IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellee/Petitioner,

v. CASE NO. 81,263

JACK TIMOTHY TOWNSEND,

Appellant/Respondent.

_____/

RESPONDENT'S ANSWER BRIEF ON THE MERITS

JAMES G. KONTOS
Law Firm of Daniel S. Ciener
Fla. Bar #788554
255 N.Grove Street, Suite A
Merritt Island, FL 32953
(407) 452-2433

COUNSEL FOR RESPONDENT

Cross appeal not filed

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STATEMENT OF THE CASE AND FACTS

Respondent adds the following to Petitioner's Statement of the Case and Facts:

The Fifth District Court of Appeals also appears to have reversed the defendant's conviction in Townsend II due to the inadequacy of the trial court's factual findings regarding the time, content, and circumstances of the child hearsay admitted into evidence at his trial.

[PETITIONER HAS ALSO SUPPLIED A COPY OF THE STATEMENT OF FACTS AND STATEMENT OF THE CASE SUBMITTED TO THE FIFTH DISTRICT COURT OF APPEALS AS AN APPENDIX TO THIS APPEAL.]

SUMMARY OF ARGUMENT

ARGUMENT I: The issue certified to this Court by the Fifth District Court of Appeals was properly before that court because it had been raised in a prior appeal in this same case; it was not the sole basis for the court's reversal of the defendant's conviction; and the error was fundamental; and even if it was not properly raised an appellate court has the inherent power and duty to correct an incorrect prior ruling of that court.

ARGUMENT II: Unavailability under the Child Hearsay Statute, section 90.803(23), Florida Statutes (1987), does not equate to incompetence under section 90.603, Florida Statutes, because the unavailability subsections all require an event or condition to have occurred after the hearsay had been uttered and assume the competency of the declarant at the time the statement was made.

ARGUMENT III: The defendant was denied his right of confrontation because he was never given the chance to establish through cross-examination of the child the defense that the child was manipulated and coached.

ARGUMENT IV: Section 90.803(23)(c), Florida Statutes, requires that the trial court make specific findings of fact on the record to support the introduction of child's hearsay into evidence. In the instant case, the trial court did not make specific factual findings. The trial court's oral order merely restated the conclusory language of the statute. Therefore, the child's hearsay statements should not have been admitted in the defendant's trial.

ARGUMENT V: The hearsay statements repeated by Dr. Woods were not admissible under the medical diagnosis exception to the hearsay rule because there was no showing that the child knew that the statements were made for the purpose of diagnosis or treatment.

ARGUMENT VI: The errors that occurred in the defendant's case were not harmless because the evidence was not overwhelming.

ARGUMENT VII: Section 90.803(23), Florida Statutes, and the Confrontation Clause of the United States and Florida Constitutions, requires that the time, content and circumstances of child hearsay statements provide particularized guarantees of trustworthiness before they can be admitted into evidence. In the instant case, these circumstances did not provide sufficient indicia of reliability to allow the statements to be admitted into evidence. Therefore, the admissions of the statements at the defendant's trial was error.

ARGUMENT VIII: At the defendant's trial Dr. Medea Woods, Psy.D., was qualified as an expert in clinical psychology and the diagnosis and treatment of sexually abused children. This qualification was error as the facts testified to by Dr. Woods indicated she was not an expert in the area of the diagnosis of sexually abused children.

ARGUMENT IX: An expert witness is not permitted to give her opinion that the defendant committed the crime he is on trial for. In the instant case, Dr. Woods, on several occasions, gave her opinion that the defendant had sexually abused the child. After two of these comments the defendant

moved for a mistrial. The denial of the defendant's motion for mistrial and the admission of the Doctor's inadmissible opinion was reversible error.

ARGUMENT X: An expert witness is not permitted to comment on the credibility of another witness in a case. In the instant case, Dr. Woods commented on the credibility of the alleged child victim. As Dr. Woods had continually related the child's actions and statements which supported her conclusion that the child had been sexually abused by the defendant the effect of this testimony denied the defendant a fair trial.

ARGUMENT XI: There were numerous unobjected to statements of Dr. Woods which were inadmissible. These statements included: unresponsive answers; prejudicial remarks; irrelevant testimony; and hearsay which had previously been ruled inadmissible by the trial court. The cumulative effect of this testimony denied the defendant a fair trial.

ARGUMENT I

THERE WAS NO ERROR IN THE FIFTH DISTRICT COURT ADDRESSING THE ISSUE CERTIFIED TO THIS COURT.

Petitioner in it's initial argument states that the District Court based it's reversal of the defendant's conviction on an issue not raised on appeal and that therefore the District Court was "without jurisdiction to reverse on this basis." (Petitioner's Initial Brief, p. 5). Petitioner, however, cites no law in support of this position.

The Fifth District Court of Appeal did precisely what an appellate court should do: it evaluated the facts of the defendant's case through the trial transcripts, briefs and oral argument; applied the law to these facts; and issued an opinion that was just and correct. It would be manifestly unjust for an appellate court to let a prior, incorrect ruling of law stay in effect when the same case in which that incorrect ruling of law was issued is again before the appellate court.

Furthermore, the appellate court in Townsend v. State, 613 So.2d 534 (Fla. 5th DCA 1993), (Townsend II), was on notice of the issue petitioner claims it reversed on. This precise issue had been decided in the previous appeal by the state in this same case. State v. Townsend, 556 So.2d 817 (Fla. 5th DCA 1990), (Townsend I). Also, a significant amount of time was spent in a discussion of Townsend I during oral arguments in Townsend II. Therefore, this issue was properly before the appellate court.

The Fifth District Court of Appeals also based it's reversal of the defendant's conviction on two additional grounds: the failure of the trial court to make sufficient factual findings on the record to support the admission of the child hearsay statements; and the failure of the introduction of hearsay in this case to meet Confrontation Clause requirements. Townsend II, at footnote 2, 535, 538, 539. Both of these issues were also raised by appellant in his appeal. Thus, even if the issue petitioner refers to had not been properly raised, the appellate court could provide additional reasons for it's reversal of the defendant's convictions just as a trial judge's correct ruling of law can be upheld on grounds never raised before that judge.

Finally, the error corrected by the Fifth District Court of Appeal was of such a magnitude as to constitute fundamental error, therefore making any objection or raising of the issue unnecessary.

Petitioner further argues that "this issue was not preserved at the trial level." (Petitioner's Initial Brief, p. 5). If petitioner is referring to the issue that the District Court certified to this Court, petitioner is incorrect. This issue was raised by defendant's trial counsel in a pre-trial motion and was the basis of the state's appeal and appellate court's decision in Townsend I.

If, however, petitioner is referring to the failure to object to the inadequacy of the trial judge's factual findings, respondent relies on the argument made to the Fifth District Court of Appeals: that the individual and cumulative effect of all the errors in respondent's trial

rose to the level of fundamental error. Cf. Fuller v. State, 540 So.2d 182 (Fla. 5th DCA 1989), [The cumulative effect of unobjected errors can be so fundamental as to require reversal.]

ARGUMENT II

THE FIFTH DISTRICT COURT OF APPEALS WAS CORRECT IN HOLDING THAT A FINDING OF INCOMPETENCE UNDER SECTION 90.603, FLORIDA STATUTES, DOES NOT EQUATE TO A FINDING OF UNAVAILABILITY UNDER SECTIONS 90.803(23) AND 90.804, FLORIDA STATUTES.

Assuming this Court accepts jurisdiction in this case the question before it is that question certified by the Fifth District Court of Appeal in Townsend v. State, 613 So.2d 534 (Fla. 5th DCA 1993):

> DOES A FINDING OF INCOMPETENCY TO TESTIFY BECAUSE ONE IS UNABLE TO RECOGNIZE THE DUTY AND OBLIGATION TO TELL THE TRUTH SATISFY THE LEGISLATIVE "TESTIFY OR BE UNAVAILABLE" REQUIREMENT OF SECTION 90.803(23)(A)(2)?

