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IN THE SUPREME COURT OF FLORIDA

JAMES HEUSS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 86,544

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the Appellant/Defendant and Respondent was the Appellee/Prosecution in the Fourth District Court of Appeal and the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in the for Broward County, Florida, respectively.

In the brief, the parties will be referred to as the appear before this Court.

The symbol "R" will denote Record on Appeal.

The symbol "SR" will denote First Supplemental Record on Appeal.

The symbol "SRR" will denote Second Supplemental Record on Appeal.

STATEMENT OF THE CASE

On July 10, 1990, the State charged Petitioner by information with sexual battery on a child, [redacted] ("Child A"), by causing his tongue to penetrate with or unite with her vagina, (Count I); sexual battery on a child, [redacted] ("Child B"), by causing his finger to penetrate her vagina (Count II); and lewd assault on a child, [redacted] ("Child C"), by touching her in the vaginal area (Count III). R. 731-2. These crimes were alleged to have occurred between June 1 and December 24, 1989. R 731-2.

On June 13, 1991, a pretrial hearing was held before the initial trial judge, Judge Frusciante, on admitting hearsay statements by the children. SR. 1-114. At this hearing, the state elicited testimony from Cynthia (also known as Cindy) [redacted] Child A's mother (SR. 24- 47), John [redacted] Child C's father (SR. 53-9) and Broward County Sheriff's Office Detective Thomas Masching. SR. 66-73. The specific child hearsay statements which the State sought to admit through these witnesses were (1) statements made by Child A to Cindy [redacted] and (2) audio tape recorded interviews between Masching and Child A, Child B and Child C. SR. 93-4. Over Petitioner's objection, the trial court granted the State's motion and admitted the child hearsay testimony of Cindy [redacted] and the tape statements of the three children elicited by Detective Masching. SR. 87, 91-2. From June 14 to June 26, 1991, the cause was tried to a jury; a mistrial was declared when the jury deadlocked.

On September 24, 1991, the trial court, Judge Backman the successor judge to Judge Frusciante, held a hearing, outside the presence of the jury, during the second trial, as to the admissibility of hearsay statement of Child A, Child B and Child C, to be elicited through the testimony of Deputy Sheriff Hibbert. SRR. 1-57. Over Petitioner's

objection, the trial court ruled the Hibbert's child hearsay testimony admissible. SRR. 13-4. The second trial was also mistried. R. 789.

A third trial was begun December 9, 1991 before Judge Backman. On December 12, 1991, the jury convicted Mr, Heuss as charged. R 689, 793-5. The court adjudicated Mr. Heuss as to all three counts. R 693.

The court on February 7, 1992 the trial court sentenced Mr, Heuss to two sentences of life without possibility for parole for twenty-five years and fifteen years in prison, all sentences to run consecutively. R 714-51 810-8. On April 3, 1992, the court denied motions for judgment of acquittal and a new trial which had been filed December 20, 1991. R 800-8, 843-4, SR. 305-6. Thereafter, Petitioner timely filed his notice of appeal. R 837.

In his appeal, Petitioner raised, inter alia, the following issues: (1) The trial court erred when it admitted the testimony of three witnesses who related hearsay statements of the three child-victims; (2) The evidence of sexual battery as to Child A (Count I) and Child B (Count II) was insufficient as a matter of law; and (3) The trial court erred by allowing the State's expert to testify as to the truthfulness of the child-victims' testimony and to comment on their credibility as witnesses.

On March 15, 1995, the Fourth District Court of Appeal rendered its initial opinion in Petitioner's Appeal. Heuss v. State, 660 So. 2d 1052 (Fla. 4th DCA 1995). As to the first issue, the admissibility of the testimony of the three child hearsay witnesses, the Fourth District, citing Hopkins v. State, 632 So. 2d 1372, 1377 (Fla. 1994), agreed with Petitioner and found that the trial court, by merely tracking the provisions of §90.803(23)(c), the child-hearsay exception, had made insufficient, "boilerplate" findings that the hearsay evidence was reliable and trustworthy. While the Fourth District held that this hearsay evidence was erroneously admitted, it went on,

pursuant to Hopkins, supra, to determine whether the principle of harmless error applied to the erroneously admitted hearsay evidence. Upon its harmless error analysis, the Fourth District held that this error was harmless because: (1) The impermissible testimony was cumulative of the properly admitted evidence; (2) the child-victims' in court testimony and their published taped interviews[1] provided sufficient competent evidence to make a prima facie case of sexual abuse; and (3) the testimony of Nurse Nelson concerning the tear to Child B's hymenal membrane buttressed that victim's in-court testimony.

Concerning the issue of whether, as a matter of law, the State sufficiently proved as to Count I (sexual battery upon Child A), the Fourth District held that Child A's in-court testimony, together with her taped interview,[2] provided sufficient, competent evidence to support Appellant's conviction for unlawful union with the child-victim's "private part." Additionally, the Fourth District cited to Child B's taped statement[3] and the circumstantial evidence regarding her hymenal membrane tear to hold that the trial court properly denied Appellant's motion for judgment of acquittal.

Finally, the Fourth District held that there was no error in the admission of the expert opinion concerning the characteristics of a child-victim's testimony regarding their sexual abuse. It found no error because the expert did not testify as to the truthfulness or the credibility of the three child-victims or their respective testimony.

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[1] It is unclear how or why the Fourth District distinguished Detective Masching's out-of-court tape recorded interviews with the three child-victims from the rest of the erroneously admitted child-hearsay evidence.

[2] Ibid.

[3] Ibid.

Upon rendition of the Fourth District's initial opinion, Petitioner moved for rehearing. In his motion, Petitioner pointed out that the Fourth District had used a harmless error analysis in affirming his conviction, despite the fact that the Respondent failed to assert a harmless error argument in its brief to the court, and argued that it lacked the authority to do so. The Fourth District, in granting Petitioner's rehearing motion, Heuss, supra at 1058, acknowledged that while it engaged in a harmless error review sua sponte, it discerned no legal authority or public policy which prohibited such a practice and held that it had the discretion to sua sponte affirm on the ground that an error was harmless.

After the Fourth District rendered its rehearing opinion, Petitioner petitioned this Court upon its discretionary, "conflict" jurisdiction. This Court accepted jurisdiction over the instant cause on January 16, 1996.

STATEMENT OF THE FACTS

Petitioner, James Heuss, after his case was mistried on two previous occasions, [4] was convicted in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida, for sexual battery on two children (Count I, as to "Child A,"[5] and Count II, as to "Child B"[6]) and for lewd assault on a third child (Count III, as to "Child C"[7].

The allegations against Petitioner first arose when the fiance[8] of Child A's mother[9] informed her that Child A had performed oral sex on her younger brother.[10] When Child A's mother confronted Child A, Child A explained that she had learned the act from Petitioner when he had done the same thing to her. Thereafter, Child A's mother discussed her daughter's allegation with two of her sisters, the mothers of Child B[11] and

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[4] The first mistrial occurred as a result of a hung jury. R. 739-761. The second mistrial occurred before the case was submitted to the jury. R. 789.

[5] [redacted]

[6] [redacted]

[7] [redacted]

[8] Calvin [redacted] who was also Child A's biological father.

[9] Cynthia (also known as "Cindy") [redacted]

[10] [redacted]

[11] Caroline [redacted]

Child C.[12] Then, Child A's mother spoke to two of her nieces, Child B and Child C. Child B said that Petitioner had touched her privates between her legs with his fingers and that it had hurt. Child C stated that Petitioner had touched her bottom and between her legs while she remained fully clothed.

The parents of the three children complained to the Sheriff's Office. The parents told the responding deputy sheriff[13] that Petitioner had babysat all of their children over a six (6) month period, from June through December 1989. Thereafter, the deputy interviewed each child out of the presence of the other two children. At trial, the deputy testified that Child A told him that Petitioner put his mouth in her private area and she felt his tongue touching her private area. Child B stated that Petitioner penetrated her private parts with his finger and at on one occasion showed her his penis. Child C told him that Petitioner touched her buttocks and her private area while she was fully dressed.

