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

# REPLY BRIEF OF RESPONDENT ON THE MERITS

**DWIGHT M. WELLS, ESQUIRE**
Florida Bar No. 317136
304 South Albany Avenue
Tampa, Florida 33606-1715
(813) 254-0030
Attorney for Respondent

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(813) 254-0030 • FAX (813) 253-2714

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(813) 254-0030 • FAX (813) 253-2714

## REQUEST FOR ORAL ARGUMENT

Respondent, GEORGE CHERRYHOMES, by and through his attorney, requests to be allowed to present oral agrument in this cause.



DWIGHT M. WELLS • ATTORNEY AT LAW • 304 SOUTH ALBANY AVENUE • TAMPA, FLORIDA 33606-1715
(813) 254-0030 • FAX (813) 253-2714

## STATEMENT OF THE CASE AND FACTS

Appellant was charged by information by the State Attorney of the Sixth Judicial Circuit on July 15, 1990, with sexual battery on a child under eleven years of age (R-4).

Appellant was tried by a jury on the charges. The trial commenced on June 24, 1992 (R-25). The State's case was primarily based upon the hearsay statements made by the victim. The trial court declared the victim incompetent to testify, and as a matter of course, also declared her unavailable (R-75-86). The trial court then ruled that Respondent's inculpatory statement was admissible (R-88). At the close of the State's case, counsel for the Respondent moved for a judgment of acquittal based on the insufficiency of the State's evidence (R-151). The motion was denied (R-151).

The Defense then called as its witness Dr. Morris (R-155). Dr. Morris identified himself as a doctor employed by the Child Protection Team (R-156-157). Dr. Morris, after having examined the child victim, testified that he found no physical evidence of sexual abuse (R-158-160).

The Defense then rested (R-161).

The Respondent was found guilty as charged by the jury (R-165-166).

The Court sentenced the Respondent on June 24, 1992 (R-32-33) to a term of life in prison with a minimum mandatory 25 year term on the sexual battery count (R-169).



DWIGHT M. WELLS • ATTORNEY AT LAW • 304 SOUTH ALBANY AVENUE • TAMPA, FLORIDA 33606-1715
(813) 254-0030 • FAX (813) 253-2714

The Respondent timely appealed (R-34).

On appeal in the Second District Court of Appeal Respondent's conviction was reversed and the case remanded for a new trial. Cherryhomes v. State, 19 Fla. L. Weekly D452 (Fla. 2d DCA, February 23, 1994). The Second District concluded that it was improper for the trial court to declare the child victim unavailable without first completing the conditions precedent as required by §90.803(23) and §90.804(1) of the Florida Statutes.



DWIGHT M. WELLS • ATTORNEY AT LAW • 304 SOUTH ALBANY AVENUE • TAMPA, FLORIDA 33606-1715
(813) 254-0030 •FAX (813) 253-2714

## SUMMARY OF THE ARGUMENT

The trial court erred in declaring the child witness incompetent and therefore unavailable to testify. This error allowed hearsay statements to be presented to the jury as substantive evidence to prove the State's case. A determination of incompetence does not automatically satisfy the requirements necessary for a determination of unavailability. Rather, Section 90.803(23)(2)(b), Florida Statutes (1994), requires "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..."

Because unavailability was not properly determined by the trial court pursuant to Section 90.803(23), Florida Statutes (1994), the court erroneously admitted the hearsay statements as evidence.



DWIGHT M. WELLS • ATTORNEY AT LAW • 304 SOUTH ALBANY AVENUE • TAMPA, FLORIDA 33606-1715
(813) 254-0030 • FAX (813) 253-2714

## ARGUMENT

**ISSUE:** A WITNESS WHO IS DEEMED INCOMPETENT TO TESTIFY PURSUANT TO SECTION 90.603(2) IS NOT, AS A RESULT, UNAVAILABLE. THE REQUIREMENTS OUTLINED IN SECTION 90.803(23) MUST BE SATISFIED BEFORE A WITNESS CAN BE DETERMINED UNAVAILABLE.

