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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 85,113

WILLIE GREEN, JR.,

Respondent.

# RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

## TABLE OF CITATIONS

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v. : CASE NO. 85,113

WILLIE GREEN, JR., :

Respondent. :

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RESPONDENT'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Respondent, WILLIE GREEN, JR., was the appellant in the First District Court of Appeal and will be referred to in this brief as "Respondent" or by his proper name, "Green." The State of Florida, prosecuting in the trial court, and appellee in the District Court of Appeal will be referred to as "the State" or as "Petitioner."

The Respondent accepts and adopts the Petitioner's method of designation of the Record on Appeal and the opinion of the First District Court of Appeal.

The Respondent will refer to the alleged child victim herein by her initials, M.K.

## STATEMENT OF THE CASE AND FACTS

With regard to Petitioner's Statement of Facts, Respondent accepts as substantially correct those facts Petitioner has chosen to present to the Court, but notes that other salient facts from the Record on Appeal will be incorporated directly into Respondent's arguments as necessary.

As to Petitioner's Statement of the Case, Respondent additionally notes that this case comes to this Court in a somewhat unusual posture: a three-judge panel of the First District Court of Appeal produced a majority opinion which first ruled that discovery depositions may be used as substantive evidence; and then ruled that despite such a usage in the trial court, there was insufficient evidence to convict Respondent. The majority, Judge Barfield writing for the court, certified to this Court the following question:

> 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), FLORIDA STATUTES?

Judge Ervin concurred in the court's finding that there was insufficient evidence of guilt; he dissented from the finding that discovery depositions could be used as substantive evidence when not taken in accordance with the provisions of Rule 3.190(j), Fla.R.Crim.P., which governs the taking of

depositions for the purpose of perpetuating testimony. Judge Ervin proposed an additional question of great public importance:

> DOES THE DECISION IN RODRIGUEZ V. STATE, 609 So.2d 493 (Fla. 1992), EXCLUDING THE USE AS SUBSTANTIVE EVIDENCE OF DISCOVERY DEPOSITIONS THAT ARE SOUGHT TO BE ADMITTED UNDER SECTION 90.804(2)(a), FLORIDA STATUTES, EXTEND TO BAR THE ADMISSION OF DISCOVERY DEPOSITIONS OFFERED AS EVIDENCE UNDER SECTION 90.801(2)(a), FLORIDA STATUTES, PERTAINING TO A PRIOR, INCONSISTENT STATEMENT OF A DECLARANT WHO IS AVAILABLE AND SUBJECT TO CROSS-EXAMINATION AT TRIAL?

Judge Miner, in a separate opinion, concurred that the deposition testimony could be used as substantive evidence, but dissented from a finding that there was insufficient evidence to support a conviction. He did not propose a certified question for this Court to consider.

In its Initial Brief on the Merits, the Petitioner re-argued the merits of this individual case at the trial level and did not present argument to this Court on either certified question, except in passing comment. The Respondent will, perforce, address the certified question of the majority, the certified question of Judge Ervin, and the argument of the State.

## SUMMARY OF ARGUMENT

The First District Court of Appeal was correct in its ruling that there was insufficient evidence to convict Green; it was incorrect, however, in allowing the use of a discovery deposition taken pursuant to rule 3.220(h) to be used as substantive evidence. The only other evidence against Green was out-of-court statements made by the alleged victim, a mildly to moderately retarded girl who had recanted her accusation against Green, while maintaining her accusation against another man. Neither federal nor Florida law supports such a use of discovery depositions, although depositions taken to perpetuate testimony under rule 3.190(j) may be used in such a manner under certain conditions. This Court should affirm its previous rulings that discovery depositions may be used for impeachment or contradiction only.

## ARGUMENT

### ISSUE PRESENTED

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), FLORIDA STATUTES?

