IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

WILLIE GREEN, JR.,

Respondent.

CASE NO. 85,113

# PETITIONER'S INITIAL BRIEF ON THE MERITS

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## PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Petitioner, the prosecution, or the State. Respondent, Willie Green, Jr., the Appellant in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Respondent or his proper name "Green."

References to the opinion of the First District Court of Appeal, found in the Appendix of this brief, will be noted by its Florida Law Weekly citation.

The symbol "R" will refer to the record on appeal. The designation of "R" includes the deposition of M A Ke , which was part of the Supplemental Record on Appeal. Because there are multiple transcripts, which are not sequentially numbered among themselves, they will be indicated, respectively, as follows:

TVid Transcript of video-taped interview of M A K , consisting of one volume of 37 pages;

TMoL Transcript of Motion in Limine proceedings, held January 14, 1991, consisting of one volume of 72 pages;

TTr Transcript of Trial proceedings, held January 15 and 16, 1991, consisting of two volumes of 238 pages;

TMoJ Transcript of Motion for Judgment of Acquittal proceedings, held January 25, 1991, consisting of one volume of 19 pages;

TSen Transcript of Sentencing proceedings, held February 4, 1991, consisting of one volume of 13 pages.

Each symbol will be followed by the appropriate page number in parentheses.

All bold-typed emphasis is supplied unless the contrary is indicated. Italics-typed emphasis appeared in the original document unless otherwise indicated.

## STATEMENT OF THE CASE AND FACTS

The State seeks review of the decision of the First District Court of Appeal, Green v. State, 20 Fla. L. Weekly D125 (Fla. 1st DCA Jan. 4, 1995)(attached as Appendix), that held that the evidence was insufficient for Lewd, Lascivious or Indecent Assault upon a Child (R 50) and Sexual Battery (R 49).

This case is based upon an information filed December 14, 1990 (R 31-32).

The certified question concerns the sufficiency of the victim's pre-trial statements to sustain the convictions. Due to the arguments that the State will advance infra, it is important to provide details of the multiple nature of the prior statements, their various settings, as well as the other evidence introduced at trial. These details will be narrated chronologically.

On September 21, 1990, the defense deposed the victim, M A K (TTr 154-55)[1] who was fourteen years old and in the eighth grade at the time of the deposition (TTr 157, 159). The First District Court of Appeal's certified question focuses upon this deposition. Further details of the deposition will be related in the context of the trial, where it was introduced as substantive evidence.

In November 1991, the State notified the defense, pursuant to Section 90.803(23), Fla. Stat., of its intent to present testimony of out-of-court statement of the victim, M A K , to various named people. (R 17-18) In January 1991, the State notified the defense, pursuant to Section 90.803(23), Fla. Stat., of its intent to offer into evidence the "deposition of M A K and transcripts thereof, taken on September 21, 1990, by the Office of the Public Defender." (R 41)

On January 14, 1991, the defense filed a Motion in Limine, asking the trial court to exclude evidence of the victim's statements "to her aunt P K , to John Mathers of HRS, to Helene Pomeroy (Victim Services Officer) or to any other person, to the effect that defendant engaged in sexual activity with alleged victim." The motion also requested exclusion of other evidence, such as "any mention by the State that the alleged victim was brought by her mother to the Public Defender's Office

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[1] The portions of the pre-trial deposition that were read to the jury can be found in the transcript of the trial proceedings, at TTr 154-59. The entire deposition can be found at R 85-101 in the Supplemental Record on Appeal.

and told by her mother to tell any personnel of the Public Defender's Office that defendant had not engaged in sexual activity with her" and the transcript and videotape of the victim's deposition. (R 43-45)

The Motion in Limine was heard on January 14, 1991. (TMoL 1-71) At the end of the three and one-half hour hearing (TMoL 63), the trial court found that the statements have the implications of reliability, if the child testifies in this case. To reach this finding, the trial court observed the following regarding the victim:

- The child's mental age was about seven years old (TMoL 65);
- The child' developmental age was a maximum of about nine years old (TMoL 65);
- The child's statements to P K , C K and Julie Draughon were made under circumstances of reliability;
  - The relatively short time, that is, four days, between the crimes and the time they were reported (TMoL 66);
  - The "fairly normal" person to which the child first reported the incidents, that is, to her mother (TMoL 66);
  - The child's persistence in reporting the incidents to someone else "after her mother evidently did not believe her" (TMoL 66);
  - The trial court's extensive observation through a 35-minute (TMoL 66) videotape of "the child and her interaction with the HRS worker, or the child protection team worker" (TMoL 67);

- The non-suggestive, non-leading, non-threatening, non-pressured way that the child was interviewed (TMoL 67, 70-71);
- The child's nature as "extremely bashful about talking about the private parts of the body and the events that occurred" (TMoL 67-68).

The trial court summarized:

> It does not seem to be the kind of child that would make up something about a subject that she didn't particularly like to talk about, given the closeness in time of the incident and the time that it was reported.

The trial court added that it also considered "the relationship of the parties," "the relationship of the child to the defendant," (TMoL 68) the ability of the child "to communicate what occurred," and the fact that she "was not pressured in any way" (TMoL 70).

The day after the Motion in Limine was heard, the evidentiary portion of the trial began. Prior to the State calling its witnesses, the trial court instructed the jury, inter alia: "It is your solemn responsibility to determine if the State has proved it's [sic] accusations beyond a reasonable doubt against Mr. Green." "Your verdict must be based solely on the evidence, or lack of evidence, and on the law." "It is your responsibility as jurors to decide what the facts of this case are and to apply the law to the facts." (TTr 2-3)

The State called six witnesses: Susan Barnes (an expert school psychologist, TTr 23, 25), M A K (the alleged victim, R

31, hereinafter designated as "M A "), C K (age 24, M A 's sister, TTr 43), P K (M 's sister-in-law through P 's marriage to J Ke , TTr 55-56), Julie Draughon (case coordinator for the Child Protection Team, TTr 71), and Dr. Mary Seay (pediatrician, TTr 93). The State recalled M A (TTr 107) for the purpose of introducing her deposition (TTr 105-107). Each witness's pertinent trial testimony will now be summarized.

