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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner, :

v. : CASE NO. 84,106

LARK O'SEAN DUPREE, :

Respondent. :

_____/

RESPONDENT'S BRIEF ON THE MERITS

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RESPONDENT'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

References to the record proper shall be by the letter "R" followed by the appropriate page number. References to the transcripts shall be by the letter "T" followed by the appropriate page number. Contrary to the last sentence on page 1 of the Petitioner's brief, portions of the transcript dealing with the first trial which ended in a mistrial are relevant and are attached as an appendix.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the first paragraph of Petitioner's brief on page two as reasonably representative of the statement of the case.

Respondent strenuously objects to Petitioner's editorializing in his summary of the facts. For instance, on page four of his brief Petitioner states: "The surviving sibling, Joshua, testified concisely on direct examination at T-1127-1132 that he had seen the defendant bump the victim's head to the wall five times while their mother was absent at the store." [Emphasis added].

Because Respondent believes that Petitioner's facts are incomplete or inadequate the following facts are stated:

In September of 1991, Beatrice Thompson was living with Respondent and her 6-year old son ("Josh") and 2-year old daughter ("Jirishua") at the Mayfair Village Apartments. (T-1165). Respondent was not the father of either child. (T-1165).

On Friday, September 20, 1991, she picked up Jirishua from her mother's, who had been babysitting the child. (T-1167). The child appeared to be normal, nor did the child complain that she was sick. (T-1168-1169).

She and the child arrived at her apartment at approximately 6:30 in the evening. (T-1169). There, she bathed

both of the children, gave Jirishua a snack, and put her to bed after reading her a bedtime story.[1]

The child slept normally that night in a twin bed next to Joshua's bed. (T-1171). The next morning, she heard Jirishua and Joshua talking together, which was not unusual. (T-1172).

Thompson went across to the Winn-Dixie to obtain some food, and when she left, her daughter was on the bed with a coloring book and her son was on the floor in the same room. (T-1173).

About forty-five minutes later, she arrived back in the apartment and was met by her son and Respondent. Respondent told her that he had had to perform cardio-pulmonary resuscitation ("CPR") on Jirishua, so Thompson picked her up, and hugged her. (T-1174). Respondent appeared concerned, and told her that he might have over reacted. (T-1176).

Jirishua's mother believed that the child was "fine", and the child did not exhibit any difficulty breathing. (T-1178). During the day, the child slept off and on. (T-1179).

Thompson spent the day cooking, and Respondent apparently spent the day watching television. (T-1179).

During the day, the child did "spit up" a "little" and apparently had diarrhea. (T-1180). She rubbed or caressed her

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[1]Jirishua did not have dinner at Thompson's apartment that night. (T-1170).

daughter, and did not see or feel any bruises on her. (T-1180-1181).

Some time between 5:00 and 6:00 that afternoon, a man arrived from the rental agency to set up a bunk bed. (T-1181-1182). Thompson placed Jirishua in the bottom bed, and Joshua got in the top bed. (T-1182).

Around 7:30 in the evening, Thompson walked across the street to the grocery store. She estimated that she was gone from the residence approximately 4-5 minutes. (T-1184).

As she was returning to the apartment, she was approached by her son Joshua, who told her "Mom, she's doing it again". (T-1184).

When she ran into the apartment, she went straight to the children's room. There, Respondent was sitting on the side of the bed, and Jirishua was lying on the floor. (T-1185). Her daughter was not responsive. Respondent administered CPR to the girl. (T-1186).

Respondent then picked up the child, went into the bathroom, placed her in the tub, and put water on the child. (T-1187). The child apparently "came to" but did not respond when spoken to by her mother. (T-1187).

Respondent then took the child and laid her on a pillow in the living room. (T-1188).

Realizing at this point that her daughter's condition was serious, Thompson dialled "911" and her daughter was eventually taken to the hospital. (T-1189).

The child was pronounced dead at the hospital around noon on September 22, 1991. (T-1108).

