IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 83,628

GEORGE CHERRYHOMES,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL FOR THE SECOND DISTRICT STATE OF FLORIDA

BRIEF OF PETITIONER ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

HELENE S. PARNES
Assistant Attorney General
Florida Bar No. 0955825
Westwood Center
2002 N. Lois Avenue, Suite 700
Tampa, Florida 33607
(813) 873-4739

COUNSEL FOR PETITIONER

/mah

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Respondent was charged by information with sexual battery on a child under eleven years of age. (R. 4). The State filed notices of intent to introduce hearsay testimony. A motion hearing was held to determine the reliability of the child hearsay statements. The trial court ruled that the hearsay statements were admissible. The trial court heard testimony from the victim, Barbara Cherryhomes. (R. 69-74).

Based on her testimony, the trial court determined that she was incompetent to testify and thus was unavailable as a witness. The trial court further found that the hearsay statements were admissible even without Barbara's testimony. (R. 78, 81-86). The trial court then ruled that Respondent's confession was admissible. (R. 88).

The Respondent filed an appeal in the Second District Court of Appeal. (R. 34). On February 23, 1994, the Second District Court of Appeal reversed Respondent's conviction and remanded this case for a new trial. Cherryhomes v. State, 19 Fla. L. Weekly D452 (Fla. 2d DCA February 23, 1994). Two of the appellate judges concurred in the decision. One concurred specially and wrote a separate opinion. The majority found that it was error to admit the victim's hearsay statements into evidence at trial since incompetency under Section 90.603, Fla. Stat. (1991) does not render a witness unavailable under Section 90.803(23), Fla. Stat. (1991). The Second District certified the

following question:

> 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 majority further found that the record failed to show any hearing on the reliability of the hearsay statements. The State filed a Motion to Correct Record and for Clarification of Opinion asserting that a hearing on the reliability of the hearsay statements was held. The Second District entered an opinion on the State's motion and clarification, which found that the trial court did hold a hearing on the reliability of the hearsay statements and entered an order incorporating its findings.

The State filed a Notice to Invoke Discretionary Jurisdiction. This Court postponed the decision on jurisdiction and set a briefing schedule.

SUMMARY OF THE ARGUMENT

A witness who is incompetent to testify because of the inability to recognize the duty and obligation to tell the truth is "unavailable" for purposes of Section 90.803(23), Fla. Stat. (1991). Since incompetency satisfies the unavailability requirement of Section 90.803(23), Fla. Stat. (1991), the trial court properly admitted the child hearsay evidence and Respondent's confession.

ARGUMENT

ISSUE

A WITNESS WHO IS INCOMPETENT TO TESTIFY BECAUSE OF THE INABILITY TO RECOGNIZE THE DUTY AND OBLIGATION TO TELL THE TRUTH SATISFIES THE "TESTIFY OR BE UNAVAILABLE" REQUIREMENT OF SECTION 90.803(23)(a)(2).

Petitioner asserts that the Second District Court of Appeal incorrectly reversed the trial court's finding that the victim was unavailable to testify because she was incompetent to testify. The Second District reasoned that since the trial court erroneously determined that the victim was unavailable to testify because she was incompetent to testify...and since the victim did not testify, all of the prerequisites for admission of child victim's hearsay statements were not met...The trial court therefore erred in admitting the statements into evidence at trial. This reasoning is in error.

This Court recently decided in Townsend v. State, 19 Fla. L. Weekly S202 (Fla. April 21, 1994) that a finding of incompetency satisfies the unavailability requirement. This Court held that "a finding of incompetency to testify because one is unable to recognize the duty and obligation to tell the truth satisfies the 'testify or be unavailable' requirement of section 90.803(23)."

In the instant case, the trial court declared Barbara to be incompetent because she was unable to determine the difference between the truth and a falsehood at the time of trial. A review of her testimony reveals that Barbara could not distinguish between the truth and a lie. (R. 71-74). Competency focuses on the mental capacity of the witness at the time she is offered as

a witness at trial rather than at the time the facts testified to occurred. Further, "it is the particularized guarantees of trustworthiness that ensure the reliability of a statement, not the competency of the witness making the statement." Townsend, at S204; Perez v. State, 536 So. 2d 206 (Fla. 1988). Under Townsend, the trial court's finding was proper because Barbara's testimony has satisfied the "testify or be unavailable" requirement of Section 90.803(23).