Susan Barnes qualified, without objection, as an expert school psychologist (TTr 25). Barnes had tested M A a week prior to the trial of this case. (TTr 27) Barnes testified that M A 's IQ tested at 50, placing her "within the mildly to moderately retarded range." (TTr 26) Although M A 's chronological age was 14, she was functioning "on about a middle first grade level in reading and written language, and about a middle second grade level in mathematics." (TTr 26) M A 's condition did not interfere "with her ability to perceive and relate reality"; she was "able to communicate verbally facts and things that have occurred in the past." (TTr 27, 28)

M A testified that her date of birth was July 10, 1976, making her 14 years old at the time of the trial. (TTr 29) She testified that she attended Carter Paramore School, where she was in the eighth grade and Miss Foreman was her teacher. (TTr 29-30) She liked school. (TTr 30) At the time of the trial, M A lived with her mother, E K , and M A 's brother's and sisters at "I " (TTr 29-30, 31) M A has

lived there all of her life. (TTr 31) Her mother had ten children, "four girls and six boys," of which she was the second youngest. (TTr 30-31) She named the brothers and sisters who still lived with her and her mother. (TTr 31) Her father lived separately, in a location that was not within walking distance. (TTr 32) C lived close-by. (TTr 32-33)

M A knew that she was testifying at the trial "about Willie Green." (TTr 34) She has known Green "for a couple of years." (TTr 33, 34) She had "seen Willie Green before," (TTr 33) but she denied being home whenever Green was at her house (TTr 34, 38). She knew Green because her mother told her about him. (TTr 33) When asked if Green was her mother's "boyfriend," she responded, "a friend." (TTr 33-34)

M A knew how to distinguish good from bad "touches," (TTr 35-36) but she denied ever having "bad touches from Willie Green" or sex with him. (TTr 36, 38) Instead, she accused Irving McGriff of forcing her to have sex with him (McGriff). She said that McGriff bragged about it. (TTr 40) Specifically, she testified in response to the prosecutor's questions:

> Q When Irving McGriff, you said, had some bad touches on you, what --
> A Yes.
> Q -- kind of bad touches did he --
> A He forced me to have sex with him. And so, I had told my daddy. And so, and my daddy taught him. And so, he gave me five dollars not to tell nobody. I told my mama and my daddy.
> So, they started talking to him. And they told -- and he started bragging about it. That he did it.
> So, then he had called over my sister's house and told her that he did it. Willie ain't had nothing to do with this, just like that.

Q When, after Irving McGriff gave you five dollars not to tell anybody, did you ever remember talking [to] C or Pe about Irving McGriff?
A [Shakes head from side to side.]
Q And telling them he did?
A Yeah, I told C .
Q You told C ?
A Yes.
Q When you told C about Irving McGriff, did you, after that, talk to her about Willie Green doing something, the same type of thing?
A I ain't said nothing about him.

(TTr 40-41) She then swore that she did not know if she had told anyone "about Willie Green having sex with" her. (TTr 41) M A specifically denied talking with the following people about having sex with Green: "any of" her "sisters," C , P K , and "Miss ." (TTr 38)

The State called C K , M A 's 24-year-old sister, next. (TTr 42-43) C lived three houses from where M A lived with their mother. (TTr 43) C identified Green as her mother's boyfriend from about "a year or so" prior to trial through the time of C 's testimony. (TTr 44-45)

C had seen Green at the mother's house or in the neighborhood "at different times and different days," (TTr 45) when M A was living there and when M A knew Green (TTr 45). While at C 's house, M indicated that Irving McGriff had "messed" with her. (TTr 46) A couple of days later, C told M A that she had heard that Green "was messing with her." (TTr 50) M A did not respond at first but then after asking M A "a bunch of times" (TTr 54), "she said he

[Green] was messing with her" (TTr 51). C 's testimony continued:

> She [M A ] kept saying he [Green] was messing with her, right. And I asked her was she talking about he had sexual contact with her and she said, 'Yes.'
> ***
> She ... [said] it happened at [her mother's] home.

(TTr 51) As a result, C called P and HRS. (T 52)

P K , M A 's 23-year-old (TTr 64-65) sister-in-law and the daughter-in-law of M A 's mother, (TTr 55-56) testified that Green was her mother-in-law's boyfriend (TTr 57). "During the last couple of years" prior to trial, P had seen Green at the mother-in-law's house or "in and around" the neighborhood when M A was living at that house and when M A knew Green. (TTr 57-58) At the time that Green was the mother-in-law's boyfriend, he was married. (TTr 62)

In response to C 's call, (TTr 60) P asked M A about Green messing with her. M A replied that Green had put his hand "in her panties" while "feeling on her." (TTr 60, 61) M A also told P that Green then had sex with her after "she told Willie Green to stop." These incidents occurred when M A 's mother "walked up the road" and locked M A in the house" while Green was inside there. (TTr 60-61)

After P talked with M A , P told C that it was none of their business, but C persisted, and they called HRS. HRS came to P 's house to interview P and C .. (TTr 61-62) M A stayed with P for about one week after the report to HRS. (TTr 66)

On cross-examination, P testified that the Health Department in December 1989 had recommended that M A be placed on birth control pills. (TTr 64) She also testified that she did not "get along" with her mother-in-law (TTr 64), that she had called HRS one other time when the mother-in-law hit her [the mother-in-law's] daughter with a shovel handle, and that she had seen Green at the mother-in-law's house when the mother-in-law was not there (TTr 65).

Julie Draughon was the State's next witness. She was the case coordinator for the Child Protection Team, which entailed conducting special assessments, interviewing children, and coordinating case management activities. She had held that position for a year. (TTr 71-72) Draughon was assigned the case on June 25, 1990, due to a call from an HRS child protection investigator. (TTr 72)

Draughon was present on June 26, 1990, when Dr. Wilhout attempted to examine M A . M A was cooperative "until the point that he was ready to do the genital examination." "At that point, M A became quite upset and reluctant to be examined and Dr. Wilhout chose to abandon the examination ... ." (TTr 73)

After the attempted genital examination, Draughon conducted a videotaped interview of M A . (TTr 75-79) The witness authenticated the videotape, and it was introduced into evidence

and played[2] for the jury. (TTr 79-80) There were numerous instances of "no oral response" throughout the tape. (TVid 2-36) However, on tape, M A provided Draughon some details about her family's living arrangements (TVid 2-7), the ten children (TVid 5), her school work, and her play activity (TVid 7-8). Draughon asked M A about a fish's eyelashes. She asked her to identify various parts of the human body and describe their functions: eyes, nose, mouth, hand, toes. (TVid 9-12) She asked M A what a penis ("private") was "used for," and M A responded that it was used to "pee." (TVid 12)

M A identified a female body part as the "private." (TVid 12-13) M A said that her teacher had previously talked to her about "good touches and bad touches." (TVid 13) M A identified various "good" touches: a kiss from Mom and her Dad patting her on the back. (TVid 13) She identified as "bad touches" someone hitting her hard on the shoulder or touching her on her "private." (TVid 14) She said that her mom gave her a bad "touch" when she hit her. (TVid 15)

