OA 2-14-95

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 84,106

LARK O'SEAN DUPREE,

Respondent.
_____/

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent Dupree, defendant in the trial court and appellant in the district court, will be referred to as defendant. Petitioner state, appellee in the district court, will be referred to as the state. References to the record on appeal will be by use of the symbol R followed by the appropriate page number(s). References to the transcript of proceedings will be by the use of T followed by the appropriate page number(s). The transcripts for the trial under review begin with volume VIII, T811.

STATEMENT OF THE CASE AND FACTS

The defendant was indicted and convicted of first degree murder of Jirisha Thompson on 21 September 1991. R134-135, R145, R191-194. Prior to trial the state filed a notice that it intended to introduce evidence of out-of-court statements made by the deceased child's brother, Joshua Tunsill, as hearsay exceptions pursuant to section 90.803(23), Florida Statutes (1989). R33-40. A hearing was held on 20 April 1992, T45-150, at which the state argued that the hearsay exception was applicable to a child witness pursuant to Russell v. State, 572 So. 2d 940 (Fla. 5th DCA 1990),and the defendant contended that Russell was not applicable and that the section 90.803(23) hearsay exception did not apply to child witnesses of child and sexual abuse who were not themselves the victims in the charged offense. T134-150. The trial court ruled that the hearsay exception criteria had been met and the evidence was admissible. T148-150. On appeal, the district court held that the hearsay exception was only applicable to the child victim of the charged offense and reversed the conviction for retrial. Dupree v. State, 19 Fla. L. Weekly D1404 (Fla. 1st DCA June 29, 1994). The state petitioned this Court for discretionary review based on conflict with Russell, which was granted by order dated 9 November 1994.

At trial, the state presented the following sequential evidence on which the jury based its verdict. The medical examiner, Dr. Arruza, testified at T1011-1085 that the victim was

a two-year old infant girl with numerous bruises which were not caused by medical treatment but were caused by blunt impacts within 24 hours of death. T1018-1030. Further, there were seven identifiable blunt impacts to the top of the head which caused a nine-inch fracture with wide gaps. T1030-1034. The impacts themselves were very forceful and could not have been accidental unless the accident involved something like a six-story fall or a motor vehicle accident. T1034-1050. The infant died from blunt head traumas within 24 hours of death and there were no indications of previous injuries. T1050-1067. The medical examiner also testified that the blunt impacts were consistent with the child hitting a fixed object with great force but not with a moving object hitting the child with great force. T1078-1079. Further, that the locations of the blunt impacts on the top of the head were such that they could not been caused by play or accident and that they would have caused instant unconsciousness. T1079-1082. The treating physician, Dr. DeNicola testified at T1090-1126 that he first had contact with the deceased child at approximately 10-11 p.m. on 21 September 1991 when the child was unconscious in a pre-death state, T1095, that there was a soft area on the back of the head similar to water in a plastic bag, and that there were extensive fractures caused within six hours of his examination. T1096-1099. He further opined that the blunt impacts would have been very severe, could have been caused by repeated impact with a wall or fixed object, T1107-1109, and that the injuries would have required a great deal of force which would have rendered the victim instantaneously unconscious. T1112-1125.

The surviving sibling, Joshua, testified concisely on direct examination at T1127-1132 that he had seen the defendant bump the victim's head to the wall five times while their mother was absent at the store. He also demonstrated to the jury using a doll how the defendant swung the deceased child to strike the wall.

Counsel for defendant cross examined Joshua from T1132 through T1162. There was no redirect by the state. An appendix containing Joshua's testimony is attached for the convenience of the reader. The state will argue below that the central theme of the lengthy cross examination was to express or imply that Joshua's testimony was due to improper influence, motive, or recent fabrication. From this, the state will argue that the prior consistent statements of Joshua were also admissible pursuant to section 90.801(2)(b) as hearsay exceptions without regard to their admissability under section 90.803(23). The record facts underlying this issue will be set out in the argument on issue II below.