This case presents to the Court a truly unique situation. A child victim, the Respondent's daughter (hereinafter referred to as Ms. Cherryhomes) suffering from both physical AND mental deficiencies, testified to the trial court out of the jury's presence. As a result of her proffered testimony, Ms. Cherryhomes was deemed incompetent. It is important to realize that at the time of the testimony, Ms. Cherryhomes was nine years old. Her testimony clearly demonstrates her inability to distinguish the truth from fiction. Hearsay statements, made by Ms. Cherryhomes to the three (3) State witnesses, were subsequently admitted as substantive evidence. The Second District Court of Appeal correctly reversed the trial court's finding that the victim was automatically unavailable to testify because she was incompetent. The Second District reasoned that the trial court should have examined Sections 90.803(23) and 90.804(1), Florida Statutes (1994), in order to make the determination of unavailability. By not doing so, the trial court erroneously admitted Ms. Cherryhomes' hearsay statements. This reasoning is legally correct and in accordance with the Appellate Court decisions of this State.

Three conditions precedent exist before a trial judge can



DWIGHT M. WELLS • ATTORNEY AT LAW • 304 SOUTH ALBANY AVENUE • TAMPA, FLORIDA 33606-1715
(813) 254-0030 • FAX (813) 253-2714

properly admit the hearsay statements of a child victim into evidence. The trial judge 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." Cherryhomes v. State, 19 Fla. L. Weekly D850 (Fla. April 15, 1994); See also Florida Statutes (1994) §90.803(23).

As to the first requirement, given the mental deficiencies of Ms. Cherryhomes, this issue was properly reassessed by the Second District. The hearsay statements used at trial against Respondent were made by Ms. Cherryhomes when she was seven years old. This was approximately two years prior to the trial court's determination that Ms. Cherryhomes was incompetent. The State failed to demonstrate that those statements, made when Ms. Cherryhomes was seven, had any more of the required indicia of reliability than was exhibited two years later when the trial court declared Ms. Cherryhomes, at age nine, to be incompetent. As a result, the Second District, and reasonably so, believed "the victim's lack of understanding of what the truth is casts grave doubt on the reliability of her hearsay statements to [the State's witnesses]." Ibid. at D851. Moreover, in Townsend v. State, 613 So.2d 534 (Fla. 5th DCA 1993) (Townsend II), the Fifth Circuit Court of Appeal asserted the appropriate view of the issue should be "whether the admission of this evidence violated long-standing evidence rules designed to protect not only criminal defendants,



DWIGHT M. WELLS • ATTORNEY AT LAW • 304 SOUTH ALBANY AVENUE • TAMPA, FLORIDA 33606-1715
(813) 254-0030 • FAX (813) 253-2714

but anyone whose liberty, property, or other rights might be affected by the introduction of unreliable evidence." Townsend II, id.

The second requirement the trial judge must satisfy is the "finding...that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm..." Florida Statutes (1994) §90.803(23). As to this requirement, the trial record is virtually bare. The trial judge made no mention that such a result was probable or even possible in the instant case. Instead, as noted by the Second District "the judge failed to make a finding, as required by §90.803(23)(2)(b), that the victim's participation in the trial was likely to cause severe emotional or mental harm." Cherryhomes v. State, Fla. L. Weekly D850 (Fla. April 15, 1994).

Finally, the trial judge was required to find a category or definition included in §90.804(1), Florida Statutes (1994), applicable to the determination of Ms. Cherryhomes' unavailability. Respondent argues that §90.804, Florida Statutes, and its definitions of unavailability assume that the witness is competent. It assumes that the witness could testify except for (1) some privilege, (2) the witness' persistent refusal to testify, (3) a lack of memory which would destroy his effectiveness as a witness, (4) the inability to require the witness to attend, or (5) the death of the witness or his inability to testify caused by physical or mental illness or infirmity existing at the time of trial. As the court in Townsend II held, the statute's reference to "then



DWIGHT M. WELLS • ATTORNEY AT LAW • 304 SOUTH ALBANY AVENUE • TAMPA, FLORIDA 33606-1715
(813) 254-0030 • FAX (813) 253-2714

existing...mental...infirmity" must refer to a condition **arising after** the purported hearsay statements, Townsend II, id.

An attempt to place Ms. Cherryhomes into the confines of the fifth definition of unavailability (mental infirmity) cannot succeed. It cannot be argued in this case that the existing mental infirmity was a condition that arose after the purported hearsay statements were made. Ms. Cherryhomes has had long standing mental and physical defects. In fact, it is arguable that because two years had elapsed between the time the hearsay statements were made and the time Ms. Cherryhomes testified to the trial judge, that any statements made by Ms. Cherryhomes when she was younger are more likely to be unreliable then her testimony leading to the determination of her incompetence.