M A described Green as her mother's boyfriend. She said that Green touched her twice. (TVid 17) Her mother was drunk. (TVid 17) The first time her mother had locked her in her room, but Green "had got the keys and unlocked the door." He "said go ahead and let him," and he was "feeling on" her, "stuck his hand

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[2] The court reporter did not transcribe the tape as it was played. (TTr 80) However, it has been transcribed for the record on appeal at TVid 1-37.

down like this," on top of her clothes. (TVid 18-20) He kissed her on the lips. (TVid 20) The second time was at night, when M A asked her mother to lock her bedroom door because "they" were drinking, and they fight and "cuss" when they drink. (TVid 21-22) Her mother drank every day. (TVid 23) "They hit me (inaudible) drinking." (TVid 22)

M A described the second incident. She heard her door open, and she called her mom, but she "was snoring because she was drunk. And he started feeling on me." He was in his underwear. She initially had her clothes on. She went in the kitchen, where he "got on top" of her. At first, he touched her with his "private" while she had her clothes on, but he repeatedly "rolled," "grabbed" her, and pulled her clothes off as she "pulled them back up." At some point, Green finally put his "private" inside her "private." (TVid 24-27) She did not see "anything come out of his private" because she said that she was asleep. (TVid 28)

M A did not affirm questions regarding whether Green had put his "private on any other parts of" her, whether he made her touch him anywhere, whether he put his mouth on her, and whether he made her put her "mouth on him anywhere." (TVid 28)

She also said that Irving McGriff had also pulled down her pants and put his "private" in her "private." She told him to stop. (TVid 31-32)

She indicated that she informed her mother, J , and P of the incidents with Green. (TVid 29) When M told her

mother, she "didn't believe it" and "cussed her out"; she then told her father. (TVid 20, 26)

M A said that P told her to "tell the truth." (TVid 35)

After the videotaped interview, Draughon "contacted Dr. Mary Seay, who is another pediatrician who contracts for the Child Protection Team, thinking that M A might be more comfortable with a female physician" (TTr 85). Draughon viewed Seay's physical examination of M A on June 28, 1990. (TTr 85)

On cross-examination, Draughon said that the Child protection Team was under contract with HRS and conducted "interviews at the request of HRS." (TTr 85-86) In response to a question suggesting that the Team's function was to punish persons accused of child abuse "in conjunction with the State Attorney's Office and HRS, Draughon testified that the Team provided "an assessment," weighed the facts as they are presented to the Team, and made "a recommendation based on our assessment of the credibility of the child's statements." She indicated that there were "certain factors that do enhance credibility that we look for." (TTr 88-89) Draughon indicated that "in most cases, when a child provides disclosure, it is truthful" (TTr 88) Draughon said that she would try several techniques prior to accepting "no." (TTr 87) Out of the approximately 30 interviews Draughon had conducted by the time of trial, there was one that she still thought was questionable whether abuse occurred. (TTr 87-88)

Reasoning that the defense had "opened the door," the trial court allowed the prosecutor to ask Draughon on redirect exam about the factors bearing upon a child's credibility. Draughon said she could provide the names of supportive researchers. (TTr 90-91) After discussing several factors, Draughon outlined typical stages of sexual abuse: the period of actual sexual interaction, secrecy, disclosure, and suppression (recantation). (TTr 91-92)

Dr. Mary Seay, a pediatrician and expert (TTr 93-94), was the State's next witness. She was a consultant for the Child Protection Team, which entailed frequently evaluating "children or teenagers who are suspected of being abused or neglected." (TTr 93) Dr. Seay conducted a general and genital physical examination of M A on June 28, 1990, in the doctor's office. (TTr 94-95) The doctor found "no lesions or sores or discharge."

However, the doctor found "the vaginal opening" to be unusually large. Due to the reported non-use of insertable material, such as tampons, Dr. Seay concluded that the size of the vaginal opening was consistent with "some form of vaginal penetration" (TTr 96), that is, vaginal sexual activity (See TTr 96-97). This conclusion was consistent with M A 's disclosure that she had "sexual intercourse on three separate occasions, involving two separate men, with the most recent incident reported "to have been eight days prior to" the doctor's examination of M A . (TTr 96)

Given the gap of time since the last incident, the doctor did not "expect to find any sperm or chemical changes in the vagina." Also, the physical examination "would not be able to pinpoint any particular perpetrator." (TTr 96-97) On cross-examination, Dr. Seay added that her examination of M A could not pinpoint "when the alleged sexual activity occurred." (TTr 97)

After lengthy debate among the parties and the trial court (TTr 98-106), the trial court instructed the jury as follows:

> Members of the jury, before we begin, I want to remind you of a point of law that you will hear about later. And particularly, in connection with the testimony of Julie Draughon.
>
> And that is, and you will be getting an instruction on this at the close of the trial, that, you, as jurors, have the sole responsibility to determine the credibility of witnesses in this case.
>
> And that includes witnesses who have testified live and witnesses who have given testimony in the form of video tape.
>
> You should rely upon your own judgment about the credibility of witnesses and you should not be persuaded o[r] influenced by any implication given to you by others about the credibility of witnesses.

(TTr 107)

The State then announced that it intended to recall M A as a witness. (TTr 104-105) After the trial court overruled the defense's objection (TTr 106), M A resumed the witness stand. (TTr 107)

At this point in the trial, M A testified that, although she remembered the deposition, she did not remember what she said at the deposition. (TTr 105) M A then asserted that at the deposition she said that "Willie Green never touched me." (TTr 108-109) She denied testifying at the deposition that Willie

108-109) She denied testifying at the deposition that Willie Green had messed with her and had sex with her. She denied testifying at the deposition that Green took her clothes off. (Tr 109) She denied testifying at the deposition that Green "put part of his body inside" her between her legs (TTr 109).

She also denied saying anything to Draughon about Green, except that Green did not know where her father stays. (TTr 110-11) When the prosecutor asked her about talking with Draughon regarding "what happened in your bedroom at your mama's house," M A responded: "I wasn't home when that happened." "I wasn't there. I was up to my Dad's house." (TTr 111)

M A agreed at this point in the trial that she has been living with her mother "for quite some time," (TTr 111) but she denied that her mother had been talking to her about Green. (TTr 112) Green's trial counsel asked no questions. (TTr 112) After lengthy debate, the trial court ruled that M A 's perception-based accusations made at deposition that Green sexually abused her were admissible as substantive evidence. (TTr 113-131) The defense and the prosecution conferenced on what lines of the deposition should not be read to the jury. (See TTr 137) When court reconvened, the prosecutor listed some parts of the deposition that he agreed would not be read to the jury, for example, a question about Green "messing with her sister and she said she did not know." (TTr 137-38) The parties and the court then proceeded to discuss the admissibility of many other details of the deposition. (TTr 140-52) After this discussion, the trial

court admitted portions of the deposition into evidence, which the prosecutor began to read to the jury with the assistance of Miss Pomeroy. (TTr 154)

The jury heard that the deposition was taken at the Gadsden County Courthouse, and the only persons noted as present were M A , Green's attorney, the assistant state attorney, and the court reporter. (TTr 155) Green's attorney, Assistant Public Defender Carol Ann Turner, conducted the direct examination of M A , and the prosecutor asked no questions. (TTr 156-69) M A was sworn in and told that everything that she said at the deposition would be recorded. (TTr 156) Green's attorney explained to M A , "I need to know everything I can know about what happened" (TTr 157).