The answer to this question is and should be NO and the analysis of Judge Harris in Townsend II should be adopted by this Court.

Section 90.803(23), Florida Statutes (1987), provides that child hearsay describing sexual abuse is admissible if:

> 2. The child either:
>
> a. Testifies; or
>
> b. Is unavailable as a witness . . . . Unavailability shall include a finding by the court that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm, in addition to findings pursuant to s. 90.804(1)

Thus, the legislature has determined that a child is unavailable for the purposes of section 90.803(23) under any one of six situations: the "substantial likelihood of severe

emotional or mental harm" of 90.803(23), and the five definitions in section 90.804(1). The definition relied upon by petitioner to support it's contention that "incompetence" is also "unavailability" is section 90.804(1)(d), Florida Statutes, which states:

> "Unavailability as a witness" means that the declarant:
>
> (d) Is unable to be present or to testify at the hearing because of death or because of then existing physical or mental illness or infirmity.

To understand the meaning of the words "then existing," and the intent of this subsection, it is necessary to read subsection (d) in conjunction with the other four subsections of section 90.804(1).

The other four definitions of unavailability of section 90.804(1) all relate to a condition or event that did not exist at the time the statement was made, but rather relate to a condition or event occurring <u>after</u> the uttering of the hearsay. These definitions are as follows:

> "Unavailability as a witness" means that the declarant:
>
> (a) Is exempted by a ruling of a court on the ground of privilege from testifying concerning the subject matter of his statement;
>
> (b) Persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so;
>
> (c) Has suffered a lack of memory of the subject matter of his statement so as to destroy his effectiveness as a witness during the trial;
>
> (e) Is absent from the hearing, and the proponent of his statement has been unable to procure his attendance or testimony by process or other reasonable means.

Section (a) refers to a ruling of the court which could only have occurred after the uttering of the hearsay. Similarly, a refusal to testify (subsection b) would have to be a refusal to testify after a statement had been made, because if there was a refusal to make a statement in the first place that statement would not exist. Subsection (c) also refers to a situation arising after the making of a statement: lack of memory must occur after the making of some statement, because if an individual doesn't remember what to say before he speaks, the statement will never be made. And finally, in subsection (e), the absence of the declarant from a hearing must occur after the statement was made because if the declarant was not present when the statement was supposed to have been made the statement could not have been made.

Merely going through this analysis leads to the conclusion that these subsections can only be understood if they are read to require some event occurring after the uttering of the hearsay statement. Thus, by reading the other four subsections of section 90.804(1), it becomes clear that the legislative intent in enacting this entire section (including subsection (d)) was to allow for the admissibility of hearsay when some event or condition occurring after the uttering of the hearsay rendered the declarant unable or unwilling to testify in court as to the subject matter of the statement.

A close reading of subsection (d) results in the same conclusion. Subsection (d) states that an individual is unavailable if the declarant is "unable to be present or to testify at the hearing because of death or because of then

existing physical or mental illness or infirmity." This subsection provides for two conditions: 1) death, or 2) then existing physical or mental infirmity. As to the first condition, if a death of the declarant has occurred, the death must have been after the uttering of the statement or the statement could not have been uttered. Again, this is a condition which could not have existed at the time the statement was made, but rather occurred after it was uttered. Reading this first condition covered in subsection (d) in conjunction with the second condition leads to the logical conclusion that the legislature also intended the "then existing physical or mental infirmity" to have occurred after the statement was made. Otherwise the legislature would have specifically stated that the physical or mental infirmity could exist at the time the statement was made and would have included this condition in its own separate subsection.

Furthermore, if you delete the first condition (death) from the language in subsection (d), the meaning of the remaining language becomes more clear. As modified the statute would read as follows: unavailability as a witness means unable to testify at the hearing because of then existing physical or mental illness or infirmity. The term then existing relates to at the hearing and refers to a condition which has occurred after the statement has been uttered. If petitioner's position were correct there would have been no need for the legislature to include the words then existing in the statute. If the legislature had not included this language the statute would merely say "unable to testify at the hearing because of physical or mental

illness or infirmity." This language would have encompassed both a then existing and previously existing illness or infirmity. However, by limiting the statute with the then existing language the legislature made it's intent clear: the illness or infirmity must have occurred after the statement was made and must exist at the time of the hearing.

Thus, an analysis of the clear language of subsection (d); a comparison of the two conditions contemplated in subsection (d); and a comparison of all the other subsections of 90.804(1), result in the logical conclusion that subsection (d) refers to a condition which did not exist at the time the statement was made but that occurred at some time afterwards. This analysis also supports Judge Harris' statement in Townsend II that "all the section 90.804 definitions of unavailability . . . assume the competency of the witness." Townsend v. State, 613 So.2d 534, 535 (Fla. 5th DCA 1993).

What petitioner is asking this Court to do is to rewrite section 90.804(1) to include in its definition of unavailability a finding of incompetency which existed from the time the statement was made until the hearing at which the statement is being offered. Should the legislature desire to do so it will amend section 90.804(1) or 90.803(23) to include this situation that petitioner wishes it to cover. However, until that time, the language of the statute is clear and does not encompass the situation petitioner wishes it did.

In support if it's argument asking this court to rewrite sections 90.804(1) and 90.803(23), petitioner states that a reading of the statute which requires the physical or mental infirmity to arise after the uttering of the hearsay would decimate the entire hearsay exception because the statements of very young children and mentally defective children who are most vulnerable to sexual abuse would be excluded. (Petitioner's Initial Brief, p. 8). This argument, however, is incorrect.

The child hearsay exception remains a very powerful weapon in the prosecutor's arsenal. Children who are unable to testify because the trauma would cause them serious, long term effects can still have their cases prosecuted with the use of their hearsay statements. Furthermore, the hearsay statements of children that fall within the traditional hearsay exceptions, (such as excited utterances and spontaneous statements) are still admissible. Thus, a reading of section 90.804(1) which comports with its plain language and obvious legislative intent, would not have the devastating effect on the prosecution of child sexual abuse cases as petitioner claims. Rather, such a reading ensures that an innocent defendant is not faced with evidence that is impossible for him to confront and refute by means other than denying the charges against him.

Unfortunately, in our society many people manipulate children to say things that are not true; including vindictive ex-wives and actual perpetrators of crimes against children. Once manipulated, a child may then be able to convince other "unbiased" individuals that what she has been

told to say is true. Often, the only way to establish the coaching and manipulating of the child is through a skillful cross-examination of the child herself. To rule as petitioner asks this Court to do would deny innocent defendant's what may be their only chance to establish the unreliability of a child's statements against them.

Furthermore, to allow the hearsay statements of an incompetent witness to be presented to the jury results in the very problem articulated by Judge Harris in his opinion in Townsend II. As Judge Harris stated:

> [a suggestion] that hearsay evidence may somehow be better evidence than the direct evidence given by the declarant . . . implies that the direct evidence of the witness which the legislature has mandated the jury not be permitted to hear because of its inherent untrustworthiness, is somehow improved and made more believable (and therefore judicially determined to be admissible) by filtering it through hearsay testimony (often of biased and hostile witnesses). Townsend v. State, 613 So.2d 534, 537 (Fla. 5th DCA 1993).

To allow the state to proceed in such a manner in cases where child hearsay is the chief evidence against a defendant simply allows the state to present potentially biased and coached statements through more reliable and credible adult witnesses, without allowing the defendant the opportunity to cross-examine the declarant who has been coached and manipulated.

Petitioner further argues that even if Judge Harris is correct, and the analysis of availability must occur at the time of trial, then the hearsay is still admissible because at the time of trial in the instant case the child was incompetent. This argument, however, is incorrect, because a determination of unavailability has two prongs:

1) unavailability at the time of the hearing; and 2) a change in the condition of the declarant that has occurred after the hearsay was uttered and has rendered the declarant unable or unwilling to testify. It is this lack of a change in the condition of the declarant that renders the hearsay inadmissible in the instant case because the declarant was incompetent for the same reason both before and after the hearsay statements were made. Thus, the hearsay statements in the instant case are not admissible under the section 90.804(1) definitions of unavailability.