A few days after the first deputies had met with and had spoken to the three children, another sheriff's deputy[14] conducted audio taped interviews with them. These interviews were published to the jury and included the following information: (1) That Child A stated that Petitioner had taken her into the bedroom of his apartment, laid her down on the carpet, removed her clothing and placed his tongue in her vagina; (2) That Child B stated that Petitioner had placed one of his fingers within her vagina at least five times and when he would stick it in, it would hurt; and (3) That Child C stated that

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[12] Susan [redacted]

[13] Deputy Sheriff Alcibiades Hibbert.

[14] Detective Thomas Masching.

Petitioner had touched her numerous times between the legs, an area she referred to as her "privates," and had patted her buttocks on several occasions.

At trial, all three children testified. Child A stated that while she did not know the number of times she had been to Petitioner's apartment, once while she was there, she had gone to use the bathroom. Petitioner, accompanying her to the bathroom, closed the door, laid her down on the a floor rug, pulled her pants down and "licked [her] private," located between her legs, two times. On cross-examination, Child A admitted that her deposition testimony was inconsistent with her trial testimony. Then, on redirect-examination, she reaffirmed her intent to tell the truth and reiterated her direct-examination testimony.

Child B testified that she slept in Petitioner's waterbed once or twice during the night and that Petitioner also slept in the bed. While in bed, Child B stated that Petitioner touched her between the legs with his fingers and that it made her "uncomfortable." She also stated that the first time this occurred, Petitioner made her promise not to tell her mother. Child B went on to testify that despite this promise, she was going to call her mother, but she failed to do so, because Petitioner would not allow her out of his room.

Child C stated that Petitioner touched her between her legs while she had her clothes on. On cross-examination, Petitioner revealed that during her deposition, Child C denied that appellant had ever touched her. Additionally, while it was disclosed that Child C's father[15] had reviewed her deposition testimony with her prior to trial, he denied that he had ever suggested how she ought to answer any question asked of her at trial.

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[15] John [redacted]

The nurse[16] who examined all three children testified as to the results of her examination. The nurse found a tear in Child B's hymenal membrane at the one o'clock position. While she stated that the tear was consistent with a finger touching a hymen and that it was very unlikely that a child, herself, would independently touch her own hymen to cause it to tear, due to the amount of pain such a touching would cause, she also did not observe any other physical trauma and could not conclusively state how the tear occurred or whether that tear was evidence of child abuse. She could only testify that the tear appeared "suspicious." Additionally, the nurse testified that there was no evidence of any trauma to Child A's and Child C's genitalia.

The State also elicited expert testimony[17] regarding the characteristics of a child-victim's testimony regarding sexual abuse and the reasons why a child may recant a sexual abuse allegation. The expert also testified about what appropriate child-victim interviewing techniques were and the effects of repeated and leading questions on a child's perception of the events.

Petitioner testified in his own defense. Although he denied the allegations, the jury found him guilty as charged in all three counts.

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[16] Mary Alice Nelson.

[17] Dr. Dennison Reed.

SUMMARY OF THE ARGUMENT

Point I:

The Fourth District erred in holding that an appellate court has the discretion to engage in sua sponte harmless error review when the State fails to address the harmless error issue in its brief or argument to the court. The concept of sua sponte harmless error review is contrary to this Court's rulings in State v. DiGuilio, Ciccarelli v. State, and State v. Lee, which maintain that the burden is on the State, as beneficiary of the trial error, to prove that the error harmlessly affected the jury's verdict, beyond a reasonable doubt and that where the State fails to address an error's alleged harmlessness, the issue is waived and not reviewable by appellate courts. Moreover, sua sponte harmless error review diminishes the neutrality of appellate courts and denies appealing defendants due process of law.

Point II:

The Fourth District's sua sponte harmless error analysis as to erroneously admitted child-hearsay was flawed because it used an incorrect prima facie case of guilt standard of harmlessness review; it incorrectly characterized repetitive evidence, which only served to improperly bolster the child-victims' credibility, as harmlessly cumulative; and it erroneously considered impertinent medical evidence as corroborative. Consequently, the error in admitting this evidence was not harmful.

Point III

The Fourth District erred in affirming the trial court's denial of Petitioner's judgment of acquittal motions, as to Counts I and II. The State failed to elicit any evidence which proved that Petitioner committed a sexual battery on Child B, by penetrating her vagina with his finger or on Child A, by uniting or penetrating her vagina with his tongue. Additionally, the evidence which the Fourth District points to in finding

that the State's proof was sufficient to overcome a judgment of acquittal motion as to Counts I and II was child-hearsay evidence it had also ruled had been erroneously admitted, making the erroneous admission of that evidence harmful error

ARGUMENT

POINT I

THE FOURTH DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT AN APPELLATE COURT MAY SUA SPONTE DETERMINE AN ERROR HARMLESS WHERE THE STATE FAILS TO ALLEGE, ARGUE AND PROVE HARMLESS ERROR.

In Ciccarelli v. State, 531 So. 2d 129 (Fla. 1988) this Court held that, "if the state has not presented a prima facie case of harmlessness in its argument, the [appellate] court need go further." Id. at 131. The Fourth District interpreted this passage to mean that an appellate court may, at its option, sua sponte consider error harmless, absent the State raising, arguing and proving an error harmless beyond a reasonable doubt.

In Ciccarelli, supra, this Court insisted that the State shoulder and sustain the burden of proving harmless error and, in accord with State v. DiGuilio, 491 So. 2d 1129, 1138-9 (Fla. 1986), held that the harmless error test places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict. Id. at 130-131.

The Fourth District's instant decision, Heuss v. State, supra at 1058, expressly and directly conflicts with decisions of the First District, which, pursuant to Cicarrelli and DiGuilio, hold that where the State fails to address that an error was not harmful beyond a reasonable doubt, an appellate court either "cannot" or is "unable" to consider and deem the complained of error as being harmless and reversal is required. Johnson v. State, 595 So. 2d 132, 135-6 (Fla. 1st DCA 1992) (holding that where error is present, the burden is on the State to prove, beyond a reasonable doubt, that the error was harmless and when the State fails to argue harmless error the appellate court "cannot" view the complained of error as harmless); Perkins v. State, 585 So. 2d 390, 392 (Fla. 1st DCA 1991) (holding that an appellate court is "unable" to view error harmless where

the state fails to argue harmless error, but only contends that there was no error); Taylor v. State, 557 So. 2d 138 (Fla. 1st DCA 1990) (holding that where the State fails to argue harmless error, it fails to carry its burden of proof and an appellate court is "unable" to view the error as harmless).

The Fourth District, in holding that the erroneous admission of the three child-victims' hearsay statement was harmless beyond a reasonable doubt, apparently overlooked the fact that Respondent, within its Answer Brief,[18] failed to raise and/or argue that any erroneous admission was harmless beyond a reasonable doubt (See Appendix A, Answer Brief of Respondent/Appellee at 12-22). But more importantly, Respondent's failure must be viewed in light of the fact that Petitioner addressed the issue of the error's harmfulness in his initial brief to the Fourth District Court of Appeal (See Appendix B, Initial Brief of Petitioner/Appellant at 24). Consequently, the Fourth District's sua sponte harmless error review was most inappropriate when Respondent, being offered a direct opportunity to contest the harmlessness of the erroneous admitted child-hearsay, failed to do so, thereby waiving the issue.