It was the state's theory that Respondent was guilty of felony murder through aggravated child abuse. To that end, the state introduced medical testimony, Joshua Tunsill's testimony and hearsay-testimony and Detective Bradley's testimony (concerning statements that Respondent allegedly made).

Pediatrician Lucian DeNicola testified that he treated the child prior to her death. When he first saw her, she was in a "pre-death state". (T-1095). The child was in cardio-vascular collapse, and had a soft area on the back of her skull. (T-1096). His initial determination was that the child was not going to recover from her injuries. (T-1097).

A "CAT" scan showed that the child was suffering from "edema" (swelling of the brain). (T-1098). The CAT-scan also showed extensive fractures to the skull. (T-1099). All these injuries were consistent with an injury having occurred within six hours previously. (T-1099).

The child also suffered from retinal hemorrhages in both eyes which could have been caused by a traumatic shaking of the head and which in his opinion would not have been caused by CPR. (T-1103-1104).

DeNicola believed that the fractures to the skull were caused by a "lot of force" because they were so severe. (T-1107). He believed that the child's injuries could have been caused if she had been struck by a heavy object or if she

had been pushed "...severely against a hard object, a wall or a cement floor,...". (T-1109).

On cross-examination, he admitted that if the child had been struck, it would be "very difficult" to determine whether the child had been struck one or more times. (T-1110).

Pathologist Margarita Arruza performed the autopsy on the child. (T-1015).

According to Arruza, there were two types of bruises on the child: bruises that were caused by the medical procedures in an attempt to save her life, and other bruises. She believed that the other bruises occurred within 24 hours of death, and she internally examined some of these bruises but not all of them. (T-1020-1023). She believed that some of these bruises were consistent with someone having forcibly grabbed the child. (T-1028-1029). She did not believe that properly performed CPR would have caused the bruises. (T-1030).

In addition to the bruises on the body, there were apparently some bruises on the head of the child. (T-1031-1033). The pathologist believed that these bruises had been caused by blunt impacts within 24 hours of the child's death. (T-1033-1034). The child also had a nine-inch long skull fracture which was "gaping". (T-1034). She believed that

the child suffered more than one impact in order to cause this fracture. (T-1034-1036).[2]

Over objection of defense counsel, the pathologist was allowed to testify that although she had seen a skull fracture like this in accidents where great force was employed (such as motor vehicle accidents), she had not seen such a skull fracture in other accident cases. (T-1040). She believed that this skull fracture was contemporaneous with the bruising on the scalp, the bruising on the chest, and the bruising on the back of the child. (T-1040-1041). She did not believe that this fracture could have been caused by a fall in the tub, by a fall from a bed, by a bump on a door, or by the plastic beads that the child wore in her hair. (T-1041).

She also did not believe that the child could remain conscious very long after receiving this fracture. (T-1043).

As a result of this fracture, the child suffered brain injury. (T-1044). She believed that the child's moving head hit a stationary object. (T-1050).

The cause of death was blunt head trauma. (T-1051). Over the objection of defense counsel, she was allowed to testify that the child's death was a homicide. (T-1051).

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[2]Defense counsel objected and asked for a motion for mistrial based on the pathologist's expression of opinion that the child had had her skull fractured by blunt trauma. (T-1036-1038).

Pediatrician Bruce McIntosh was allowed to testify over the objection of defense counsel that he had evaluated over one thousand cases of child abuse, and that he did not always find that the person accused of child abuse had committed child abuse. (T-1354-1357). He was qualified by the court as an expert in the field of pediatrics. (T-1357-1358).

He reviewed the medical records of the child, including the autopsy report. (T-1359). Over the objection of defense counsel, he testified that after reviewing the child's medical records it was his opinion "...that it was child abuse." (T-1361). He believed that the child's skull fracture was caused "...by having the child's head [strike] forcefully against some object." (T-1367). He did not believe that the child's skull fracture(s) could have been caused from a fall from the bunk bed. (T-1386).