In support of it's argument petitioner claims it's position is consistent with the United States Supreme Court's decision in Idaho v. Wright, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990), because "the court found that a child who had been ruled incapable of communicating with the jury was 'unavailable' within the meaning of the Confrontation Clause." (Petitioner's Initial Brief, p. 9). A close reading of Wright, however, disputes petitioner's contention.

In Wright, the Supreme Court specifically pointed out that the trial court only determined the child was "not capable of communicating to the jury" and did not make the findings necessary to determine the child incompetent to testify. The court further stated that:

> the more reasonable inference is that, by ruling that the statements were admissible under Idaho's residual hearsay exception, the trial court implicitly found that the younger daughter, at the time she made the statements, was capable of receiving just impressions of the facts and of relating them truly.

This finding of the trial judge in Wright is directly contrary to the facts of the instant case where "the parties stipulated the child victim was disqualified because she was not able to understand the duty or obligation to tell the truth because of her chronological age." (Petitioner's Initial Brief, p. 7). Thus, Wright does not equate incompetency to testify with unavailability and is inconsistent with petitioner's position in the instant case.

Finally, petitioner claims that the Fifth District in both Townsend I, and Townsend II, determined that the child was unavailable under the "substantial likelihood of severe emotional or mental harm" language of section 90.803(23). However, this claim is incorrect. In Townsend II, Judge Harris stated that:

> we did not find this error in the court's evaluation of the credibility of the testimony but rather in the court's reliance on its summary of the psychologist's testimony which was contrary to the psychologist's testimony in the record. Because of this contradiction -- either the court misheard the testimony or the record is inaccurate -- we held that this finding of availability should not stand unless the trial judge reconsidered the issue based on a review of the psychologist's testimony. . . . However, because we felt bound by the dictum in Perez v. State, 536 So.2d 206 (Fla. 1988), cert. denied, 492 U.S. 923, 109 S.Ct. 2353, 106 L.Ed.2d 599 (1989), we believed the child's unavailability was immaterial and discouraged the trial court from reconsidering the issue of harm to the child if she testified. The issue was therefore not revisited before trial. [Emphasis added] Townsend v. State, 613 So.2d 534, 536 (Fla. 5th DCA 1993).

Thus, the appellate court did not determine that the child was unavailable due to a substantial likelihood of severe emotional or mental harm, but rather determined that the trial judge should reconsider this issue. However,

reconsideration was unnecessary because the child was unavailable under subsection (d) of 90.804(1). (A ruling receded from in Townsend II.) Therefore, the trial court has never reconsidered the issue of substantial likelihood of severe emotional or mental harm and such a reconsideration is necessary before a finding of unavailability could be sustained.

ARGUMENT III

BASED ON THE FACTS OF THE INSTANT CASE THE DEFENDANT'S RIGHT OF CONFRONTATION AS GUARANTEED BY THE UNITED STATES AND FLORIDA CONSTITUTIONS WAS VIOLATED WHEN THE CHILD HEARSAY WAS ADMITTED INTO EVIDENCE.

Petitioner claims that defendant's failure to raise the Confrontation Clause issue at trial means this issue was not preserved for appellate review. However, respondent relies on the same argument made to the Fifth District Court of Appeals: that the individual and cumulative effect of all the errors in respondent's trial rose to the level of fundamental error. Cf. Fuller v. State, 540 So.2d 182 (Fla. 5th DCA 1989), [The cumulative effect of unobjected errors can be so fundamental as to require reversal.]

To understand respondent's Confrontation Clause argument, and the Fifth District Court's ruling, one must first understand the facts of this case. The alleged child victim never testified at trial, never testified at any pre-trial hearing, and never appeared before the trial judge. At the time the allegations of penetration arose the defendant and the mother of the child were separated and divorce proceedings were in progress. (2nd Supp. R. 4, 9-10). At that time the mother and child were living with the child's

maternal grandmother and her family. (R. 259). The child's maternal grandmother hated the defendant. (R. 516, 588, 599, 612). The defendant told an H.R.S. worker that he thought the abuse report had been made by the mother because the divorce was pending and she wanted to limit visitation. (R. 549). (See statement of facts from Appellate's Initial Brief to the Fifth District Court of Appeals in Townsend II, Appendix p. 1-4).

Thus, Townsend never had the chance to face his accuser and attempt to establish through cross-examination the basis of his defense: that the child had been manipulated and coached by her mother and maternal grandmother. Instead, Townsend was faced with a parade of "competent" witnesses who repeated statements of a witness who was herself incompetent to testify. This is the Confrontation Clause problem in the instant case. There are indeed situations where cross-examination would do little to test the reliability of an out of court statement (such as the traditional hearsay exceptions). There may also be situations involving the child hearsay exception where the necessity of cross-examination is lessened because there is no indication of prior animosity between the family of the child and the defendant and no evidence of coaching or motivation of the family to manipulate the child. However, the facts in the instant case do not describe one of these situations. To allow the hearsay statements of an incompetent, two year and nine month old child to be filtered through adults (some of which had strong motives to lie) without allowing the defendant a chance to confront and cross-examine the very

witness who made the accusations in order to show the manipulation and coaching which occurred, is certainly a denial of the defendant's right of confrontation under the Sixth Amendment to the United States Constitution and Article 1, Section 16 of the Florida Constitution. Therefore, under the specific facts of this case, the defendant's Right of Confrontation was violated when the child hearsay was admitted even though the child was incompetent to testify.

In it's argument, petitioner claims that the defendant's Right of Confrontation was not impinged and in support of it's position claims that this Court, in Perez v. State, 536 So.2d 206 (Fla. 1988), cert. denied, 492 U.S. 923, 109 S.Ct. 2353, 106 L.Ed.2d 599 (1989), "rejected the view that the confrontation clause bars the use of any out-of-court statements when the declarant is unavailable for cross-examination." (Petitioner's Initial Brief, p. 10). However, petitioner's reliance on this language in Perez is mistaken. It has long been settled that traditional hearsay exceptions contain sufficient guarantees of trustworthiness to survive Confrontation Clause challenges. The problem in the instant case, however, is that the specific factual situation confronted by the Fifth District Court in Townsend II did not survive this challenge.

Additionally, in rendering its decision in Perez, this Court did not have the benefit of the United States Supreme Court's discussion, in Idaho v. Wright, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990), of the Confrontation Clause as it applies to child hearsay exceptions. One of the factors relied upon by this Court in Perez as establishing

the particularized guarantees of trustworthiness necessary for the Florida child hearsay exception to pass Confrontation Clause scrutiny was the existence of corroborative evidence of abuse. However, in Idaho v. Wright, the Supreme Court stated that:

> we are unpersuaded by the State's contention that evidence corroborating the truth of a hearsay statement may properly support a finding that the statement bears "particularized guarantees of trustworthiness." To be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial."

Thus, given the Supreme Court's discussion in Idaho v. Wright, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990), Florida's child hearsay exception should be declared by this Court to be unconstitutional because it violates the defendant's right to confrontation of the Florida and United States Constitutions.[1] However, even if the child hearsay statute does pass Confrontation Clause scrutiny, the application of the child hearsay statute to the facts of the instant case clearly do deny this defendant his right of confrontation.

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[1] It should also be noted that in Idaho v. Wright, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990), the Supreme Court cited Ohio v. Roberts, 448 U.S. 56 (1980), as the case that set forth the general approach for determining when hearsay statements meet the requirements of the Confrontation Clause. However, the Supreme Court in Wright further stated that the hearsay in Roberts "bore sufficient indicia of reliability, particularly because defense counsel had an adequate opportunity to cross-examine the declarant at the preliminary hearing." In the instant case the defendant never had a chance to cross-examine the alleged victim.

