IN THE SUPREME COURT OF FLORIDA

TIMOTHY RAY HADDEN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 87,574

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Timothy Ray Hadden, who was the defendant in the trial court and the appellant on appeal, will be referred to herein by his last name. Respondent, State of Florida, who was the prosecuting authority in the trial court and appellee on appeal, will be referred to herein as the "State." The child victim will be referred to by the initials, "T.H."[1] The record on appeal consists of two volumes, which will be referred to respectively by the symbols, "R" and "T."

STATEMENT OF THE CASE AND FACTS

The State accepts Hadden's statement of the case and facts with the following additions.

Defense counsel elicited answers from T.H. on cross examination showing that (1) she had repeatedly returned to Hadden's home after the sexual abuse (T. 25, 30-31); (2) she had received more attention from her parents since reporting the abuse (T. 26); and she had been inconsistent in her descriptions of the abuse (T. 27-28).

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[1]The State strongly objects to Hadden's use of the victim's full name in his brief. Even juvenile delinquents are protected from full disclosure of their identity on appeal, and child victims surely deserve no less.

DR. JONES' TESTIMONY PRESENTED IN THE JURY'S PRESENCE. (T. 90-97, 107-116) Dr. Jones has been a licensed mental health counselor and school psychologist for seventeen years. (T. 90) He has a degree in professional psychology and a master's degree in counseling. (T. 90) He is trained in the subject of child sexual abuse, which training has continued throughout his career. (T. 91) He specializes in school psychology and treats children who have emotional, social, and educational problems. (T. 90-91) He previously testified five or six times in court in civil cases. (T. 92)

Jones saw T.H. eleven times because of "emotional or adjustment" problems resulting from "an incident of alleged sexual molestation." (T. 108) He relied on her parents and school personnel for a description of T.H.'s affect prior to his involvement in the case. (T. 115)

Jones expressed his opinion on the following subjects:

1. Based upon his "experience and training," T.H. exhibited symptoms of child sexual abuse. (T. 108, 110) Those symptoms were a flat affect (frozen emotions) when discussing the sexual abuse; difficulty in providing specific details about when and where the abuse occurred; a sense of guilt; and a sense of responsibility. (T. 108-109, 114) To reach his conclusion, he

relied on his knowledge of adjustment disorders with mixed emotional features or post-traumatic stress disorders (PTSD). (T. 110)

2. Based upon his "experience and training," it is common for a ten-year-old child to reveal part of the abuse and then more of it with the passage of time, such as initially describing the abuse as only fondling and then later adding penetration by the finger. (T. 107)

3. It would not be "unusual" for an abused child to return to the place of the abuse if she were going there to visit a friend. (T. 110) Neither would it be "uncommon" for the child to want to go back to the abuser's home:

> The interesting syndrome of child molestation in sexual abuse is that it usually happens in the context of someone the child knows. And the sad thing is that it's common even in family incest. So that a person has a relationship with the party, the perpetrator, and they have a relationship with them either as a friend or sometimes as a confidante, sometimes as a trusting parental relationship. So the emotions are extremely confused in terms of that event.
>
> The other thing about child sexual abuse is that there is a part of it that is indeed pleasurable, so that there is a sense of -- this may be wrong, but it also feels good, so it's -- and therefore, the confused emotions are what tend to create the trauma. It's not unlikely this person or a person would go back to a relationship especially if it's within the family because there is both, there's a dual relationship,

friendship or whatever, as well as molestation behavior. (T. 112-113)[2]

4. Post-traumatic stress disorder involves experiencing a traumatic event followed by feelings of anxiety, depression, flashbacks, sometimes recurring dreams of the event and avoidance of stimuli associated with the event. (T. 92-93) Child sexual abuse victims tend to exhibit similar symptoms. (T. 93-94)

5. The child sexual abuse syndrome includes several symptoms, the most significant being anxiety and a flat affect (unemotional reporting of events). (T. 94) The child's school grades may suffer, and she may avoid certain kinds of relationships. (T. 94) She may or may not experience dreams. (T. 94, 114) Due to her special relationship with the abuser and her mixed emotions, she might not avoid him. (T. 96) If she does avoid him, some form of violence may have been involved, or she may be older and wiser. (T. 113) Moreover, children respond differently to the same situation, depending on their perception of it. For example, when abuse occurs in a day care center, some children love the

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[2]This explanation was prompted by defense counsel's question, "That's hard to understand [that a child would return to the abuser's home], isn't it, Doctor? Jones answered, I will be glad to explain it." (T. 112)

teacher and willingly return, whereas others resist and cry. (T. 113)

6. To rule out fabrication, Jones considers whether the description of the sexual abuse is in the child's own language. (T. 95) "Fabrication often looks more like a robot-like description that is always very consistent, not in a child's words, but in a way that would suggest that someone had sort of described for them what they should feel, what they should think." (T. 95) Difficulty in describing the details of sexual abuse, on the other hand, is not evidence of fabrication. (T. 95) "With children because of the nature of sexual abuse, it's common that they have difficulty relating specific times, specific events, because it's an extremely emotional kind of experience and they are children." (T. 96)