Inasmuch as the State is the beneficiary of the error, as with a beneficial constitutional right, it can, by not sustaining its burden of proof, waive the issue of its harmlessness upon the jury's verdict on appeal. See, e.g. Patsy v. Board of Regents, 457 U.S. 496, 515 n 19, 102 S.Ct. 2557, 2567 n 19, 73 L.Ed.2d 172 (1982). Moreover, when an appellate litigant failed to raise critical, beneficial issues at the district court level, this Court deemed such issues waived and refused to permit further argument. Landmark First National Bank v. Gepetto's Tale O'The Whale, 498 So. 2d 920, 921-2 (Fla. 1986); see also Winn-Dixie Stores, Inc. v. Goodman, 276 So. 2d 465,

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[18] No oral argument was held before the Fourth District in the instant appeal.

466 (Fla. 1972). In criminal appellate proceedings, this Court has adjudged an issue "abandoned and any legal defect waived," when a petitioner had failed to address an issue which had been raised by the State in its brief for district court review. D.C.W. v. State, 445 So. 2d 333, 335 (Fla. 1984). Yet, while D.C.W. involved a criminal defendant waiving an appellate issue, procedural default rules can apply equally to the State as well as the accused. Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993). Issues not raised on appeal are not to be reviewed. State v. Dupree, 656 So. 2d 430, 432 (Fla. 1995). Additionally, where the State fails to brief the issue of a procedural bar in answer to an appellant's issue of error, the State's reliance on the procedural bar is deemed waived and it cannot then address it for the first time in its motion for rehearing or claim that its previous failure to contest was merely an oversight. Thomas v. State, 599 So. 2d 158, 161 n. 1 (Fla 1st DCA 1992). Further, the State waives the issue of a criminal defendant's standing to suppress evidence for appellate review when it fails to raise it on appeal, no matter how obvious the defendant's lack of standing appears to be from the trial record. See Brown v. State, 636 So. 2d 174, 175 (Fla. 2d DCA 1994) citing State v. Wells, 539 So. 2d 464, 468 n.4 (Fla. 1989), affirmed, Florida v.Wells, 495 U.S. 1, 110 S. Ct. 1632, 109 L. Ed. 2d 1 (1990).

No where in Respondent's answer brief to the Fourth District is the issue of harmlessness of the erroneous admission of the child-hearsay argued, let alone even mentioned (See Appendix A, 15-22). Not until Respondent replied in opposition to Petitioner's rehearing motion before the Fourth District did the State attempt to address the alleged harmlessness of the erroneously admitted child-hearsay (See Appendix C, Respondent/Appellee's Response to Petitioner/Appellant's Motion for Rehearing, ¶¶ 8-13). As previously stated, where an appellate litigant has waived a beneficial issue by failing to address it in its initial briefs to a reviewing court, it cannot undo or vitiate that

waiver by an attack on the back end, after the reviewing court has rendered an opinion. Thomas v. State, supra; See, e.g., Spenkelink v. State, 350 So. 2d 85 (Fla. 1977) (This Court holding that failure to address constitutional error at the time of the original appeal waives the right to raise a constitutional claim upon that error in post-conviction proceedings). Yet, Respondent, in addressing harmless error in its response to rehearing, did not seek to prove that the error did not effect the jury's verdict beyond a reasonable doubt, as mandated by DiGuilio, supra. Rather, it did an end-around the issue, arguing that the Fourth District was correct in analyzing harmless error sua sponte and that the admission of the child-hearsay was not error. Consequently, Respondent not only failed to contest harmless error in its answer brief to the Fourth District, but even after that court had deemed that the child-hearsay was admitted in error, albeit harmlessly, it persisted to stalwartly insist that the child-hearsay evidence was properly admitted.

Petitioner submits that this Court's opinions in DiGuilio, supra, and Ciccarelli, supra, explicitly considered the question of State's waiver of a finding of harmless error by placing the burden of proof on the State. As this Court held in DiGuilio:

> The burden to show the error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful.

supra at. 1139. Consequently, where the State fails to address, let alone prove beyond a reasonable doubt, that a trial court error was harmless, an appellate court, upon finding trial error, need not proceed to a harmless error analysis, absent guidance from the State on that issue. The Fourth District, in interpreting the "need not" language of Ciccarelli, supra at 131, as being permissive, rather than jurisdictionally limiting, thus allowing sua

sponte harmless error review, cites as it only legal authority §59.041, Fla. Stat. (1911),[19] claiming that it requires an appellate court to consider whether any error is harmless. However, the Fourth District, in analyzing harmless error sua sponte, fails to consider this Court's answer, in State v. Lee, 531 So. 2d 133 (Fla. 1988), to this certified question:

> Does the erroneous admission of evidence of collateral crimes require reversal of appellant's conviction where the error has not resulted in a miscarriage of justice but the state has failed to demonstrate beyond a reasonable doubt that there is no reasonable possibility that the error affected the jury verdict?

Id. at 134. This Court answered in the affirmative and pointed out that the State had failed to brief and orally argue harmless error to the district court, insisting instead that it was incumbent upon the reviewing court to apply the harmless error test without argument or guidance from the State. Id. at 136. In rejecting that notion and declining to modify the test announced in DiGuilio, supra at 1139, this Court noted that while the legislature has the authority to enact harmless error statutes, as in §59.041 and §924.33, Fla. Stat. (1939),[20] the Supreme Court retains the authority to determine when an error

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[19] Section 59.041 provides that:

> No judgment shall be set aside or reversed, or new trial granted by any court of the state in any cause, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence or for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice. This section shall be liberally construed.

[20] Section 924.33 provides that:

> No judgment shall be reversed unless the appellate court is of the opinion, after an examination of all the appeal papers, that error was committed that injuriously affected the substantial rights of the appellant. It shall not be presumed that error

is harmless and the analysis to be used in making the determination. State v. Lee, supra at 136-7 n.1. More recently, in State v. Schopp, 653 So. 2d 1016 (Fla. 1995), this Court reaffirmed the proper harmless error analysis to be followed in effectuating §924.33. The Court acknowledged that the harmless error analysis applies to all judgments and reiterated the DiGuilio requirements which continue to place the burden of proof on the State to show that the error did not affect the jury's verdict beyond a reasonable doubt. Id. at 1020. Moreover, the entire purpose of requiring the State to shoulder this responsibility is to dispel the concern that a reviewing court would find an error harmless without affording the defendant the opportunity to show the error's prejudicial affect on the jury's verdict. Id. Where the State does not meet this burden, the error must be considered harmful. Id.

In Ciccarelli, supra at 131, this Court also noted the State's burden of proof under the DiGuilio for harmless error review. Moreover, citing Lee, the Ciccarelli court, made it clear that an appellate court will not engage in harmless error review when the State fails to make a prima facie showing of harmlessness. Id. This is, as this Court determined, the condition precedent for an appellate court review of the entire record on appeal to determine if the jury verdict would have been the same, absent the error. Id.

Contrary to the Fourth District's holding in the present case, this Court's opinions in Lee, Ciccarelli and DiGuilio create a restriction in an appellate court's authority to sua sponte consider harmless error, because "if there is error, it requires reversal **unless** the state can prove beyond a reasonable doubt that the error was harmless." Ciccarelli v. State, supra at 131 [emphasis added]. Since the State failed to even address or make any argument showing that the erroneously admitted child-hearsay evidence was harmless, the

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injuriously affected the substantial rights of the appellant.

Fourth District initiated a sua sponte form of review disapproved by this Court in DiGuilio, Ciccarelli and Lee, finding that error harmless.

Moreover, while the Fourth District failed to discern any public policy supporting a restriction against sua sponte harmless error review, Petitioner maintains that such a limitation is not only appropriate, but essential in order to preserve the neutral integrity of appellate courts as well as sustain the criminally accused's right to due process of law at the appellate level.