ARGUMENT IV

THE FACTUAL FINDINGS OF THE TRIAL JUDGE WERE INSUFFICIENT TO MEET THE REQUIREMENTS OF IDAHO V. WRIGHT AND SECTION 90.803(23), FLORIDA STATUTES

Petitioner claims that the trial judge made sufficient factual findings regarding the admissibility of the hearsay statements and made individual findings as to the reliability of each statement. The record, however, does not support this assertion.

The trial judge did not make any factual findings but rather merely named the statement he was considering and then gave his conclusion that the circumstances surrounding the statement showed it was trustworthy. The trial court's ruling as to each hearsay statement actually presented by the prosecution at trial are as follows:

1st statement, from Dr. Medea Woods:

> "I find that statement is reliable and can be admitted before the jury." (1st Supp. R. 4).

2nd statement, from Ronda Bordac:

> "I find that statement to have been reliably made. Time, contents and circumstances." (1st Supp. R. 4).

3rd statement, from Ronda Bordac:

> "That statement is admissible. Child-Hearsay Statute." (1st Supp. R. 5).

4th statement, from Kathy Nabbie:

> "That statement shall be admitted to the jury." (1st Supp. R. 5).

5th statement, from Kathy Nabbie:

> "That statement shall be admitted." (1st Supp. R. 5).

6th statement, from Thelma Diaz:

> "That statement shall be admitted in the trial." (1st Supp. R. 6).

7th statement, from Lurinda Maria Chang-Fane:

> "I'm going to find time, place and circumstances are such that I can conclude it is reliable and will permit it." (R. 425).

Contrary to petitioner's claim, this conclusory recitation of the statutory language does not meet the procedural requirements of Idaho v. Wright. The Supreme Court in Idaho v. Wright, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990), stated that:

> unless an affirmative reason, arising from the circumstances in which the statement was made, provides a basis for rebutting the presumption that a hearsay statement is not worthy of reliance at trial, the Confrontation Clause requires exclusion of the out-of-court statement. [emphasis added]

Furthermore, the trial judge in Wright did recite specific factual findings into the record, however, even these factual findings were considered insufficient to pass Confrontation Clause analysis and allow the hearsay statements to be admitted into evidence. Idaho v. Wright, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990).

In the instant case no affirmative reasons were cited into the record by the trial judge, nor do they exist. Thus, the trial judge's conclusory recitations do not meet the procedural requirements of Idaho v. Wright.

These conclusory recitations also fail to meet the standards required in section 90.803(23), Florida Statutes. In determining the admissibility of child hearsay statements,

section 90.803(23)(c) requires that "the court shall make specific findings of fact, on the record, as to the basis for its ruling under this subsection."

In the instant case, the trial court made no specific factual findings as to any of the hearsay statements admitted into evidence. Florida Appellate Courts have consistently held that a trial judge must do more than just give conclusory recitations, and the failure to do so can be reversible error. Jaggers v. State, 536 So.2d 321 (Fla. 2d DCA 1988), Lacue v. State, 562 So.2d 388 (Fla. 4th DCA 1990), Weatherford v. State, 561 So.2d 629 (Fla. 1st DCA 1990), Fricke v. State, 561 So.2d 597 (Fla. 3rd DCA 1990). Thus, the trial judge's failure to comply with section 90.803(23)(c) in the instant case was reversible error.

ARGUMENT V

THE CHILD HEARSAY RECOUNTED THROUGH DR. WOODS WAS NOT ADMISSIBLE UNDER THE MEDICAL DIAGNOSIS EXCEPTION TO THE HEARSAY RULE.

Petitioner argues that the hearsay statement repeated by Dr. Woods was admissible under the medical diagnosis statute, section 90.803(4), Florida Statues. (Petitioner's Initial Brief p. 11). However, as argued to the Fifth District Court, the testimony of Dr. Woods was not admissible at trial under the medical diagnosis exception to hearsay.

In order for hearsay to be admissible under the medical diagnosis or treatment exception there must first be a showing by the state that: (a) the statements were made for the purposes of diagnosis or treatment, and (b) that the individual making the statements knew the statements were being made for this purpose. Begley v. State, 483 So.2d 70

(Fla. 4th DCA 1986), Lazarowicz v. State, 561 So.2d 392 (Fla. 3rd DCA 1990).

In the instant case there was no showing by the prosecutor at the trial that the child knew the statements were being made for the purpose of treatment. Furthermore, nowhere in the state's memorandum of law on the admissibility of the child's hearsay through the testimony of Dr. Woods or in the trial testimony of Dr. Woods herself is there any argument by the prosecutor that the hearsay is admissible under this theory.

At the time of the alleged statement the child was not yet four years old. (2nd Supp. R. 4, R. 451, 477, 478). The statement was not made to a medical doctor, nor was it made soon after the alleged sexual contact. (R. 445, 446, 477, 478, 2nd Supp. R. 15-16). Rather, the statement was made to a therapist nine months after the child's last contact with the defendant. (R. 477, 478, 2nd Supp. R. 15-16). Furthermore, there was no testimony that the child was ever told that it was important for her to tell the truth to Dr. Woods because she was being treated as a patient or that her statements to Dr. Woods were part of the treatment. Thus, there are no circumstances which indicate the child ever knew the statements were made for the purpose of treatment.

The reason a statement for the purpose of medical treatment is considered sufficiently reliable to allow it to be admitted into evidence despite its being hearsay is the notion that a person understands the duty to tell the truth to a physician. In the instant case, the age of the child, the time period which elapsed between the alleged

event and the statement, and the characterization of the doctor as a therapist and not a medical doctor, combine to establish no showing that the child knew the duty to tell the truth to Dr. Medea Woods.

Therefore, the prosecutor did not establish a sufficient predicate to allow the hearsay statement to be admitted into evidence under the medical purpose or treatment exception to the hearsay rule.

However, even if the proper predicate had been established it would be error for the portion of the child's statement identifying the defendant as the perpetrator to be admitted into evidence. Cf. Hanson v. State, 508 So.2d 780 (Fla. 4th DCA 1987). [It is error for a physician to recite the name of the person who had sex with the victim under the statements for purposes of medical diagnosis or treatment exception to the hearsay rule.]

ARGUMENT VI - THE ERRORS THAT OCCURRED IN THE INSTANT CASE WERE NOT HARMLESS

Finally, appellee argues that because the hearsay statements to Dr. Woods were admissible, any error in admitting the other statements is harmless. (Petitioner's Initial Brief P. 11). However, no error in this case can be considered harmless based on the following:

A defendant who testified at trial and denied all of the allegations against him. (R. 534-535).

An alleged victim who never appeared at the trial or before the trial judge.

Allegations made after the mother and defendant were separated and divorce proceedings were in progress and while the child was living in the home of the maternal grandmother. (R. 259, 2nd Supp. R. 4, 9-10).

A severe hatred of the defendant by the maternal grandmother of the child. (R. 516, 588, 599, 612).

A C.P.T. doctor who examined the child and stated that her hymenal opening was normal and that the only abnormality was some thickening, redundancy, and scar tissue around the central rim of the perforation of the hymenal membrane. (R. 352-353). The doctor also testified that the scar tissue could be the result of a child with long fingernails exploring herself. (R. 367, 369).

The Fifth District Court of Appeals opinion in Townsend II that stated "the medical evidence was, at best, inconclusive." Townsend II, footnote 1 at 535.

The Fifth District Court's statement that Townsend may be "the hapless victim of the most vicious child manipulation coming in the midst of a bitter and recriminating domestic battle." [emphasis added] Townsend II, at 534.

Such evidence from the record, and as viewed by the Fifth District Court of Appeal, is clearly not overwhelming evidence of the defendant's guilt and the errors committed in the instant case cannot be said to be harmless.