Over the pre-trial and trial objections of defense counsel (T-1234-1237), Department of Health and Rehabilitative Services Protective Investigator Supervisor Alice Wong was allowed to testify that she "attended the interview" of Joshua Tunsill which was conducted on September 25, 1991, by child protection team member Eleanor Coyle. (T-1239-1242). She observed this interview through a one-way mirror and heard it through a monitor. (T-1242). According to her, Joshua seemed quite comfortable during this interview, and spoke freely with Ms. Coyle. (T-1245). Joshua told Coyle that he knew that his sister "Rish" was "in Heaven" because his uncle told him so. (T-1245). Joshua told Coyle that Respondent "always" fought

with his sister, and apparently punched her. (T-1246). Joshua (on the date of the incident) saw Respondent "...bumping Rish's head into the wall, and he saw [Respondent] drop Rish into the bathtub and he saw her bump his head [sic]--bump her head on the brick wall outside." (T-1246). Joshua was then handed a doll by Coyle, and asked to demonstrate how Respondent bumped Rish's head into the wall. (T-1246). He was told by Coyle to pretend that the doll was Rish, and that one of the chairs in the interview room was the wall. Joshua picked up the doll under the arms, and hit it three or four times onto the back of the chair. (T-1247).

Joshua indicated that when this happened his mother was not home. (T-1248).

Coyle then asked Joshua how he got along with Respondent, and he indicated that Respondent "like[d] him okay." (T-1248). He told Coyle that Respondent didn't like his sister, and that he didn't know why Respondent did not like his sister. (T-1248-1249).

Near the end of the interview, Coyle asked Joshua why his sister had died, and Joshua indicated that she had died because "...the air conditioner was not on in the apartment." (T-1249).

Over the objection of defense counsel, the prosecutor was allowed to ask the witness whether Joshua appeared to be coached, and she indicated that he did not, that he had answered Coyle's questions "spontaneously". (T-1249).

On cross-examination, the witness indicated that even though video tape recording equipment was in place at the

interview room, it was not used to record this interview. (T-1250).

Joshua Tunsill testified that he was six years old and that Jirishua was his sister. (T-1127-1128). He indicated that he liked Respondent, but that his sister only liked Respondent "sometimes". He had seen the two of them fight on previous occasions. (T-1130).

He saw Respondent "bump" Jirishua's head to the wall in their "house" five times when his mother wasn't there. (T-1130-1131). In court, he used a doll to demonstrate how Respondent did this. (T-1132).

On cross-examination, he admitted that Respondent had never hit nor hurt him, and that he was not afraid of Respondent. (T-1134).

He also indicated that both his grandfather and his mother would hit or spank him and his sister. (T-1135-1136).

The child also remembered that his sister had trouble breathing that day and that Respondent picked her up and took her to the bathroom. En route, his sister's head struck the middle of the door. (T-1141). He saw Respondent place his sister in the bathtub and put water on her. He also saw his sister fall back in the bathtub and hit her head (although Respondent had not pushed her). (T-1142).

That day, he never told his mother that Respondent had hit anyone or had hit anyone's head against the wall or a door. (T-1143). He denied ever telling anyone that Respondent ever

hit Jirishua's head against the outside of a wall or a brick wall. (T-1144).

Homicide Detective John Bradley testified that after constitutional warnings were administered to Respondent, Respondent made three custodial statements:

In the first statement, Respondent indicated that on the day of the incident he was watching a Florida football game on television and he heard Jirishua crying. He went to the bedroom, picked up the child, and the child "...went limp." He then brought the child into the living room and administered CPR; after this, he took the child to the bathroom, placed her in the bathtub, and ran water on her. (T-1304-1305). He never mentioned anything about the child falling or hitting her head in any way. (T-1306).

Bradley told Respondent that he didn't believe this version of events because the child's injuries were too severe. (T-1307).

Respondent admitted that he had lied to Bradley, and amended his previous statement by adding that whenever the mother of the child was not at home, the child was scared of him and would cry. (T-1308). He indicated that the child's crying aggravated him. (T-1308).

