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IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,135

GERALD DOWLING,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

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ON APPLICATION FOR DISCRETIONARY REVIEW

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# BRIEF OF PETITIONER ON JURISDICTION


BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1351 Northwest 12th Street
Miami, Florida 33125
(305) 545-3005

LOUIS CAMPBELL
Assistant Public Defender
Florida Bar No. 0833320

Counsel for Petitioner

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CASE NO.

GERALD DOWLINC,

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## BRIEF OF PETITIONER ON JURISDICTION

### INTRODUCTION

The petitioner, Gerald Dowling, was the defendant in the trial court, and the appellant in the District Court of Appeal of Florida, Third District. The respondent, the State of Florida, was the prosecution in the trial court, and the appellee in the appellate court. This brief refers to the parties as they stood in the trial court. The symbol "A" designates the appendix to this brief.

### STATEMENT OF THE CASE AND FACTS

The defendant was convicted after a jury trial of sexual battery on a person under twelve years of age. The Third District Court of Appeal affirmed his conviction and sentence in a per

curiam decision without written opinion on November 26, 1991. (A. 1-2). In support of its decision, the district court cited section 90.803(23), Florida Statutes, and State v. Pardo, 582 So.2d 1225 (Fla. 3d DCA 1991). (A. 1-2).[1] State v. Pardo is pending review in this Court (Florida Supreme Court Case Number 78,318).

## ION PRESENTED

WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL IS IN DIRECT AND EXPRESS CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL OR OF THIS COURT.

## SUMMARY OF ARGUMENT

The district court of appeal's per curiam opinion cites as controlling authority a decision that is pending review in this Court, and therefore constitutes prima facie express conflict and allows this Court to exercise its jurisdiction. Moreover, the decision relied upon by the district court itself certified conflict with a decision of another district court of appeal, and also certified a question of great public importance.

## ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL IS IN DIRECT AND EXPRESS CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL OR OF THIS COURT.

A per curiam decision without opinion of a district court of appeal which cites as controlling authority a decision that is pending review in this Court constitutes prima facie express

[1] In the decision, Pardo is cited as 16 F.L.W. D1791 (Fla. 3d DCA 1991). (A. 2).

conflict for purposes of jurisdiction. Jollie v. State, 405 So.2d 418 (Fla. 1981). Accord State v. Lofton, 534 So.2d 1148 (Fla. 1988).

Here, one of the several issues raised on appeal concerned the construction of section 90.803(23), Florida Statutes. With respect to that issue, the district court of appeal cited as controlling authority its decision in State v. Pardo, 582 So.2d 1225 (Fla. 3d DCA 1991). (A. 1-2). In Pardo, the court certified that its decision on the construction of the statute is in express and direct conflict with Kopko v. State, 577 So.2d 956 (Fla. 5th DCA 1991). Pardo at 1228. The court also certified that its decision passed on a question of great public importance regarding the construction of section 90.803(23), Florida Statutes. Pardo at 1228.

Pardo is pending review in this Court (Case Number 78,318). Accordingly, this Court has jurisdiction pursuant to article V, section 3(b)(3), Florida Constitution. Jollie.

## CONCLUSION

Based on the foregoing, petitioner requests this Court to grant discretionary review in this cause.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1351 Northwest 12th Street
Miami, Florida 33125
(305) 545-3005

BY: Louis Campbell
LOUIS CAMPBELL
Assistant Public Defender
Florida Bar No. 0833320

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded by mail to the Office of the Attorney General, 401 N.W. Second Avenue, Post Office Box 013241, Miami, Florida 33101 this 2nd day of January, 1992.

Louis Campbell
LOUIS CAMPBELL
Assistant Public Defender

# A P P E N D I X

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, 1991

GERALD BRUCE DOWLING, **

Appellant, **

vs. ** CASE NO. 90-1306

THE STATE OF FLORIDA, **

Appellee. **

Opinion filed November 26, 1991.

An Appeal from the Circuit Court for Dade County, Henry L. Oppenborn, Judge.

Bennett H. Brummer, Public Defender, and Louis Campbell, Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General, and Angelica D. Zayas, Assistant Attorney General, for appellee.

Before HUBBART, BASKIN, and GERSTEN, JJ.

PER CURIAM.