Since the trial court properly determined that the victim was unavailable to testify because she was incompetent to testify, the trial court properly admitted the child hearsay evidence and Respondent's confession. A motion hearing as to the admission of the child hearsay statements was held and the court heard testimony from witnesses regarding statements made by the child victim about the sexual acts perpetrated on her by Respondent. Based on this testimony, the trial court announced its findings on the record and in its written order in accordance with Section 90.803(23), to wit: the time, contents and circumstances of the hearsay statements made to the adult witnesses possess sufficient indicia of reliability to be trustworthy.

In its order, the trial court found that the statements made to Dorothy Morrill, Barbara's grandmother, provide sufficient safeguards of reliability based on their proximity in time to the incident and their unsolicited nature. The trial court also found reliability because the statements were given to Barbara's grandmother who is in close relation to Barbara. The trial court

further found that the statements made to Margaret Randazzo, Barbara's teacher, were reliable because Ms. Randazzo was in a trusted position to Barbara, and the statements were given within a close time of the incident and they were unsolicited.

The statements given to Detective Maggie Jewett were also reliable due to their proximity in time to the incident and due to the detective's position as a trained child abuse investigator skilled in conducting interviews with child victims. The court further found no indication of any coaching of the victim. Based on this Court's findings in Townsend and the evidence presented in the instant case, the reasoning applied by the Second District was in error.

Since the witnesses were found to be trustworthy and the time, content and circumstances of the hearsay statements made to the adult witnesses possess sufficient indicia of reliability, the Respondent's confession was properly admitted into evidence. The corpus delicti could be established using circumstantial evidence for the purposes of admitting a defendant's confession and the proof of corpus delicti need not be uncontradicted or overwhelming. Burks v. State, 613 So. 2d 441 (Fla. 1993).

In the case at bar, Respondent while being interrogated by Detective Jewett admitted to the crime. He stated that while he and the victim were both undressed, he placed vaseline on the victim's vaginal area and that his penis did come in contact with the opening of the victim's vagina. He also admitted that these incidents occurred in both the bathroom and the bedroom. (R. 129-133).

The court does require the State to show the existence of each element of the crime. Burks, 613 So. 2d at 443. The State did offer evidence that Respondent committed sexual battery. Section 794.011(1)(h), Fla. Stat. (1991) defines sexual battery as "oral, anal, or vaginal penetration by, or union with, the sexual organ of another..." In the instant case, each witness testified that the child confided that Respondent had placed his penis in union or in contact with the sexual organ of Barbara. All the elements of the crime were proved by substantive evidence without dependence on Respondent's statements. Burks, 613 So. 2d at 444.

Thus, the finding of the Second District Court of Appeal that "[w]ithout the hearsay statements, the corpus delicti of capital sexual battery was not established, and therefore, it was also error to admit Cherryhomes' inculpatory statement to the police" is in error. Since the State presented substantive evidence establishing the corpus delicti, the admission of the Respondent's confession was valid.

CONCLUSION

Based upon the foregoing reasons, arguments and citation of authority the Petitioner respectfully requests that this Honorable Court affirm the judgment and sentence of the trial court.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

HELENE S. PARNES
Assistant Attorney General
Florida Bar No. 0955825
Westwood Center, Suite 700
2000 N. Lois Avenue
Tampa, Florida 33607-2366
(813) 873-4739

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Dwight M. Wells, Esquire, 304 So. Albany Avenue, Tampa, Florida 33606, this 10th day of June, 1994.

OF COUNSEL FOR PETITIONER

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

GEORGE CHERRYHOMES,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 92-02588

Opinion filed February 23, 1994.

Appeal from the Circuit
Court for Pinellas County;
Susan F. Schaeffer, Judge.

Dwight M. Wells, Tampa,
for Appellant.

Robert A. Butterworth,
Attorney General,
Tallahassee, and
Helene S. Parnes,
Assistant Attorney General,
Tampa, for Appellee.