The Fourth District's opinion on rehearing dismisses the notion that it ought to reverse Petitioner's "valid conviction" simply due to a euphemistic "legal technicality" arising from the State's failure to brief and argue harmless error. Heuss v. State, supra at 1059. Yet, this sentiment clearly compromises the strict neutrality with respect to all cases which come before an appellate court, regarding the manner in which parties are treated and particularly as to the consequence of opinions rendered. See Golden Hills Turf and Country Club v. Buchanan, 273 So. 2d 375 (Fla. 1973); See Ostrum v. Department of Health and Rehabilitative Services 663 So. 2d 1359 (Fla. 4th DCA 1995)(noting that, with the exception of appellant briefs filed pursuant to Anders v. California,[21] an appellate court cannot become an advocate for any party but must persist at being a neutral and detached decision making body, without bias or prejudice for or against any party). Such a position of neutrality is antithetical to the court shouldering the State's burden of proof to save a conviction when the State has not bothered to argue that improperly admitted evidentiary error did not infect the verdict.

When the State fails to argue harmless error, the appellate court's neutrality is placed at issue, due to the fact that the American method for determining questions of

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[21] 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

guilt revolves around the adversary system. See Singer v. United States, 380 U.S. 24, 36, 85 S.Ct. 783, 13 L.Ed.2d 630 (1965). The axiom of this system is that appellate courts do not preside as independent councils of inquest and research, but rather, they are arbiters of legal issues presented and argued by litigants. Consequently, an appellate court ought not engage in sua sponte review when a party fails to brief and/or argue an issue, because it is contrary to the adversary system of justice, which is dependent upon input and aid of all the parties, and because such review is essentially unfair to the party against whom a decision is made. When an appellate court assumes upon itself the responsibility for the results of a case, it compromises its neutrality in the even application of the law and exceeds the appropriate parameters of judicial restraint. See Golden Hills Turf and Country Club v. Buchanan, supra; See Ostrum v. Department of Health and Rehabilitative Services, supra.

Not only does an appellate court's sua sponte harmless error review negate the State's well established responsibility of proving that trial error did not effect the jury's verdict beyond a reasonable doubt, State v. DiGuilio, supra, it also denies an appealing defendant's rights of due process of law. Procedurally, sua sponte review is adverse to a defendant's right to be put on notice that an error may be harmless and to reply to convince the appellate court of the contrary. Substantively, such a procedure diminishes his right to effective assistance of appellate counsel when the court engages in promoting a position which should be reserved as a function of the State. A court cannot take the State's side in a dispute against a criminally accused by filling in the gaps of omission in the State's representation of its client. Broome v. Chastine, 629 So. 2d 293 (Fla. 4th DCA 1993). When judges do so, they become direct participants and caste doubt on the neutrality and integrity of the court upon which they preside. Id. at 294.

"Procedural due process serves as a vehicle to ensure fair treatment through the proper administration of justice where substantive rights are at issue." Department of Law Enforcement v. Real Property, 588 So. 2d 957, 960 (Fla. 1991). Moreover, this state's constitution, Art. I, §9, Fla. Const., insures that the courts will engage in procedures which will protect and enforce citizens' private rights and in so doing, provides that a defendant will receive fair notice and given an actual opportunity to be heard and defend at a meaningful time and in a meaningful manner in an orderly procedure, before any judgment is rendered against him. Id. However, when an appellate court engages in sua sponte harmless error review, in absence of the State's failure and/or waiver in briefing and arguing this issue, the appealing defendant receives no meaningful notice of the error's alleged harmlessness, nor does he have a meaningful opportunity to argue, or in an other word defend, against it.

Substantively, since a criminal defendant in Florida is afforded the right to a direct appeal from his conviction at trial, §924.06, Fla. Stat. (1983), he has the right to not only be represented by counsel, Douglas v. California, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963), but the right to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985). Where the State never raises or argues any issues involving harmless error, appellant's counsel would not even have to address such issues. An appellate court's sua sponte dictum that an error is harmless leaves appellant's counsel wide open to a claim of ineffective assistance of appellate counsel. See, e.g., Darden v. State, 475 So. 2d 214 (Fla. 1985).[22]

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[22] An appellate counsel is ineffective where it can be shown that: (1) specific errors or omissions where made which indicate that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance and (2) the deficiency of that performance compromised the appellate process to such an extent as to undermine confidence in the fairness and correctness of the appellate results.

This Court's precedent is contrary to the concept of an appellate court engaging in sua sponte harmless error determination. The State, in all appeals from convictions, holds the advantage of being the beneficiary of a trial error. As such, it is only fair that it also retain the burden of proving, beyond a reasonable doubt, that the complained of error did not effect the jury's verdict so it may be found harmless. This is not an overwhelming or onerous responsibility. Yet, where the State fails to brief and/or argue the issue of harmlessness, as in the case sub judice, it waives the appellate court's consideration of harmlessness and amounts to the State's concession that harmless error is not argued because no such argument can be made. Then, all that remains for the appellate court to determine is whether there is, indeed, error and if so, reverse the trial court. However, if an appellate court can, with unfettered discretion, analyze the harmlessness of an error, sua sponte, without a briefing by the State, the DiGuilio standard is rendered meaningless and contrary to the federal constitutional principles announced in Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), and the very heart of our adversary system of justice. Consequently, this Court should vacate the Fourth District's ruling, deem the error in admitting the child-hearsay reversible and remand the instant cause to the trial court for a new trial.

ARGUMENT

POINT II

THE ERRONEOUSLY ADMITTED CHILD-HEARSAY EVIDENCE WAS HARMFUL AND THE FOURTH DISTRICT COURT OF APPEAL ERRED IN UTILIZING INCORRECT FACTORS IN ITS HARMLESS ERROR DETERMINATION.

Initially, Petitioner agrees with the Fourth District's holding that the admission of the child-hearsay evidence in his trial was error and that error was preserved for appellate review. Heuss v. State, supra at 1056-7, citing Hopkins v. State, 632 So. 2d 1372 (Fla. 1994). Where the Fourth District and Petitioner part company, however, is in regard to the lower tribunal's conclusion that this error was harmless[23] and with the analysis it undertook in reaching this conclusion. Yet, assuming arguendo that an appellate court has the discretion to engage in sua sponte harmless error review, this Court should, nevertheless, reverse the Fourth District's holding because its harmless error evaluation was incorrect, employing the wrong factors of review, and because the instant facts, when the proper factors of analysis are applied, do not support its finding that the erroneous admissions of the child-hearsay evidence did not affect the jury's guilty verdict beyond a reasonable doubt. State v. DiGuilio, supra at 1139.

The Fourth District's sua sponte harmless error analysis, found that erroneous admission of the child-hearsay evidence harmless because:

1. The impermissible testimony was cumulative of the properly admitted evidence;

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[23] C.f. State v. Townsend, 635 So. 2d 949 (Fla. 1994), where this Court noted that trial courts have committed reversible error when they have failed to place on the record specific findings indicating the basis for determining the reliability of a child's statements introduced as hearsay, pursuant to §90.803(23), Fla. Stat. Id. at 957.

2. The child-victims' in-court testimony **and** their published taped interviews provided sufficient competent evidence to make a prima facie case of sexual abuse; and

3. Child B's testimony was buttressed by the nurse's testimony concerning physical trauma.

Heuss v. State, supra at 1057. However, these are incorrect factors to upon which to determine harmless error and the lower tribunal's use of them violated the standards this Court set forth in DiGuilio, supra.

In DiGuilio, this Court held that:

> The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. A harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict.

Id. at 1139.

In applying this standard, an appellate court must view the entire record on appeal, Ciccarelli v. State, supra at 132, and then ask itself whether the trial result "would have been the same absent the error." Id. at 131; Sanchez v. State, 537 So. 2d 660, 662 (Fla. 3d DCA 1989). To begin to properly analyze the affect of the erroneously admitted child-hearsay evidence on Petitioner's verdict, the record on appeal must be reviewed without consideration of **any** of the child-hearsay. Consequently, the only competent evidence which may be considered within the context of the harmless error review is the child-victims' in-court testimony, along with Nurse Nelson's expert medical opinion, if it indeed carried any weight, as substantive evidence of the alleged sexual abuse. Id.

