. did not have a sexually transmitted disease. The culture revealed that C.S. had a yeast infection. Yeast infections were not considered to be sexually transmitted. The physical manifestations of a yeast infection could include things like red bumps or virginal redness.

April McLaughlin worked for the Jacksonville Child Protection team. McLaughlin investigated the living situation of K.G. And her children at the grandmother's home. The period was March 12, 2010, to April 23, 2012. the call was to investigate why the children were missing school. Petitioner did not live at the home. McLaughlin interviewed the children alone and let them know that she was a safe person to discuss any issues. However, she did not question C.S. about sexual molestation because that was not the purpose of the investigation at the time.

Wanda Nichols worked with the Department of Children and Families in Nassau County, specifically on the dates between August 12, 2011, and November

22, 2011. On August 12, 2011, she received information in reference to K.G. and her family. The home was a single-wide mobile home, two bedrooms, one bath. The report concerned environmental hazards. The home was very small and there were eight people residing at the home. There was only one package of meat to feed the entire family. The family moved in with the paternal grandfather.

The family was again investigated in approximately September of 2011. The report concerned the children's health and the children's clothing. At the paternal grandfather's home, the children had their own room. Shortly after this investigation, the children went to live with the maternal grandmother in Jacksonville. During both of the investigations, Nichols spoke wit the children alone and let them know that she was a safe person to talk to should there be any issues. The report did not involve inappropriate sexual behavior.

The testimony of T.W. Was read into the record for the jury. T.W. Testified she lived in Jacksonville on Old Plank Road when the family included C.S. and siblings, lived with her. The family stayed about six months. It was 2009. The home was a two bedroom trailer. She and her husband had one of the bedrooms and Petitioner, K.G., and the three children stayed in the front bedroom. K.G. And Petitioner took turns sleeping on the couch or in the bed with the children. T.W. Did not work and she stayed home all the time.

After they stayed with her, Petitioner and his family moved to Callahan in Nassau County and stayed with Petitioner's father on Sunshine Drive. It was around 2009. The home was also a trailer but it was a double wide. Larry, Sr. and his wife Barbara lived with them but then moved out. The family lived at Sunshine drive off and on for about a year. Afterwards the family returned to live with T.W. Without Petitioner. T.W. Did not allow him to stay at her home because he was not working. Petitioner stayed with relatives. If petitioner visited, he stayed out in his truck.

When C.S. and the children lived with T.W., after the parents gave up custody of them, C.S. was not upset that she was not able to see her mother. C.S. spoke angrily of her parents and wondered why they did not take better care of the children. C.S. was always worried about her two sisters, and acted like a mother to them. C.S. called her parents irresponsible, and she called her mother by her first name. C.S. complained to T.W. About vaginal rash but she never blamed her stepfather for such a rash.

C.S. disclosed to her and S.E. In June, 2012. C.S. said petitioner messed with her and laid his thing on her leg. Upon further questioning, C.S. told them she did not remember any details because her mother gave her either NyQuil or Benadryl to help her sleep. C.S.'s demeanor during the disclosure was matter of

fact, however, she did cry. T.W. Immediately called Child protection Services. C.S. related to T.W., the last time Petitioner molested her was at the double-wide trailer on Sunshine Drive right before T.W. got custody of them.

Lindsey Gonzalez spoke with C.S. C.S. disclosed to her that the stepfather touched sexually her on more than one occasion. According to what C.S. told Gonzalez, the first time happened when she was nine and she was living in Jacksonville with her grandmother. C.S. told her specifically, at the time of the molestation, the mother moved to sleep on the couch and Petitioner touched her genital area and breasts and also used his penis to touch her with. She was clothed except her shirt was off. C.S. disclosed to Gonzalez the rest of the incidents happened in Callahan, and C.S. told her she felt pain during those molestations.

