

No. 93758

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Appellate Court of
)	Illinois, Second District, No. 2-00-0747
Plaintiff-Appellee,)	
)	
-vs-)	There heard on Appeal from the Circuit
)	Court of DuPage County, Illinois,
)	No. 98 CF 2702.
)	
ISMAEL LOPEZ,)	Honorable
)	Perry R. Thompson,
Defendant-Appellant.)	Judge Presiding.

PROOF OF SERVICE

TO: Hon. Lisa Madigan, Illinois Attorney General, 100 W. Randolph St., 12th Floor,
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Please be advised that on March 4, 2003, I caused to be filed with the Clerk of the Supreme Court of Illinois, the attached Reply Brief in the above-entitled cause by enclosing the original in an envelope, properly addressed, postage prepaid, and by depositing the envelope in a U.S. Mail Box in Elgin, Illinois. This certifies that I served the above-named parties by hand-delivering two copies to the State's Attorneys Appellate Prosecutor and by mailing three copies to the Attorney General and one copy to the defendant listed above in envelopes deposited in a U.S. Mail Box in Elgin, Illinois, with postage fully prepaid and addressed as indicated above.

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SUBSCRIBED AND SWORN TO
Before me on March 4, 2003.

NOTARY PUBLIC

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REPLY BRIEF AND ARGUMENT FOR DEFENDANT-APPELLANT

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ARGUMENT

Under the Due Process Clause, the defendant has a right to a fundamentally fair trial. To ensure a fundamentally fair trial, because the State will be putting on examining experts who will testify that a physical examination revealed possible sexual trauma to the complainant, it is a basic tool for the defense that it be allowed to have an expert physically examine the complainant so as to offer another opinion about the complainant's condition. Alternatively, the defense should be allowed to have an expert physically examine the complainant because it has shown a compelling need for such an examination.

In his Original Brief, the defendant argued that, under *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), and *People v. Wheeler*, 151 Ill.2d 298, 602 N.E.2d 826 (1992), due process entitled his expert to physically examine the complainant. If the complainant's family did not want to have her examined, then the State could not have its experts testify about their examination. Rather, the State's experts would have to rely on second-hand material --- i.e. examination notes or photographs ---- just as the defense expert would.

Although the State's brief has one argument heading, it is broken down into two subsections. In subsection (a), the State makes five points in response to the defendant's argument. First, it suggests that the trial court has no inherent authority to order the complainant to be examined physically. Second, it argues that such an examination violates the complainant's Fourth Amendment privacy interests. Third, it argues that the defendant has no due process right to request that the complainant be examined. Fourth, in light of its previous points, the State suggests that this Court revisit *Wheeler*, or else, confine *Wheeler* to its facts. Five, it makes various miscellaneous objections to the defendant's argument.

In subsection (b) of its brief, the State argues that if this Court adopts the Second District's six-factored "compelling needs" test, then it should conclude that the defendant has failed to demonstrate a compelling need for such a physical examination of the complainant.

With regard to subsection (b), the defendant will stand on the arguments that he made in his Original Brief. In his Reply Brief, the defendant will respond to the contentions that the State has made in subsection (a).

Subsection (a)

The State's first objection

Regarding the first point, the State argues that those Illinois cases that found that the trial court had the inherent authority to order a complainant to undergo a court-ordered physical examination --- i.e. *People v. Glover*, 49 Ill.2d 78, 273 N.E.2d 367 (1971) and *People v. Visgar*, 120 Ill.App.3d 584, 457 N.E.2d 1343 (2d Dist. 1983) --- were rooted in the sexist and unfounded belief that sex offense complainants had to be scrutinized and questioned more carefully than other complainants. Accordingly, the State asks that these cases be overruled. (St. br. at 6-10)

In response, the defendant notes that he never argued that the order for the complainant's physical examination stemmed from the trial court's inherent authority. Rather, analogizing his case to *Ake* and *Wheeler*, he argued that the power to order a physical examination stemmed from the due process clause.