7. Except in divorce cases, Jones had "seldom" encountered fabrications of molestation (T. 96)[3], and in divorce cases, fabrication was present in no more than 3 to 5 percent of the cases (T. 97). Other professionals, like Richard Gardner, might

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[3]This answer was in response to defense counsel's question, "So as far as the diagnostic criteria for finding abuse and not finding abuse, it's just a matter of sometimes it is there and sometimes it may not be there depending on what you feel is important at the time? (T. 96)

disagree with Jones' statistics. (T. 97) In divorce cases, children may direct the parents' attention away from the marital problems and onto their problems, or they may assist one parent at the expense of the other in a divorce proceeding. (T. 109, 115-116) Based on Jones' personal experience, friction in the home does not increase the probability of fabrication. (T. 97) It is "always a possibility" that a child "could make something up to help maybe a friend of her mother," but Jones had never counseled a child who had fabricated abuse against a neighbor to assist another neighbor. (T. 116)[4]

DR. JONES' TESTIMONY ON PROFFER THAT WAS **NOT** REPEATED IN THE JURY'S PRESENCE. (T. 98-106)

1. When children feel safe in a relationship, they tend to be more accurate in their descriptions of sexual abuse. At first, there will be minimal description, but later the child will provide more details. (T. 98)

2. T.H. exhibited anxiety. (T. 99)

3. With respect to T.H.'s school and family environment, Jones received a thorough clinical history. (T. 103) T.H. is normally "a happy-go-lucky type of ten-year-old child" and an

[4]The answers provided in paragraphs 4 through 7 were all initiated by defense counsel.

average student in school. (T. 99, 104) She exhibited a "physiologic reaction" to any discussion of sexual abuse. (T. 99) There was nothing in her history, except the sexual abuse, that would explain her flat affect. (T. 103) Her parents argued, and she had disagreements with other students at school and on the school bus, but her affect was very different when discussing these problems than when she was discussing the sexual abuse. (T. 103-104)

Depressed children will exhibit a flat affect, and very introverted children under certain circumstances will tend to be quiet and guarded in their emotions. (T. 104-105) Medications will also cause a flat affect. (T. 104-105)

At the close of the proffer, defense counsel objected to Dr. Jones testifying about the "syndrome" because it is not scientifically reliable, and he has not "specified enough diagnosis criteria to make the diagnosis that he's prepared to make." (T. 105) The prosecutor relied on Ward v. State, 519 So. 2d 1082 (Fla. 1st DCA 1988) to admit the testimony. (T. 104-105) In overruling defense counsel's objection, the trial court stated:

> The Court has conducted a hearing under 90.105 and finds that under the requirements of Rule 90.702, two things first, that the Court has determined whether the

> subject matter is proper for expert testimony and that is whether it will assist the trier of fact in understanding the evidence and determining the facts in issue, and the Court finds that indeed this is a proper subject matter for expert testimony as has been recognized by some of the appellate decisions. And secondly, the Court further finds and determines that the witness is adequately qualified to express such an opinion because he possesses the requisite knowledge, skill, and experience and training and education to express such an opinion. (T. 106)[5]

Michele Peavy, investigator with the Sheriff's Department, took a tape recorded statement from Hadden in which he admitted fondling the child.[6] He told Peavy:

> Q. [I want to talk to you and get it off my shoulder.] I did do it.
>
> Q. You're being accused of fondling T.H. Did you do it?
> A. Well you know, evidently my hands probably touched her chest or something like that, you know, when I was trying to steer, you know. (T. 77-78)

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[5]Hadden's statement that Dr. Jones was qualified as an expert in "rape trauma syndrome" is not entirely accurate. (I.B. 4) In the jury's presence, the prosecutor asked that Dr. Jones be declared an expert in "child sexual abuse." (T. 91) After the proffer and in the jury's presence, the trial court ruled that Dr. Jones "may express any opinions that you wish to inquire of him consistent with the proffer that has been made." (T. 107)

[6]Hadden's statement was recorded, but the tape recording was not brought to trial. Investigator Peavy had a transcript with her which she read from during her testimony. The trial court ruled that the defense could call her back to play the tape in their case, but the offer was declined. (T. 67-69, 71-72 77)

A. I did touch her a little bit, you know, a little bit. (T. 79)
Q. Where did you touch her?
A. Well, just right down there, down on her leg right there, you know.
Q. By her vaginal area that -- over her clothes, is that correct?
A. Yes, right. (T. 79)

Consistent with Hadden's request (T. 128), the jury was instructed that to convict Hadden of the lesser offense, it must find that he "handled or fondled T.H. in a lewd, lascivious or indecent manner." (T. 151)

Defense counsel in closing argued:

> Now, Timothy [Hadden] had a conversation at the jail and you will remember the deputy acknowledged there was some discussion about a bond, concerning that statement and the statement was that there was some fondling in this case. And the Judge is going to instruct you that if you don't find Mr. Hadden guilty of sexual battery with his finger, that you can find a verdict of lewd and lascivious acts by the fondling, and I submit to you that is something that you should consider if you cannot find total innocence in this case, even though I submit to you that the evidence is there. (T. 149) (e.s.)