HALL, Judge.

George Cherryhomes appeals his conviction of capital sexual battery of his daughter. He contends the trial judge erred in admitting into evidence at his trial the hearsay statements of his daughter, who was seven years of age at the time she made the statements, that he had made sexual contact with her. He also contends there was no basis for the admission

into evidence of his inculpatory statement to the police. We agree and reverse.

At trial, the victim, who was then nine years of age, was asked a series of questions by the prosecutor and defense counsel regarding whether she understood what the truth is. The victim stated that she did not know what the truth is and she did not know that she must tell things the way they really are. Upon request of defense counsel, the trial judge ruled that the victim was incompetent to testify, § 90.603(2), Fla. Stat. (1989), and that she was therefore unavailable to testify, 90.803(23)(a)2.b., Fla. Stat. (1989). Consequently, the trial judge allowed, over objection of defense counsel, the victim's grandmother and a detective to testify that the victim told them that "Daddy put his ding-dong in my hoo-hoo." The judge also allowed one of the victim's teachers to testify that the victim told her, "Daddy tried to stick his ding-dong in my woo-woo." The trial judge further ruled that this testimony established the corpus delicti of the crime of capital sexual battery. The judge therefore ruled that Cherryhomes' inculpatory statement to a detective that he had caused the union of his and the victim's sexual organs could be admitted into evidence as other corroborative evidence of the offense.

In addition to the testimony of the grandmother, the teacher, and the detective to whom Cherryhomes made his inculpatory statement, the jury heard the testimony of Dr. Mark Morris. He performed a physical examination of the victim and found no physical signs of sexual abuse. Dr. Morris stated that

the lack of physical signs of abuse did not negate the possibility that such abuse occurred.

The jury found Cherryhomes guilty after deliberating for an hour, and he was sentenced to life imprisonment with a twenty-five year minimum mandatory.

Section 90.803(23), Florida Statutes (1989), governs the admissibility of hearsay statements of a child victim of sexual abuse. It provides that the statements are admissible if:

> 1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. . . . and
> 2. The child either:
> a. Testifies; or
> b. Is unavailable as a witness, provided that there is other corroborative evidence of the abuse or offense. 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).

Section 90.804(1) provides the following definitions of unavailability as a witness:

> (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;
>
> (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; or
>
> (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.

Thus, before a trial judge may allow the hearsay statements of a child victim who does not testify at trial to be admitted into evidence pursuant to section 90.803(23), she must find in a hearing outside the presence of the jury that the circumstances of the statements provide sufficient safeguards of reliability; she must find that the child's participation in the proceedings would result in a substantial likelihood of severe emotional or mental harm; and, she must find that the victim was unavailable according to one or more of the definitions in section 90.804(1), provided there is other corroborative evidence of abuse.

The judge in this case stated at trial that she had ruled during a previous hearing on the reliability of the victim's hearsay statements and that she had entered an order incorporating her ruling. However, although the amended supplemental directions to the clerk request the transcript of the previous hearing and orders related thereto, the record only contains the transcript, which reveals no ruling by the judge as to whether the circumstances of the statements provide sufficient safeguards of reliability or whether there was substantial likelihood of severe

emotional or mental harm to the child. Rather, the hearing was continued, and the transcript of the continued hearing reveals that the hearing was continued once again. The next transcript in the record is of the trial. At the trial, the judge ruled that because the victim was incompetent to testify, she was unavailable to testify. This ruling was erroneous. Townsend v. State, 613 So. 2d 534 (Fla. 5th DCA 1993) (Townsend II), review granted, State v. Townsend, 624 So. 2d 268 (Fla. 1993).

In Townsend II, the Fifth District receded from its opinion in State v. Townsend, 556 So. 2d 817 (Fla. 5th DCA 1990)(Townsend I), in which it had determined that the stipulation that the child victim's inability to understand the duty to tell the truth met the then existing physical illness or infirmity definition of unavailability. In Townsend II, the Fifth District found that

> the fact that a witness has been declared incompetent under section 90.603(2) meets none of the listed reasons for a determination of unavailability. We acknowledge that an incompetent witness is not permitted to testify but that is not legislatively recognized as being "unavailable" under section 90.803(23)(2)(a). And we think for good reason. To automatically permit the hearsay statements of one who does not understand the

> duty to tell the truth is not so free from risk of inaccuracy that the right to cross examination can be constitutionally ignored.