Affirmed. § 90.803(23), Fla. Stat. (1990); Glendening V. State, 536 So.2d 212 (Fla. 1988), cert. denied, 492 U.S. 907, 109 S.Ct. 3219, 106 L.Ed.2d 569 (1989); Duest V. State, 462 So.2d 446

(Fla. 1985); Delap v. State, 440 So.2d 1242 (Fla. 1983), cert. denied, 467 U.S. 1264, 104 S.Ct. 3559, 82 L.Ed.2d 860 (1984); Farmer v. City of Ft. Lauderdale, 427 So.2d 187 (Fla.), cert. denied, 464 U.S. 816, 104 S.Ct. 74, 78 L.Ed.2d 86 (1983); Ferguson v. State, 417 So.2d 639 (Fla. 1982); State v. Cumbie, 380 So.2d 1031 (Fla. 1980); State v. Pardo, 16 F.L.W. D1791 (Fla. 3d DCA 1991); Davis v. State, 569 So.2d 1317 (Fla. 1st DCA 1990); Gonzalez v. State, 511 So.2d 703 (Fla. 3d DCA 1987); Marshall v. State, 439 So.2d 973 (Fla. 3d DCA 1983).

their property. For the same reason, the trial court erred in not enforcing by injunctive relief the right of the Perlinis to have a mailbox on lot 25. However, we affirm the trial court's denial of damages regarding the mailbox because we conclude that the record supports the trial court's factual finding that the Perlinis failed to prove damages.

We shall next address the issues raised by the Association's cross-appeal. First, the Association's attack on the injunctive relief afforded it by the trial court is moot because we have decided that the granting of any injunctive relief is not supported by the record. For this reason any claim of damages by the Association due to the Perlinis' practice of driving over the equestrian easement is also precluded.

[6] Second, the Association argues that the trial court erred in denying its request for declaratory judgment establishing the Associations' right to erect a fence on the equestrian easement. We have pointed out that this easement is a nonexclusive easement and, therefore, the Perlinis are entitled to use their land in any manner so long as the use does not interfere with the Association's rights under the easement. ***Stephens,*** Further, the burden created by this equestrian easement over the Perlinis' property cannot be increased beyond that reasonably contemplated at the time of its creation to prevent the Perlinis from having access and egress to their land over which the easement is located. *Easton.*

Third, the Association's claim that the trial court erred in not awarding it attorney's fees is now moot. The Association would only be entitled to attorney's fees under the declaration of restrictions if the Association succeeded in any proceeding to compel compliance with any applicable restriction. In the instant case, the Association was not successful.

AFFIRMED in part; REVERSED in part and REMANDED.

HARRIS and PETERSON, JJ., concur.

KEY NUMBER SYSTEM

**STATE of Florida, A pellant,**

**v.**

**Norman Arthur BROWN,** Appellee.

**No. 90–3280.**

District Court of Appeal of Florida, Fourth District.

July 3, 1991.

Rehearing Denied Aug. 23, 1991.

Appeal from the Circuit Court for Broward County; Robert W. Tyson, Jr., Judge.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Joseph A. Tringali, Asst. Atty. Gen., West Palm Beach, for appellant.

R.H. Bo Hitchcock of Hitchcock & Cunningham, P.A., Fort Lauderdale, for appellee.

**PER CURIAM.**

We reverse and remand for resentencing on the authority of ***State v. Lane,*** *582* So.2d 77 (Fla. 4th DCA 1991), *State v. Baxter*, 581 So.2d 937 (Fla. 4th DCA 1991) and ***State v. Ross,*** *447* So.2d 1380 (Fla. 4th DCA 1984).

**REVERSED** *AND* **REMANDED.**

LETTS, GLICKSTEIN and **DELL,** JJ., concur.

WEST KEY NUMBER SYSTEM

**The STATE of Florida, Petitioner,**

**v.**

**Jaimes Antonio** PARDO, a/k/a **Jay Pardo** Foliacci, **a/k/a Anthony James Pardo Foliacci, Respondent.**

**No. 91–1215.**

District Court of Appeal of Florida, Third District.

July 9, 1991.

**State** petitioned for writ of certiorari to quash an order of the Circuit **Court,**

Dade County, Richard V. Margolius, J., excluding child victim's hearsay statements from introduction into evidence in prosecution for capital sexual battery on a child seven years of age. The District Court of Appeal, Cope, J., held that child's availability to testify at trial does not preclude reception of child's out-of-court statement if statement is otherwise admissible under statutory child victim exception to hearsay rule.

Certiorari granted; question certified; conflict certified.

**1. Courts ⇐91(2)**

Decisions of other District Courts of Appeal should be treated by trial courts in same way that District Court of Appeal treats those decisions: as persuasive authority; such decisions are deserving of careful consideration by trial courts but are not binding on them.

**2. Infanta ⇐20**

Child's availability to testify at trial does not preclude reception of child's out-of-court statement if the statement is otherwise admissible under a statutory child victim exception to the hearsay rule. West's F.S.A. § 90.803(23).