Prior to asking any substantive questions, Green's attorney told M A :

> If you don't understand any questions, or if you don't remember something, just tell me that you don't remember or you don't understand it. And then, I'll try to ask it a different way.

(TTr 157)

At the time of the deposition, M A lived with her mother. Green was the mother's boyfriend. (TTr 159) In response to defense counsel's questions, M A testified that she was in the eighth grade at Carter Paremore (TTr 159) and related incidents in which Green attempted to abuse or abused her. (TTr 160-68)

M A swore at the deposition that Green would come in her mother's house "a lot." (TTr 160) One incident occurred while Green was at the mother's house with M A alone. (TTr 160) Another incident occurred when M A was at home with her mother and Green. (TTr 160-61) The two events were about a week apart. (TTr 166) Green pushed her on the bed and pulled his and her clothes down. M A "was hollering." (TTr 161) At some points, Green "messed with" M A (TTr 167), touched M A between her legs (TTr 161), and while both of them had their clothes off, Green tried to put a part of his body inside of her. (TTr 165) M A could "smell liquor on him." (TTr 165)

Green hit M A after he sexually abused her. (TTr 162-63) She complained to her mother, who responded by threatening to whip her. (TTr 161) At the end of the deposition, Green's attorney asked the victim, in the context of a fact that the attorney asserted:

> Q ... Well, when she [the victim's mother] came to my office, she said you had changed your mind and that Willie [Green] had never touched you; is that right? Do you remember her saying that?
> A [shakes head from side to side]

(TTr 168-69)

The State rested (TTr 169) and the defense moved for a judgment of acquittal. (TTr 170-83). The trial court denied the motion.

The trial court instructed the jury after the closing arguments. (TTr 222-33) These included standard instructions pertaining to reasonable doubt, the function of the jury "to

decide what evidence is reliable" and believable, and factors to use in determining what evidence is more or less reliable, for example:

> You may find some of the evidence not reliable or less reliable than other evidence. You should consider how the witness acted, as well as what they said.
> Some of the things you should consider are, did the witness seem to have an opportunity to see and know the things about which the witness testified? Did the witness seem to have an accurate memory? Was the witness honest and straightforward in answering the attorney's questions? Did the witness have some interest in how the case should be decided? Does the witness's testimony agree with other testimony and other evidence in the case?
> You may rely upon your own conclusion about the witness. A juror may believe or disbelieve all or any part of the evidence, or the testimony of any witness.

(TTr 228)

On January 16, 1991, the jury found Green guilty of Sexual Battery on a Mentally Defective Victim (R 49) and Lewd, Lascivious or Indecent Assault upon a Child (R 50).

On January 25, 1991, the trial court granted the defense Motion for Judgment of Acquittal in so far as it reduced the charge to "Sexual Battery, Second Degree Felony Battery." (TMoJ 9)

On January 31, 1991, a Guardian Ad Litem Report to the Court" was filed. (R 54), in which M A 's guardian recommended that Green receive "the maximum sentence." (R 55) The guardian reasoned that M A 's recantation was precipitated by "extreme pressure from her mother, some of her siblings and Willie Green's family" and that she expects continued pressure from them. (R 54-55) "M A 's shyness and her eagerness for kindness and

acceptance along with her immaturity makes her particularly vulnerable to future sexual abuse." (R 55)

On February 4, 1991, the trial court sentenced Green to seven years in the Department of Corrections on each charge, to run concurrent, followed by a term on probation for a period of five years." (TSen 11-12; R 59-64)

This appeal ensued (See, e.g., Notice of Appeal at R 65), and on January 4, 1995, the First District Court of Appeal filed its opinion, reported at Green v. State, 20 Fla. L. Weekly D125, that yielded the certified question, which is quoted in this brief as the Issue.

## SUMMARY OF ARGUMENT

The DCA's decision reversing the trial court's on the ground of insufficient evidence should be disapproved. Applying the appropriate standard of appellate review, the composite of evidence introduced at trial demonstrated that the victim's pre-trial deposition testimony was reliable and probative of Green's guilt. The victim incriminated Green not only in the deposition but also through multiple pre-trial statements to other parties. The victim's recantation at trial was consistent with the typical stages through which an abused child undergoes. Here, the circumstances of the recantation, in which the victim lived with her mother, who was Green's girlfriend, provide additional confidence in the victim's deposition and other pre-trial statements, in contrast to her trial testimony. The circumstances of the exaggerated recantation also stand in contrast to other established facts.

The majority of the First DCA misconstrued and misapplied a leading case in the area. It does not control, and, even if it did, its requirements were met here.

The State urges this Court to adopt Judge Miner's dissent as its own.

## ARGUMENT

### ISSUE

WHEN AN ALLEGED VICTIM OF CHILD SEXUAL ABUSE RECANTS AT TRIAL, DOES HER PRIOR INCONSISTENT STATEMENT, ADMISSIBLE PURSUANT TO SECTION 90.801(2)(A), FLORIDA STATUTES, CONSTITUTE SUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION WHEN THE ONLY OTHER EVIDENCE OF THE DEFENDANT'S GUILT IS OTHER PRIOR INCONSISTENT STATEMENTS MADE BY THE VICTIM, WHICH HAVE BEEN FOUND TO BE RELIABLE AND ARE ADMISSIBLE PURSUANT TO SECTION 90.803(23)(A)? (Certified Question)

Section 90.801(2)(a), Fla. Stat., was designed for cases like this, where the victim's mental condition made her especially vulnerable not only to the initial abuse but also to pressure from her mother. The victim lived with her chronically-drinking mother almost all of the pre-trial period, and the mother's boyfriend at the time of abuse and at the time of trial was the abuser. Therefore, the decision of the majority of the First DCA panel essentially guts this statute and evidentiary rule; that decision is contrary to public policy, well-settled principles enunciated by this Court, and the modern evidentiary trend. The State will now elaborate on these arguments.