Id. at 537 n.5.[1]

We agree with the Fifth District that there is good reason that the legislature did not define unavailable as a witness to include being disqualified as a witness under section 90.603(2). We believe the instant case reveals the merits of that reason because we believe the victim's lack of understanding of what the truth is casts grave doubt on the reliability of her hearsay statements to her grandmother and teacher. Although section 90.803(23)(a)1. requires the trial judge to conduct a hearing to determine whether the circumstances of those statements provided sufficient safeguards of reliability, we believe that admission of the hearsay statements of a witness who is unable to understand the duty to tell the truth raises serious concerns regarding a defendant's rights under the confrontation clause. However, in Townsend II, the Fifth District, characterizing the following statement in Perez v. State, 536 So. 2d 206, 210-211 (Fla. 1988), cert. denied, 492 U.S. 923, 109 S. Ct. 3253, 106 L. Ed. 2d 599 (1989), as dictum, noted that it could be read to suggest that the supreme court is of a contrary belief:

> We reject the argument that the child must be found to be competent

---

[1] Townsend I and II were interpreting the 1987 version of section 90.803, whereas this case is governed by the 1989 version of that statute. The 1989 statute contains minor modifications of the 1987 statute, but they do not affect the concerns, analysis, or holding of this case.

> to testify before the child's out-of-court statements may be found to bear sufficient safeguards of reliability. Section 90.603(2), Florida Statutes (1985), provides that '[a] person is disqualified to testify as a witness when the court determines that he is . . . [i]ncapable of understanding the duty of a witness to tell the truth.' A young child generally does not understand abstract concepts such as duty, truth or lie. The fact that a child is incompetent to testify at trial according to section 90.603(2) does not necessarily mean that the child is unable to state the truth. The requirement that the trial court find that the time, content, and circumstances of the statement provide sufficient safeguards of reliability furnishes a sufficient guarantee of trustworthiness of the hearsay statement, obviating the necessity that the child understand the duty of a witness to tell the truth.

The Fifth District was of the belief that this statement could be interpreted to suggest that the time, content, and circumstances test can substitute for the unavailability requirement if the child is held incompetent to testify, thereby invalidating its analysis in Townsend II. Consequently, it certified the following question to the supreme court:

> 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)?

613 So. 2d at 538. Due to the concerns we have expressed in this opinion and the importance of this issue, we also certify the

above question to the supreme court.

Since the record does not contain all of the findings required by section 90.803(23) for the admission of the victim's hearsay statements, and the finding it does contain is erroneous, we hold that it was error to admit the victim's hearsay statements into evidence at trial. Without the hearsay statements, the corpus delicti of capital sexual battery was not established and, therefore, it was also error to admit Cherryhomes' inculpatory statement to the police. Consequently, Cherryhomes' conviction must be reversed and this case remanded for a new trial.

CAMPBELL, A.C.J., Concurs.
PARKER, J., Concurs specially.

PARKER, Judge, Concurring.

I concur in the result which the majority has reached. Cherryhomes's conviction must be reversed because the record does not contain the trial court's findings regarding the reliability of the hearsay statements and the substantial likelihood of severe emotional or mental harm to the child. I write to urge the legislature to revisit section 90.803(23)(a) as it applies to a child victim who has been declared incompetent to testify.

Section 90.803(23)(a) mandates the following four requirements for a nontestifying child's hearsay statement to be admitted into evidence: a finding that the circumstances surrounding the statement provide sufficient safeguards of reliability; a finding that the victim's participation in the

proceeding would result in a substantial likelihood of severe emotional or mental harm; other corroborative evidence of abuse; and unavailability. The majority holds that the trial court erred in concluding that the victim was unavailable to testify because the trial court had ruled that the child was incompetent to testify. The language in section 90.803(23)(a)2.b. clearly requires that the child's unavailability be determined pursuant to section 90.804(1). A child ruled incompetent to testify possibly would fall within the purview of section 90.804(1)(d) which classifies a person with a then existing mental infirmity as unavailable. If the legislature did not intend for an incompetent witness to fall within this category, then, in my opinion, it should amend section 90.803(23) because an incompetent witness, in fact, is unavailable to testify.