Summary of Argument

The trial court erred in allowing the evidence that C.S. had genital herpes and that she had contracted the disease from Petitioner. First, C.S. suffered from a yeast infection and not genital herpes. Second, petitioner could not have been the source of her disease even if she had genital herpes, because Petitioner did not have Herpes 2, the antibody responsible for the genital herpes. The evidence was so inflammatory and so irrelevant to a material issue at trial that the only remedy is a reversal for a new trial.

Legal error requiring a reversal occurred when the trial court allowed State witness Lori Armstrong to testify as to C.S.'s out of court statements. No applicable exception applied to he testimony but if it did, the trial court failed to follow the statutory requirements of section 90.803(23), Florida Statutes.

There was insufficient evidence to support a jury instruction on attempted sexual battery as the permissive lesser of all the sexual batteries. The failure to give the requested instruction, requires a new trial as to those offenses.

The evidence was insufficient to prove that C.S. was less than 12 years old at the time the crime alleged in count IV occurred. The victim did not remember the date when the offense occurred, and she was not sure if it happened before or after she turned 12. Petitioner should be discharged as to this offense.

Petitioner was denied his right to fully confront the witnesses and present a full and fair defense because the trial court erred in not allowing him to present evidence of prior sexual encounters by C.S. the proffered testimony would have explained the statements that Petitioner made made to the police and would have shown the jury that C.S. had prior sexual knowledge all of which was relevant to the case.

It is improper for a trial court to allow the State to question a state expert witness about treatises and scientific documents because the purpose of allowing it was to bolster the expert's own opinion which is impermissible in Florida.

Reasons for Granting the Writ

Question One:

> Does the State of Florida violate a defendant's right to confront witnesses when they allow the State to introduce evidence that a minor suffered from genital herpes because the evidence was irrelevant, the test administered to the minor was not reliable, and the evidence was hearsay?

Prior to trial Petitioner moved *in limine* to prevent the State from introducing evidence that C.S. had contracted genital herpes arguing that the evidence was irrelevant and highly prejudicial, particularly since Petitioner tested negative for genital herpes. Petitioner also argued the test was not reliable and did not meet the standards of *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 589 (1993), but even if the evidence was relevant and met the *Daubert* standard, it would be hearsay unless the technician who took the actual test testified to its results pursuant to *State v. Johnson*, 982 So.2d 672 (Fla. 2008). The trial court denied the motion and allowed the evidence. This was error. Petitioner's direct appeal was *per curiam* affirmed without a written opinion.

According to the testimony at trial, there are two types of the disease Herpes: HSVI or Herpes 1 manifested by cold sores and shared by 60 percent of the population in the United States; and HSVII or Herpes 2 manifested by blisters and sores in the genital area. Herpes HSVII or Herpes 2 is sexually transmitted, while

Herpes 1 is transmitted by innocent contact including during pregnancy by an infected mother.

The testimony at trial revealed C.S. disclosed the instant molestation to her grandmother and maternal aunt in June 2012. The Child Protection Team was contact and as a result, C.S. was physically examined by Nurse Practitioner Kristi Green, The exam was normal. However, because C.S. gave the history of recurrent red bumps with painful urination, Green ordered a test be conducted of C.S.'s blood to determine if she had the Herpes antibody. Although the test technician did not testify at trial, ms. Green related to the jury the test revealed C.S. had the Herpes antibody in her system. The test performed on C.S. could not differentiate between HSVI or HSVII. Green requested C.S. to follow up with her general physician which she did. The University of Florida Dunn Avenue family practice followed up and conducted a blood test dated October 1, 2012, which was introduced into evidence as a business record exception to the hearsay rule. Green interpreted this test and testified C.S. also tested positive for the Herpes antibody on October 1, 2012.

The evidence revealed that in August 2012, C.S. had a breakout of which she though was her genital herpes. She presented to her physician Dr. Peterson complaining of red bumps. Dr. Peterson conducted a culture test, and determined

that C.S. suffered from a yeast infection. Yeast infections are not sexually transmitted and the symptoms include red bumps and painful urination. Dr. Peterson did not notice any herpetic lesions during C.S.'s outbreak.