Bradley was not satisfied with this version of events either; he told Respondent that the second version of events was essentially similar to the first version of events, and that Respondent had not explained how the child had obtained head injuries. (T-1310).

In Respondent's third statement, Respondent indicated that the child was crying before he picked her up, and that as he was carrying the child into the bathroom, he accidentally struck the side of the child's head on the door casing. (T-1310). Respondent demonstrated to Bradley how this occurred. (T-1311). Bradley asked Respondent how the child obtained the bruises on her chest and back and Respondent indicated that he did not know. (T-1312).

Finally, Louise Thompson testified that when the child was in her care and custody prior to the child's mother picking her up, the child appeared to be normal and did not have any illnesses nor did she complain of being sick or hurt. (T-1273-1277).

RESPONDENT'S CASE

Detective Bradley was recalled to the stand, and he testified that when he first talked to Joshua, Joshua told him that his sister was crying and that Respondent picked her up, blew into her mouth, placed her into the bathtub, and put water on her. (T-1395). When his sister was in the bathtub, she fell backwards. (T-1396). The child did not mention to Bradley anything about Respondent hitting or beating his sister. (T-1396-1397).

Jacksonville Sheriff's Deputy Larry Emanuel testified that at the hospital on the night of the incident, he talked to Joshua, and that Joshua indicated to him that when Respondent took his sister to the bathroom, she hit her head on the door frame as he walked through the bathroom door. (T-1413). Once in the bathtub, Joshua told Emanual that his sister's head hit the bathtub on one or more occasions. (T-1413-1414). Joshua never told him that Respondent grabbed the child and hit his sister's head against the wall. (T-1414-1415).

Debra Allen testified that she was a protective investigator for HRS and that she interviewed Joshua on September 22. (T-1424). At that (initial) interview, Joshua told her that he and Respondent were watching TV when they heard his sister breathing funny. Respondent went into the bedroom where his sister was, and attempted to wake her up. Respondent then carried his sister into the living room and put some water on her. (T-1425). After that, he took her into the bathroom, placed her in the bathtub, and put water on her in a

further attempt to wake her up. (T-1426). As his sister was carried into the bathroom, she hit her head on the side of the door frame. (T-1426). Once in the bathtub, she fell backward three times. (T-1426). Joshua never told her that he saw Respondent intentionally beat the child in any way. (T-1426-1427).

Respondent's mother testified that Respondent had a reputation for peacefulness and truthfulness. (T-1437-1439).

Likewise, Jerome Williams testified that Respondent had a reputation for peacefulness and truthfulness. (T-1444-1447).

Louis Woodard testified that he gave Respondent a ride to the hospital along with Joshua, and that he never heard Joshua say that Respondent hurt Joshua's sister. (T-1454-1455).

Mabel Woods testified that Respondent had a reputation for peacefulness and truthfulness. (T-1468).

Respondent took the stand on his own behalf and explained the circumstances surrounding the incident, including the manner in which he performed CPR on the child, and his other attempts to revive the child. (T-1502-1537). He denied ever harming the child, and denied ever inflicting "pain" on the child. (T-1531-1537).

SUMMARY OF THE ARGUMENT

Section 90.803(23)(a) provides for a hearsay exception for statements of a child victim. The term "child victim" appears in the title to the statute as well as twice in the body of the statute. Nowhere in the statute appears the term "witness".

The plain language of this statute limits this hearsay exception to a "child victim". The criminal law must be strictly construed, and there can be no doubt that in its operation, this statute is penal in nature. Even if this court doesn't believe that this is a penal statute, this statute is in derogation of the common law and must be strictly construed for that reason.

The state attempts to divine a mythical legislative intent by pointing to the preamble of the statute (which is not the law). Inquiry into legislative intent may begin only where the statute is ambiguous on its face (which this statute most assuredly is not). If it is necessary to determine legislative intent, courts must look to the plain language of the statute. A court may not add additional words to a statute which the legislature did not place there. While the title of a statute is not part of the statute, it has the function of defining the scope of the statute. Here, both the title of the statute and the body of the statute are consistent, and both limit this hearsay exception to a "child victim".