[RESPONDENT ALSO ASSERTS THE FOLLOWING ISSUES AS GROUNDS FOR REVERSAL. THESE ISSUES WERE ARGUED TO THE FIFTH DISTRICT COURT AND ARE ALSO CONTAINED IN APPELLANT'S INITIAL BRIEF TO THAT COURT]

ARGUMENT VII

THE TRIAL COURT ERRED IN ADMITTING THE SPECIFIC CHILD HEARSAY STATEMENTS BECAUSE THE TIME, CONTENT AND CIRCUMSTANCES OF THE STATEMENTS DO NOT PROVIDE SUFFICIENT INDICIA OF RELIABILITY

The hearsay exception created by section 90.803(23), Florida Statutes, is not a traditional, firmly rooted hearsay exception, and therefore the Confrontation Clause of the United States and Florida Constitutions requires that there be a showing of "particularized guarantees of trustworthiness" of the statements before they can be admitted into evidence. Idaho v. Wright, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990); Ohio v. Roberts, 448 U.S.

56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980); Perez v. State, 536 So.2d 206 (Fla. 1989).

Furthermore, when the prosecution attempts to introduce into evidence a statement under Florida's child hearsay statute, the Confrontation Clause creates a presumption that the statement is inadmissible and the burden is on the prosecution to present sufficient evidence to show that the hearsay has "particularized guarantees of trustworthiness." Idaho v. Wright, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990).

In addressing this requirement of trustworthiness of the hearsay statement, section 90.803(23)(a)(1), Florida Statutes, (1987), requires that "the time, content, and circumstances of the statement provide sufficient safeguards of reliability." The statute then goes on to list circumstances the court may consider in making it's determination as to the admissibility of the child hearsay. These circumstances include the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate. This list of circumstances to be considered, however, can only relate to the circumstances surrounding the actual making of the statement that render the declarant particularly worthy of belief. Idaho v. Wright, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990).

In the instant case, the evidence presented by the prosecution, and the evidence before the court, was insufficient to provide the required particularized guarantees of trustworthiness to allow the statements to be admitted into evidence.

The first hearsay statement of the child admitted into evidence at the trial was a statement allegedly made by the child to her mother, the estranged wife of the defendant, Ronda Bordac. (R. 256, 278). This statement was allegedly made by the child at least two days after her visit with the defendant during the weekend of July 22, 1988. At the time of this alleged statement the child was two years, nine months old. (R. 257). The mother testified at the hearing, when specifically asked as to this first statement of the child after the July 22 visit, as follows:

> "I was washing her, and I asked her to -- to spread her legs, and she spread her legs. And I was washing her, and she said, Mama. And I said, what, Brittany. And she said, Papa does this.
> And I said, what's that, Brittany? And she said Papa sticks his fingers in my chita.
> . . . And she put her hands in her vagina. And she was making motions.
> . . . And she said, I am done now." [emphasis added] (2nd Supp. R. 10).

The trial judge, in his oral order of December 3, 1990, regarding the admissibility of this hearsay, made the following ruling:

> "The next statement elicited from Ronda Bordac. Ronda Bordac.
> Specifically, the statement: Papa does this. Papa sticks his fingers into my chita.
> Thereupon, motions were made simulating the act and, thereafter, she concluded by saying: I am done now.
> (Court reads document.)
> I find that statement to have been reliably made. Time contents and circumstances." [emphasis added] (1st Supp. R. 4).

At trial, however, when asked what statement by the child was made approximately two days after the July 22 visit with the defendant, Ronda Bordac stated the following:

> "I was giving her a bath.
> . . . She said poppa stuck his finger in my chita. Poppa stuck his finger in my chita.
> . . . (Question) Did she do anything, any act accompanying her statement?
> No, I was just washing her, I was washing her down there." [emphasis added] (R. 278-279).

This first circumstance to be considered as to the trustworthiness of this statement is the physical and mental age and maturity of the child. At the time she allegedly made this statement the child was only two years, nine months old, and in response to a motion to determine the competency of the child to testify the state stipulated that she was not competent to testify. (R. 732). Thus, the age of the child and the stipulation that she did not understand the duty to tell the truth are compelling reasons why the child's statement should not have been admitted into evidence.

Furthermore, the trial judge never even had contact with the child in order to make a determination as to what the child's mental age or maturity was. Had the trial judge observed the child, even if only in chambers or in a less frightening situation than in a courtroom, he could have made a factual finding regarding the child's maturity. However, the prosecution failed to present the child witness for any type of examination or observation. Therefore, the prosecution failed to carry its burden of establishing that the maturity and mental age of the child would indicate the child's statement was trustworthy.

The second circumstance the court may consider, according to section 90.803(23)(1), is the nature and duration of the abuse or offense. Where there is evidence of abuse over a long period of time and the child is able to recount specific instances of abuse in relation to certain time periods, such as birthdays, Christmas, or Easter, there is some indicia of reliability in the statements. In the instant case, however, the child did not indicate when, in relation to any recognizable event, the act contained in her statement allegedly occurred. She merely stated that "papa sticks his fingers in my chita." Such a statement, without any indication as to when this allegedly occurred, is another reason the statement lacks sufficient indicia of reliability and should not have been admitted into evidence.

The next circumstance for the trial court to consider is the relationship of the child to the offender. It is much more likely that a person other than the biological father of a child (such as a step-father, baby-sitter, or neighbor) would sexually abuse that child. However, in the instant case it is the biological father who was accused of the abuse. Therefore, the biological relationship of the child to the alleged offender would not be a circumstance which would indicate the statement was reliable.

Furthermore, the actual relationship between the child and the defendant; and between the child's mother, her family and the defendant; are important considerations which indicate the statement of the child is not reliable. The allegations of abuse by the mother first surfaced after her separation from the defendant. (2nd Supp. R. 4, 9-10). The

mother testified at the trial that she feared the defendant and that they had a stormy relationship. (R. 309). Testimony at the trial also established that there was considerable animosity between the family of the mother and the defendant. (R. 516, 588, 599, 612).

It is precisely this type of situation: where the mother has just been separated from the defendant and divorce proceedings are about to begin; where the family of the mother hates the defendant; and where the child is daily exposed to this environment; that would establish the untrustworthiness of a child's statement.

The final circumstances which may be considered by the trial court are the reliability of the assertion, the reliability of the child and any other factor deemed appropriate. The reliability of the assertion is actually a conclusion the trial court must make based on the circumstances surrounding the statement, and appellant asserts that the circumstances as listed in this brief indicate the unreliability of the statement and the reasons it should not have been admitted into evidence.

The reliability of the child is another circumstance that was not shown by the prosecution in it's hearing on the admissibility of child hearsay. The child was not presented as a witness, nor was the child even seen or spoken to by the trial judge. There was also no testimony at this hearing that the child was a truthful or reliable child.

Finally, the court may consider any other factor deemed appropriate. There are numerous additional factors which go to show the unreliability of the statement. First, the child

made differing statements as to what sexual abuse occurred. At various times she stated that papa hurt her chita, papa put his fingers in her butt, she sat on papa's pee-pee, papa stuck his pee-pee in her butt, papa put his fingers in her chita, papa bumped her chita, papa stuck his pee-pee in her chita, and papa fixed her rash. (2nd Supp. R. 10, 11, 30, 40, 53, 63, R. 743, 744, 794). These statements would indicate some type of anal penetration (papa put his fingers in her butt), and penal penetration (she sat on papa's pee-pee). Yet there was no physical evidence of any penal penetration or anal penetration and no charges regarding this alleged conduct were ever filed. In fact, the evidence presented at trial that the child's hymenal opening was normal would indicate that penal penetration did not occur.

Thus, several of the child's statements were specifically not supported by the physical evidence obtained during the physician's examination of the child and therefore these unsupported statements cast doubt as to the trustworthiness of the remaining statements.

The second additional factor showing the unreliability of the child hearsay is the fact that the child used two separate words to describe her private parts. The first word used by the child in referring to her vagina was tookie. While her mother and the defendant were still living together, shortly before their separation, the child stated to the defendant in the presence of her mother that "mama fixed my rash, now you can't touch my tookie anymore." (This statement was not allowed into evidence by the trial judge.) (2nd Supp. R. 8). The word tookie was used by the

defendant's side of the family to refer to her vagina, and the defendant, Jennifer Townsend, and Ova Novotny all testified at trial that the child used the word tookie to describe her vagina. (R. 533, 581, 613).