There was testimony from the mother of the children, Beatrice Thompson, that they had been left in the care of defendant, who was a live-in boyfriend, for a short period of time at approximately 7:30 p.m. on the 21st when she went to a grocery store, that the deceased had no bruises or other injuries when she left, and that the deceased child was unconscious on the floor when she returned. T1163-1195. The mother was cross examined, and further examined, from T1195-1233. The defense

asked if Joshua would say things other people told him to say and was answered, "yes definitely," at T1208-1209. She was also asked repeatedly if Joshua had ever told her that the defendant slammed the deceased victim's head into the wall and answered no. See, e.g., T1216-1219. On redirect, she denied ever telling Joshua to testify as he did that the defendant had slammed the child's head into the wall five times. T1227.

Alice Wong, a protective investigator supervisor for HRS, testified that she observed an interview with Joshua conducted on 25 September 1991 by Eleanor Coyle, a member of a child protection team; and that only Ms. Coyle and Joshua were in the interview room. T1239-1243. Ms. Wong and two police officers were in another room observing by two-way mirror and a television monitor. She made notes on the interview and further testified that Ms. Coyle put Joshua at ease, that he spoke spontaneously, that he was not led, and that Joshua said the defendant was always fighting the deceased child, and had punched her and bumped her head into the wall several times while the mother was gone. Joshua demonstrated the bumping with a doll. T1237-1249.

Evidence officer Crews described the walls of the home where the murder occurred as "real thick, hard plaster." T1264. The grandmother of the two children, Louise Thompson, testified that the deceased child was uninjured when she saw her last on the day before her fatal injuries. T1273-1281. On cross examination, she said that Joshua had never told her that the defendant abused the deceased or had banged her head against a

wall or door. T1282, T1285. Detective Bradley testified that the defendant had given him three conflicting exculpatory statements on the child's injuries. T1294-1327. He was not questioned on his observation of the child protection team interview of Joshua by either the state or defense.

Doctor McIntosh, the medical director of the Duval County child protection team, testified at T1250-1386 that he had examined the medical records of the deceased, that the fracture would have required an extremely powerful and strong force and to a reasonable degree of medical certainty that the injuries were not accidental and were caused by some form of abuse.

The state then rested and the defense called Officers Bradley and Emanuel. They were both questioned on what Joshua had previously told them and whether they had suggested Joshua's testimony to him. Both denied suggesting the testimony. T1392-1422. An HRS investigator, Debra Allen, was also called by the defense and questioned concerning her interview with Joshua and whether he had reported to her that the defendant had struck the deceased's head against the wall; she was also questioned on whether she had suggested Joshua's testimony to him. Her answer to both was no. T1423-1435. The defense also called Mary Dupree Gantt, Jerome Williams, Louis Woodard, and Mabel Woods, who testified that the defendant was a peaceable person. T1436-1469. The defendant also took the stand and denied that he had abused, hit, or otherwise caused the death of the deceased child. T1470-1569.

SUMMARY OF ARGUMENT

The trial court did not err in admitting the out-of-court statements of the child pursuant to section 90.803(23). The statute and its preamble show a clear legislative intent to admit into evidence trustworthy out-of-court statements by children who are victims or witnesses of child abuse and child sexual abuse.

Moreover, even if the statements were not admissible pursuant to section 90.803(23), they were clearly admissible pursuant to section 90.801(2) to rebut implied or express claims that the child's in-court testimony was a recent fabrication or was due to improper influence or motive. Thus, the error if any was irrelevant and could not have impacted the jury verdict.

ARGUMENT

ISSUE I

DID THE TRIAL COURT ERR IN RULING THAT THE OUT-OF-COURT STATEMENTS OF THE CHILD WERE ADMISSIBLE PURSUANT TO SECTION 90.803(23)?