However, in staking out its position, the State does not explain where the power to order a physical examination of complainant can ever come from. The State cannot be

arguing that physical examinations of the complainant in a sex offense prosecution are never permissible. Out-of-state authorities, while critical of the sexist and outmoded assumptions that historically dogged sex offense complainants, have nonetheless asserted that the power to order a compulsory physical examination stems from the trial court's inherent authority. For example, in *State v. Barone*, 852 S.W.2d 216 (Tenn. 1993) ---- the case that the Second District seemed to rely on most heavily in formulating its "compelling needs" test ---- the Tennessee Supreme Court found that the power to order a complainant to undergo a physical examination lay in the trial court's inherent authority: "We hold that in any case involving a sex violation, the trial judge has the inherent power to compel a psychiatric or psychological examination of the victim, where such examination is necessary to insure a just and orderly disposition of the cause." 852 S.W.2d at 221, *quoting Forbes v. State*, 559 S.W.2d 318, 321 (1977).

The State's second objection

Second, the State notes that the complainant has a privacy interest in her body, particularly a Fourth Amendment privacy interest. The State writes, "the submission to a physical exam at the behest of the court is in violation of a victim's Fourth Amendment protection against unreasonable searches and seizures." (St. br. at 11) That the Fourth Amendment protects a sex-offense complainant from submitting to a court-ordered physical examination is a point that has been developed in academia. Comment, "A Fourth Amendment Approach to Compulsory Physical Examinations of Sex Offense Victims," 57 U.Chi.L.Rev. 873(1990).

In response, the defendant readily concedes that the complainant has a privacy interest

in her body, and concedes that a court-ordered examination would be a Fourth Amendment search. However, he disputes whether such a search would be an unreasonable search. A search occurs where the State investigates an area where a person has a subjective expectation of privacy that society is prepared to accept as reasonable. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Clearly, the complainant has a subjective expectation of privacy in her body, and this is an expectation that society is prepared to accept as reasonable. *See Daryl H. v. Coler*, 801 F.2d 891, 899-900 (7th Cir. 1986)(Court finds that a visual inspection by a governmental social worker of a nude child implicates the Fourth Amendment). However, the question then becomes whether such a search is reasonable:

The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

Bell v. Wolfish, 441 U.S. 520, 559, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). The *Bell* quote suggests that the State cannot categorically say that all physical examinations of sex offense complainants represent unreasonable Fourth Amendment searches. Rather, a detailed, fact-specific inquiry must be initiated to determine if the particular search is reasonable.

Here, the invasion contemplated is not inconsiderable --- the viewing of a young child's private parts. On the other hand, the scope of the particular intrusion and the manner in which it is to be conducted are reasonable. The trial court ordered a "brief,

limited purpose examination to be undertaken by Dr. Slupik. The natural mother [would] determine who else would be present at this examination.” (C.L.R. 102) In an affidavit, defense expert Dr. Ramona Slupik indicated that she would tailor the examination so that it would be minimally invasive. In particular, she stated that the proposed examination would take approximately five minutes, that one ounce of sterile warm water would be used to rinse the hymen or other debris to facilitate its depiction, and that other than Q-tips, no other instruments would be used during the examination. (C.L.R. 118-119) The trial court noted that this examination was no more invasive to the child than Dr. Anderson’s examination. (C. 336)

Further, the justification for initiating the examination is to further the truth-seeking function of the trial. At this point, the analogy to *Ake* becomes very strong. *Ake* observed that there are frequently disagreements over psychological diagnoses regarding a defendant’s sanity. Competing diagnoses, one from the defense and one from the prosecution, would not only present the jurors with all the relevant facts but would force them to look behind the respective diagnoses to the bases upon which the diagnoses rested. This would allow them to pick out the most reliable diagnosis. 470 U.S. at 81.

The Second Circuit Court of Appeals has observed that there are disagreements over a sexual trauma diagnosis, particularly when the diagnosis hinges on the hymen’s condition, as in this case. Assessing an ineffective assistance of counsel claim in a *habeas* appeal, the Court noted:

the lesson to be learned from [prior precedent] is that when a defendant is accused of sexually abusing a child and the evidence is such that the case will turn on accepting one party's word over the

other's, the need for defense counsel to, at a minimum, consult with an expert to become educated about the "vagaries of abuse indicia" is critical. The importance of consultation and pre-trial investigation is heightened where, as here, the physical evidence is less than conclusive and open to interpretation.