However, when the alleged statements of sexual penetration occur the child only uses the word chita, a word used by the mother's side of the family to describe the girl's vagina. (2nd Supp. R. 8). This sudden change in the word the child used to describe her vagina indicates that she was exposed to the word chita, and therefore conversation about her chita, by her mother or her mother's family at some time after the separation of her mother and the defendant and prior to the child's accusatory statements. This creates an inference of influence by someone over the child and again indicates a complete lack of trustworthiness of the statement.

Finally, the admission of this hearsay statement was error because the recounting of the statement by the mother at trial was not the same as the recounting of the statement during the hearing on the admissibility of the child hearsay. At the pre-trial hearing the child's mother repeated the statement as "papa sticks his fingers in my chita." The mother then indicated that the child put her hands in her vagina and made motions while making the statement. (2nd Supp. R. 10). However, when asked at trial whether the child made any accompanying motions during the statement the mother said no. (R. 278-279).

This gross inconsistency between the trial testimony and the testimony at the hearing indicate that either the mother was fabricating her testimony or her memory of the statement and actions was so vague that there was no reliability to the statement. It would seem logical that a child's first statement relating facts of sexual abuse to a mother and the circumstances surrounding that statement would be indelibly stamped in the mother's mind. Yet, in the instant case this did not occur.

Furthermore, during the trial judge's brief oral order allowing admission of the statement he specifically stated that motions of the child accompanied the statement. The trial court's inclusion of the physical motions accompanying the statement in his order indicates they were an important consideration as to the admissibility of the statement. The statement and the motions were admitted into evidence by the trial court, not just the statement alone.

Therefore, for all the reasons stated above, the admission of the first hearsay statement into evidence was error.

The trial court also committed error in admitting the second hearsay statement at trial. At the hearing on the admissibility of child hearsay the mother testified that on different occasions the child would state that papa had put his finger in her chita. (2nd Supp. R. 11-12). Later in the same hearing the mother was asked on how many different occasions the child brought up comments about Daddy putting his finger into her chita. The mother stated "maybe ten or fifteen times." (2nd Supp. R. 16).

The trial court's ruling on this statement (or statements) was as follows:

> Same witness: Ronda Bordac:
> Daddy stuck his fingers into my chita ten or fifteen times.
> (Court reads document.)
> That statement is admissible.
> Child-Hearsay Statute. (2nd Supp. R. 4-5).

At trial the mother testified as follows:

> "I would put the diapers on her. And then she would spread her legs and then stick her fingers up into her vagina and say my poppa puts his fingers in my chita." (R. 283).

Much of the same reasoning as to why the first hearsay statement was inadmissible also applies to this statement. The physical and mental age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender (including the pending divorce and the animosity between the mother, her family, and the defendant), the unreliability of the assertion, the lack of reliability of the child, the additional statements not supported by the medical evidence, and the failure of the child to use consistent terms to define her vagina, combine (under the same analysis as to the first statement) to establish no reliability as to the second hearsay or any other admitted hearsay statement.

For these reasons the trial court erred in admitting this second statement into evidence.

The third hearsay statement admitted into evidence at trial was allegedly made to H.R.S. worker Thelma Diaz. Her testimony at trial was as follows:

> "[she] put her hand in her vagina and took her finger and said this is what Poppa does to my chita.
> I said what? I said who touches your chita? And she said Poppa.
> And I said, you said Pepe? And she said no, I told you Poppa." (R. 320).

For the same reasons as the admission of the first hearsay statement into evidence was error, the admission of this statement into evidence was also error. Additionally, this statement was allegedly made on September 12, 1988, seven days after the last contact of the child with the defendant on September 5, 1988. (R. 315, 2nd Supp. R. 15-16). This period of time is sufficient to question whether the child was relating what had actually occurred, what someone had told her to say, or what someone had told her the H.R.S. worker was there to talk to her about.

Furthermore, the H.R.S. worker specifically came to speak with the child in response to an allegation of sexual abuse and the interview with the child was conducted with the child's mother, grandmother, grandfather and a friend of the family, Michael Grenlaugh, present. (R. 315-316). Also, at the onset of the interview the H.R.S. worker brought out anatomically correct dolls for the child to play with. (R. 316-317). Obviously, the atmosphere of this meeting was such that pressure (either direct or indirect) would likely be exerted on the child to respond as her mother, her family, and the H.R.S. worker wanted her to: with an allegation against her father. Therefore, the statement of the child to Thelma Diaz is not reliable and its admission into evidence at the defendant's trial was error.

The fourth and fifth hearsay statements admitted into evidence were made to Kathy Nabbie. At the hearing on the admissibility of child hearsay Kathy Nabbie testified that the child made the following statements to her:

> "My papa is bad. . . because he used to put his finger in my chita." (2nd Supp. R. 38).
>
> "My papa is bad. . . . He used to stick his pee-pee in his butthole and then stick it in my butthole.
> And I said, what? And she said, yeah. He used to stick his fingers in his pee-pee and then stick it in my pee-pee. And I said, in your what? and she said, in my chita." (2nd Supp. R. 40).
>
> "she took her finger and stuck it, as she calls it, in her chita, and then stuck it in her mouth." (2nd Supp. R. 42).

The trial court made the following rulings regarding these statements:

> The next statement is that which was elicited from Kathy Nabbie.
> February to March, 1989. In that particular statement, the relevant portion: My papa is bad. My papa Jackie used to put his finger into my chita.
> (Court reads document.)
> That statement shall be admitted to the jury. In about two or four weeks time span, two or four weeks later, there was another statement. And that statement was: Stick his fingers into my chita.
> (Court reads document.)
> That statement shall be admitted. (1st Supp. R. 5).

At trial Kathy Nabbie testified as follows:

> "She said my Poppa is bad. . . .
> I said why is your poppa Jackie bad? And she said because he used to stick his finger in my chita." (R. 400-401).

Later, she testified that:

> "she said my Poppa used to stick his pee-pee in my butthole." (R. 403).

For the same reasons stated in appellant's argument as to the inadmissibility of the first hearsay statement these third and fourth hearsay statements were also inadmissible at trial. These statements are also inadmissible for the following additional reasons.

It was testified that the first statement made to Kathy Nabbie occurred in February or March of 1989. (R. 399). The last time the child visited the defendant was during the labor day weekend of 1988, which ended on September 5, 1988. (2nd Supp. R. 15-16). Thus, approximately six months passed between the last visit of the child with the defendant and this statement.

One of the circumstances the trial court must assess in determining the reliability of the statement is the time when the statement was made in relation to when the alleged abuse could have occurred. In the instant case, during this lapse of time: the prosecution of the defendant had began; the child had on numerous occasions spoke of the allegations with her mother and grandmother; the mother, who was the caretaker of the child and had the most contact with her, believed that the defendant was guilty of the crime he was charged with; and the opportunity for coaching, cajoling and prompting had existed for six months. Furthermore, the child was only a few months past her third birthday at the time of these statements to Kathy Nabbie. While it is obvious that a much older person could clearly remember events which occurred six months before, there was no evidence presented by the prosecution that this was true with a three year old or that what she was relating was anything other than what she

remembered she had said before, rather than what she remembered had allegedly occurred before.

Therefore, the lengthy period of time between the alleged abuse and the statement, combined with the same arguments rendering the first hearsay statement as inadmissible, make the admission into evidence of this statement to Kathy Nabbie error.

The second statement testified to by Kathy Nabbie was also not admissible. This second statement had previously been ruled as inadmissible by the trial court in his oral order ruling on the admissibility of the child hearsay statements. The trial court had stated that the statements relating to contact other than that alleged in the information (vaginal penetration by finger or object) were irrelevant and therefore inadmissible. (1st Supp. R. 3). This second statement recounted by Kathy Nabbie referred to the child alleging that her father had stuck his pee-pee in her butthole. Because this statement had been previously ruled as inadmissible its admission into evidence at trial was error. Furthermore, because this statement alleged additional "prior bad acts" of the defendant relating to conduct not charged in the information, the admission of this statement into evidence was reversible error.