The Fourth District's opinion quoted portions of all three child-victims in-court testimony. Heuss v. State, supra at 1054-5. Regarding Child A, she testified that while visiting Petitioner's apartment, Petitioner accompanied her to the bathroom, where he

pulled her pants down, laid her on a rug, closed the bathroom door, and "licked" her "private" between her legs two times (R. 167-8). Heuss v. State, supra at 1054. Yet, while the lower tribunal acknowledged that Child A affirmed making prior inconsistent statements during cross-examination, Id., it neglected to mention that these inconsistencies included the fact that she totally recanted her sexual battery allegation against Appellant in her deposition, when responding to a question asked of her by the State. R. 178, 181. Notwithstanding her reaffirmation to tell the truth and reiteration of her direct testimony on redirect-examination, Child A stated on cross-examination that her parents, after reviewing the deposition transcript with her, told her to testify differently than she had at deposition. R. 178-9. Specifically she was told to say that Petitioner licked her privates, whereas she had denied that ever happening at deposition, and to testify that it occurred in the bathroom, whereas at deposition she denied ever being in any room at Petitioner's apartment, other than the living room where she had played video games in the presence of her brother and cousins. R. 180-3.

Child B testified that when Petitioner babysat her and her brother, he would sometimes sleep with her in his waterbed and there touch her between her legs with his fingers, which made her "uncomfortable" (R. 449, 453-5). Heuss v. State, supra at 1054-5. Yet, the Fourth District's opinion omitted the fact that Child B too had previously denied that Appellant had touched her and that this prior denial occurred **before** Child A's sexual abuse allegations against Appellant had surfaced on December 24, 1989. R. 494, 523. Caroline [redacted] Child B's mother, testified that she became aware that Petitioner had been giving her daughter and son stickers when he babysat them. Thereafter, for a consecutive eight (8) to nine (9) week period, she asked Child B, at least once or twice a week, whether Petitioner had touched her. R. 494, 523. Each time, Child B denied that he had. R. 494. Moreover, adding to these

inconsistencies was Child B's refutation, on cross-examination, that her mother had ever asked her whether Petitioner had ever touched her (R. 463) and her remark, on direct-examination, that when someone lies, they will get "revenge." R. 449.

The Fourth District found that when Child C had visited Petitioner's home, Petitioner had touched her between her legs while she remained fully clothed (R. 346-7) and that she had recanted her sexual abuse claim against Petitioner during her deposition testimony (R. 352). However, Child C's direct testimony, which asserted that Petitioner had touched her, did not come out until after the court reconvened from the lunch recess. R. 342-3. Prior to that, she was on the witness stand for forty (40) to (45) minutes and failed to make any response to the prosecutor's questions regarding, what did Petitioner do to her at his apartment (R. 334) and what she told the police about what Petitioner had done to her (asked of her three times). R. 338-340. Additionally, while the lower tribunal points out the fact that Child C's father reviewed her deposition with her before trial, it maintains that he did not tell her how to answer any questions which would be posed to her. Heuss v. State, supra at 1055. Yet, in this regard, the Fourth District ignored Child C's sworn testimony that her father underlined the "wrong" answers in her deposition transcript, told her to correct them and that she thought her father was angry when he talked about it. R. 356-7, 362. Child C's father refuted his daughter's testimony by stating (in addition to denying that he did not tell her how to testify) that his daughter, an eight year old, underlined portions of the deposition transcript and inserted the "correct" answers herself, while she and he rode in an automobile, enroute to a meeting with the State Attorney at the Broward County Courthouse. R. 384-5.

Viewing the child-victims' in-court testimony as the properly admitted evidence, in relation to the complete record on appeal, the erroneously admitted hearsay is clearly

not merely harmlessly cumulative, but harmful, repetitive evidence which unduly bolstered the child-victims' otherwise shaky credibility. In Arney v. State, 652 So. 2d 437 (Fla. 1st DCA 1995), the First District found that error in admitting child-hearsay, based upon deficient reliability and trustworthiness findings, pursuant to 90.803(23), was harmful because of the reinforcing effect the hearsay has on the minds of jurors regarding the credibility of the child witness, notwithstanding other evidence which corroborated the child's claim of abuse. Id. at 438-9. Here, the testimony of the three child-victims were replete with inconsistencies and doubts as to the veracity of their testimony. These included: (1) evidence of undue influence applied to Child A and Child C by their respective parents to change deposition testimony; (2) Child A's and Child C's recantation of their respective allegation of sexual abuse at the hands of Petitioner; (3) Child B's denial that Petitioner conducted himself improperly with her in the face of repeated questioning by her mother; (4) Child B's viewpoint that people who lie get revenge; and (5) the fact that Child C, when repeatedly asked what Petitioner had done, testified in an uncommunicative manner for nearly 45 minutes, only to ultimately answer the prosecutor's questions after the trial court's luncheon recess.

In Garcia v. State, 659 So. 2d 388 (Fla. 2d DCA 1995),[24] the Second District ruled that under DiGuilio, there is a substantial likelihood that the erroneous admission of child-hearsay, based on a trial court's failure to make the requisite reliability and trustworthiness findings, pursuant to 90.803(23), will prejudice a defendant, because child

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[24] It must be pointed out that the Garcia court cited the Fourth District's Heuss opinion to make the point that the erroneous admissions of child-hearsay can be harmless where there is medical testimony consistent with abuse. Id. at 393. However, the Second District did not have the benefit of knowing the fact that Nurse Nelson's "medical testimony" was inconclusive regarding Child B's sexual abuse allegation and failed to corroborate any of the properly admitted trial evidence. Infra.

sexual abuse is "one of the most heinous and widely condemned crimes known to society," especially where the hearsay statements are inconsistent with the child-victims in-court testimony. Id. at 393. Similarly, the crimes charged against Petitioner were extremely grave and the consequences of his conviction severe.[25]

Moreover, the veracity of the child-victims' accusations against Petitioner was the dominant issue at his trial. The sole purpose for which the State used the child-hearsay evidence was to unfairly bolster the child-victims' in-court testimony. This is evident by the fact that not one, but **three** sources of child-hearsay; to wit: Cindy, [redacted] Hibbert and Masching, were presented to the jury. Inasmuch as the three children were the crucial witnesses in the case and their in-court testimony was highly impeached, Petitioner's verdict was harmed by the trial court's erroneous admission of the child-hearsay evidence. Bertram v. State, 637 So. 2d 258, 259 (Fla. 2d DCA 1994).

Additionally, the instant erroneously admitted child-hearsay cannot not be characterized as properly admitted prior consistent statements, under §90.801(2)(b), Fla. Stat. (1981). C.f., e.g., State v. Jones, 625 So. 2d 821 (Fla. 1993).[26] For a prior consistent statement to be admissible, the party opponent must have first expressly or implicitly charged a witness with improper influence, motive or recent fabrication. Bertram v. State, supra at 259. Furthermore, the prior consistent statement can only be

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[25] The trial court sentenced Petitioner to life imprisonment, with a mandatory minimum term of twenty-five years on Counts I and II and fifteen years on Count III, all to run consecutively to each other. R. 810-818.

[26] While this Court in Jones found that the trial court's failure to follow the provisions of 90.803(23) made the child-hearsay evidence inadmissible under that statute, it held, nonetheless, that it was admissible as a prior consistent statement of the declarant-victim, since it was admitted only **after** he was cross-examined by the defendant and charged with recent fabrication of the truth.

admitted **after** the declarant has testified and has been cross-examined, otherwise it is not admissible as **rebuttal** evidence, which, by the plain language of the statute, is the sole intended purpose of such evidence. Dufour v. State, 495 So. 2d 154, 160 (Fla. 1986), cert. denied, 479 U.S. 1101, 107 S. Ct. 1332, 94 L. Ed 2d 183 (1987); Edwards v. State, 662 So. 2d 405 (Fla. 1st DCA 1995); Columtino v. State, 620 So. 2d 244, 245 (Fla. 3d DCA 1993); Keller v. State, 586 So. 2d 1258 (Fla. 5th DCA 1991).