It is argued by Respondent, and agreed with by the Second District, that the trial court erred when it held that incompetency is, in legal effect, the same as unavailability. In Townsend II, the Fifth District was revisiting an earlier decision cited at State v. Townsend, 556 So.2d 817 (Fla. 5th DCA, 1990) (Townsend I). In Townsend I, the Fifth District determined that the then existing "mental infirmity" definition of unavailability encompassed the child victim who was unable to understand the duty to tell the truth as required in §90.603(2) Florida Statutes. In Townsend II, however, the Fifth District revised the conclusions asserted in Townsend I. In Townsend II the Fifth District receded by stating:

> in [Townsend I] we failed to consider the requirements of §90.803(23) and held that incompetency is, in legal effect, the same as unavailability. We now think that was error.



DWIGHT M. WELLS • ATTORNEY AT LAW • 304 SOUTH ALBANY AVENUE • TAMPA, FLORIDA 33606-1715
(813) 254-0030 • FAX (813) 253-2714

> [T]he fact that a witness has been declared incompetent under §90.603(2) meets none of the listed reasons for a determination of unavailability...To automatically permit the hearsay statements of one who does not understand the duty to tell the truth is not so free from risks of inaccuracy that the right to cross examination can be constitutionally ignored.

Id. at 537.

The Second District is in complete and total agreement with the reasoning of Townsend II. Moreover, the Second District sees the application of the merits of that reasoning to Respondent's case as proper. "[W]e believe the victim's lack of understanding of the what the truth is casts grave doubt on the reliability of her statements to [State witnesses]." Cherryhomes, at D851. Moreover, the Second District asserted 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." Ibid.

The legislature mandated that a condition precedent to the introduction of the testimony is that the child testify or be determined unavailable. In addition to being determined unavailable the trial judge "shall include a finding...that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm." Florida Statutes (1994), §90.803(23)(2)(b). This procedure was not followed by the trial court in Respondent's case.

As a result of the failure of the trial court to satisfy all conditions precedent, the trial court erred in admitting the



DWIGHT M. WELLS • ATTORNEY AT LAW • 304 SOUTH ALBANY AVENUE • TAMPA, FLORIDA 33606-1715
(813) 254-0030 • FAX (813) 253-2714

hearsay statements into evidence. Without the hearsay statements, the State failed in its burden of establishing the corpus delicti of capital sexual battery. Therefore, the trial court compounded its error by admitting the Respondent's extrajudicious inculpatory statement to the police. For all of the these reasons, recognized by the Second District, the reversal of Respondent's conviction and the remand for a new trial were proper.



DWIGHT M. WELLS • ATTORNEY AT LAW • 304 SOUTH ALBANY AVENUE • TAMPA, FLORIDA 33606-1715
(813) 254-0030 • FAX (813) 253-2714

## CONCLUSION

Based upon the foregoing facts, argument, and citations of authority, Respondent respectfully requests that this Honorable Court affirm the decision of the Second District Court of Appeal, reversing Respondent's conviction and remanding the case for a new trial.

DWIGHT M. WELLS
304 S. Albany Avenue
Tampa, Florida 33606
(813) 254-0030
FL Bar #317136
Attorney for Respondent

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was this 27th day of July, 1994 forwarded by U.S. Mail to the Office of the Attorney General, 2002 North Lois Avenue, Suite 700, Tampa, Florida 33607, and George Cherryhomes, DC#A140134, B-51-B, Sumter Correctional Institution, P.O. Box 667, Bushnell, Florida 33513.

DWIGHT M. WELLS, ESQUIRE
304 S. Albany Avenue
Tampa, Florida 33606
(813) 254-0030
Florida Bar # 317136

Exhibit A

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

GEORGE CHERRYHOMES,

Appellant,

vs Case No: 92-02588

STATE OF FLORIDA,

Appellee.
_____/

AN APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

# INITIAL BRIEF OF APPELLANT

DWIGHT M. WELLS, ESQUIRE
Florida Bar #317136
304 S. Albany Avenue
Tampa, Florida 33606
(813) 254-0030

COUNSEL FOR APPELLANT

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## STATEMENT OF THE CASE

Appellant was charged by information by the State Attorney of the Sixth Judicial Circuit on July 15, 1990, with sexual battery on a child under eleven years of age (R-4).