The sixth hearsay statement admitted into evidence at trial was allegedly made to Linda Marie Chang-Fane in November of 1988. (R. 437). At trial Linda Marie Chang-Fane testified as follows:

> "she put her hand down in her vagina and began to masturbate. . . .
> I looked at her and I said Brittany, don't do that. And she looked at me and then said well, my Poppa does it." (R. 438-439).

Again, for the same reasons that the first hearsay statement was inadmissible, so to is this hearsay statement to Linda Marie Chang-Fane inadmissible. Furthermore, this statement was allegedly made in November of 1988, at least two months after the last contact between the defendant and the child. Such a time lapse between the time of the alleged statement and the closest possible time of the possible event, with a child just three years old at the time of the statement, renders the statement as untrustworthy and inadmissible.

The seventh and final hearsay statement admitted into evidence was allegedly made to Dr. Medea Woods. At trial Dr. Medea Woods testified as follows:

> "she said, my Poppa does stick his fingers -- doesn't stick his fingers inside my chita anymore because my mommy is keeping me safe." (R. 478).

This statement was allegedly made on June 12, 1989, nine months after the child no longer had contact with the defendant. (R. 477). Furthermore, the statement was made to a Doctor who was treating the child for the alleged sexual abuse and the child was described by the Doctor at trial as not functioning at the level she should have been intellectually and not able to focus attention for the period of time one would expect of a child her age. (R. 454, 460). Due to this nine month time lapse; the relationship of the child to the examining physician; the characterization of the child by Dr. Woods; and the reasons listed for the

inadmissibility of the first hearsay statement, admission of this hearsay statement into evidence was error.

Several Florida cases have addressed the admissibility of child hearsay statements under circumstances applicable to the instant case. In Jaggers v. State, 536 So.2d 321 (Fla. 2nd DCA 1988), the Second District Court reversed the defendant's conviction where the hearsay statements of the alleged victim's were often contradictory and were not made at a time "closely approximate to the alleged occurrence." In addressing the time the statements were made the court stated that:

> "The time of the out of court statements, relative to the time of the incident charged and the circumstances of the statements, are critical to a determination of reliability."

Similarly, in the instant case, the time the hearsay statements were made is an important factor in determining their reliability. None of the statements were made "at the first available opportunity, while the child was still emotionally affected by the occurrence." Griffin v. State, 526 So.2d 752 (Fla. 1st DCA 1988). The first statement was made two days after the child's contact with the defendant. The other statements were made between seven days and nine months after the child's last contact with the defendant. Such a delay in the relating of these statements fails the "critical determination of reliability" of the close-proximity-in-time-test and renders all of the statements (and especially the statements farther removed from the last contact of the child with the defendant) as inadmissible.

Jaggers also discusses the inconsistencies between the alleged victim's statements as a factor in the trial court's error in admitting the hearsay statements into evidence. The child in the instant case also made statements which were not consistent with the facts at trial. On various occasions the child stated that her papa put his fingers in her butt and that she sat on papa's pee-pee. (R. 736-737). These statements would indicate digital penetration of the anus and penal penetration of the vagina. Yet, there was no evidence of this presented by the examining Doctor. In fact, the examination of the Doctor indicated a normal hymenal opening which would logically be contradictory to penal penetration. Therefore, the statements made by the child at various times were inconsistent with the evidence at trial and therefore none of the statements had the required indicia of reliability to allow their admission into evidence.

ARGUMENT VIII

DR. MEDEA WOODS WAS NOT SUFFICIENTLY QUALIFIED TO GIVE AN EXPERT OPINION IN THE DIAGNOSIS OF SEXUALLY ABUSED CHILDREN

At trial Dr. Medea Woods, Psy.D., was qualified as an expert in clinical psychology and the diagnosis and treatment of sexually abused children. (R. 450). Although the defendant accepted her as an expert in these areas the trial court erred in qualifying her as an expert in the diagnosis of sexually abused children based on the facts presented to him.

In responding to a question asking what clinical psychology was, Dr. Woods responded as follows:

> "Clinical psychology is specifically involved with treating disturbances and disorders in behavior and emotions opposed to other kinds of psychology that look at human behavior in general." (R. 446).

Furthermore, when asked later in the trial whether the child had been brought to her for "therapy or for an investigative purpose in terms of determining whether sexual abuse had occurred," Dr. Woods responded that:

> "no, the investigation was already done. That whole phase of everything was over with and I don't do the investigation part." (R. 458-459).

Thus, it is obvious that when the child was brought to Dr. Woods the investigation into allegations had been completed. The Doctor's responsibility was to treat the child for the diagnosis that had already occurred. Her responsibility, and her training, were not in the investigation of sexual abuse but rather in the treatment of children who had already been determined as having been sexually abused. Therefore, her qualification as an expert in diagnosis of sexual abuse was error.

ARGUMENT IX

AT TRIAL DR. MEDEA WOODS IMPERMISSIBLY GAVE HER OPINION THAT THE DEFENDANT COMMITTED A SEXUAL BATTERY ON THE CHILD

At trial the following statements were made by Dr. Medea Woods:

Statement #1:

> "she [the child] had been sexually overstimulated by an adult person." (R. 461).

Statement #2:

> "And she utilized the sand trays as a pretend shower stall and bathtub and she spent a good deal of time with the Poppa doll and the little girl doll in the bathtub and in the shower in cleaning their genitals after she had undressed them." (R. 465).

Statement #3:

"There were behaviors that were consistent with the possibility of having been sexually abused.
And specifically those behaviors included the preoccupation with the genitals of only the Poppa and the little girl and then wetting her pants in close proximity to that as well." (R. 468).

Statement #4:

(Question) "Again, were there any behaviors which were consistent with having been sexually abused during that session?
(Answer) Yes. Again, she was exceedingly focused on genitals of the Poppa doll and the little girl doll in cleaning them, of the need for secrecy and with the possibility that if there was not secrecy, there could be harm." (R. 469).

Statement #5:

"During this June 7th session, she had also indicated to me her one feeling that she was to blame for things that had occurred.
For repeatedly spanking the girl doll and indicating that whatever had happened in the shower between the little girl doll and the Poppa doll was because of something very bad." (R. 472).

At this point the defendant made a motion for mistrial and the motion was denied. (R. 473-474).

Statement #6:

"And she focused on sleeping arrangements. She made it clear that the mother and the stepfather, she made a bed for them on one side of the room and she made another bed for her Poppa way over on the other side of the room. (R. 475-476).

Statement #7:

"At the very end of the session, I simply asked her to go over and get the Jackie doll. . . .
She brought me the doll that had been the Poppa doll who was doing these things to the little girl." (R. 481).

Statement #8:

"She had demonstrated with the dolls in a great deal more detail on specific sexual things that were occurring between the Poppa and the little girl." (R. 482-483).

At this point the defendant again moved for a mistrial that was again denied by the trial court. (R. 483-485).

Although Florida courts have held that it is permissible for a qualified expert to give an opinion as to whether a child has been the victim of sexual abuse, it is impermissible for that witness to give an opinion that it was the defendant who perpetrated the sexual abuse. Glendenning v. State, 536 So.2d 212 (Fla. 1988).

In Glendenning, this court addressed the propriety of an expert witness stating that in her opinion the victim had "been sexually abused by her father." The court stated that:

> it was improper for the expert witness to testify that it was her opinion that the child's father was the person who committed the sexual offense."

In the instant case the statements of Dr. Woods accomplished precisely what was not allowed by this Court in Glendenning: they identified the defendant as the alleged sexual abuser. Although the statements of Dr. Woods do not contain precisely the same words as those in Glendenning their implication is the same.