In its second issue, the state attempts to raise an issue that was never raised at the trial court as far as the undersigned can determine, and which most assuredly was not

raised in the Florida First District Court of Appeal either by answer brief or by rehearing petition. This court has held that procedural default rules are applicable to the state as well as to the defense.

Moreover, it is important to note that prior to the taking of the relevant testimony in the first trial, the trial court in this case ruled that this testimony was admissible pursuant to Section 90.803(23), Florida Statutes. Thus, defense counsel knew from that point forward that this testimony was going to be admitted, and he crafted his strategy accordingly. This case initially ended in a mistrial, and prior to the admission of this testimony in the second trial, defense counsel again objected, and was again told that this testimony was going to be admitted pursuant to the hearsay exception.

Finally, it should be pointed out that the state attempted to bolster this testimony by asking the child protection team worker that overheard Alice Wong interview the child whether Joshua Tunsill appeared to be "coached", and the witness indicated that he had not. Thus, it was the prosecution, not defense counsel, which first raised the insinuation that the child's testimony might be a recent fabrication.

ARGUMENT

ISSUE I

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

Prior to the testimony of Alice Wong, defense counsel renewed his objections to her testimony which had been denied prior to the first trial. (T-1234-1237). In a hearing held prior to the first trial the trial court (incredibly) applied Section 90.803(23), Florida Statutes, to Wong's testimony. (T-134-150). Wong was then allowed to testify to the hearsay statements of non-child victim Joshua Tunsill, as detailed in the statement of the facts in this brief. (T-8-9). These hearsay statements as testified to before the jury by Wong differed from Tunsill's trial testimony and were extremely prejudicial. Section 90.803(23)(a) provides:

> (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 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. In making its determination, the court may consider the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate; 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). [Emphasis added]

Clearly, the plain language of this statute limits this hearsay exception to a "child victim". Joshua Tunsill was not a "child victim"; the alleged child victim in this case was his sister. The court should take specific notice that the term "child victim" is repeated twice in the statute and is also found in the title of the statute.

The criminal law must be strictly construed, and there can be no doubt that in its operation, this statute is penal in nature. State v. Wershow, 343 So.2d 605 (Fla. 1977). [Penal statutes must be strictly construed]. Even if this court does not believe that this is a penal statute this statute is in derogation of the common law and must be strictly construed for that reason. Graham v. Edwards, 472 So.2d 803 (Fla. 3d DCA 1985), review denied, 482 So.2d 348 and Collinsworth v. O'Connell, 508 So.2d 744 (Fla. 1st DCA 1987).

Further, this court in Jeffries v. State, 610 So.2d 440 (Fla. 1992), has stated:

> We have stated elsewhere that common law rules of construction...cannot take precedence over provisions of the Constitution. Perkins v. State, 576 So.2d 1310, 1314 (Fla. 1991). We have also held that criminal statutes must be strictly construed according to their letter, and that this rule of strict construction emanates from Article I, Section 9 and Article II, Section 3 of the Florida Constitution. Id. at 1312-1314.

In Jeffries, this court applied the strict rule of construction required in criminal cases (or cases whose sole purpose is to derogate the common law and to make it easier for the state to obtain a conviction), and noted that the literal language did not include the defendant in that case. The remedy in Jeffries was the same remedy suggested here (i.e., that "the legislature is free to redraft the statute with greater precision" if it feels that this statute should apply to child witnesses with a physical, mental, emotional or developmental age of 11 or less.)

Inquiry into legislative intent may begin only where the statute is ambiguous on its face. Burke Company v. Bruce M. Ross Co., 585 So.2d 382 (Fla. 1st DCA 1991). If it is necessary to determine the legislative intent, courts must look to the plain language of the statute. Thayer v. State, 335 So.2d 815 (Fla. 1976); S.R.G. Corp. v. Department of Revenue, 365 So.2d 687 (Fla. 1978); In re Order on Prosecution of Criminal Appeals by Tenth Judicial Circuit Public Defender, 561 So.2d 1130 (Fla. 1990).