I disagree with the majority's statement that the victim's lack of understanding of what the truth is casts grave doubt on the reliability of her hearsay statements to her grandmother and teacher. The child's grandmother and teacher may well be her closest confidantes. The supreme court has recognized the difference between a child's understanding to tell the truth at a court proceeding and the trustworthiness of statements the child has made to others, as evidenced by the following:

> [A] child victim's statements are "valuable and trustworthy in part because they exude the naivete and curiosity of a small child, and were made in circumstances very different from interrogation or a criminal trial," State v. Robinson, 153 Ariz. 191, 204, 735 P.2d 801, 814 (1987), and "therefore are usually irreplaceable of

> substantive evidence." [United States v.] Inadi, 475 U.S. [387,] 394, 106 S. Ct. [1121,] 1126, [89 L. Ed. 2d 390, ___ (1986)].

Perez v. State, 536 So. 2d 206, 209 n.5 (Fla. 1988), cert. denied, 492 U.S. 923, 109 S. Ct. 3253, 106 L. Ed. 2d 599 (1989). The statute's requirement of a finding that the circumstances of the statement provide sufficient safeguards of reliability should quell any fear that the statement is untrustworthy.

Finally, I believe that it defies common sense to require a trial court to make a finding that a child is likely to suffer severe emotional or mental harm when the trial court has declared the child incompetent to testify. If the child will not be present to testify because of incompetency, then there will be no harm to the child resulting from the child's participation in the trial. Thus, I would encourage the legislature to revisit section 90.803(23)(a) as it applies to a child victim who the trial court has declared incompetent to testify to require only that the circumstances of the statement provide sufficient safeguards of reliability and other corroborative evidence of abuse.

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

GEORGE CHERRYHOMES,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 92-02588

Opinion filed April 15, 1994.

ON MOTION TO CORRECT RECORD AND FOR CLARIFICATION OF OPINION

HALL, Judge.

George Cherryhomes appeals his conviction of capital sexual battery of his daughter. He contends the trial judge erred in admitting into evidence at his trial the hearsay statements of his daughter, who was seven years of age at the time she made the statements, that he had made sexual contact with her. He also contends there was no basis for the admission into evidence of his inculpatory statement to the police. We agree and reverse.

At trial, the victim, who was then nine years of age, was asked a series of questions by the prosecutor and defense counsel regarding whether she understood what the truth is. The

victim stated that she did not know what the truth is and she did not know that she must tell things the way they really are. Upon request of defense counsel, the trial judge ruled that the victim was incompetent to testify, § 90.603(2), Fla. Stat. (1989), and that she was therefore unavailable to testify, 90.803(23)(a)2.b., Fla. Stat. (1989). Consequently, the trial judge allowed, over objection of defense counsel, the victim's grandmother and a detective to testify that the victim told them that "Daddy put his ding-dong in my hoo-hoo." The judge also allowed one of the victim's teachers to testify that the victim told her, "Daddy tried to stick his ding-dong in my woo-woo." The trial judge further ruled that this testimony established the corpus delicti of the crime of capital sexual battery. The judge therefore ruled that Cherryhomes' inculpatory statement to a detective that he had caused the union of his and the victim's sexual organs could be admitted into evidence as other corroborative evidence of the offense.

In addition to the testimony of the grandmother, the teacher, and the detective to whom Cherryhomes made his inculpatory statement, the jury heard the testimony of Dr. Mark Morris. He performed a physical examination of the victim and found no physical signs of sexual abuse. Dr. Morris stated that the lack of physical signs of abuse did not negate the possibility that such abuse occurred.

The jury found Cherryhomes guilty after deliberating for an hour, and he was sentenced to life imprisonment with a twenty-five year minimum mandatory.

Section 90.803(23), Florida Statutes (1989), governs the admissibility of hearsay statements of a child victim of sexual abuse. It provides that the statements are admissible if:

> 1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. . . . and
> 2. The child either:
> a. Testifies; or
> b. Is unavailable as a witness, provided that there is other corroborative evidence of the abuse or offense. 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).