The State requested Petitioner submit to a blood test in order to determine if j=he had herpes antibody. Petitioner's blood sample was sent to LabCorp in Tampa and two lab technician testified the screen tests done on the sample revealed the Petitioner had the herpes antibody; and the second technician Gonzalez, who performed a more in-depth test, testified the petitioner had the HSVI or Herpes 1 commonly known as the cold sores on the lip herpes.

Based upon the above facts, petitioner insists the evidence was irrelevant, highly inflammatory evidence at his trial denied him of his right to a fair trial. A new trial should have been afforded.

Section 90.401, Florida Statutes, provides the definition of relevant evidence and states that "relevant evidence is evidence tending to prove or disprove a material fact." In order for evidence to be relevant, it must have a logical tendency to prove or disprove a fact which is of consequence to the outcome of the action. The definition of relevant evidence in Section 90.401, combines the traditional principles of "relevancy" and "materiality." The concept of "relevancy" has historically referred to whether the evidence has any logical tendency to prove or

disprove a fact. *Johnson v. State,* 595 So.2d 132, 134 (Fla. 1st DCA 1992). If the evidence is logically probative, it is relevant and admissible unless there is a reason for not allowing the jury to consider it. *State v. Taylor,* 648 So.2d 701, 704 (Fla. 1995); Section 90.403, Florida Statutes.

Here, the evidence adduced had no logical tendency to prove or disprove a material fact. The fact Petitioner had the cold sore herpes (Herpes 1) does not prove he battered or touched C.S. on her genital areas as alleged, because C.S.'s malady was found to be a yeast infection which is not even sexually transmitted. Even if C.S. had genital herpes as she and her aunt testified, the evidence Petitioner had the Herpes 1, is not relevant because Petitioner is not a carrier of HSVII or Herpes 2, the culprit of genital herpes. The only relevancy or purpose for the evidence was to inflame the jury and appeal improperly to the jury's emotions.

Also, in order to admit evidence based on the results of scientific tests, the proponent of the evidence must establish the reliability of the process, test, or experiments. *Robinson v. State*, 610 So.2d 1288 (Fla. 1992); *Stevens v. State*, 419 So.2d 1058 (Fla. 1982); *Robinson v. State*, 604 So.2d 783 (Fla. 1992)(scientific tests are admissible if it is established that 1) the test was reliable, 2) the test was performed by a qualified operator with the proper equipment, and 3) expert testimony is presented concerning the meaning if the test); *Melvin v. State*, 677

So.2d 1317 (G+Fla. 4th DCA 1996)(police officer with special training but without scientific expertise could not lay the foundation for the admissibility of an HGN test).

On July 1, 2013, Florida adopted the standard established in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), with regard to determining whether an expert witness would be allowed to offer testimony in the form of an opinion at trial. According to the *Daubert* standard, a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (1) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (2) the testimony is based on sufficient facts or date; (3) the testimony is the product of reliable principles and methods; and (4) the expert has reliably applied the principles and methods to the facts of the case.

In the present case, the State presented no witnesses from which the trial court could determine the reliability of the IgG test for the herpes antibodies. The state failed to present reliable principles and methods for the test of those used in the case. The IgG antibodies test does not provide for a reliable assessment of the herpes virus; it is merely a screening test at best, which, does not make an accurate determination of the virus type, virus transmission source, age of the virus, or

d=genetic identify of the virus. Therefore, under *Daubert* standard, the evidence concerning any tests performed on C.S. for the herpes antibodies was inadmissible. Petitioner should have been awarded a new trial from his direct appeal.

And lastly, the State's evidence via Kristi Green that C.S. tested positive for the Herpes antibodies violated Petitioner's right of confrontation. Although Ms. Green ordered the test to be performed and requested that C.S. follow up with her physician, she did not conduct the test and therefore her testimony was impermissible hearsay. *State v. Johnson*. 982 so.2d 672 (Fla. 2008) and *Crawford v. Washington*, 541 U.S. 36 (2004).