Judge Barfield, writing for the majority of the First District Court of Appeal, declared that discovery depositions are admissible as substantive evidence under section 90.801(2)(a), Florida Statutes. That section provides:

> (2) A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross examination concerning the statement and the statement is:
>
> > (a) Inconsistent with his testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

Judge Barfield did not discuss any of the Florida cases which have worked to correlate the rules of discovery with the rules of evidence, [other than State v. Moore, 452 So. 2d 559 (Fla. 1984), which permitted a prior inconsistent statement given under oath to a grand jury to be used as substantive evidence where the witness testified and was subject to cross-examination], and the opinion with its certified question seems to assume that the word "deposition" in subparagraph (a)

includes discovery depositions conducted under Rule 3.220(h), Fla.R.Crim.P., and is not limited to depositions to perpetuate testimony conducted under Rule 3.190(j). That presumption is contrary to judicial interpretation, which culminated in this Court's decision in Rodriguez v. State, 609 So. 2d 493 (Fla. 1992); and is contrary to Article I, Section 16 the Florida Constitution providing for confrontation of one's accusers at trial, and Amendment Six to the United States Constitution.

The Respondent agrees with the First District Court of Appeal that there was insufficient evidence to sustain a conviction; however, he is unable to embrace the aberrational holding of the majority opinion that discovery depositions may be used as substantive evidence, believing that to be error. Therefore, he is compelled to separate the certified question into sub-issues in order to present it properly to this Court for response:

> (1) May a discovery deposition taken under the provisions of Rule 3.220(h), Fla.R.Crim.P. ever be used as substantive evidence;
> (2) Is a prior inconsistent statement sufficient to sustain a conviction of guilt where the only other corroborating evidence is hearsay admissible under section 90.803(23)(a), Florida Statutes?
> (3) Does recantation of an alleged victim make him or her "unavailable" for purposes of admitting out-of-court statements under the provisions of section 90.803(23)(a), Florida Statutes?

Those sections will be discussed separately.

> (1) MAY A DISCOVERY DEPOSITION TAKEN UNDER THE PROVISIONS OF RULE 3.220(h), FLA.R.CRIM.P. EVER BE USED AS SUBSTANTIVE

EVIDENCE?

This Court has uniformly forbidden the use of discovery deposition testimony as substantive evidence in criminal cases, both before and after the adoption of the Florida Evidence Code, and on more than one legal principle. Shortly before the adoption of the new evidence code in Florida, this Court addressed the issue of deposition testimony as substanive evidence in the courtroom in the case of State v. Basiliere, 353 So. 2d 820 (Fla. 1978).

In Basiliere, the alleged victim was deposed by the defense attorney pursuant to Rule 3.220(d), Fla.R.Crim.P., as happened here. The alleged victim in Basiliere subsequently died of natural causes, and the state moved to use the deposition testimony as evidence in the defendant's trial.

This Court examined the defendant's right to confront adverse witnesses in the context of the Constitution of the State of Florida, Rule 3.220(h), Fla.R.Crim.P., which provides for discovery depositions, and Rule 3.190(j), Fla.R.Crim.P., which provides for depositions to perpetuate testimony. The Basiliere Court said:

> . . . when the defendant sought discovery through means of deposition, it was only to ascertain facts upon which the charge was based. Being unaware that this deposition would be the only opportunity he would have to examine and challenge the accuracy of the deponent's statements, defendant could not have been expected to conduct an adequate cross-examination as to matters of which he first gained knowledge at the taking of the deposition. (Id. at 824-25).

The Basielere Court cited with approval the decision in Chapman v. State, 302 So. 2d 136 (Fla. 2d DCA 1974), which found that "[t]he use of a deposition, taken in the involuntary absence of a defendant, as evidence against him violates the defendant's right to be personally present during his trial and his Sixth Amendment right to confront witnesses." (Id. at 823).

Since the Basielere decision and the Chapman decisions, the Florida Rules of Criminal Procedure were amended, forbidding the defendant's presence at a discovery deposition except on stipulation of the parties or on court order for good cause shown. Rule 3.220(h)(6), Fla.R.Crim.P. Therefore, the language of Chapman is even more vital today to an assessment of a criminal defendant's rights of confrontation.