Other long-standing rules of statutory construction which are applicable to this case are that a court will refuse to add additional words into a statute where uncertainty prevails as to the intent of the legislature and that a court, in construing a statute, cannot invoke a limitation or add words to the statute not placed there by the legislature. Devin v. City of Hollywood, 351 So.2d 1022 (Fla. 1976) and Chaffee v. Miami Transfer Co., Inc., 288 So.2d 209 (Fla. 1974). While the title of an act is not part of the basic act, it has the function of defining the scope of the act. The operative provisions of the statute are those which follow the enabling clause. Finn v. Finn, 312 So.2d 726 (Fla. 1975).

It should be noted that the title of the act is consistent with the body of the act in this case; i.e., the title of the act indicates that this statute is limited to a "child victim" under the appropriate circumstances, as is the body of the statute.

This was a criminal case and the plain meaning of the statute as evidenced by its language is that the hearsay exception applies only to a child "victim". End of story.

In the past, this statute has been strictly construed by the Florida First District Court of Appeal. Childress v. State, 543 So.2d 413 (Fla. 1st DCA 1989).

There is a maverick and bizarre case that concludes otherwise, although the Florida First District Court of Appeal in its opinion below distinguished this case. Dupree v. State, 19 Fla. L. Weekly D1404, 1405, footnote 5 (Fla. 1st DCA 1994).

In Russell v. State, 572 So.2d 940 (Fla. 5th DCA 1991), the principles of statutory construction referred to earlier were blithely ignored. Russell wrongly applied this exception to the exclusion of hearsay in order to allow the hearsay testimony of "J" the four-year old brother of the victim "A".

The Russell court wrongly applied this exception on two bases: first, the court fly-specked the preamble to Chapter 85-53, Laws of Florida, which in its second "Whereas" clause inexplicably provides "...children are in need of special protection as victims or witnesses in the judicial system as a result of their age and vulnerability...". This is the only paragraph in the preamble in which the term "witnesses" appears, and it does not appear in the language of the statute (which is the law, unlike the preamble, which is not) or the title of the statute. The court also justified an alternative reason for allowing "J's" testimony into evidence. According to the court, "J" was a "victim" because he witnessed lewd and lascivious acts committed in his presence.

Russell is just wrong. This is a criminal statute and a statute in derogation of the common law rule, and it must be strictly construed. The language in the statute restricts its use to the victim, and not to a child "witness". This appears to be another case where a court has found the underlying crime so abhorrent that it has judicially expanded the language of the statute, thus usurping the traditional legislative function and the separation of powers mandated by the Florida Constitution.

Russell involved sexual abuse, and this case involves child abuse. Under no stretch of the judicial imagination can it be construed that Joshua Tunsill was a "victim" in this case, notwithstanding the state's absurd charge that Tunsill was a victim to the uncharged crime "...of simple child abuse under Section 827.04, Florida Statutes" footnote 2, Petitioner's brief at 11. This is especially true as the state's witness testified that Tunsill didn't even realize what he was witnessing (Tunsill thought that his sister had died because the air conditioning was not working). (T-1249).

A number of points in Petitioner's brief don't need to be addressed, but will be lest they cause confusion.

First, the Petitioner only quotes a portion of the statute and makes the (incredible) claim that: "The remaining statutory language is not at issue." (Petitioner's brief at 9). In quoting only a portion of the statute, the Petitioner has eclipsed another relevant portion of the statute which contains a reference to "...the reliability of the child victim,...." Section 23(a)1. This is important for two reasons: 1) because it is another reference in the statute to the unambiguous term "child victim" and 2) because it clearly refers to the "child victim" in the singular. Indeed, this brings up the next point in the state's brief that will be commented upon.