Section 90.804(1) provides the following definitions of unavailability as a witness:

> (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;
> (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; or
> (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.

Thus, before a trial judge may allow the hearsay statements of a child victim who does not testify at trial to be admitted into evidence pursuant to section 90.803(23), she must find in a hearing outside the presence of the jury that the circumstances of the statements provide sufficient safeguards of reliability; she must find that the child's participation in the proceedings would result in a substantial likelihood of severe emotional or mental harm; and, she must find that the victim was unavailable according to one or more of the definitions in section 90.804(1), provided there is other corroborative evidence of abuse.

The trial judge in this case found in a hearing prior to trial that the circumstances of the hearsay statements the victim made to her grandmother, her teacher, and the detective indicated their reliability, and she entered an order incorporating this finding. In the order, the judge also found that the victim was at that time not unavailable and that the hearsay statements would therefore be admissible at trial after the victim testified. § 90.803(23)2.a. At the trial, however, the judge found the victim incompetent to testify and ruled that she was thus unavailable to testify. In so ruling, the judge failed to make a finding, as required by section 90.803(23)2.b., that the victim's participation in the trial was likely to cause severe emotional or mental harm. That failure notwithstanding, the judge's finding that the victim was unavailable to testify because she was

incompetent to testify was erroneous. Townsend v. State, 613 So. 2d 534 (Fla. 5th DCA 1993) (Townsend II), review granted, State v. Townsend, 624 So. 2d 268 (Fla. 1993).

In Townsend II, the Fifth District receded from its opinion in State v. Townsend, 556 So. 2d 817 (Fla. 5th DCA 1990)(Townsend I), in which it had determined that the stipulation that the child victim's inability to understand the duty to tell the truth met the then existing physical illness or infirmity definition of unavailability. In Townsend II, the Fifth District found that

> the fact that a witness has been declared incompetent under section 90.603(2) meets none of the listed reasons for a determination of unavailability. We acknowledge that an incompetent witness is not permitted to testify but that is not legislatively recognized as being "unavailable" under section 90.803(23)(2)(a). And we think for good reason. To automatically permit the hearsay statements of one who does not understand the duty to tell the truth is not so free from risk of inaccuracy that the right to cross examination can be constitutionally ignored.

Id. at 537 n.5.[1]

We agree with the Fifth District that there is good reason that the legislature did not define unavailable as a witness to include being disqualified as a witness under section

---

[1] Townsend I and II were interpreting the 1987 version of section 90.803, whereas this case is governed by the 1989 version of that statute. The 1989 statute contains minor modifications of the 1987 statute, but they do not affect the concerns, analysis, or holding of this case.

90.603(2). We believe the instant case reveals the merits of that reason because we believe the victim's lack of understanding of what the truth is casts grave doubt on the reliability of her hearsay statements to her grandmother and teacher. Although section 90.803(23)(a)1. requires the trial judge to conduct a hearing to determine whether the circumstances of those statements provided sufficient safeguards of reliability, we believe that admission of the hearsay statements of a witness who is unable to understand the duty to tell the truth raises serious concerns regarding a defendant's rights under the confrontation clause. However, in Townsend II, the Fifth District, characterizing the following statement in Perez v. State, 536 So. 2d 206, 210-211 (Fla. 1988), cert. denied, 492 U.S. 923, 109 S. Ct. 3253, 106 L. Ed. 2d 599 (1989), as dictum, noted that it could be read to suggest that the supreme court is of a contrary belief:

> We reject the argument that the child must be found to be competent to testify before the child's out-of-court statements may be found to bear sufficient safeguards of reliability. Section 90.603(2), Florida Statutes (1985), provides that '[a] person is disqualified to testify as a witness when the court determines that he is . . . [i]ncapable of understanding the duty of a witness to tell the truth.' A young child generally does not understand abstract concepts such as duty, truth or lie. The fact that a child is incompetent to testify at trial according to section 90.603(2) does not necessarily mean that the child is unable to state the truth. The requirement that the trial court find that the time, content, and circumstances of the statement

> provide sufficient safeguards of reliability furnishes a sufficient guarantee of trustworthiness of the hearsay statement, obviating the necessity that the child understand the duty of a witness to tell the truth.