**A. The facts of this case highlight the need for Section 90.801(2)(a), Fla. Stat. and provide sufficient evidence of Green's guilt.**

**1. Under the appropriate standard of appellate review, the conviction should be affirmed.**

The majority opinion in Green v. State, 20 Fla. L. Weekly D125 (Fla. 1st DCA Jan. 4, 1995), did precisely what Tibbs v. State,

397 So.2d 1120 (Fla. 1980)(Tibbs II), prohibited, that is, reweighed the evidence:

> Henceforth, no appellate court should reverse a conviction or judgment on the ground that the weight of the evidence is tenuous or insubstantial.

397 So.2d at 1125.

Tibbs II, 397 So.2d at 1123, summarized this area of the law:

> As a general proposition, an appellate court should not retry a case or reweigh conflicting evidence submitted to a jury or other trier of fact. Rather, the concern on appeal must be whether, after all the conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment. [footnotes omitted]

Tibbs II is dispositive here on its facts as well as on the reweighing-prohibition rule that it established. Its predecessor was Tibbs v. State, 337 So.2d 788 (Fla. 1976)(Tibbs I), in which the Florida Supreme Court did reweigh the evidence, including the rape victim's identification of Tibbs. The reliability of the identification was questionable because of her use of marijuana "immediately prior to the crimes" and her viewing three photographs of Tibbs ten days after the crime. Tibbs I reversed the conviction and remanded for a new trial because it characterized this and other evidence as "not substantial." Id. at 791. Tibbs II explicitly receded from the approach taken in Tibbs I and held that such a reweighing of the evidence was improper on appeal. Just as Tibbs I reweighed evidence because of arguable weaknesses in the foundation for the witness's

identification of Tibbs, the majority opinion of the First District Court of Appeal panel reweighed it by holding that it was insufficient even though there were multiple items of evidence indicating that Green was guilty. Tibbs II indicates the test that should be applied.

Under Tibbs II and its progeny, See, e.g., State v. Law, 559 So.2d 187, 189 (Fla. 1989), the question becomes: after all the conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, whether there is substantial, competent evidence to support the verdict and judgment.[3]

**2. Applying the appropriate standard of appellate review, the facts were sufficient.**

M A is the alleged victim in this case. As a witness with direct evidence of Green's crime, See Davis v. State, 90 So. 2d 629, 631 (Fla. 1956)(direct evidence is that which witness testifies of his/her own knowledge as to the facts at issue), her deposition encompassed the following facts:

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[3] Accordingly, the trial court's factual findings under Section 90.803(23), Fla. Stat, are entitled to deference on appeal. See Owen v. State, 560 So. 2d 207, 211 (Fla. 1990)(suppression; ruling entitled to presumption of correctness, must interpret the evidence and reasonable inference and deductions in a manner most favorable to sustaining the trial court's ruling); Markham v. Fogg, 458 So. 2d 1122, 1126 (Fla. 1984)(where competent substantial evidence to support trial court's finding, appeals court should not substitute its judgment); Shapiro v. State, 390 So. 2d 344, 346 (Fla. 1980)(suppression; trial court's findings presumably correct, must be interpreted most favorably to trial court's conclusions).

- The only persons noted as present at the deposition were M A , Green's attorney, the assistant state attorney, and the court reporter (TTr 155);
- Prior to asking any substantive questions, Green's attorney told M A to "just tell" her (the defense attorney) if she does not understand any questions (TTr 157);
- M A was sworn in and told that everything that she said at the deposition would be recorded (TTr 156);
- Green's attorney conducted the examination of M A , and the prosecutor asked no questions (TTr 156-69);
- Green's attorney explained to M A , "I need to know everything I can know about what happened" (TTr 157);
- M A swore at the deposition that Green would come in her mother house "a lot" (TTr 160);
- Each of the incidents occurred at M A 's mother's house (TTr 160, 163, 167);
- One incident occurred while Green was at the mother's house with M A alone (TTr 160);
- Another incident occurred about a week later when M A was at home with her mother and Green (TTr 160-61, 166);
- In one of the incidents, Green pushed her on the bed and pulled his and her clothes down; M A "was hollering" (TTr 161);
- In one of the incidents, Green "messed with" M A (TTr 167);

- In one of the incidents, Green touched M A between her legs (TTr 161);
- In one of the incidents, while both of them had their clothes off, Green tried to put a part of his body inside of her (TTr 165);
- Green hit M A after he sexually abused her (TTr 162-63);
- M A could "smell liquor on him" (TTr 165);
- M A complained to her mother, who responded by threatening to whip her (TTr 161).

Applying the appellate standard of review, entitling the verdicts to all reasonable inferences from the evidence and to the resolution of all conflicts in its favor, four distinctive sets of facts corroborate and supplement the accuracy of the events described in M A 's deposition: first, the circumstances of her recantation; second, M A 's statements to her sister, sister-in-law, and Julie Draughon; third, the expert testimony of Draughon; and, fourth, the expert opinion of Dr. Seay, the pediatrician. These will now be discussed in sequence.

**The circumstances of her recantation.**

The deposition setting itself suggests the roots of M A 's recantation. At the end of the deposition, Green's attorney said, "when she [the victim's mother] came to my office, she said you had changed your mind and that Willie [Green] had never touched

you; is that right? Do you remember her saying that?" M A denied changing her mind. (TTr 168-69)

Over three months after the deposition, affidavits purporting to be from E K (M A 's mother) and from M A were filed with the trial court. (R 38-39) The affidavits denied that Green sexually abused M A . Both affidavits were dated December 27, 1990, and both were sworn under the same notary (Rebecca Reep). The trial began approximately two weeks after the affidavits.

The crucial fact about the ultimate recantation is where M A lived. Except for a week or two, she lived in the home of her mother. (TTr 29-30, 31, 43, 45, 57-58, 66, 111, 159. TVid 2) Her mother chronically drank alcohol (TVid 17, 23), but most importantly, during the abuse, during the time between the abuse and the trial, Green was the boyfriend of M A 's mother. (TTr 43, 45, 57, 159-60. TVid 17) The interest of the mother in the outcome of this case is illustrated by the mother's reaction to M A 's report of the abuse. The mother responded by threatening to whip her. (TTr 161)

Therefore, here was a child who was bashful and mentally slow and who had to live day-in and day-out for months with someone who had authority over her, who, with a threat, had attempted to chill her initial report of the abuse, and who had a material interest in stopping the prosecution. It was the mother who told the public defender prior to the deposition that M A had changed her mind. It was the mother who signed an affidavit of

recantation on the same day as M A in front of the same notary. Moreover, the person who abused her sexually and who was the boyfriend of her mother hit her at the time of the abuse.