Appellant was tried by a jury on the charges. The Trial commenced on June 24, 1992 (R-25). At the close of the State's case, counsel for the Defendant moved for a judgment of acquittal based on the insufficiency of the State's case (R-151).

The Appellant was found guilty as charged by the jury (R-165-166).

The Court sentenced the Appellant on June 24, 1992 (R-32-33) to a term of life in prison with a minimum mandatory 25 year term on the sexual battery count (R-169).

This appeal was timely commenced by a filing of a Notice of Appeal on July 8, 1992 (R-34).

## STATEMENT OF THE FACTS

The first witness called by the State was Barbara Cherryhomes. Ms. Cherryhomes is a nine year old female, the natural daughter of the Appellant (R-70). The testimony of Ms. Cherryhomes was taken by the Court out of the presence of the jury (R-70-75).

Because of the age of Ms. Cherryhomes, the Court had decided to determine her competence before the Court allowed her to testify to the jury (R-75). Ms. Cherryhomes was asked a series of questions by the prosecutor in an attempt to qualify her as a witness. Ms. Cherryhomes was the alleged victim of the sexual battery (R-70-75). Ms. Cherryhomes was seven years old at the time of the alleged incident which led to the Appellant being charged with sexual battery (R-70).

Ms. Cherryhomes failed to answer most if not all of the questions asked of her by the prosecutor, the defense attorney and the Court (R-70-75). At the end of the questioning, the Court declared the witness, Ms. Cherryhomes, to be incompetent (R-78-85).

The Court then excused the witness and both the prosecutor and the defense argued about the admissability of hearsay testimony, in lieu of the testimony of Ms. Cherryhomes (R-85). The Court then ruled that due to the incompetence of Ms. Cherryhomes that she was unavailable under the hearsay rules and therefore hearsay testimony would be allowed to support the state's case (R-86).

The Court's ruling as to the admissibility of the hearsay testimony was made over the objection of defense counsel (R-46).

The Court ruled additionally that if the hearsay testimony formed corpus delicti of the crime (R-48), that the defendant's statement would be admissible as substantive evidence for whatever weight the jury wished to give it (R-48). Again, this ruling was made over the objection of the defense (R-48).

The jury was then returned to the courtroom and the state called its second witness. The witness identified herself as Margaret Randazzo, and stated that she was a teacher's assistant at Eisenhower Elementary School (R-105). Ms. Randazzo testified that she assisted the teacher in the class where Ms. Cherryhomes attended school (R-106). She described her interaction with Ms. Cherryhomes and related a specific incident with Ms. Cherryhomes (R-108-109). She testified that Ms. Cherryhomes was having some specific problems related to hygiene and that in working with the child, that she had related to her (Ms. Randazzo) a statement by the child (R-110). The statement implicated the Appellant in an alleged incident of sexual misconduct with his daughter (R-109-110).

Based upon the statement made by Ms. Cherryhomes, the teacher's assistant reported the incident to the school administrator (R-116).

The final witness called by the State was Ms. Margaret Jewett. This witness identified herself as a detective with the Pinellas County Sheriff's Office. She was the detective assigned to investigate the case against the Appellant (R-117).

Ms. Jewett testified about her contact with and interview of Barbara Cherryhomes (R-117-136). Ms. Jewett told the jury that Barbara Cherryhomes stated that her father put his ding-dong in her hoo-hoo (R-119). Pictures drawn by Ms. Cherryhomes were introduced by the State and Ms. Jewett described for the jury what the pictures represented (R-80, 84-85).

Ms. Jewett next told the jury about her interview with the Appellant. Over the objection of defense counsel, the detective was permitted to tell the jury what Mr. Cherryhomes had told her about the incident (R-126-133).

In her testimony, Ms. Jewett, described both the content of the statements made by the Appellant, as well as his demeanor while making those statements (R-126-133).

At the conclusion of the testimony by Ms. Jewett, the State rested its case (R-151).