The relevant facts are that Joshua Tunsill, a six-year old child, was interviewed by a child protection team member, Eleanor Coyle, on 25 September 1991. This interview was observed from another room by Alice Wong, a protective investigator supervisor for HRS, and two police officers.[1] The observers viewed and heard the interview through a two-way mirror and a sound television. Joshua told the interviewer that the defendant had punched the decedent child and repeatedly bumped her head into a wall while the children's mother was temporarily absent from the home. The question for the trial court was whether section 90.803(23), Florida Statutes (Supp. 1990) was applicable and would permit the out-of-court statements of the child to be introduced into evidence by the observers or the interviewer. Specifically, the state argued that the statute was not narrowly applicable only to child victims of charged offenses, in this case the deceased, but was also applicable to child witnesses to any child or sexual abuse offenses. The defendant argued that the statute was only applicable to the deceased child victim. The state argued that Russell v. State, 570 So. 2d 940 (Fla. 5th

[1] Alice Wong was the only witness called by the state for the purpose of recounting the out-of-court statement.

DCA 1990), where the district court read the statute as permitting child witnesses of the sexual abuse to testify even though they were not the victims of the charged offense was controlling. The trial court ruled that Russell was applicable and followed it pursuant to case law making decisions of another district court controlling unless contradicted by decisions of the cognizant district court or of this Court. Pardo v. State, 596 So. 2d 665 (Fla. 1992); Stanfill v. State, 384 So. 2d 141, 143 (Fla. 1980).

The statutory language at issue reads as follows:

> (23) HEARSAY EXCEPTION; STATEMENT OF CHILD VICTIM.
>
> (a) Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by a child victim with a physical, mental, emotional, or developmental age of 11 or less describing any act of child abuse or neglect, any act of sexual abuse against a child, the offense of child abuse, the offense of aggravated child abuse, or any offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding of: .....

The remaining statutory language is not at issue. Because this is an issue of statutory interpretation, judicial review here is de novo with no presumption of correctness afforded the courts below.

There are a number of rules of statutory interpretation to be applied. The cardinal rule is that the court should attempt to effect legislative intent; other rules of construction are

subservent to that cardinal rule of determining legislative intent. Florida State Racing Commission v. McLaughlin, 102 So. 2d 574 (Fla. 1958). In determining this intent, the entire statute should be considered and construed as a whole so that it is meaningful in all parts. Wiloncky v. Fields, 267 So. 2d 1 (Fla. 1972) Intent is determined primarily from the language of the statute itself; ambiguity should not be created where none exists. S.R.G. Corp. v. DOR, 365 So. 2d 687 (Fla. 1978). However, legislative intent should be given effect even if it contradicts the strict letter of the statute, and no statute should be construed so as to produce an absurd result. State v. Webb, 398 So. 2d 820 (Fla. 1981). In determining intent, the court should consider the evil or problem to be remedied and the purpose of the statute. Webb. A declaration by the legislature of the purpose or evil to be addressed is highly persuasive. D.O.T. v. Fortune, 532 So. 2d 1267 (Fla. 1988).

Turning to an analysis of the statute itself, there are ambiguities. The term "child victim" is not on its face limited only to child victims of charged offenses when used, as here, in an evidentiary statute which does not define the statutory elements of a criminal offense. Thus, the rule of construction set out in section 775.021(1) favoring a criminal defendant is not applicable here. Moreover, other statutory language clearly shows that the statute is addressing instances where there are multiple victims and witnesses. Common experience confirms that this is frequently the case. On this point, see section 1.01(1), Florida Statutes which prescribes that in construing statutes,

the singular includes the plural and vice versa where the context permits. Further, the statutory language, "describing any act of child abuse or neglect, any act of sexual abuse against a child, the offense of child abuse, the offense of aggravated child abuse, or any offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child, not otherwise admissible, is admissible" (e.s.) is expansive, not restrictive and suggests that the statute is applicable to all child witnesses to all of the enumerated offenses involving child victims.[2] As this case shows, a "declarant child" is not necessarily the "child victim" of the charged offense. Thus, there is an ambiguity calling for interpretation and a strong suggestion that the legislature intended the statute to cover more than the child victim of the charged offense[3] .