Here, Hibbert and Masching, two of the sources of the erroneously admitted child-hearsay evidence, were the first and second State witnesses at Petitioner's trial. R. 57-89, 105-154. Their hearsay testimony was elicited **before** any one of the three child-victims testified. Clearly, their recitation of all three child-victims' hearsay declarations was not rebuttal evidence, since Petitioner had yet to be given an opportunity to cross-examine the declarants, themselves, and charge them with recent fabrication, motive or improper influence. Dufour v. State, supra; Edwards v. State, supra; Columtino v. State, supra; Keller v. State, supra.

Although Cindy, [redacted] the third child-hearsay witness, testified (R. 214-261) after her daughter, Child A (R. 161-185), she did so before the jury heard the testimony of Child B (R. 435-465) or Child C (R. 321-363). Moreover, her testimony cannot be characterized as rebuttal to the charge of recent fabrication or improper influence against Child A. Petitioner's cross-examination of Child A, indeed his entire defense, was to demonstrate that her initial accusation of sexual abuse, made on December 22 or 23, 1989, though not recent, was a remote fabrication. See Hitchcock v. State, 636 So. 2d 572, 574 (Fla. 4th DCA 1994); Bertran v. State, supra at 259. Moreover, before a prior consistent statement can be admitted to rebut the charge of improper influence, the out-of-court statement must have been made before the existence of facts which would indicate improper influence. Columtino v. State, supra at 245. Child A's initial

statement was made after she was caught sexually abusing her sibling and after her mother confronted her about that incident. SR. 25-7. Consequently, Child A had a motive to lie, after she had been caught with her (brother's) pants down. See Lazarowicz v. State, 561 So. 2d 392, 393 (Fla. 3d DCA 1990).

Determining the credibility of the child-victims was one of the jury's central functions in the case sub judice. It had to decide whether to believe Petitioner, who denied all wrongdoing,[27] Heuss v. State, supra at 1056, or the three child-victims, who testified inconsistently with out-of-court statements made both prior and subsequent to their in-court testimony. The erroneously admitted child-hearsay evidence did nothing more than unduly bolster their testimony through improper, repetitive assertions of facts. Hitchcock v. State, supra at 574; Lazarowicz v. State, supra at 395. As a result, the error was harmful, because the repeated hearsay prejudiced Petitioner's case in the collective mind of the jury. Hitchcock v. State, supra; Escoto v. State, 624 So. 2d 836, 837 (Fla. 5th DCA 1993).

The credibility of the child-victims' in-court testimony was also improperly bolstered due to the fact that Hibbert and Masching, two of the child-hearsay witnesses, were Sheriff's deputies. Juries widely regard law enforcement officers as disinterested, objective and inherently credible witnesses. See Tindall v. State, 645 So. 2d 129, 131 (Fla. 4th DCA 1994). Hibbert and Masching, testifying as law enforcement officers

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[27] The Fourth District stated that Petitioner blamed the bitter demise of his intimate relationship with Child C's mother for the sexual abuse allegations, however, the trial record shows that he made no such claim. In fact, he was uncertain as to the reason he was accused, did not know how or why it happened and merely speculated that his breakup with Susan [redacted] may have been a precipitating factor. R. 581. He also argued that motive for anyone to accuse him was not an issue in the case, suggested alternatives from where the child-victims could have learned about these sexual acts and asked the jury to acquit because the incredible inconsistencies in the State's evidence raised a reasonable doubt. R. 619, 622-642.

regarding improperly admitted child-hearsay evidence, unduly heightened the credibility of the child-declarants' in-court testimony, even before any one of the victims ascended the witness stand. Consequently, the error in admitting this excessively repetitive evidence harmfully affecting the jury's verdict. State v. DiGuilio, supra at 1139; Tindall v. State, supra at 131; see also Perez v. State, 595 So. 2d 1096, 1097 (Fla. 5th DCA 1992).

Furthermore, the Fourth District's sua sponte harmless error analysis was erroneous because it applied a "prima facie case" standard of review, deviating significantly from this Court's DiGuilio principle that a "sufficiency-of-the-evidence" test is inappropriate in determining an error's harmless affect on a verdict. Id. at 1139. The lower tribunal's error is compounded by the fact that it relied on evidence which it had deemed erroneously admitted child-hearsay as support for its prima facie proof finding!

The Fourth District held that the child-hearsay evidence was admitted erroneously because the trial court failed to make the requisite findings of the out-of-court statements' reliability, pursuant to §90.803(23), Fla. Stat. (1991). Heuss v. State, supra at 1056-7. Nonetheless, it cites to the out-of-court tape recorded statements of the three child-victims, admitted into evidence through the testimony of Detective Masching, as factual support for it "prima facie" proof harmless error determination.[28] Heuss, supra at 1057. Petitioner submits that **all** child-hearsay evidence in the instant case, whether in the form of viva voce testimony or audio tape recordings, was erroneously admitted. See Minnis v. State, 645 So. 2d 160, 161 (Fla. 4th DCA 1994).

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[28] It also erroneously refers to the taped statements as support for it affirmance of the trial court's denial of Petitioner's judgment of acquittal motions as to Counts I and II (See Argument Point III, infra). Heuss, supra at 1057.

At the June 13, 1991 hearing, pursuant to §90.803(23), conducted prior to Petitioner's first mistried hung jury trial, the State elicited testimony from Cindy, [redacted] John [redacted] and Detective Masching. SR. 1-114. Then, the State sought to admit the hearsay testimony of Hicks, regarding statements made to her by the child-victims between December 22 and 24, 1989 (SR. 24-47), **and** the hearsay statements of the child-victims, tape recorded by Masching on December 27 and 28, 1989 (SR. 66-73). The trial court's inadequate, "boilerplate" findings of reliability, Hopkins v. State, supra; see also Idaho v. Wright, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990); see also State v. Townsend, 635 So. 2d 949, 957 (Fla. 1994), encompassed **both** [redacted] Cindy's hearsay testimony and Masching's taped statements. SR. 87, 91-4.[29] Without the benefit of the child-hearsay exception, Masching's tape recorded, out-of-court interviews were offered by the State to prove the truth of the matters asserted therein (R. 117, 121, 123, 767-788) and were clearly erroneously admitted hearsay, without exception. Minnis v. State, supra; §90.801, Fla. Stat. (1981).[30]

The Fourth District's sua sponte harmless error analysis also cites Nurse Nelson's findings regarding "physical trauma" (R. 292), which it states buttressed Child B's testimony. Heuss v. State, supra, at 1057. However, in making this conclusion, the

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[29] Additionally, the trial court's September 24, 1991 determination of the admissibility of Deputy Hibbert's child-hearsay testimony was also based on similarly deficient "boilerplate" reliability findings (SSR. 1-57). Heuss v. State, supra at 1056-7.

[30] If, however, the Fourth District has deemed Masching's in-court testimony as erroneously admitted, while the child-hearsay taped statements were not, its opinion fails to clarify that point; and if it is so, it is a most disingenuous distinction. The source of all child-hearsay statements which Masching testified to at trial was the taped recorded interviews. Other than interviewing each child-victim for ten minutes or less, Masching did not speak to them at any other time (R. 128-9). Consequently, Masching's in-court testimony is inseparable from the taped interviews and they were equally admitted in error, due to inadequate reliability findings, pursuant to 90.803(23).

lower tribunal overlooked the fact that Nurse Nelson's expert opinion as to the cause of Child B's hymenal membrane tear, at the "one o'clock" position (R. 291) was that it was merely "suspicious." R. 296. Child B's three millimeter by five millimeter hymenal opening was an appropriate size and shape for a girl of her development at the time of the examination. R. 291. If it had been otherwise enlarged, it would have been a significant sign that she had been sexually abused. R. 296. Her vagina area did not suffer from any bruising, trauma or scaring, which would have been, along with the hymenal tear, dispositive signs of sexual abuse. R. 295-6. While Nelson doubted that Child B's hymenal tear was self-inflicted, since such an injury is very painful (R. 292-3), she did not rule out such a cause and additionally indicated that an indwelling Foley catheterization, as well as child's play could cause this type of injury. R. 298-9. Moreover, since Child B's vulva and vaginal canal appeared normal, without signs of redness, or bruising, Nelson could not determine when the tear occurred. R. 300. Consequently, Nelson was not able to state to any degree of medical certainty that Child B's hymenal tear was evidence of sexual abuse. R. 310. She only testified that the injury was "suspicious."[31] R. 296, 310.