[P]rior to trial, various questions had been raised in the medical community that could have been used to call [State expert] Dr. Lazoritz's conclusions into doubt. Dr. Lazoritz partly based his conclusions on an examination of the girls' hymens, specifically focusing on measurements of their enlarged hymenal openings. Contemporaneous medical studies raised questions about the reliability of hymenal examinations as the basis for determining the occurrence of sexual abuse. See, e.g., John McCann et al., Genital Findings in Prepubertal Girls Selected for Nonabuse: A Descriptive Study, 86 Pediatrics 428 (1990) (finding that measurements of hymenal opening varied depending on hymenal type and child's position when measurements were conducted) (cited with approval in Lindstadt, 239 F.3d at 201); Astrid Heger & S. Jean Emans, Introital Diameter as the Criterion for Sexual Abuse, 85 Pediatrics 222 (1990) (noting growing concern over emphasis placed on measurements of hymenal opening to diagnose sexual abuse and noting various factors that can impact on the results of such measurements).

Eze v. Senkowski (No. 99-2261) 2003 U.S. Lexis. 2511 (2nd Cir. 2003), citing *Lindstadt v. Keane*, 239 F.3d 191 (2d Cir. 2001) and *Pavel v. Hollins*, 261 F.3d 210 (2d Cir. 2001).

Admittedly, the State's experts in this case did not rely on the length of the hymenal opening to determine whether there was abuse. Yet, inasmuch as they had different bases for suspecting sexual abuse, *the State diagnoses already conflict to some measure*. Dr. Anderson connected possible sexual trauma to an adhesion of the labia with synechial scar of the tissue touching together, covering the opening of the vagina and obscuring the hymen (C.L.R. 131-NP108). By contrast, Dr. Flannery connected her conclusions regarding possible sexual trauma to the hymen's condition, noting that the edges of the hymen were thickened and that there were notched areas on the hymen. (C.L.R. 131-NP5)

Because there is already a dispute between the diagnoses, another diagnosis would present the jurors with all relevant facts and help them to find the truth by forcing them to examine the bases behind the physicians' opinions. Incidentally, with regard to Dr. Flannery's conclusion, there is research to indicate that these findings can be observed in girls who have not been abused. *See* Beth A. Townsend, "Defending the Indefensible: A Primer to Defending Allegations of Child Abuse," 45 A.F.L. Rev. 261, 269-270 (1998) ("If the initial examination of the victim produced evidence of physical findings such as hymeneal tears, notches, or clefts, there is research that indicates the presence of these findings in nonabused girls.").

Under the reasoning of *Ake*, a defense examination would be beneficial because it would present the jurors with competing diagnoses of equal validity. This would not only present the jurors with all the relevant facts, but force them to look behind the diagnoses to the bases upon which they rested. In examining the bases for the diagnoses, the jurors could properly pick out the most credible diagnosis. And, by allowing both sides to examine the child, the State would be foreclosed from having unilateral access to an examination, a strategic advantage that might "cast a pall on the accuracy of the verdict obtained." *Ake*, 470 U.S. at 79.

Finally, the trial court ordered that the examination take place in a location amenable to the complainant and her family. Although the complainant's family never actually allowed her to be examined, an agreement was evidently in place that would have allowed her to be examined. This agreement was discussed in the defendant's motion to dismiss

the indictment

The examination was scheduled to take place on April 4, 2000, at 9 a.m., at Edward Hospital in Naperville. The arrangements were made by defense counsel so as to minimize hardship and burden on the complaining witness. Ms. Christine Ewing of Edward Hospital assisted counsel in granting Dr. Slupik temporary privileges. Nurse Dorothy Melquist of the Edward Hospital Care Center assisted counsel in setting up an exam room. Ms. Linda Peterson of the DuPage County Children's Center assisted counsel in setting a date agreeable to [the complainant's] family. At the State's request, Dr. Strada, chief of staff at Edward Hospital, was to observe the exam.

(C.L.R. 113) Thus, as noted in the defendant's Original Brief, great care was taken to ensure that a limited purpose exam would be conducted, in an atmosphere in which the complainant would be as comfortable as possible, with possible trauma minimized.

In sum, viewing the search here in light of *Bell*, it does not appear unreasonable under the Fourth Amendment.

The State's third objection

Regarding the third point, the State denies that a right to examine the complainant flows from the due process clause. For the State, the defendant's due process rights in this case can flow from three possible sources: 1) from the defendant's Sixth Amendment's due process rights to receive exculpatory evidence from the State during discovery, as discussed in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and *United States v. Agurs*; 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); 2) from the Sixth Amendment's compulsory process clause; and 3) from the defendant's Fourteenth Amendment right to a fundamentally fair trial, as discussed in *Ake*.