Green was not permitted to be present during the deposition of the alleged victim; his absence was involuntary and the Chapman/Basielere decisions establish that his rights under the Sixth Amendment to the United States Constitution were violated. As this was Green's only opportunity to cross-examine his accuser, his rights to confrontation at trial guaranteed by Article I, Section Sixteen of the Constitution of the State of Florida were also violated.

Judge Ervin, in his sound dissent below, avoids the constitutional issue by commencing his examination of this Court's rulings after Basielere. He notes that State v. James, 402 So. 2d 1169 (Fla. 1981), was based on the rules regarding

impeachment of witnesses, and that the James decision was recently reaffirmed by this Court:

> In State v. James, 402 So. 2d 1169 (Fla. 1981), the supreme court broadly stated that discovery depositions are not admissible as substantive evidence absent compliance with rule 3.190(j), and based its holding not on any perceived violation of the confrontation clause, but on certain language of rule 3.220(h), providing that discovery depositions 'may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness.' Thus, the court interpreted the rule as precluding the use of discovery depositions at criminal trials for any purpose other than for impeachment or contradiction. The James decision was recently reaffirmed by the Florida Supreme Court in Rodriguez v. State, 609 So. 2d 493, 499 (Fla. 1992), wherein the court, in refusing to extend the rule which allows the use of discovery depositions as substantive evidence in civil cases to criminal cases, noted that because the rules of civil procedure do not provide an exception to the common law rule excluding depositions as hearsay, the evidence code may provide such an exception in civil proceedings. Id. at 498. The court continued, however, that a similar result was not warranted in criminal cases 'because greater latitude for the use of depositions in civil cases exists by virtue of Rule of Civil Procedure 1.330 which is much broader than the Rules of Criminal Procedure that provide for the use of deposition testimony.' Id. See also [cites omitted]. Green, 20 Fla.L.Weekly D125, 126 (Fla. 1st DCA Jan. 4, 1995).

Judge Ervin then summarized his opinion very simply: "If the rules of criminal procedure do not provide a basis for the admission as substantive evidence of discovery depositions, then application of the common law forbids their use for such purposes." (Green, at D126).

Judge Ervin suggested that, until this court adopts the same position as federal courts, i.e., allowing the use of discovery depositions as substantive evidence in criminal trial, the majority should have followed the case law of Florida. He used the phrase "parallel provisions," implying a similarity which does not exist. This statement of a respected judge demonstrates the danger in a slavish modelling of state law upon federal models: even state jurists forget or overlook the dynamic differences between the federal and state codes of evidence and rules of procedure.

While it is true that the Florida rules of evidence are closely patterned after the federal model, the rules of criminal procedure are not. Florida rules of discovery in criminal cases are broader, tending away from "trial by ambush" towards the notion that justice for all is better served when both sides are aware of the strengths and weaknesses of the other's case.

Compare, for example, the federal rule governing depositions, which states, in pertinent part:

> Rule 15. **Depositions.**
> a WHEN TAKEN. Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition . . . . (e.s.)

with the Florida rule:

> Rule 3.220. **Discovery.**

> (h) **Discovery Depositions.**
> (1) Generally. At any time after the filing of the indictment or information the defendant may take the deposition upon oral examination of any person who may have information relevant to the offense charged. . . . (e.s.).

It is unlikely that this Court would embrace federal rulings regarding the use of depositions as substantive evidence while the generative philosophy of the Florida rules of discovery is antithetically opposed to that of the federal rules. With that caveat in mind, then, Judge Ervin's dissent is demonstrated to be the only opinion below which conforms with controlling case law.

> (2) IS A PRIOR INCONSISTENT STATEMENT SUFFICIENT TO SUSTAIN A CONVICTION OF GUILT WHERE THE ONLY OTHER CORROBORATING EVIDENCE IS HEARSAY ADMISSIBLE UNDER SECTION 90.803(23)(a), FLORIDA STATUTES?