Question Two:

Does the State of Florida violate a defendant's rights to fully cross-examine a witness and fully present his defense?

Petitioner denied he molested C.S. During trial, Petitioner attempted to show his stepdaughter was making up the allegations against him and wanted to introduce the testimony of Marina Anderson to show that C.S. had prior sexual experience and prior knowledge of sexual activities because she herself had been investigated for sexual misconduct in 2008 and therefore she knew that DCF was a safe entity to report sexual misconduct. The specific behavior investigated would have also corroborated Petitioner's statement to the police and it would have shown that petitioner was truthful during his interview with the police. Moreover, Petitioner attempted to introduce testimony of Bruce Wheeler who molested C.S. during the period of time she live with him and during the time she initially disclosed in this case and to also show her knowledge of sexual activities. The trial court ruled the evidence was inadmissible, therefore granting the State's motion *in limine*. This was error.

This Court has held prior behavior of a victim to be admissible in limited circumstances, particularly when it exposes the witness' motivation for testifying and when it affords an accused his full constitutional rights to fully cross-examine a witness and fully present his defense. *Olden v. Kentucky*, 488 U.S. 227 (1988);

Davis v. Alaska, 415 U.S. 308 (1974)(exposure of witness' motivation for testifying is a proper and important function of the constitutionally protected right to cross-examination); and *Chambers v. Mississippi*, 410 U.S. 284 (1973). Also *Roberts v. State*, 510 So.2d 885 (Fla. 1987)(If Florida's Rape Shield Law interferes with a defendant's right to confront witness and otherwise present a full and fair defense, the statute would have to give way to these constitutional rights).

During statements to the police, Petitioner admitted that once when he was asleep, he woke up to find C.S. trying to touch him and getting on top pf him. C.S. was rubbing on him. Petitioner told C.S. not to ever do that again. C.S. apologized. Petitioner thought there was no skin to skin contact, however it could have been possible that contact took place because he was wearing boxers and she did not have any clothes on. Petitioner denied anything ever happened in Jacksonville. Petitioner admitted though that he went to Jacksonville fro a visit at the grandmother's house, and that C.S. attempted to kiss him on his cheeks. Petitioner told her to stop. This happened in front of everyone including his wife. Petitioner continued to insist that he did not touch C.S.'s vagina or rub on her.

In arguing to the jury, the State stated:

> The defendant told her not to tell. So, although he's not on trial for events that occurred in Jacksonville, you may consider it for its relevancy...because the defendant in this statement says that there was sexual activity in Jacksonville. Of course, he reverses the role to

make himself the victim, But he says, yeah, it happened in Jacksonville, too.

***

The defendant in his statement to the police admitted that there was penile/vaginal contact or union with C.S., he simply put the blame on her for those actions.

***

Well, you know that the defendant in his statement to the police said his wife went to the hospital for kidney stones a lot. He also admitted that the kids slept with him when his wife was in the hospital for kidney stones. He admitted there was penile/vaginal contact or union with C.S.; he just put the blame on her for being the initiator.

***

Again, the defendant to the police admits penile/vaginal contact, he simply flip-flops the role of who is the aggressor and who is the victim.

**

But once he's formulated or come up with a way he's going to explain away C.S.'s herpes, listen to his statement and then take that "he's" and then "she's," the pronouns that he uses, and flip-flop them, so that you have him saying that he was asleep in the bed when C.S. started touching him.

Indeed, the State replayed Petitioner's statement during closing argument.

The prior sexual conduct by C.S. attempted to explain to the jury that C.S. in fact engaged in the same type of activity, that is, getting on top of a person and touching that person just like C.S. did with petitioner. However, petitioner was

precluded from cross-examining the witness or from presenting a full and fair defense. A new trial should have been afforded.

Conclusion

The petition for a writ of certiorari should be granted.

DECLARATION

I hereby declare under penalty of perjury that I understand English language or have had it read to me in a language that I understand and therefore, state that the facts set forth are true and correct.

Respectfully submitted,
/s/ Larry A. Gibbs
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