The evils or problems which the legislature sought to address are set out in the WHEREAS clauses of chapter 85-53, Laws of Florida which created section 90.803(23)[4]

WHEREAS, ... and,

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[2] Pursuant to Russell, Joshua was a victim of the uncharged offense of simple child abuse under section 827.04, Florida Statutes.

[3] The state does not consider it dispositive but, as an officer of the court, undersigned counsel point out that the Senate Staff Analysis and Economic Impact Statements of 1 May, revised 10 May, 1985 contain a sentence with emphasis in original: "This hearsay exception applies only to child victims who are witnesses."

[4] Section 90.803(23) was subsequently expanded beyond sexual abuse to cover other offenses, such as here, by chapter 90-174, §4, Laws of Florida.

> WHEREAS, children are in need of special protection as victims or witnesses in the judicial system as a result of their age and vulnerability, and
> WHEREAS, ... and,
> WHEREAS, a young child is able to relate descriptions of acts involving sexual contact or sexual acts performed in the child's presence in a reliable manner based upon consideration of the child's age and development, and
> WHEREAS, the credibility and reliability of a child's testimony can be assured by procedural safeguards that will not infringe upon the defendant's right to a fair trial or the rights of any party in a judicial proceeding, and
> WHEREAS, it is necessary that safeguards be instituted for the children of the State of Florida who are victimized to assure that their right to be free from emotional harm and trauma occassioned by judicial proceedings is protected by the court, and
> WHEREAS, effective handling of child abuse cases in the judicial system is essential to future protection of the child, and
> WHEREAS, the Legislature recognizes that special provisions are necessary to assure that evidence of unlawful sexual offenses against children is admissible in the courts, based upon sound principles of child development, and
> WHEREAS, the assistance of professionals and persons having a special relationship with the child can aid the courts in assuring full access to legal remedies for the protection of children, NOW, THEREFORE
> Be It Enacted by the Legislature of the State of Florida

There are numerous evils or problems in the WHEREAS clauses which cannot be addressed if the statute is truncated by limiting it only to actual child victims of the charged offense. First, the actual victim of the charged offense may not be available as a witness. Here, the victim was only two years old and it is doubtful if she could have testified, even had she survived the aggravated child abuse. She didn't, of course. (Logically,

witnesses to sexual and criminal abuse of children are more likely to be other children than adults because adult witnesses are more of a deterrent to such crimes.) Further, even had the two-year old survived, the six-year old would be a more reliable witness if interviewed, as here, by a trained and experienced professional well qualified to conduct interviews of young children. Second, the WHEREAS clauses are clearly treating the children as witnesses, not merely victims of the charged offenses. Indeed, the clauses are primarily aimed at children as witnesses rather than victims. Third, the rule in Florida is that all relevant evidence is admissible except as provided by law. §90.402, Fla. Stat. There is no question here that the procedural safeguards of section 90.803(23) were fully satisfied and that the out-of-court statements of Joshua are reliable as determined by the Legislature[5]. The defendant here was afforded his full constitutional right to confrontation and cross examination on the declarant's statement. There is no logical basis for denying the courts of Florida this highly relevant evidence which is obtained under conditions showing its trustworthiness.

It should also be noted that the Russell decision on which the trial court relied in 1992 was decided in 1990. It is presumed that legislatures are familiar with court decisions interpreting statutes. State v. Gonzalez, 467 So. 2d 723, 726

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[5] See, footnote 4 of the district court decision below. The defendant did not contest the issue of whether the findings of reliability were sufficient. These findings, even if error, do no constitute fundamental error. State v. Townsend, 635 So. 2d 949, 959 (Fla. 1994).