The Fifth District was of the belief that this statement could be interpreted to suggest that the time, content, and circumstances test can substitute for the unavailability requirement if the child is held incompetent to testify, thereby invalidating its analysis in Townsend II. Consequently, it certified the following question to the supreme court:

> 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)?

613 So. 2d at 538. Due to the concerns we have expressed in this opinion and the importance of this issue, we also certify the above question to the supreme court.

Since the trial court erroneously determined that the victim was unavailable to testify because she was incompetent to testify, see Townsend II, and since the victim did not testify, all of the prerequisites for admission of the child victim's hearsay statements were not met. § 90.803(23)(a). The trial court therefore erred in admitting the statements into evidence at trial. Without the hearsay statements, the corpus delicti of capital sexual battery was not established, and therefore, it was also error to admit Cherryhomes' inculpatory statement to the

police. Consequently, Cherryhomes' conviction must be reversed and this case remanded for a new trial.

CAMPBELL, A.C.J., Concurs.
PARKER, J., Concurs specially.

PARKER, Judge, Concurring.

I concur in the result which the majority has reached. Cherryhomes's conviction must be reversed because the record does not contain the trial court's findings regarding the reliability of the hearsay statements and the substantial likelihood of severe emotional or mental harm to the child. I write to urge the legislature to revisit section 90.803(23)(a) as it applies to a child victim who has been declared incompetent to testify.

Section 90.803(23)(a) mandates the following four requirements for a nontestifying child's hearsay statement to be admitted into evidence: a finding that the circumstances surrounding the statement provide sufficient safeguards of reliability; a finding that the victim's participation in the proceeding would result in a substantial likelihood of severe emotional or mental harm; other corroborative evidence of abuse; and unavailability. The majority holds that the trial court erred in concluding that the victim was unavailable to testify because the trial court had ruled that the child was incompetent to testify. The language in section 90.803(23)(a)2.b. clearly requires that the child's unavailability be determined pursuant to section 90.804(1). A child ruled incompetent to testify possibly

would fall within the purview of section 90.804(1)(d) which classifies a person with a then existing mental infirmity as unavailable. If the legislature did not intend for an incompetent witness to fall within this category, then, in my opinion, it should amend section 90.803(23) because an incompetent witness, in fact, is unavailable to testify.

I disagree with the majority's statement that the victim's lack of understanding of what the truth is casts grave doubt on the reliability of her hearsay statements to her grandmother and teacher. The child's grandmother and teacher may well be her closest confidantes. The supreme court has recognized the difference between a child's understanding to tell the truth at a court proceeding and the trustworthiness of statements the child has made to others, as evidenced by the following:

> [A] child victim's statements are "valuable and trustworthy in part because they exude the naivete and curiosity of a small child, and were made in circumstances very different from interrogation or a criminal trial," State v. Robinson, 153 Ariz. 191, 204, 735 P.2d 801, 814 (1987), and "therefore are usually irreplaceable of substantive evidence." [United States v.] Inadi, 475 U.S. [387,] 394, 106 S. Ct. [1121,] 1126, [89 L. Ed. 2d 390, ___ (1986)].

Perez v. State, 536 So. 2d 206, 209 n.5 (Fla. 1988), cert. denied, 492 U.S. 923, 109 S. Ct. 3253, 106 L. Ed. 2d 599 (1989). The statute's requirement of a finding that the circumstances of the statement provide sufficient safeguards of reliability should quell any fear that the statement is untrustworthy.

Finally, I believe that it defies common sense to require a trial court to make a finding that a child is likely to suffer severe emotional or mental harm when the trial court has declared the child incompetent to testify. If the child will not be present to testify because of incompetency, then there will be no harm to the child resulting from the child's participation in the trial. Thus, I would encourage the legislature to revisit section 90.803(23)(a) as it applies to a child victim whom the trial court has declared incompetent to testify to require only that the circumstances of the statement provide sufficient safeguards of reliability and other corroborative evidence of abuse.