In sum, in M A 's world, her continuation of the prosecution by testifying against Green at trial portended only further abuse.

In addition to M A 's relationship with her mother and Green, the content of her recantation also provides corroboration. Under Section 90.803(2)(a), Fla. Stat, the prior deposition was entitled to admittance. Its content was, thus, entitled to belief by the trial jury; this is consistent with the standard of appellate review discussed supra. Accepting the content of the deposition as true enables one to compare it with the content of her trial testimony. This comparison reveals the following:

- In contrast to M A 's mother threatening to whip M A when she reported Green's abuse (TTr 161), there was no indication of any such threats when she reported McGriff's abuse (See TTr 40);
- In contrast to her deposition (TTr 160-61) (and to her statements to C K , TTr 51-51, Γ K , TTr 60-61, and Draughon, TVid 18-21), at the trial M A denied being home whenever Green was at her house (TTr 34, 38);
- In contrast to the evidence described in the preceding paragraph, at the trial M A said she knew Green because her mother told her about him (TTr 33);

- In contrast to her deposition (TTr 159-60) and videotaped statement (TVid 17) and in contrast to the testimony of C K (TTr 44-45) and P (TTr 57) that Green was the mother's boyfriend, at the trial when asked if Green was her mother's "boyfriend," she responded, "a friend" (TTr 33-34);
- In contrast to her deposition (TTr 160-65) (and to her statements to C , TTr 50-51, P K , TTr 60-61, and Draughon, TTr 18-27) at trial she denied ever having "bad touches from Willie Green" or sex with him (TTr 36, 38); instead, she accused Irving McGriff of forcing her to have sex with him (McGriff);
- In contrast to what actually transpired at her deposition, at trial M A unequivocally asserted twice that at the deposition she said that "Willie Green never touched me" (TTr 108-109); at trial she also denied testifying at the deposition that Willie Green had messed with her, had sex with her, or even took off her clothes (Tr 109).

In addition to the conflicts between M A 's trial testimony and the evidence presented by her sister, sister-in-law, and Draughon noted in the preceding paragraphs:

- In contrast to M A 's obvious attempt at trial to exaggerate her lack of contact with, and even knowledge of, Green, M A did not affirm Draughon's questions regarding whether Green had put his "private on any other parts of" her, whether he made her touch him anywhere, whether he put his

mouth on her, and whether he made her put her "mouth on him anywhere" (TVid 28);

- In contrast to her sister's testimony (TTr 51-52), at trial M A recalled telling her sister about Irving McGriff, but she explicitly and unequivocally denied telling her sister about Green abusing her (TTr 40. Also TTr 38);
- Similarly, at trial M A denied telling F and Draughon about Green doing some bad touches on her (TTr 38), even denying that she told Draughon anything substantive about Green (TTr 110-11), in contrast to evidence that they each presented, as discussed above.

Perhaps even more revealing was M A 's response to the prosecutor's question about talking with Draughon regarding "what happened in your bedroom at your mama's house." Here, M A 's mental slowness may have let a glimmer of truth sneak through, regardless of any coaching she may have received from her mother. M A responded: "I wasn't home **when that happened**." "I wasn't there. I was up to my Dad's house." (TTr 111) In other words, she affirmed the abuse of herself while denying that she was present when it occurred.

If there was any doubt that M A spoke the truth at her deposition and fabricated her trial testimony, at trial she testified that, even though she has been living with her mother "for quite some time," she had not discussed Green with her

mother. (TTr 112) This is incredible in light of the mother's long-standing relationship with Green.[4]

**The content per se of M A 's statements to Julie Draughon, M A 's sister, and M A 's sister-in-law**

In the preceding section, many of these statements were juxtaposed with M A 's trial testimony to show that her deposition was weightier than her trial testimony. These contrasts will not be repeated here. However, it is important to emphasize crucial aspects of M A 's statements that were admitted pursuant to Section 90.803(23), Fla. Stat., that were, in detail, found to be reliable by the trial court (TMol 65-68), that were essentially consistent with her deposition, and that materially contributed to the proof of the elements of the offenses:

- Draughon's interview with M A was videotaped, and the videotape was played at the trial, enabling the jury to first-hand assess the manner in which the interview was conducted and M 's demeanor; in the videotaped interview, M A told Draughon that he "felt her," "got on top" of her, repeatedly pulled her clothes off as she "pulled them back up," and put his "private" (penis) inside her "private" (vagina) (TVid 24-27);

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[4] Incidentally, it is also incredible due to a fact not presented to the jury. M A 's mother had sworn to specific communications that the mother had with M A regarding the charges against Green. (R 38)

- M A 's confirmation of C K 's question whether Green had sexual contact with her (TTr 51); and,
- M A 's statements to P K that Green had put his hand "in her panties" while "feeling on her" (TTr 60, 61), that Green then had sex with her after "she told Willie Green to stop."

**The expert testimony of Draughon**

Among other supportive expert evidence elicited on redirect examination, Draughon outlined typical stages of sexual abuse: the period of actual sexual interaction, secrecy, disclosure, and suppression (recantation). (TTr 91-92) The facts of this case track those stages.

**The expert opinion of Dr. Seay, the pediatrician**

Dr. Mary Seay concluded that the size of the vaginal opening was consistent with "some form of vaginal penetration" (TTr 96), that is, vaginal sexual activity (See TTr 96-97). This conclusion was consistent with M A 's disclosure that she had "sexual intercourse on three separate occasions, involving two separate men, with the most recent incident reported "to have been eight days prior to" the doctor's examination of M A . (TTr 96)

Judge Miner, in his dissent, pointed out that corroborative evidence need not "'equate to proof' of the commission of a crime." Citing several authorities, Judge Miner pointed out that corroboration is "additional or supplemental information which

tends to strengthen a factual assertion previously in evidence." 20 Fla. L. Weekly at D128. Here, there are a multitude of corroborative items of evidence establishing Green's guilt.

**B. Section 90.801(2)(a), Fla. Stat. is consistent with well-settled and well-grounded Florida law.**

Determining the sufficiency of evidence does not lend itself to "bright lines." This was the underlying wisdom of Tibbs II and kindred cases, which recognized the unique role of the jury in evaluating the credibility and weight of conflicting evidence.

Gone are the days when a rape victim was required to produce testimony of another witness besides her own. See §794.022(1), Fla. Stat.(victim need not be corroborated). Gone are the days when an appellate court would reweigh the evidence under the guise of "sufficiency." Instead, a lone victim's testimony can constitute sufficient evidence of rape, even if she was laboring under the influence of marijuana. Similarly, a victim's prior inconsistent statements should be sufficient where there are adequate indicators of their reliability.