The defense made a motion for a judgment of acquittal based on two grounds. The first ground was that the State had not presented sufficient evidence to prove a prima facie case against the Appellant. The second ground for the judgment of acquittal was the fact that the entirety of the State's case was based upon inadmissible hearsay testimony (R-111). The Court denied the motion for a judgment of acquittal (R-111). In fact, in denying the Motion for a Judgement of Acquittal, the Court stated that the Court did not know what "union with" means but that the Court would allow it to be answered by the jury (R-151).

The Defense then called as its witness Dr. Morris (R-155). Dr. Morris identified himself as a doctor employed by the Child Protection Team (R-156-157). He then told the jury that as a part of his responsibility for the Child Protection Team, he routinely examined children at the request of state agencies, where it was suspected that the children had been victim of abuse (R-156-157).

It was in this capacity that Dr. Morris examined Barbara Cherryhomes. He testified that he found no physical evidence of sexual abuse as a result of his examination of the child (R-158-160).

The Defense then rested its case (R-161).

The judge instructed the jury and sent them out to deliberate (R-164).

After approximately one hour, the jury returned a verdict of guilty as charged (R-165-166).

## SUMMARY OF THE ARGUMENT

The Trial Court erred in declaring the child witness incompetent and therefore unavailable to testify. This error by the Court resulted in a ruling that allowed the hearsay statements of the child victim to be presented to the jury as substantive evidence to prove the state's case. This was clearly contra to the rulings of the State Appellate Courts. Additionally, this error deprived Appellant his 14th Amendment right to due process as asserted in the United States Constitution.

The Trial Court further erred in admitting into evidence statements made by the Appellant, when the State had failed to prove the corpus delicti against the Appellant. This error contradicted what the rulings of Florida's Appellate Courts tended to show. Furthermore, this error violated Appellant's 14th Amendment right to due process as guaranteed via the United States Constitution.

The Appellant contends that the Trial Court should not have permitted the hearsay testimony of the victim, nor should the Court have allowed into evidence any statements made by the Appellant. For these reasons, the decision and sentence should be reversed and a new trial granted.

## ARGUMENT

ISSUE I: WHETHER THE TRIAL COURT ERRED IN DECLARING THE CHILD WITNESS INCOMPETENT AND THEREFORE UNAVAILABLE TO TESTIFY. THIS ERROR BY THE COURT RESULTED IN A RULING THAT ALLOWED THE HEARSAY STATEMENTS OF THE CHILD VICTIM TO BE PRESENTED TO THE JURY AS SUBSTANTIVE EVIDENCE TO PROVE THE STATE'S CASE.

This case presents this Court with a truly unique issue. After the child victim testified to the Court out of the presence of the jury, the Court declared the witness to be incompetent and therefore unavailable to testify. It is important to realize that at the time of the testimony, the child was nine years old. It was brought out during her proffer that the child suffered from both physical and mental deficiencies. Her testimony during the proffer clearly indicated her inability to distinguish the truth from fiction as well as several other deficiencies. When a court is asked to consider when and if to admit out-of-court statements, it must make a factual finding as to the safeguards of the statement's reliability. In this case, the trial court determined that the statements had the requisite indicators of reliability to admit the out-of-court statements.

Given the problems of this child witness, an issue which must be looked at by this court, is the reliability of the statements made by Ms. Cherryhomes when the child was seven years old. There was no showing by the state that the statements made by the child witness when she was seven years old had any more of the required

infirmity. As the Court held in Townsend, the statute's reference to "then existing. . . . mental. . . . infirmity" must refer to a condition arising after the purported hearsay statements, Townsend v. State, id.

It cannot be argued in this case that the existing mental infirmity was a condition that arose after the purported hearsay statement. The child witness in this case has long standing mental and physical defects. In fact, it is argued that because two years had elapsed between the time the hearsay statements were made and the time of the trial testimony, that any statements made when the child witness was younger are more likely to be unreliable.

In Townsend, 18 FLW D390, (1993), the Fifth Circuit was revisiting an earlier decision cited at State v Townsend, 556 So. 2d 817 (Fla. 5th DCA, 1990), herein after cited as Townsend I. In Townsend I, the 5th DCA relied upon the language contained in Perez v State, 536 So. 2d, 206, (Fla. 1988).

It is argued that in this case the trial court erred when it held that incompetency is, in legal effect, the same as unavailability. What the trial court has done in the instant case was to suggest that hearsay evidence may somehow be better evidence than the direct evidence given by the declarant of the hearsay statement.