The First District Court of Appeal invites this Court to carve out an exception to its ruling in State v. Moore, 485 So. 2d 1279 (Fla. 1986), by allowing convictions to be based on prior inconsistent statement in cases where a child is alleged to be the victim of sexual abuse. Respondent urges the Court to hold firm to its stand in Moore.

In Moore, this Court relied upon the federal decision in United States v. Orrico, 599 F.2d 113 (6th Cir. 1979). The Orrico court noted the change in the Federal Rules of Evidence which permitted "a very broad standard of admissibility with the goal of placing all relevant evidence before the trier of fact" (at 117).

The Orrico court stated that, while the new rules were under consideration by Congress, "objection was made that admitting prior inconsistent statements as substantive evidence raised the possibility that a person might be convicted solely upon such evidence." (Id. at 118) The First District appears to believe that hearsay found to be admissible under section 90.803(23)(a) should be sufficient to give a prior inconsistent statement enough corroboration to support a conviction.

One does not have to pursue this course very far to reach the danger zone. The state has presumed through this case that M.K.'s mother manipulated her into a recantation. A far more likely conclusion, based on the facts, is that the child was instead manipulated into the initial accusation of Willie Green and then reverted to the truth.

M.K., a mildly to moderately retarded girl operating at a level consistent with first or second grade children (TTr 26) related to her mother an incident that happened while M.K. was staying at her father's house involving a man named Irving McGriff.

From the witness stand, M.K. testified that her mother had talked to Irving McGriff and gone to the police and told the police that if they were unable to get Irving McGriff, she would get him herself (TTr 39).

M.K. testified that Irving McGriff had "called over to my sister's house and told her he did it." (TTr 40). The sister, C Ke , testified that M.K. did tell her that Irving

McGriff had "messed with her" and that she next spoke with M.K. a couple of days later (TTr 40). C didn't report this incident to the authorities, nor discuss it with her mother.

The sister began questioning M.K. about Green--not about McGriff--and said that M.K. "eventually" told her that Green had messed with her at her mother's home after she had asked her a "bunch of times" (TTr 51-52; 54). C K did not call HRS or her mother; she called her sister-in-law, P K , who had been on the outs with M.K.'s mother for ten years. After a couple more days had passed, the two called HRS (TTr 53; 65-66). M.K. stayed in P 's home for a week after the call to HRS, and then went back to her mother's home (TTr 66).

M.K. gave the facts of the McGriff attack in an unabashed, straight-forward manner:

> 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.

(TTr 40). Compare her interview statement about alleged assaults by Green which has, by contrast, a dream-like, insubstantial quality: she said her mother had locked her in her room, but Green got the keys and unlocked the door. He "said go ahead and let him" and he was "feeling on her" and put his hand on top of her clothes. He kissed her on the lips.

(TVid 17-23).

And, she said she heard her door open, she called her mom, who was snoring and didn't wake up. M.K. said she had her clothes on, but that Green was in his underwear. She went in the kitchen, and kept pulling her clothes back up, as he tried to take them off. Eventually, she said Green put his private inside her private while the two were on the kitchen floor, but she didn't see anything come out of his private because she was asleep (TVid 22-28).

Consider that when M.K. told her mother about the sexual battery by Irving McGriff, the mother went directly to McGriff and then to the police, and told the police if they wouldn't get him, she would. These are not the actions and words of a woman who would cover up for a boyfriend who had abused her daughter. These are the actions and words of a woman who was ready to defend her daughter against the world.

Consider that when M.K. told her sister about the sexual battery by Irving McGriff, her sister did nothing, but after a couple of days, began to ask M.K. if Green had ever messed with her, and M.K. "eventually" said that he had. The sister did not confront McGriff or Green, or take the news to her mother. She called her sister-in-law, and after a couple of more days had passed, the two decided to call HRS. M.K. stayed with her sister for a week, but was returned to her mother's home.