Child B's trial testimony was that when Petitioner touched her between her legs with his fingers she did not like it and it made her "uncomfortable." R. 454-5. The only evidence that Petitioner's purported touching caused her pain was from the erroneously admitted child-hearsay evidence in the form of Masching's taped statement

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[31] Nurse Nelson's opinion that Child B's hymenal tear was merely "suspicious" was legally deficient as to draw any conclusion that the tear was indicative of any sort of physical or sexual abuse. See,e.g., Penton v. State, 548 So. 2d 273 (Fla. 1st DCA 1989)(State fails to establish corpus delicti to sustain a manslaughter conviction when its medical expert is unable to opine that decedent's cause of death was a homicide); but c.f. Delap v. State, 440 So. 2d 1242, 1253 (Fla. 1983).

of Child B. R. 772. Moreover, it was Masching's erroneously admitted child-hearsay trial testimony which equated between the legs and private parts with vagina. R. 136-7. No where in Child B's taped statement did she say that "between her legs" or "her private part" was her vagina. R. 767-774. Placing the medical evidence in the context of what the Fourth District had properly determined to be admissible trial evidence, Child B's discomfort does not equate to pain. Consequently, Nelson's physical examination of Child B fails to buttress the girl's testimony to the necessary extent that the erroneous admission of the child-hearsay evidence did not effect the jury's verdict. State v. DiGuilio, supra at 1139.

In light of the fact that the collective testimony of the three child-victims was highly inconsistent between their deposition testimony and the in-court testimony of their respective parents, it cannot be said that the erroneously admitted child-hearsay evidence, introduced through Cindy, [redacted] Hibbert and Masching, had no affect on the jury. On the contrary, the continuous repetition of the child-hearsay statements had a most egregious of the jurors, since it improperly bolstered the credibility of the child-victims' in-court testimony. Since the child-hearsay evidence was inadmissible due to the trial court's failure to comport with §90.803(23) and the fact that it could not have been admitted under any other evidentiary rule, the Fourth District's sua sponte harmless error analysis improperly deemed this error harmless beyond a reasonable doubt. Consequently, this Court should vacate the opinion of the Fourth District, find that the erroneous admission of all of the child-hearsay evidence was harmful to the jury verdict and remand this cause to the trial court for a new trial.

ARGUMENT

POINT III

THE FOURTH DISTRICT ERRED IN AFFIRMING THE TRIAL COURT'S DENIAL OF PETITIONER'S JUDGMENT OF ACQUITTAL MOTIONS AS TO COUNTS I AND II, IN THAT THE PROPERLY ADMITTED EVIDENCE FAILED TO NEGATE PETITIONER'S REASONABLE HYPOTHESIS OF INNOCENCE.

Circumstantial evidence of guilt is insufficient as a matter of law if there is a reasonable hypothesis of innocence which is not contradicted by the evidence. Juries are not permitted to find guilt in such a case because circumstantial evidence which does not exclude a reasonable hypothesis of innocence has no probative force.

"Likewise the state's hypothesis is also not unreasonable and arguendo may even give rise to a strong inference of guilt. But again, where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence." State v. Law, 559 So. 2d 187, 188 (Fla. 1989); McArthur v. State, 351 So.2d 972 (Fla. 1977).

"The ultimate question devolves here then as to whether a jury may be permitted to consider a single set of circumstances, which are at once susceptible of opposing reasonable hypotheses on the issue of guilt or innocence in a criminal case, and return a verdict of guilty based on their view of the more reasonable of the two. Clearly not, since it is the tendency to establish one fact to the exclusion of contrary facts which gives circumstantial evidence the force of proof in the first place; and when circumstances are reasonably susceptible of two conflicting inferences they are probative of neither. There

simply would be no proof." Grover v. State, 581 So. 2d 1379, 1381 (Fla, 4th DCA 1991), The evidence in this case failed to meet this standard in Counts I and II,

In Count II, the State charged that Petitioner sexually battered Child B by penetrating her vagina with his finger. R 731. Digital sexual battery requires penetration of the vagina; merely touching the vagina without penetrating it is not a sexual battery. See J.W.C. v. State, 573 So.2d 1064 (Fla. 5th DCA 1991) (citing cases); Firkey v. State, 557 So.2d 582, 585 (Fla. 4th DCA 1989). In the instant case, Child B's in-court testimony failed to established the requisite penetration of her vagina by Petitioner's fingers, as alleged in Count I of the information.

Child B testified that, "He [Petitioner] touched me in between the legs, and I didn't like it." R. 454. She then stated that he felt there with his fingers and it made her feel "uncomfortable." R 455. Later, she said that Petitioner went under her panties. R 457. While Nurse Nelson, who examined Child B, said that the girl's hymenal membrane was torn, she was not able to say that it was more likely than not that the cause of the injury was sexual or physical abuse. R. 310. In fact the most she could opine was that the tear appeared to be of a "suspicious nature" without stating what that nature could be. R. 310. Such testimony is insufficient to prove penetration of the vagina. C.f. Davis v. State 569 So. 2d 1317, 1319 (Fla. 1st DCA 1990) (Medical testimony showed that the victim, a child under twelve years of age, had a vaginal discharge and had suffered from a recent laceration to her vagina was one factor which helped to overcome the lack of competent, direct testimony showing that defendant's finger penetrated the victim's vagina). In J.W.C. v. State, supra, the child-victim testified that the defendant "played with my privates," but the Fifth District found that that statement failed to prove penetration. Id. at 1064. Likewise, Child B's in-court

testimony that Petitioner touched between her legs is entirely consistent with contact of the space between her legs, but not penetration anywhere near the vagina.

Additionally, Masching's taped interview of Child B, where she stated that Petitioner "kind" of put his finger in and then clarified that he "tried" to put his finger in her (R 769, 771) cannot be considered sufficient competent evidence, since the Fourth District ruled it was admitted in error. Heuss v. State, supra at 1056-7. Yet, in its holding that the trial court did not err in denying Petitioner's judgment of acquittal motion as to Count II, the lower tribunal specifically cited to Child B's audio taped statements to Masching as evidence which contradicted Petitioner's claim of innocence. Heuss v. State, supra at 1058, citing, State v. Law, 559 So. 2d 187 (Fla. 1989).

The irony of this ruling lies in the fact that the Fourth District ruled this child-hearsay evidence had been admitted in error. The paradox continues because despite the lower tribunal's finding that the erroneously admitted child-hearsay was harmless to the jury's verdict, it nonetheless needed to use this improperly admitted evidence in order to affirm the trial court denial of Petitioner's judgment of acquittal motion, which had been based upon circumstantial and insufficient evidence of guilt! Id.

Returning for a moment to Petitioner's argument in Point II, above, it is difficult, if not impossible to fathom how evidence, admitted in error, could be both sufficient and competent to rebuff a claim of insufficiency in establishing a prima facie case of guilt **and** be harmless to the jury's verdict, beyond a reasonable doubt. If, as the Fourth District has determined, the former is true, then its sua sponte harmless error analysis is fallacious and Petitioner must be given a new trial. State v. DiGuilio, supra at 1139; See also, e.g., Kelley v. State, 637 So. 2d 972 (Fla. 1st DCA 1994)(where appellate court deemed evidence sufficient to overcome judgment of acquittal, such evidence cannot also be deemed harmless to the jury's verdict); see also Bailey v. State, 419 So. 2d 721 (Fla.