The first statement expressed to the jury the doctor's belief that the child has been abused by an adult. Such a statement goes far beyond the permissive range of opinion allowed by Glendenning. By defining the abuser as an adult the doctor has defined a class of people that could be, in her opinion, the abuser. As the defendant was the only adult accused and on trial the obvious implication is that she believes he is the person who committed the sexual offense.

Further statements go on the indicate a preoccupation of the child with the genitals of the Poppa doll (previously established in the trial as the defendant and also established in statement #7) and a cleaning of the genitals of the Poppa doll. Additionally, the doctor asserted her opinion in statement #5 that sexual abuse had occurred between the girl and the defendant when she said that the child felt she was to blame for what happened between the little girl doll and the Poppa doll in the shower.

Finally, in statement #8, the doctor eliminates the word doll from her statement and makes the explicit statement that "specific sexual things were occurring between the Poppa and the little girl." This statement, by itself, is tantamount to the doctor stating that the defendant sexually abused the child.

Each of these statements by themselves would be sufficient to violate the rule of Glendenning: that it is improper for an expert to comment on the defendant as being the person who committed the sexual offense. However, in the instant case the error was compounded by the cumulative effect of these inadmissible statements. The defendant's motion for mistrial should have been granted and the defendant's conviction should be reversed.

ARGUMENT X

IT WAS REVERSIBLE ERROR FOR DR. MEDEA WOODS TO COMMENT ON THE CREDIBILITY OF THE CHILD AT TRIAL

At trial Dr. Woods testified as follows:

> "And I also, at this point, to find out what she knew about telling the truth or lying. And so I simply played a game with her that would allow her to

> demonstrate to me when she was telling the truth and when she was lying.
>
> [Question] Could you describe that briefly for the Jury how you did that?
>
> Well, I would say -- I would hold up a toy and I would call it something that it wasn't and I should say am I telling the truth or am I lying. And then the child would tell me. And then I would ask them to do that and we would do it back and forth.
>
> Do that a number of times and then I talked about making believe and lying and telling the truth and all those things; and how those things are different from each other and the context of play to further differentiate that.
>
> [Question] And was she able to differentiate between telling the truth and telling a lie, pretending and playing?
>
> Yes, she was." (R. 466-467).

Prior to trial, in response to the defendant's motion to determine the competency of the child, the prosecution stipulated that in fact the child was not competent to testify. (R. 732). Section 90.605(2), Florida Statutes, (1985), provides that a child may testify in court if "the court determines the child understands the duty to tell the truth or the duty not to lie." Therefore, the prosecution had already stipulated that the child did not understand the duty to tell the truth or not to lie.

However, at trial, the prosecutor attempted to illicit from Dr. Woods her opinion as to whether the child knew the difference between telling a lie and the truth. For the prosecutor to illicit such testimony, after having stipulated to exactly the contrary before trial, is highly improper and error.

Furthermore, by engaging in a lengthy discussion of how she determined that the child was able to distinguish between the truth and a lie, the Doctor was indirectly commenting on the child's credibility. The only inference that can be

drawn from this testimony is that Dr. Woods was of the opinion that the child was being truthful in her demonstrations, statements, and accusations.

There is considerable Florida law that establishes that an expert witness cannot vouch for the credibility of a witness. In Davis v. State, 527 So.2d 962 (Fla. 5th DCA 1988), the Fifth District Court reversed the defendant's conviction and concluded that it was error for a clinical psychologist to testify that a child sexual abuse victim was "being frank" according to his (the witnesses) validity scale. The court stated that:

> "[the witness] invad[ed] the province of the jury and his "validating" testimony should have been excluded."

Similarly, in Tingle v. State, 536 So.2d 202 (Fla. 1988), this Court held that it was error for a witness to testify as to the truthfulness of a victim and that:

> "the ultimate conclusion as to the victim's credibility always will rest with the jury."

In Tingle, two expert witnesses testified. The first witness, an H.R.S. intake counselor, testified that he believed the child was telling him the truth. He then went on to explain the factors he considered in making this assessment. Later, he testified that he believed the child had been sexually abused. The second witness, a social worker, also testified that she believed the victim was telling the truth.

Similarly, in the instant case, the state's expert witness, Dr. Woods, testified that the child was able to distinguish between telling the truth and telling a lie. The

doctor then went on to describe the procedure she used in her determination. This description and opinion came in the middle of her testifying about the child's statements and actions, which in her opinion implicated the defendant as the man who had sexually abused her. Thus, the only inference to be drawn from the doctor's testimony was that she believed the child was telling the truth. Such testimony is inadmissible.

Although the defendant did not object to the doctor's testimony, its damaging (and improper) effect on the jury reaches the level of fundamental error.

In Fuller v. State, 540 So.2d 182 (Fla. 5th DCA 1989), the Fifth District Court addressed the unobjected to opinion of a child protection team doctor that the alleged victim had told him the truth. In reversing the defendant's conviction the court stated:

> "This testimony was not objected to at trial. Although the absence of an objection ordinarily precludes appellate review of an alleged error we consider the cumulative effect of this error and others which will be discussed to be so fundamental as to require reversal."

As in Fuller, the doctor's opinion on the truthfulness of the child, combined with the other errors described in this brief, combine to reach the level of fundamental error.

ARGUMENT XI-THE INADMISSIBLE TESTIMONY OF DR. MEDEA WOODS CONSTITUTED FUNDAMENTAL ERROR

The following unobjected to testimony of Dr. Woods was inadmissible and its admission into evidence and effect on the defendant constitutes fundamental error.

Statement #1:

> "she is not able, then, to feel the lower part of her body. She is not able to feel when she needs to go to the bathroom.
>
> So, her choices are she can either wet her pants many times a day or she can be sexually experiencing the memories and so forth of the sexual event and be so sexually overstimulated that she feels the need to do this to other children." (R. 462).

This is a medical diagnosis for which this witness was never tendered or qualified.

Statement #2:

> "she indicated however that she knew that when men did that something different come out besides urine." (R. 470).

This is a hearsay statement which was previously ruled inadmissible by the trial court and its recounting was therefore a direct violation of his order. (1st Supp. R. 7).

Statement #3:

> "She was referring to a belief that her natural father might be dead and indicating that she thought that this might be because of what she had told and what had happened to her." (R. 471).

This is again a hearsay statement which was previously ruled inadmissible by the trial court. (1st Supp. R. 7).

Statement #4:

> "She indicated the belief that she could be harmed for divulging what had occurred and also that the person who did it would be murdered." (R. 489).

This could be construed as a comment that the defendant had threatened the victim if she told what had allegedly occurred.

The cumulative effect of these four statements combined to deny the defendant a fair trial and warrant a reversal of his conviction and a remand for a new, fair, trial.

CONCLUSION

The Fifth District Court of Appeals was correct in granting the defendant a new trial on the grounds that: incompetency does not equate to unavailability for the purposes of section 90.803(23); the defendant's right of confrontation was denied based on the facts of his case; and the trial court erred in failing to make sufficient factual findings regarding the time, content, and circumstances of the hearsay statements admitted into evidence at defendant's trial. Therefore, if this Court accepts jurisdiction in this case, the question certified to it should be answered in the negative and the Fifth District Court of Appeals decision should be affirmed and it's rationale adopted by this Court. However, if this Court does not agree with the Fifth District Court of Appeals decision this Court should still affirm the granting of the defendant a new trial based on the other issues raised in but not decided by the Fifth District Court of Appeals.

CERTIFICATE OF SERVICE

I, as counsel for the Respondent, respectfully submit this "Respondent's Answer Brief" to this Honorable Court, and I HEREBY CERTIFY that a true and correct hereof has been furnished, by mail delivery, to the Honorable Robert Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32014, this 22nd day of April, 1993.

By: _____

JAMES G. KONTOS
Bar ID # 788554
The Law Firm of Daniel S. Ciener
255 North Grove Street, Suite A
Merritt Island, Florida 32953
(407)-452-2433