Although the state strains to conclude that the preamble to the statute (which is not the law) indicates that the plural is used, it is clear that a plain reading of the statute (which is the law) indicates that the term child victim is singular,

and that all verbs that go with the term child victim are singular.[3]

Next, the state tries to argue that because the bizarre Russell decision upon which the trial court relied was decided in 1990, had not been "overruled" (state's language) by the "Florida legislature" as of "late 1994," that it "correctly interprets legislative intent by addressing the evils and problems with which the Legislature was concerned." (State's brief at 14). It should be pointed out that Russell was a district court decision, and this Court has the final say in determining the interpretation of a statute. Respondent might be more impressed had this Court acted as Russell had done in 1990 with a concomitant future failure of the legislature to overturn this Court's language. But that is not the case, and Petitioner's supposition is meaningless.

The district court's opinion in Dupree contains some interesting and relevant points. For instance, the District Court noted this court's recent interpretation of 90.803(23), Florida Statutes:

> [This statute]...creates a limited exception to the hearsay rule for reliable statements of child victims, 11 years or younger, which describe an act of child or sexual abuse [emphasis added]; Feller v.

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[3]Which, aside from the clear and plain language of the statue, is probably why the sentence staff's analysis and economic impact statements of May 1st and May 10th, 1985 "...contain a sentence with emphasis in original: "This hearsay exception applies only to child victims who are witnesses." (State's brief at 11, footnote 3).

> State, 19 Fla. L. Weekly S196, S197 (Fla. 1994), [as quoted in Dupree at 19 Fla. L. Weekly D1405].

The District Court in Dupree also noted that it could not discover any Florida appellate decision that has expanded this statutory exception to include non-victim witnesses in cases involving non-sexual child abuse, and that no decision of the United States Supreme Court has upheld the use of a child's out-of-court statement under circumstances as outlined in the statute.

Finally, the decision by the District Court in Dupree concluded:

> We find it unnecessary to reach any constitutional question in the present case, but we believe that the statute is properly construed against this constitutional backdrop. We cannot perceive, moreover, any reason for giving precedence to statements made out of court by children who reportedly witness violent crimes over such statements made by adults. After all, adults may be better able to articulate perceptions better informed, in the first place, by greater experience. [Dupree at D1405].

In this case, Wong's testimony was devastatingly prejudicial. She testified that Joshua told Coyle that Respondent "always" fought with his sister, that Respondent had punched his sister, that Respondent bumped his sister's head against the wall, and that Respondent dropped her into the bathtub, as well as bumped or hit her head on the brick wall outside. (T-1246).

In light of the foregoing, the District Court of Appeal's opinion should be affirmed.

ISSUE II

THE STATE HAS NO BUSINESS RAISING THIS ISSUE BECAUSE IT WAS NEVER RAISED IN EITHER COURT BELOW. (RESTATED).

As far as the undersigned can tell, for the first time ever the state raises the issue of whether "the out-of-court statement of the declarant child [was] admissible as a prior consistent statement pursuant to Section 90.801(2)(b), Florida Statutes."

This was not the basis of the trial court's ruling. This was not argued in the District Court of Appeal, either in the state's answer brief or in a rehearing petition.[4]

In Thomas v. State, 599 So.2d 158, 159 (Fla. 1st DCA 1992), the state failed to argue in its answer brief the issue of waiver. For the first time on rehearing, the state raised the issue of waiver. In footnote 1 of that opinion, the Florida First District Court of Appeal remarked: "We specifically note that the state did not timely argue that this issue was not adequately preserved." Further, in that same footnote on pages 160 and 161 the Florida First District Court of Appeal stated:

> The state's motion for rehearing acknowledges that this procedural waiver issue was not timely argued in its answer brief. However, in view of the dissent, the state now characterizes its omission as "an oversight" and contends that, "this oversight is not authority for this Court

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[4]The state failed to file a rehearing petition in this case.