As the Court said in Townsend II, 18 FLW D391, 1993:

"We now recede from the last quoted statement from Townsend I, because in that case we failed to consider the requirements of section 90.803(23) and held that incompetency is, in legal effect, the same as unavailability. We now think that was error. We are also concerned about the quoted statement in Perez that suggests that hearsay evidence may somehow be better evidence than the

direct evidence given by the declarant of the hearsay statement. The Perez statement 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). This inconsistency of logic can be resolved by recognizing as an "exception" to the section 90.603(2) exclusion any judicially determined credible testimony which does not depend on the witness's ability to understand the obligation to tell the truth.

The legislature mandated that a condition precedent to the introduction of the testimony is that the child testify or be unavailable. Section 90.803 (23) requires the court to first find unavailability before it even considers the statement's reliability under the "time, content and circumstances" test. This procedure was not followed by the court in this case.

In a concurring decision, Judge Diamantis stated the following:

"While I concur in the results, I base my conclusion on the fact reached by the majority. However, I base my conclusion on the fact that the admission of the child's testimony violated the Confrontation Clause. In a split 5-4 decision Idaho v. Wright, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990), the Court held that the hearsay testimony of a 2 1/2-year-old child who was not "capable of communicating to the jury" was inadmissible because the testimony was not admitted under a "firmly rooted" hearsay exception and for the reason that such testimony lacked the particularized guarantees of trustworthiness necessary to satisfy the requirements of the Confrontation Clause of the Fifth Amendment. In Wright, the Court stated the following, which is equally applicable to this case:

We think the "particularized guarantees of trustworthiness" required for admission under the Confrontation clause must likewise be drawn from the totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of belief. Our precedents have recognized that statements admitted under a "firmly rooted" hearsay exception are so trustworthy that adversarial testing would add little to their reliability. See Green, 399 U.S., at 161, 90 S. Ct., at 1936 (examining "whether subsequent cross-examination at the defendant's trial will still afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement"); see also Mattox, 156

U.S., at 244, 15 S. Ct., at 340; Evans, 400 U.S., at 88-89, 91 S. Ct., at 219-220 (plurality opinion); Roberts, 448 U.S., at 65, 73, 100 S. Ct., at 2538, 2542. Because evidence possessing "particularized guarantees of trustworthiness" must be at least as reliable as evidence admitted under a firmly rooted hearsay exception, see Roberts, supra, at 66, 100 S. Ct., at 2539, we think that evidence admitted under the former requirement must similarly be so trustworthy that adversarial testing would add little to its reliability. See Lee v. Illinois, 476., at 544, 106 S. Ct., at 2063 (determining indicia of reliability from the circumstances surrounding the making of the statement); see also State v. Ryan, 103 Wash. 2d. 165, 174, 691 P. 2d. 197, 204 (1984) ("Adequate indicia of reliability [under Roberts] must be found in reference to circumstances surrounding the making of the out-of-court statement, and not from subsequent corroboration of the criminal act"). This, 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.

To affirm this ruling would be to render the 5th DCA's decision in Townsend II erroneous and void. Additionally, an affirmation would deprive Appellant of his 14th Amendment right to due process. For these reasons, the decision and sentence should be reversed and a new trial granted.

## ARGUMENT

ISSUE II: THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE STATEMENTS MADE BY THE APPELLANT, WHEN THE STATE HAD FAILED TO PROVE THE CORPUS DELICTI AGAINST THE APPELLANT.

At issue in this case is whether the State had established the corpus delicti when the only evidence admitted by the State was the hearsay statement of the victim who was determined to be incompetent. It is imperative to make two determinations prior to resolving this issue. First, it is necessary to determine what the requirements are to establish the corpus delicti. Then, it is important to determine if the State satisfied those requirements; thereby, establishing the corpus delicti. Only after establishing the corpus delicti would the Appellant's be admissible.