The operative concept is the admissibility of the evidence. If evidence that is competent and substantial is admitted, then the jury should be allowed to weigh it at its face value if it chooses to do so. Cf. Diaz v. U.S., 223 U.S. 442, 451 (1912)(hearsay admitted without objection given its natural probative effect as if it were in law admissible); Tri-State Systems, Inc. v. Dept. of Transportation, 500 So.2d 212, 215

(Fla. 1st DCA 1986)(hearsay admitted without objection "usable as proof as any other evidence"); U.S. v. Key, 725 F.2d 1123, 1127 (7th Cir. 1984)(refused to excise erroneously admitted confession when considering sufficiency of evidence).

Under Sections 90.801(2)(a) and 90.803(23) incriminating evidence was admitted that, in the context of all of the facts of this case, was sufficient to establish Green's guilt. In accordance with well-established Florida law, the jury was repeatedly told its exclusive role to evaluate the evidence: at the inception of the trial (TTr 2-3), at a point proximate to the introduction of the deposition (TTr 107), and during the final charge to the jury (TTr 228). The jury's role was proper; their resulting verdict was also proper.

**C. The purposes of hearsay rules were satisfied here.**

Although Section 90.801(2)(a), Fla. Stat., explicitly excludes a prior inconsistent deposition from the definition of hearsay, this exclusion is contingent upon the declarant testifying at trial and being "subject to cross-examination." In assuring the opportunity for cross-examination, the legislature placed this hearsay exclusion on the firm foundation of a policy underlying many of the rules pertaining to hearsay. See State v. Freber, 366 So. 2d 426 (Fla. 1978)(out-of-court pre-trial identification admissible because declarant testified, satisfying "prime" reason for hearsay rule: "opportunity to confront and cross-examine the hearsay declarant").

Here, Green's counsel had multiple opportunities to cross-examine regarding the deposition: (1) when M A first testified at the trial (TTr 42); (2) when M A was recalled as a witness at the trial (TTr 112). Indeed, (3) the questions of Green's own counsel elicited all of M A 's testimony at the deposition. The dual-opportunities for truth-testing cross-examination of M A at trial were not only pertinent to the admissibility of the prior inconsistent deposition but also factors in assessing the probative value of her deposition. Similarly, even though unnecessary for admissibility or sufficiency, the exclusive role of defense counsel in eliciting the information at the deposition enhances the probative value of the deposition.

A reason underlying the value of an opportunity to cross-examine the declarant under oath is the constitutional right of confrontation, See, e.g., Ohio v. Roberts, 448 U.S. 56, 70-73, 65 L.Ed.2d 597, 100 S.Ct. 2531 (1980)("the *opportunity* to cross-examine"; direct-examination at time of prior statement satisfied requirement); Calif. v. Green, 399 U.S. 149, 165-166, 26 L.Ed.2d 489, 90 S.Ct. 1930 (1970).

However, another aspect of the opportunity to cross-examine the declarant is the reliability or trustworthiness of the prior statement. The opportunity to cross-examine the declarant helps

assure that reliability. Here, Green's multiple opportunities[5] to cross-examine the declarant and his counsel's role in actually eliciting the deposition add weight to the deposition's reliability.

Moreover, here, in light of the discussion supra and the proximity of M A 's deposition to the abuse, M A 's deposition testimony and other prior statements were very likely substantially reliable whereas her trial testimony was very likely unreliable. A leading authority's explanation merits quoting at length:

> ... another ... factor may reasonably persuade us that prior statements are not merely of equal reliability with the witness's [trial] testimony, but are superior in trustworthiness. This is the obvious truth, which the voluble readiness of witnesses tends to obscure, that memory hinges upon recency. The prior statement is always nearer and usually very much nearer to the event than is the testimony. The fresher the memory, the fuller and more accurate it is. The rule as to memoranda of prior recollection, permitting their use only when made while the matter recorded is fresh in memory, is based precisely on this principle.
> ***
> Manifestly, this is not to say that when a witness changes his story, the first version is invariably true and the later is the product of distorted memory, corruption, false suggestion, intimidation, or appeal

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[5] In light of the evidence, discussed supra, strongly inferring that M A 's trial testimony was fabricated, it is likely that Green's trial counsel wisely chose not to pursue a rigorous cross-examination at trial. Rigorous cross-examination would have provided additional indices of fabrication. Perhaps this was a tactical reason why Green's counsel even objected at trial to the State's recalling M A (TTr 106). Fabrication is difficult to mask upon cross-examination and repeated examination.

The crucial factor remains the **opportunity** to cross-examine; the State should not be punished because of the defense's choice not to pursue the opportunity at trial.

> to sympathy. No, the time-element plays an important part, always favoring the earlier statement, in respect to all of these hazards. The greater the lapse of time between the event and the trial, the greater the chance of exposure of the witness to each of these influences. *A priori*, the probability that the earlier statement has been so influenced is always less. All in all, in view of these considerations, and after reading hundreds of illustrative cases, the writer believes that as a class prior inconsistent statements, when they are so verified that their actual making is not in doubt, are more reliable as evidence of the facts than the later testimony of the same witness.

McCormick, The Turncoat Witness: Previous Statements as Substantive Evidence, 25 Texas L. Rev. 573, 577-79 (1947). Accord, Freber, 366 So. 2d at 428 (identification while incident fresh in witness's mind "of obvious probative value"); Law Revision Council Note-1976, §90.801, in 6C F.S.A. 236, 238 (1979)("prior statement may be more reliable than the present testimony").

**D. Section 90.801(2)(a), Fla. Stat, and its application here to the sufficiency of the evidence is consistent with the trend in other jurisdictions.**

Given the plethora of indicators of reliability pertaining to the deposition, as supplemented by M A 's other reliable statements, they are sufficient to support the verdict. This result is reasonable and consistent with those in numerous other jurisdictions. See, e.g., Ticey v. Peters, 8 F.3d 498, 500-504 (7th Cir. 1993)(prior statement not under oath, upheld sufficiency upon considering several factors); Patterson v. State, 441 SE. 2d 414 (Ga. Ct. App. 1994)(defendant's 5-year-old

recanted on witness stand; prior inconsistent statements to several people sufficient proof of sexual molestation); Nance v. State, 629 A.2d 633, 639 (My. Ct. App. 1993)(extra-judicial identification "sufficient evidence of criminal agency to sustain a conviction"); State v. Mancine, 590 A.2d 1107, 1114-19 (N.J. 1991)(lengthy analysis and discussion of background and authorities; evidence upheld as sufficient; "weigh substantive evidence found in a prior inconsistent statement on the same scale as any other evidence when determining whether sufficient evidence to support guilty verdict").