> to address an issue which, as a matter of law, is procedurally barred" because waived by appellant, and, further, that "the State's failure to apprise the Court of this waiver in its brief most certainly does not constitute an "unwaiver" which confers judicial authority to consider an unpreserved issue." We reject the state's contention that appellant waived his objection to this evidence, not only because the state improperly attempts to insert this issue for the first time on motion for rehearing, but also because this contention is not supported by the record.

In this case, the state has not bothered to apprise this Court that this issue is being raised for the first time, and that the state did not raise this issue in its answer brief or even in a rehearing petition.

In raising this issue without mentioning that it had never been raised below, the state suffers from both gall and tunnel vision. In Cannady v. State, 620 So.2d 165, 170 (Fla. 1993), this court stated: "Contemporaneous objection and procedural default rules apply not only to defendants, but also to the state."

No better case could be found for the application of the procedural default rule than this case. As the District Court of Appeal mentions in its opinion, this case was initially tried but ended in a mistrial and then retried. Prior to the first trial, a hearing was held on the admissibility of the hearsay evidence in Issue I, and the state, armed with the Russell case, argued that this testimony was admissible pursuant to Section 90.803(23). (T-134-150). (Appendix) In

order to preserve the record, defense counsel's objections were renewed again in the second trial. (T-1234-1237). (Appendix).

What is significant about all of this is that defense counsel knew from the beginning of the first trial through the second trial that this evidence was going to be admitted by the trial court. There is no question about that in this record. Thus, defense counsel's whole strategy was then determined by the trial court's ruling that this evidence was admissible pursuant to 90.803(23), Florida Statutes, prior to the testimony in that trial. Defense counsel made a strategic choice, based on his prior knowledge that the trial court had already ruled that this evidence was admissible, to cross-examine Joshua Tunsill as he did. Whether defense counsel would have made that strategic choice had the state raised this issue is another argument, and one which is not properly considered at this point. Perhaps it can properly be considered at the retrial of Respondent, but not here and not now.[5] Defense counsel's whole strategy was determined by the

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[5]Footnote 3 of Dupree reads:

"We reject appellee's argument that cross-examination concerning the testimony received over objection waives the objection.

"It is a general rule that a party does not waive his previous objection to the admission of improper, illegal or incompetent evidence merely by cross-examining the witness with relation to the objectionable matter." Louett v. State, 12 So.2d 168, 174 (Fla. 1943); Stripling v. State, 349 So.2d 187, 193 (Fla. 3d DCA 1977). [The state attempted to make a waiver argument in

(Footnote Continued)

trial court's ruling in the first trial that this testimony was admissible pursuant to Section 90.803(23). Once his strategy was dictated by the trial court's ruling that this testimony was admissible pursuant to that statute, Respondent cross-examined Joshua Tunsill accordingly. In the event of a retrial, new issues (such as this one) may arise, and if they do, trial counsel will select his strategy according to the trial court's ruling as it did in this case. It is, however, completely unfair for the state to raise a new issue at this late date after trial counsel's strategy was determined on the issue raised by the state below, and which is now before the Court (unlike this issue).

To allow the state to get away with this, would be tantamount to sanctioning "sandbagging" by the state, and would encourage the state to take further unfair advantage of defense counsel in the future. Finally, the state has glaringly omitted to inform this Court that over the objection of defense counsel, the prosecutor started all of this when he was allowed to ask Wong whether Joshua appeared to be coached, and she indicated that he did not, that he had answered Coyle's questions "spontaneously". (T-1249).

(Footnote Continued)
its answer brief below based on defense counsel's cross-examination of Tunsill. However, the argument raised by the state in this course is raised here for the first time ever, as far as undersigned counsel can determine.

CONCLUSION

Based on the foregoing arguments and authorities, the ruling of the Florida First District Court of Appeal should be affirmed, and this cause should be remanded to the trial court for a new trial.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been forwarded by delivery to James W. Rogers, Assistant Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, this 12th day of December, 1994.

Respectfully submitted,

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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, vs. LARK O'SEAN DUPREE, Respondent.	:	CASE NO. 84,106

A P P E N D I X