1st DCA 1982)(where the state's proof of guilt is circumstantial, error in admitting hearsay, offered to prove defendant's motive in committing the crime charged, was not harmless to the jury's verdict).

Moreover, the Fourth District erroneously found that within her taped statement Child B stated that Petitioner had placed his finger in Child B's vagina. Heuss v. State, supra at 1058. At no time during Child B's in-court testimony did she state that the area between her legs or her private parts was her vagina. R. 454-7. Nor was there any testimony or other evidence from a competent source which equated the area between Child B's legs or her "private parts" with being her vagina.[32] C.f. State v. Pate, 656 So. 2d 1323, 1324 (Fla. 5th DCA 1995)(evidence sufficient to prove sexual battery on a child where child-victim testified that defendant sucked and licked her "front private" along with evidence defining this term as meaning her vagina). Further and notwithstanding the Fourth District's instant findings, Child B's erroneously admitted taped statement also fails to equate "private part" or "between the legs" with being a vagina.

Where the State alleges a sexual battery with an object other than a penis, it must show that the object actually penetrated the victims vagina. Firkey v. State, supra at 585. Since there was no competent evidence establishing that Petitioner's finger penetrated Child B's vagina and any evidence tending to support this finding was erroneously admitted, the trial court erred in denying Petitioner's judgment of acquittal motion. See Bates v. State, 78 Fla. 672, 84 So. 373 (1919)(this Court held that where

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[32] Since the Fourth District held that it was error to admit Hibbert's child-hearsay evidence, his testimony, that Child B told him that "[Petitioner] had used his finger, and in her words, she said put into her private" (R. 73-4) is not competent and cannot support the trial court's denial of Petitioner's judgment of acquittal motion.

the trial court erred by failing to suppress the defendant's confession, in that it was involuntarily made, the defendant was entitled to be discharged because the remaining evidence was insufficient to support a verdict of guilty); See Gueits v. State, 566 So. 2d 829 (Fla. 4th DCA 1990)(where co-conspirator's statements were erroneously admitted against the defendant and all other circumstantial evidence merely showed the defendant's mere presence at a location where others committed a crime, such was not sufficient to prove a conspiracy and the defendant was entitled to be discharged).

With regard to Count I, it charged that Petitioner committed a sexual battery by "causing his tongue to penetrate or unite with the vagina of" Child A. R 731. The only evidence that Petitioner's mouth had penetrated or had union with that child-victim's vagina was her in-court testimony that "He licked my private" (R. 168). This was followed by her response to the prosecutor's question, "Between your legs?" to which she answered, "Yes." R 168. Child A never indicated what she meant by the word "private." Moreover, neither Cindy, [redacted], Hibbert's nor Masching's erroneously admitted child-hearsay evidence explained what Child A meant by "private parts." R. 70-1, 225, 777-8. While it is true that Cindy [redacted] said that Child A told her Petitioner "pulled her legs apart and licked her between her privates" (R. 225), she did not explain what her daughter would have meant by the statement.

In addition to it being improperly admitted, Child A's out-of-court statements to all three hearsay witnesses were unsworn and uncorroborated and as such was insufficient evidence of guilt. See Bell v. State, 569 So. 2d 1322, 1323 (Fla. 1st DCA 1990); Williams v. State, 560 So.2d 1304, 1306 (Fla. 1st DCA 1990); Jaggers v. State, 536 So. 2d 321, 326 (Fla. 2d DCA 1988). Consequently, as Petitioner maintains in Point II, above, this child-hearsay improperly bolstered the diminished credibility of Child A's in-court testimony and, as such, the error in it admission was harmful to the jury's verdict.

Additionally, the Fourth District's finding that "Child A's taped interview... provided competent, substantial evidence to support [Petitioner's] conviction for unlawful union with the child's private parts," makes suspect its sua sponte harmless error ruling. As previously stated, if erroneously admitted evidence is necessarily relied upon to affirm the denial of a judgment of acquittal motion, the error in its admission cannot be harmless to the jury's verdict.

Returning to the argument at hand, a conviction on the crime as charged under §794,011(2), Fla. Stat. required proof of union between Petitioner's mouth and the sexual organs, either the labia majora, labia minora, or vagina, of Child A. §794,011(l)(h), Fla.Stat, (1991); see Firkey v. State, supra at 585. However, the State in this case specifically alleged that Mr, Heuss committing this sexual battery by penetrating or uniting with Child A's **vagina**, not her "privates" or her labia minora or labia majora. Such an allegation alleges a specific kind of sexual battery and is different in kind than, e.g. sexual battery by penile penetration of the victim's anus. See Duke v. State, 444 So. 2d 492, 493 (Fla. 2d DCA), affirmed, 456 So. 2d 893 (Fla. 1984). If the State alleges a defendant has committed a crime in a specific way, even if the statute allows alternate ways to commit the crime, the State must prove the allegations made. See Long v. State, 92 So. 2d 259 (Fla. 1957); Tillman v. State., 559 So. 2d 754 (Fla. 4th DCA 1990); Kahlenbera v. State, 404 So.2d 1135, 1137 (Fla. 4th DCA 1981). In Tillman, the State alleged a sexual battery occurred by penetration of the victim's vagina, but the evidence showed at most a union with the vagina; this Court reversed. Therefore, in the case sub judice, the State was required to prove at least contact between Mr. Heuss' tongue and Child A's [redacted] vagina: contact with her labia majora or labia minora was not enough. But c.f. State v. Pate, supra at 1326; but see Bowden v. State, 642 So. 2d 769, 770-771 (Fla. 1st DCA 1994). To find the State proved a charge never made

would deny Mr. Heuss the due process of law guaranteed him by the Fourteenth Amendment to the Federal Constitution and Article I, §9 of the Florida Constitution. See Rose v. State, 507 So. 2d 630, 632 (Fla. 5th DCA 1987) (citing cases).

Presently, Child A merely testified that Petitioner had licked her "privates." The Fourth District recognized in Firkey that even the law considered the phrase "private parts" to include the labia majora and labia minora. Yet, he record on appeal is silent as to what the term "privates" meant to Child A. C.f. State v. Pate, supra at 1324; Stone v. State, 547 So.2d 657 (Fla. 2d DCA 1989)(evidence elicited which showed that the child-victim used the word "privates" to mean her genitalia). Since Child A's claim that Petitioner licked her private could have including the upper parts of her leg, her testimony was consistent with the hypothesis that Mr. Heuss did not touch any of her sexual organs, i.e. the "vagina," but only licked her near them.

Due to the lack of competent, substantial evidence equating that Child A's and/or Child B's "private" body part or the area "between" their legs meant their respective vaginas, the State failed to negate Petitioner's reasonable hypothesis of innocence, in that he neither penetrated Child B's vagina with his finger, nor did he penetrate or unite Child A's vagina with his tongue. Consequently, the Fourth District erred by affirming the trial court's denial of Petitioner's motions for judgments of acquittal as to Counts I and II. Hence this court should vacate the lower tribunal's opinion and reverse Petitioner's convictions as to these two counts and upon remand, direct the trial court to discharge Petitioner as to Counts I and II.

Additionally, since the Fourth District necessarily relied upon Masching's tape recordings of Child A and Child B, which it had deemed to have been erroneously admitted child-hearsay, to affirm the trial court denial of Petitioner's judgment of acquittal motion as to Counts I and II, the wrongful admission of this evidence was not

harmless beyond a reasonable doubt. Therefore, assuming arguendo this Court does not deem it appropriate to discharge Petitioner as to Counts I and II, it should, nevertheless, vacate the Fourth District's instant opinion and remanded this cause for a new trial due to the harmful effect this evidence had on the jury's verdict.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Petitioner respectfully requests this Court quash the decision of the Fourth District Court of Appeal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Sarah B. Mayer, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401-2299 this 19th day of February, 1996.

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