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Robert A. Butterworth, Atty. Gen., and Anita J. Gay, Asst. Atty. Gen., for petitioner.

Kaeiser & Potolsky and Clayton R. Kaeiser, Miami, for respondent.

Before **FERGUSON**, COPE and **GERSTEN, JJ.**

COPE, Judge.

The State petitions for a writ of certiorari to quash the trial court's order excluding a child victim's hearsay statements from introduction into evidence at trial. The question presented is whether a child's hearsay statements which qualify for the child victim hearsay exception, § 90.803(23), Florida Statutes (1989), must be excluded from evidence whenever the child is able to testify fully and completely at trial, on the ground that admission of the child's prior consistent statements would constitute impermissible bolstering of the child's testimony. We grant the writ and quash the order under review.

Defendant Jaimes Pardo is-charged with seven counts of capital sexual battery on a child who was seven years of age at the time of the events in question. Pursuant to subsection 90.803(23), the State filed notices of intent to rely on hearsay statements made by the child victim to several individuals. The trial court conducted a hearing as contemplated by the statute in order to ascertain the reliability of the statements. The court viewed a videotape interview of the child victim and reviewed depositions of the child victim and the rape treatment center physician. The court took testimony from mental health counselor Dawn Bralow, rape treatment center physician Dr. Raquel Bild-Libbin, and state attorney children's center interviewer Merci Restani.

At the conclusion of the hearing, the court found that the child's statements made to the three witnesses contained sufficient indicia of reliability to render them admissible pursuant to subsection 90.803(23). The court made the requisite findings under the statute, and those findings are not challenged here. The court also found that the State intended to call the child to testify at trial, and that the child had the ability to testify fully concerning all of the elements of the alleged crimes.

The trial court concluded, however, that it was required to exclude the hearsay statements under authority of Kopko *v.* State, 577 So.2d 956 (Fla. 5th DCA 1991). Kopko holds that where the child victim is able to testify fully regarding the circumstances of the alleged sexual abuse, the child's prior consistent statements may not be introduced, even though the criteria of subsection 90.803(23) are satisfied. In the present case the trial court expressed disagreement with Kopko but concluded that in the absence of a decision from this court or the Florida Supreme Court, the trial court was obliged to follow Kopko. The court entered an order excluding the child's

hearsay statements under authority of *Kopko* while encouraging the State to seek review here.

[1] As a preliminary matter, we address the weight to be given by trial courts to the decisions of other district courts of appeal where there is no controlling decision of this court or the Florida Supreme Court. In our view, decisions of other district courts of appeal should be treated by trial courts in the same way that this court treats such decisions: as persuasive authority. Such decisions are deserving of careful consideration by trial courts in this district, but are not binding on them. Smith *v. Venus Condominium Ass'n, Inc.*, 343 So.2d 1284, 1285 (Fla. 1st DCA 1976), *quashed on other grounds*, 352 So.2d 1169 (Fla.1977). *Contra In re* E.B.L., 544 So.2d 333, 336 (Fla. 2d DCA 1989); *State v. Hayes*, 333 So.2d 51, 53 (Fla. 4th DCA 1976).

The trial court's ultimate obligation is to ascertain and follow the law. The interests of justice are best served where trial judges have the opportunity and responsibility to reach a reasoned decision after consideration of all pertinent authority. In the present case there were sound reasons to disagree with the *Kopko* decision, and the trial court was entitled to do so.

As a second preliminary matter, we note that the order below does not involve any ruling on the admissibility of statements made for purposes of medical diagnosis or treatment under subsection 90.803(4), Florida Statutes (1989). *See generally State v. Ochoa*, 576 So.2d 854 (Fla. 3d DCA 1991). The issue before us involves only the proper interpretation of subsection 90.803(23).[1]

[2] Turning to the merits of the petition, subsection 90.803(23) is a hearsay exception fox child victims of sexual or other abuse who are eleven years of age or younger. It was added to the Evidence Code in 1985, *see* ch. 85-53, § 4, Laws of Fla., and placed Within section 90.803—a group of hearsay exceptions which may be invoked whether or not the hearsay declarant—in this case, the child—is available to testify at trial.[2] As a statutory matter, the text of subsection 90.803(23) explicitly provides that the child's hearsay statements qualify for the exception if the child testifies. *Id.* § 90.803(23)(a)(2). In the present case, once the court determined that the criteria of subsection 90.803(23) had been satisfied, the hearsay rule was overcome and the child's statements to the three specific individuals could not be excluded on the ground that they are hearsay.