On the first point, the defendant will concede that this case does not fit within the

framework of *Brady* and *Agurs*. Under *Brady*, the prosecution is required to disclose exculpatory evidence to the defense before trial if the defendant demands it. 373 U.S. at 87. Dispensing with the requirement that the defendant demand the exculpatory evidence, *Agurs* expanded upon *Brady*, holding that the prosecution has an affirmative duty to disclose exculpatory evidence in its possession, regardless of whether the defendant has specifically demanded it. 427 U.S. at 110.

Given that *Brady* and *Agurs* limit the disclosure of exculpatory evidence to what the prosecution “possesses,” this case cannot be situated within *Brady* and *Agurs*. The prosecution has no constitutional duty to tender to the defense what it does not have. And because the prosecution does not possess the complainant’s body or her private parts, it does not have an affirmative duty to turn this over to the defendant.

But the defendant would note the prosecution likewise does not possess the complainant’s mental state. And yet, under the due process clause, *Wheeler* found that a sex offense complainant had to submit to a psychiatric examination if the prosecution would put on examining witnesses who would testify that the complainant suffered from post-traumatic stress disorder. Although the defendant believes that this case is better situated within *Ake* than within *Brady-Agurs*, the Court could uphold its ruling in *Wheeler* by expanding the defendant’s due process discovery rights beyond what *Brady* and *Agurs* allow. See *People v. Krueger*, 175 Ill.2d 60, 74, 675 N.E.2d 604 (1996) (Court holds that it has the unquestionable authority to interpret provisions of the Illinois Constitution more broadly than analogous provisions of the Federal Constitution).

On the second point, the defendant will concede that this case should not be situated

within the compulsory process clause, although there is an argument to be made that it might. As one scholar has noted:

The Compulsory Process Clause, understood as a check against the prosecution's presentation of the evidence and as embodying limited discovery rights to effect that "checking" function would also include a defendant's right to obtain a psychological or physical examination of a complainant or witness whose mental or physical condition is placed in issue by the prosecutor.

* * *

There is no violation of due process in the Brady sense because the State does not control or possess what the defendant wants; access to the alleged victim. There is, however, a Compulsory Process Clause problem. When the prosecution presents expert testimony based on an examination of the alleged victim, but the defendant cannot present his own comparable evidence, the prosecution's evidence is insulated from the testing anticipated by the Compulsory Process Clause.

Jean Montoya, "A Theory of Compulsory Process Clause Discovery Rights," 70 Ind.L.J. 845, 885, 887 (1995). However, this issue is not before this Court --- the defendant has analogized his case to *Wheeler*, and in *Wheeler*, this Court reached its decision based on the due process clause rather than the compulsory process clause, reasoning that the compulsory process clause afforded the defendant no more protection than did the due process clause. 151 Ill.2d at 305.

On the third point, the State argues that this case does not fit within *Ake*'s framework, arguing that *Ake* is concerned about allowing indigent defendants to mount a proper defense, notwithstanding their poverty. Attempting to distinguish this case from *Ake*, the State notes that the defendant's poverty is not an issue in whether he should be allowed to have the complainant undergo a court-ordered physical examination. (St. br. at 14).

Ake identified an interest in ensuring that the indigent defendant received a

“fundamentally fair” trial, notwithstanding his poverty:

This Court has long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense. *This elementary principle, grounded in significant part on the Fourteenth Amendment’s due guarantee of fundamental fairness*, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake.

470 U.S. at 76 (emphasis added). And again:

While the Court has not held that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy, see *Ross v. Moffitt*, 417 U.S. 600, 41 L.Ed.2d 341, 94 S.Ct. 2437 (1974), it has often reaffirmed that *fundamental fairness* entitles indigent defendants to “an adequate opportunity to present their claims fairly within the adversarial system.” *id.*, at 612, 41 L.Ed.2d 341, 94 S.Ct. 2437. To implement this principle, we have focused on identifying the “basic tools of an adequate defense or appeal.” *Britt v. North Carolina*, 404 U.S. 226, 227, 30 L.Ed.2d 400, 92 S.Ct. 431 (1971).

470 U.S. at 77 (emphasis added). In *Ake*, where the defendant asserted that he was insane when the crime was committed, a basic tool for his defense was that he be allowed to hire an expert psychiatrist to assess his mental state at the time of the crime. Furthermore, fundamental fairness required that the State pay for this expert.

Wheeler cited the defendant’s right to a fundamentally fair trial, and situated that right within the due process clause, but divorced it from the defendant’s indigency. Citing *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297, *Wheeler* held that “a defendant’s right to due process is the right to a *fundamentally fair trial*, including the right to present witnesses in his own behalf.” 151 Ill.2d at 305 (emphasis added).