**E. State v. Moore, 485 So. 2d 1279 (Fla. 1986), does not control.**

The majority of the First DCA panel[6] in this case misconstrued and therefore misapplied Moore. They interpreted Moore:

> ... a prior inconsistent statement ... [admitted pursuant to Section 90.801(2)(a)] does not constitute sufficient evidence to sustain a conviction when the prior inconsistent statement is the *only* substantive evidence of guilt.

20 Fla. L. Weekly at D125.

The Moore opinion was adopted by only three justices, a plurality of this Court. As such, the plurality opinion is not binding as precedent. One justice, Justice Overton, specially concurred and wrote:

> In my view, it would be a different issue if the prior inconsistent statements were from a proceeding in which the defendant had had an opportunity to confront and

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[6] Judge Miner's dissent, 20 Fla. L. Weekly at D128, correctly identified Moore's holding.

cross-examine the witnesses.

Moore, 485 So. 2d at 1282. Justice Overton's opinion constituted the holding of Moore.

When a fragmented court decides a case and no single rationale is employed by the court, only the narrowest ground of the plurality opinion is entitled to precedential value. Marks v. United States, 430 U.S. 188, 193, 97 S.Ct. 990, 993, 51 L.Ed.2d 260 (1977); Gregg v. Georgia, 428 U.S. 153, 169 n.15, 96 S.Ct. 2909, 2923 n.15, 49 L.Ed.2d 859 (1976); Welker v. State, 504 So. 2d 802, 806-807 (Fla. 1st DCA 1987).

Therefore, the actual holding of Moore is that a prior inconsistent statement made in a forum where the defendant has no opportunity to cross-examine or confront the witness is insufficient by itself to sustain a conviction. In Moore, the prior inconsistent statement was grand jury testimony. In grand jury proceedings, the defendant cannot confront nor cross-examine the witness. In this case, the prior inconsistent statement was a deposition taken by the **defendant's** counsel. Moore is not applicable here, rendering M A 's deposition testimony by itself sufficient to sustain a conviction. A fortiori, it is sufficient when combined with the other evidence.

**F. Even if Moore did apply, it was satisfied under the facts of this case.**

As discussed at length above, in this case the prior deposition need not be considered in a vacuum. Its content should

be evaluated vis-a-vis all of the other facts in the case. As such, even if this Court were now to adopt Moore's plurality as current law,[7] this test would be met here.

Judge Miner's dissent correctly ascertained the role of the deposition in relation to the other evidence. The nature of the composite of M A 's prior statements and the situations in which they were made render them mutually corroborating. Moreover, other items of evidence corroborated the statements, as they tended to "strengthen a factual assertion previously in evidence." 20 Fla. Law Weekly D128 citing Duffy v. Brooker, 614 So. 2d 539, 545 (Fla. 1st DCA 1993), The American Heritage Desk Dictionary (1981), and Black's Law Dictionary (5th ed. 1979). Since this has been argued at length supra and since Judge Miner lays out aspects of the argument so well in his dissent, it will not be belabored here.[8]

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[7] The State urges the Court not to adopt Moore's plurality due to the reasons discussed supra, indicating the general greater reliability of a prior statement made at a time more temporally proximate to the crime. As Justice Overton implicitly suggested in Moore, this reliability is further enhanced where defense counsel had the opportunity to examine the witness at the time of the prior statement.

[8] For additional cases with results consistent with this argument, see State v. Perez, 536 So. 2d 206 (Fla. 1988)(evidence corroborating statement introduced pursuant to 90.803(23)); Chambers v. State, 504 So. 2d 476 (Fla. 1st DCA 1987)(sufficient corroboration); Webb v. State, 426 So. 2d 1033 (Fla. 5th DCA 1983)(prior grand jury testimony corroborated). Even the case relied upon by Moore's plurality, U.S. v. Orrico, 599 F.2d 113 (6th Cir. 1979), is consistent. See also State v. Townsend, 635 So. 2d 949 (Fla. 1994)(admissibility of 2-year-old's hearsay statements).

**G. The First District Court of Appeals decision punishes the State, the truth, and the jury system because of the timing of the trial.**

M A 's statements when her sister or sister-in-law talked with her, when Draughon talked with her, or when Green's own attorney deposed her would have established Green's guilt. In a situation where the mentally slow and mentally vulnerable victim was living under the authority of her mother, who was Green's girlfriend, Green's appellate complaint distills to a question of when the trial occurred. An earlier trial would have sealed his guilt, whereas a trial about seven months after the incidents enabled the victim's mother to wield her influence.

However, the mother's opportunity to influence M .. should be viewed in a larger context, as violently abusive parents may cover-up abuse through subtle or explicit threats or even further violence. Accordingly, the legislature has wisely provided avenues through Sections 90.801(2)(a) and 90.803(23) for successful prosecutions, while simultaneously providing the accused protections through the opportunity to cross-examine and through findings of reliability, See Ehrhardt, Florida Evidence 710 (1995 ed.)("balance the need for reliable out-of-court statements of child abuse victims against the rights of the accused"). Given the public's need for Sections 90.801(2)(a) and 90.803(23), the protections built into them, and, here, the mutually corroborative nature of M A 's statements and additional corroboration, an affirmance of the convictions would promote public policy.

Here, the reliability requirements of Section 90.803(23), Fla. Stat., have been met in a factual context in which the victim repeatedly accused Green of sexually "messing" with her or having intercourse with her.

An affirmance would vindicate this Court's long-standing principle that the jury's proper function is to weigh the evidence. Here, there was more than sufficient evidence.

## CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court answer the certified question in the affirmative, disapprove the decision of the First District Court of Appeal, approve Judge Miner's dissent, and direct that the trial court's judgement and sentence be affirmed.

Respectfully submitted,

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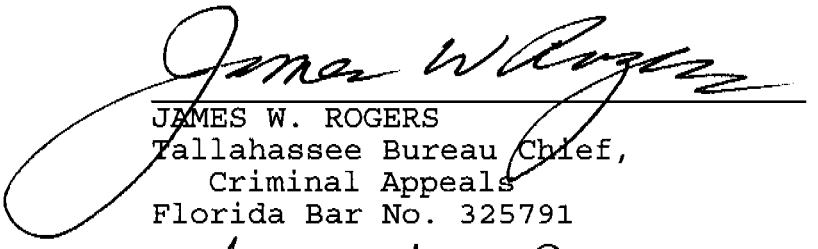
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S INITIAL BRIEF ON THE MERITS and its Appendix, have been furnished by U.S. Mail Ms. Carol Ann Turner, Esq., Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 27th day of March, 1995.

Stephen R. White
Assistant Attorney General