In determining what the requirements are to establish the corpus delicti it is helpful to examine the language of the Florida Supreme Court and 5th DCA of Florida. Both of these Courts have addressed this issue and have clearly identified the essential elements of proof of corpus delicti. First, the Florida Supreme Court in State v. Allen, 335 So. 2d 823 (Fla. 1976) conceded that the corpus delicti could be established using circumstantial evidence for purposes of admitting a defendant's confession. Id. at 825. See also, Burks v. State, 613 So. 2d 441 (Fla. 1993). Moreover, the Court suggested that the proof of corpus delicti need not be uncontradicted or overwhelming. Id. at 825. See also, Burks, supra, at 441. However, the Court demanded that the proof of corpus delicti at least show existence of each element of the crime. Id. at 825. See also, Burks, supra, at 441. In other

words, the Court requires proof of a criminal act prior to establishing corpus delicti. Id. at 825. See also, Burks, supra, at 441.

Additionally, the 5th DCA of Florida stated in L.E.W. v. State, 616 So. 2d 613 (Fla. 5th DCA, 1993) that it was the burden of the State to establish the corpus delicti. Id. at 613. This burden included offering proof: 1) that the criminal act occurred and, 2) that someone's criminality was involved. Id. at 613. The court suggested that only after establishing the corpus delicti could the State enter a defendant's confession. Id. at 613.

After determining the elements of corpus delicti, it then becomes necessary to determine if the State satisfied those elements. In the instant case the State relied solely on the victim's hearsay statement to an assistant teacher to prove corpus delicti. This testimony, under normal circumstances, would properly be admitted as it falls within section 90.803(23) of the Florida Evidence Code (the hearsay exception for statements of child abuse victims). However, determining whether corpus delicti had been established solely by the victim's hearsay statement is not conclusive. To make the determination it is beneficial to examine the ruling in the L.E.W. case.

In L.E.W., the State attempted to establish the corpus delicti by presenting the victim's hearsay statement to the investigating officer. Id. at 613. This was allowed by the court in accordance with section 90.083(23), Florida Evidence Code, (the hearsay exception for statements of child abuse victims) which generally

permits similar statements, even though the victim repudiated the statement at trial. Id. at 613. The District Court of Appeals in L.E.W. asserted, however, that the hearsay statement, although properly admitted by the trial court, was unreliable to establish corpus delicti. Id. at 613. The District Court of Appeals stated that the hearsay exception was open to "the broadened evidentiary rule that statements repudiated at trial may not be used as substantive evidence that the act occurred." Id. at 613. Because the victim's hearsay statement was not sufficient to show that the act occurred, the State failed to prove the corpus delicti. Furthermore, because the State failed to prove the corpus delicti, the trial court erred in allowing the appellant's extrajudicious confession into evidence.

In the instant case, unlike the L.E.W. case, the victim did not repudiate the statement at trial, per se. Rather, in the instant case the trial court determined the victim to be incompetent. The appellate court should find that because the victim was determined incompetent her statement, like the one repudiated in L.E.W., must similarly be subjected to the broader evidentiary rule. After applying the reasoning of the L.E.W. case to the instant case, the appellate court must find that the State failed to prove the corpus delicti. The State failed to prove the corpus delicti because statements subject to the broader evidentiary rule, as the victim's statement in the case at bar, cannot be used as substantive evidence that a criminal act occurred. Because the State failed to prove that a criminal act

occurred, the State failed to prove the corpus delicti. As such, the trial court erred in allowing the appellants' extrajudicious confession to be admitted as evidence.

To affirm this decision would resist the reasoning used by the State's Appellate Courts which tend to show that questionable hearsay statements of victims does not offer substantive evidence that a criminal act occurred. Additionally, an affirmation would deprive Appellant of his 14th Amendment right to due process. For these reasons, the decision and sentence should be reversed and a new trial granted.

## CONCLUSION

Based upon the foregoing facts, argument, and citations of authority, Appellant respectfully requests that this Honorable Court reverse all of Appellant's judgments and sentences and remand this matter to the trial court for future proceedings in conformance with this Court's Order.

DWIGHT M. WELLS
304 S. Albany Avenue
Tampa, Florida 33606
(813) 254-0030
FL Bar #317136
Attorney for Appellant

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was this 27th day of July, 1993 forwarded to U.S. Mail to the Office of the Attorney General, 2002 North Lois Avenue, Suite 700, Tampa, Florida 33607, and George Cherryhomes, DC#A140134, B-51-B, Sumter Correctional Institution, P.O. Box 667, Bushnell, Florida 33513.

DWIGHT M. WELLS, ESQUIRE
304 S. Albany Avenue
Tampa, Florida 33606
(813) 254-0030
Florida Bar # 317136