Notwithstanding the *Chambers* citation, the defendant asserted in his Original Brief that *Wheeler* had essentially, if implicitly, imported *Ake*'s "basic tools" analysis, only now with the focus on the complainant, with the issue being whether the defendant would be allowed to have an expert psychologically examine the complainant when the State sought to introduce expert testimony that, based on an examination of the complainant, the complainant suffered from post-traumatic stress syndrome. In determining whether or not the defendant should be allowed to psychologically examine the complainant, *Wheeler* did not consider the defendant's indigency.

So, in conclusion, under *Wheeler*, whether the defendant received the basic tools for constructing his defense is a question unrelated to indigency. The *Ake-Wheeler* "basic tools" analysis remains the proper analytical framework for determining whether the complainant in this case should submit to a court-ordered physical examination.

The State's fourth objection

The State provides a number of reasons why this Court should overrule or "revisit" *Wheeler*. As a beginning matter, the defendant would note that this Court has shown great deference for *stare decisis* and a reluctance to overturn prior decisions: "*Stare decisis* is not an inexorable command. However, a court will detour from the straight path of *stare decisis* only for articulable reasons, and only when the court must bring its decisions into agreement with experience and newly ascertained facts." *Chicago Bar Ass'n v. Illinois State Bd. of Elections*, 161 Ill.2d 502, 510, citing *Vasquez v. Hillery*, 474 U.S. 254, 265-266, 106 S.Ct. 617, 624-625, 88 L.Ed.2d 598 (1986).

The defendant would like to address one of the State's arguments for overturning

Wheeler: “the suppression of relevant evidence of a defendant’s guilt on the basis of a victim’s refusal to participate in an unenforceable order for an exam is contrary to the very purpose of a criminal trial, to ascertain the truth.” Actually, *Wheeler* is consistent with the truth-seeking function of a trial because, like *Ake*, it recognized that psychological diagnoses are often inconsistent and contradictory. By presenting the jurors with competing diagnoses, it will present them with all relevant facts and force them to look behind the diagnoses to their bases in order to determine which diagnosis is most credible. The jury will more readily credit as reliable an examination based on face-to-face examination: “Psychological testimony is often disputed and the value of an expert’s opinion depends in large part upon the basis for that opinion. Because the State in this case had the exclusive right to examine [the complainant] the credibility of its expert was elevated above that of any non-examining expert defendant could call.” *Wheeler*, 151 Ill.2d at 311.

As the Second Circuit Court of Appeals noted in *Eze v. Senkowski*, in a sex abuse prosecution, the “vagaries of abuse” indicia will lead to conflicting diagnoses. By presenting the jurors with competing diagnoses, the jurors will be forced to examine the basis behind the diagnosis to determine if it is credible. And, the jury is most likely to credit an examination that involves face-to-face contact.

The State’s fifth objection

Towards the end of subsection (a), the State makes various miscellaneous objections to the defendant’s argument. In particular, it notes that second-hand materials are frequently reliable for examining purposes: “The People also note that a review of reports and

photographs by defense experts is not an uncommon occurrence in criminal trials. Indeed, defense experts routinely use such methods to offer opinions regarding such topics as crime scenes, autopsies, and DNA testing.” (St. br. at 16)

That is precisely the defendant’s point --- if the second-hand material is so reliable, then the prosecution’s witnesses can rely on its as well, and not place before the jurors evidence that they examined the complainant. To allow the prosecution’s experts to do this would allow the State to maintain a strategic advantage over the defense and “cast a pall on the accuracy of the verdict obtained.” *Ake*, 470 U.S. at 79.

For the reasons discussed in this brief and in his Original Brief, Ismael Lopez, Defendant-Appellant, respectfully requests that this Court reverse the judgment of the Second District Appellate Court, and reinstate the order from the trial court ordering that the complainant submit to a physical examination. Should the complainant refuse to do so, the State should be barred from putting on testimony from its examining experts.

CONCLUSION

For the reasons discussed in this brief and in his Original Brief, Ismael Lopez, Defendant-Appellant, respectfully requests that this Court reverse the judgment of the Second District Appellate Court, and reinstate the order from the trial court ordering that the complainant submit to a physical examination. Should the complainant refuse to do so, the State should be barred from putting on testimony from its examining experts.

Respectfully submitted,

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