The Kopko court examined the line of Florida decisions holding that where a witness testifies at trial, the court may not (subject to certain exceptions) also admit the prior consistent statements of the witness. Kopko, 577 So.2d at 960. With respect to adult witnesses, this has been seen as unfair bolstering of the credibility of the testifying witness. Id; *see, e.g., Demps v. State*, 462 So.2d 1074, 1075 (Fla.1984); *Reyes v. State*, 680 So.2d 309 (Fla. 3d DCA 1991); *Lazarowicz v. State*, 561 So.2d 392 (Fla. 3d DCA 1990); *Allison v. Stale*, 162 So.2d 922, 924 (Fla. 1st DCA 1964). This general policy is now reflected in provisions of the Evidence Code. *See* §§ 90.801(1)(c), (2)(b), 90,802, Fla.Stat. (1989).

Based on the concern to avoid unfair bolstering, the Kopko court said:

> ***Accordingly we hold that where a child victim is able at trial tofully and accurately recount the crime perpetrated on him or her, it is error also to allow the introduction of prior consistent statements made by the child.*** Where the child's out-of-court statements are

1. As explained in *Ochoa*, statements by a child declarant for purposes of medical diagnosis or treatment ordinarily qualify for the hearsay exception Set forth in subsection 90.803(4). Under a traditional analysis, however. that hearsay exception is limited to those statements deemed necessary for purposes of medical diagnosis or treatment and ordinarily does not apply to the child's hearsay statements identifying the perpetrator. It appears that the State has proceeded under subsection 90.803(23) with respect to the rape treatment center physician in order to utilize the broader scope of the hearsay exception under subsection 90.803(23).

2. By contrast, the hearsay exception set forth in section 90.804, Florida Statutes, may only be invoked where the declarant is unavailable as a witness.

needed to provide evidence of any aspect of the crime or related events which the testifying or unavailable child cannot adequately supply, such out-of-court statements are available pursuant to section 90.803(23).

....

... Appellant is entitled to a new trial in which ***... the child victim's version of events can be submitted by the state to the jury once—unless the defense opens the door to more.***

Kopko, 577 So.2d at 962-63 (emphasis added).

We are unable to subscribe to the reasoning of the Kopko court. The limitation which has been read into subsection 90.803(23) runs counter to the plain language of the statute. By its placement in section 90.803, as well as by the explicit language of subsection 90.803(23) itself, a child victim's hearsay statement cannot be objected to on hearsay grounds where the criteria of subsection 90.803(23) are met—whether or not the child testifies at trial.

That is not, however, the end of the inquiry. Although the child's statements cannot be excluded as hearsay, the statements, like any other evidence, are subject to analysis under section **90.403,** Florida Statutes **(1989).** Thus, the defendant can move for exclusion of the evidence under section **90.403** "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence."

The Kopko court took the position that the presentation of the child's prior consistent statements through the testimony of the various professionals who had interviewed the child would be unfair to the defendant. As a result, the Kopko court imposed a categorical "one witness" limitation where, as here, the child victim was able to testify fully about the events in question. While the Evidence Code does not support the categorical limitation devised by Kopko, it does contain a mechanism in section **90.403** by which to evaluate any claim that the probative value is substantially outweighed by the danger of unfair prejudice.

We conclude that the order in limine should not have been entered on the basis of Kopko, and accordingly quash the order under review. This ruling is without prejudice to the defendant's right to submit a motion under section **90.403.** We do not in any way intimate a view on the merits of any such motion.

We certify express and direct conflict with Kopko *v.* State. We certify that we have passed on the following question of great public importance:

WHERE A CHILD VICTIM'S HEARSAY STATEMENTS SATISFY SUBSECTION 90.803(23), FLORIDA STATUTES (1989), AND THE CHILD IS ABLE TO TESTIFY FULLY AT TRIAL, MUST THE HEARSAY STATEMENTS BE EXCLUDED SOLELY BECAUSE THEY ARE PRIOR CONSISTENT STATEMENTS BY THE CHILD, OR IS THE TEST FOR EXCLUSION THAT FOUND IN SECTION 90.403, FLORIDA STATUTES (1989)?

Certiorari granted; question certified; conflict certified.


**The STATE** of Florida, Petitioner,

**v.**

**Michael ROLLE, Respondent.**

**No. 91–1210.**

District Court of Appeal of **Florida,** Third District,

July 30, **1991.**

An Appeal from the Circuit Court of Dade County; Phillip Knight, Judge.

Robert A. Butterworth, Atty. Gen., and Anita J. Gay, Asst. Atty. Gen., for petitioner.