(Fla. 3d DCA 1985). The Florida Legislature had not acted to overrule Russell as of 1992 and it has not done so to this date in late 1994. This suggests that Russell correctly interprets legislative intent by addressing the evils and problems with which the Legislature was concerned. To illustrate the point, see the district court decision in Childress v. State, 543 So. 2d 413 (Fla. 1st DCA 1989) narrowly interpreting section 90.803(23), Florida Statutes (1987) as applying only to child sexual abuse cases, not child abuse. The Legislature responded by enacting chapter 90-174, §3, Laws of Florida, to overrule Childress.

In summary, the language of the Act and the rules of statutory interpretation show that the legislative intent can only be satisfied by holding that section 90.803(23) is applicable to all children who witness child abuse or child sexual abuse crimes. Contrary to the flawed conclusion of the district court below, this would not require that out-of-court statements by children witnessing crimes against adults be admissible as hearsay exceptions under section 90.803(23).

ISSUE II

WAS THE OUT-OF-COURT STATEMENT OF THE DECLARANT CHILD ADMISSIBLE AS A PRIOR CONSISTENT STATEMENT PURSUANT TO SECTION 90.801(2)(b), FLORIDA STATUTES?

The state does not concede in any manner that the out-of-court statements of Joshua were not admissible pursuant to section 90.803(23). However, it is readily apparent on the face of the proceedings in the record on appeal, sequentially outlined in the statement of facts, that Joshua testified prior to the admission of the out-of-court statements in the testimony of Alice Wong. Joshua was severely cross examined, at great length, on whether his testimony that the defendant had battered the decedent child was a recent fabrication which was caused by improper influence or motive. The full cross examination is set out in the record at T1132 through T1162 and is contained in the appendix for the convenience of the reader. Without setting out all of the repetitive questions on recent fabrication, the following are representative:

> BY MR. ANDUX [Defense Counsel]:
>
> Q Josh, if your mom or your grandma tells you to say something like this pen is pink, would that be the truth?
>
> A No.
>
> Q Okay. Have you ever said that to me before, that whatever your grandma or your mom says is true -- that this is the truth; do you recall telling me that before?
>
> A Yeah.

Q Okay. You changed for some reason. Have you talked to anybody about what you talked to me about since that time about what is the truth and what isn't the truth?

A No.

Q Have you talked to Mr. Plotkin [Prosecutor] about what the truth is and what isn't the truth? Did you talk about that today, earlier today or yesterday?

A Yesterday.

Q Yesterday?

A Uh-huh (affirmative.)

T1133.

Q No? Have you talked to your mom about what you should and shouldn't say here today?

A Yeah.

Q Okay. Did you ever -- did she tell you not to talk about whether she ever hit Rish or not?

A No.

Q She didn't tell you not to talk about that?

A Yeah.

Q She did tell you that, didn't she?

A No.

Q What?

A No.

Q "Yes" or "no"?

A No

Q Did she tell you that she would get in trouble and you would get in trouble if you said that?

A No.

Q Now, you're saying you saw that happen, at some point you saw Lark pick Rich up and hit her head against a wall five times; is that what you said?

A Yeah.

Q Now, where were you when that happened?

A Home.

T1136-1137.

Q When you close your eyes, do you see Lark doing this to Rish or is this something that somebody told you to say?

A (Witness complies.)

MR. PLOTKIN: I will object to the form of the question. It is a compound question.

THE COURT: Sustained.

BY MR. ANDUX:

Q When you close your eyes, can you see Lark doing this?

A No.

Q Can you remember Lark really doing anything like this?

A Huh-uh (negative.)

Q Has somebody told you to say that?

A No.

T1140.

Q You didn't tell your mom at that time that Lark had hit anybody or hit anybody's head against a wall or anything like that, did you?

A No.

T1143.

Q You didn't say anything about Lark hitting anybody's head against a wall or against a door; is that right?

A Yeah.

Q Huh?

A Yeah.

Q You did tell him?

A Yeah.

T1143-1144.

BY MR. ANDUX:

Q Josh, you said that you had talked to the prosecutor here yesterday, how long did you talk to him?

A I don't know.

Q You don't know. Did he tell you that he was going to -- how he was going to ask you the question did Lark hurt somebody?