A far different picture then emerges of the deposition testimony (the prior inconsistent statement) and the

reliability of the hearsay statements made prior to trial. The picture is no less sordid, but these facts appear firm:

> 1. M.K. was sexually battered by Irving McGriff, and reported this to her mother.
>
> 2. Her mother reported this to the police, and threatened self-help if the police did not take care of the matter.
>
> 3. A sister and sister-in-law heard of the McGriff matter, but made no reports.
>
> 4. The sister to whom the report was made questioned the child about possible abuse by her mother's boyfriend, persisting until the child "eventually" related such abuse to her, which the sister then relayed to a sister-in-law.
>
> 5. The sister and sister-in-law did not speak with M.K.'s mother, but reported to HRS that Green had abused M.K. after a number of days had passed.
>
> 6. M.K. lived with her sister for a week, and returned to her mother's home.
>
> 7. At trial, M.K. related the sexual battery by Irving McGriff in blunt terms. She has never recanted her accusation of McGriff.
>
> 8. At trial, M.K. stated firmly, "Willie ain't had nothing to do with this, just like that." (TTr 40).

One has to conclude that the danger of convicting an innocent man in these fact-specific rough circumstances is too high. This Court and all the courts of Florida have, sadly, had to wrestle with cases--both civil and criminal--wherein the testimony of children was manipulated by adults for various nefarious purposes. Here, the child's mental impairment makes it even more likely that she would be amenable to the type of

suasion exerted by her sister's persistent questioning over a period of days concerning the possibility of abuse by Green.

> (3) DOES RECANTATION OF AN ALLEGED VICTIM MAKE HIM OR HER "UNAVAILABLE" FOR PURPOSES OF ADMITTING OUT-OF-COURT STATEMENTS UNDER THE PROVISIONS OF SECTION 90.803(23)(a), FLORIDA STATUTES?

The court below and the trial court proceeded as if M.K. were available for cross-examination at trial. This is sophistry. The state knew before trial that M.K. had recanted and would probably do so from the stand. Calling her as a state's witness was tantamount to setting up a straw man. The moment M.K. testified that Willie Green had never bothered her, she was no longer subject to cross-examination. Only a deranged practitioner would take her through rigors of cross-examination to get her to change her statement and condemn the defendant once more.

Again, looking to Judge Barfield's dissent, he noted the reasoning behind the trend towards permitting hearsay where the declarant is available for cross-examination under oath before the jury. But, he pointed to the logic used by this Court in the Rodriguez decision, supra, and concluded that the issue is not availability of non-availability of the witness, but rather the fact that that rule 3.220(h) precludes the use of discovery depositions except for purposes of impeachment or contradiction.

Therefore, it really does not matter whether or not M.K. was "available" for cross-examination at trial. The Rodriguez

decision is good law and should be affirmed.

In summary, to simply answer the certified question of the First District Court of Appeal in the negative would be insufficient to protect the integrity of the trial process. This Court should affirm its earlier stance against the use of prior inconsistent statements to obtain convictions and quash that portion of the majority opinion of the First District Court of Appeal holding that discovery depositions may be used as substantive evidence, and reaffirm and adopt the reasoning of the minority opinion of Judge Ervin.

## CONCLUSION

Based on the reasoning, legal principles, and authorities cited herein, the Respondent requests that this Court quash the holding of the First District Court of Appeal that discovery deposition may be used as substantive evidence; reaffirm and re-adopt the reasoning of Judge Ervin's dissent; and answer the certified question of the majority in the negative.

Respectfully submitted,

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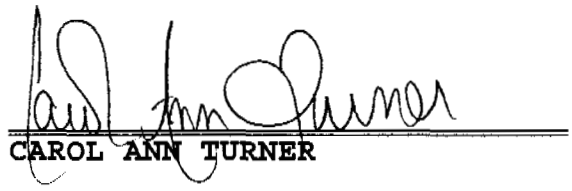
## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a copy of the foregoing has been furnished to Stephen R. White, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to respondent, WILLIE GREEN, JR., on this 16th day of June, 1995.



**CAROL ANN TURNER**