A No.

Q Huh?

A I don't know.

Q You didn't go over that?

A No.

Q You didn't go over what you were going to say?

A Huh-uh (negative.)

Q He didn't remind you of anything?

A Some things.

Q Huh?

A Some things.

Q Some things. Did you say some things to him that you couldn't remember and you were read what you had told some other people before?

A Yeah.

Q Yeah?

A (No response.)

T1148-1149.

Q Do you remember coming to this courtroom about a month ago and the court reporter telling you -- or you saying that you were going to tell the truth then?

A Yeah.

Q Do you remember then saying that the only thing that you remembered was Lark hitting the child's -- Jirishua's head against the middle of the door one time?

A Yeah.

Q You don't remember that?

A No.

T1150.

Q Josh, do you remember about a month ago coming in this courtroom like today and you were told to tell the truth, do you remember me asking you if your close your eyes and think back then, can you

remember Josh hurting Rish or hitting Rish's head against a wall and you saying, no, I can't remember that.

T1152-1153.

BY MR. ANDUX:

Q Josh, about a month ago I asked you to close your eyes, tell me if you remembered, if you could actually remember Josh (sic.) hurting or hitting Rish's head against a wall, and you said, no, I can't. Do you remember saying that?

A Yeah.

T1157-1158.

BY MR. ANDUX:

Q All right. Josh, I will be real brief here.
One, do you recall testifying, talking about what happened, about a month ago here in this courtroom?

A Yeah.

Q Okay. Do you remember at that time telling me that when you closed your eyes and thought about what happened that you could not remember Lark taking Rish and doing anything to her, like hitting her head against a wall; do you remember telling me you couldn't remember that back then?

A Yeah.

Q Now, do you recall telling me back then that Lark -- back when this happened back on this day, that when your mom got home that Lark told her, told your mom, that he had hit Rish's head against a wall?

A Yeah.

Q Did that happen?

A Yeah.

Q So when your mom got home, Lark said, "Oh, I hit Rish's head against the wall five times;" did that happen?

A No.

Q Did you say last time that that happened?

A Huh-uh (negative.)

T1159-1160.

This defense of recent fabrication was continued throughout the trial. See, for example, the cross examinations of the mother beginning at T1163 and particularly at T1208-1219 which also occurred prior to the admission of the out-of-court statements. See, also, the direct examinations of officers Bradley and Emanual beginning at T1392 and of HRS investigator Allen at T1423 when these witnesses were called for the defense.

The rules of evidence and the case law are well settled. Section 90.801(2)(b) states that out-of-court statements are not hearsay and are admissible if the declarant testifies at trial, as Joshua did, is subject to cross examination, as Joshua was, if the statement is consistent with the declarant's in-court testimony, as Joshua's was, and "is offered to rebut an express or implied charge against him of improper influence, motive, or recent fabrication," as was this prior consistent statement. Van Gallon v. State, 50 So. 2d 882 (Fla. 1951). A recent case of particular note is State v. Jones, 625 So. 2d 821 (Fla. 1993)

where this Court held that out-of-court statements made to a doctor did not meet the criteria for a hearsay exception under section 90.803(4), Florida Statutes and the state should have sought admission under section 90.803(23). Nevertheless, the failure was not fatal:

> However, the State's failure to introduce the physicians' statements through section 90.803(23) is not fatal to the State in this case because the statements in question were admissible as prior consistent statements by the child to rebut charges of recent fabrication and improper influence. Section 90.801(2)(b), Fla.Stat. (1985). (footnote omitted)
>
> On cross-examination, the child admitted discussing her testimony with the prosecutor shortly before the trial. Through questioning, the defense counsel implied that the prosecutor had told her what to say on the stand. The defense counsel also asked if she had been told to accuse Jones in order to protect her uncle. The physicians' later testimony, which was consistent with that of the child at trial, satisfies the definition of non-hearsay in section 90.801(2)(b), and under the circumstances and facts of this particular case, it was properly admitted by the trial judge. *See Nussdorf v. State*, 508 So.2d 1273 (Fla. 4th DCA 1987).

State v. Jones, 625 So. 2d at 826-827.

In summary, defendant raised his claim of recent fabrication when Joshua first testified and maintained that defense thereafter. The introduction of the out-of-court

statements was admissible pursuant to section 90.801(2)(b) and settled case law[6].

[6] In his testimony of 9 May 1985 before the Senate Judiciary/Civil Committee, Professor Ehrhardt predicted that the statements admitted as hearsay exceptions pursuant to the proposed section 90.803(23) would frequently also be admissible pursuant to other existing hearsay exceptions, such as that which section 90.801 affords.

CONCLUSION

This Court should hold that the out-of-court statements were admissible pursuant to both sections 90.803(23) and 90.801(2)(b), Florida Statutes, and quash the district court decision below.

Respectfully submitted,

ROBERT A. BUTTERWORTH
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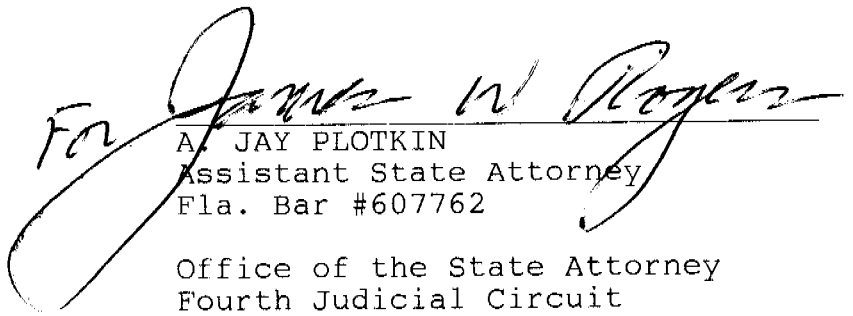

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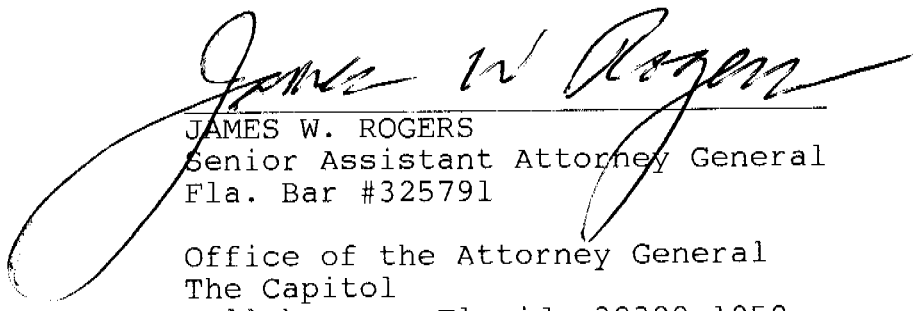

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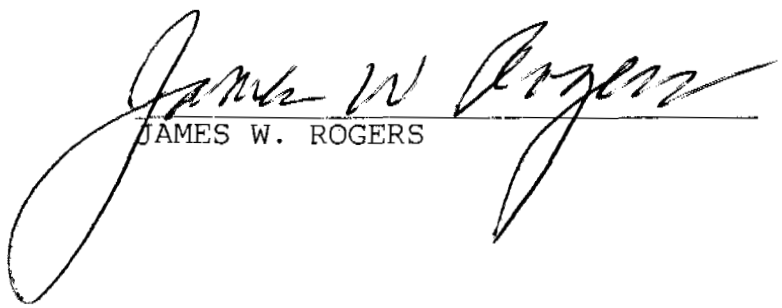
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to David P. Gauldin, Assistant Public Defender, Leon County Courthouse, Tallahassee, Florida 32301, this 5th day of December, 1994.



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APPENDIX

APPENDIX

TESTIMONY OF JOSHUA TUNSILL