The jury convicted Hadden of three counts of the lesser offense of lewd and lascivious acts. (R. 7)

SUMMARY OF ARGUMENT

ISSUE I. Child sexual abuse cases are difficult to prosecute because children make poor witnesses, and corroborating evidence is scarce. Whether a conviction is obtained may turn on the availability of expert psychological testimony.

Dr. Jones in the case at bar provided testimony that served two purposes--to prove the offense and to rehabilitate the child victim. He testified that T.H.'s symptoms of anxiety, flat affect, and feelings of guilt and responsibility were consistent with those of a sexually abused child. This type of evidence is admissible under the relevancy test as substantive evidence in the same manner as is expert testimony on the defendant's competency to stand trial, insanity defense, and mitigating circumstances to avoid the death penalty.

Dr. Jones also testified that T.H.'s behavior in disclosing the abuse piecemeal and returning to the perpetrator's home was consistent with that of an abused child. This type of evidence is almost universally admitted to dispel myths about the conduct of child sexual abuse victims. It does not prove abuse; rather, it explains why children behave in ways that seem to contradict their story of abuse. Regardless of whether Frye applies, it passes that test for rehabilitative purposes.

If it was error to admit Dr. Jones' testimony in the case at bar, the error was harmless. Hadden was charged with capital sexual battery by penetration of T.H.'s vagina with his finger. However, the jury convicted him of the lesser offense of lewd and lascivious acts, based on his fondling of the child, to which he admitted in a recorded statement to the police. For whatever reason, the jury refused to convict Hadden based on evidence (testimony of the victim and Dr. Jones) of sexual abuse that was denied by Hadden.

ISSUE II. This issue should not be reviewed because it is unrelated to and beyond the scope of the certified question.

It also is procedurally barred. It was not preserved for appeal because Hadden never objected to the admission of the hearsay evidence on the ground of reliability. Defense counsel's only objection related to the qualifications of one of the hearsay witnesses. He believed that only expert witnesses could testify that another witness appeared "relieved."

The issue is without merit because the trial court made specific findings on the reliability of the statements. It relied on the voluntary nature of the disclosure, the child's use of age-appropriate language, and the status of the person to whom the disclosure was made.

If error occurred, it was harmless. First, since the child testified at trial and was subject to full cross-examination, no confrontation clause violation occurred. Second, the evidence benefitted the defense as much as it did the prosecution because of its impeachment aspects. The statements showed that the child had made inconsistent statements. Third, as discussed under the first issue, the jury rejected all evidence of penetration and convicted Hadden of a lesser offense which coincided with his recorded admissions to a police officer.

ISSUE III. This issue should not be reviewed because it too is beyond the scope of the certified question.

The issue is procedurally barred because it was not raised in the trial court and preserved for appeal. The sentencing error complained of does not render the sentence illegal. Even with a corrected scoresheet, Hadden's sentence is still within the permitted range.

Hadden should not prevail on the merits. The points scored for victim injury on the scoresheet were calculated consistent with Florida Rule of Criminal Procedure 3.988(b).

ARGUMENT

ISSUE I(CERTIFIED QUESTION)

IN VIEW OF THE SUPREME COURT'S HOLDING IN TOWNSEND V. STATE, DOES FLANAGAN V. STATE REQUIRE APPLICATION OF THE FRYE STANDARD OF ADMISSIBILITY TO TESTIMONY BY A QUALIFIED PSYCHOLOGIST THAT THE ALLEGED VICTIM IN A CHILD SEX ABUSE CASE EXHIBITS SYMPTOMS CONSISTENT WITH THOSE OF A CHILD WHO HAS BEEN SEXUALLY ABUSED?

Psychiatrists and psychologists are experts in human behavior; that is, they study and interpret what people say and do. More specifically, they diagnose and treat patients suffering from mental disorders. They base their opinions on their clinical experience, training, and education (including instruction on theories about human behavior). Relevancy is the test for admitting this type of expert testimony. Indeed, such testimony is routinely admitted under this test to determine the defendant's sanity and competency to stand trial. Flanagan v. State, 625 So. 2d 827, 828 (Fla. 1993) ("pure opinion testimony, such as an expert's opinion that a defendant is incompetent, does not have to meet Frye, because this type of testimony is based on the expert's personal experience and training").

In State v. Townsend, 635 So. 2d 949, 958 (Fla. 1994), this Court unanimously held that "if relevant, a medical expert witness may testify as to whether, in the expert's opinion, the behavior of a child is consistent with the behavior of a child who has been sexually abused." (e.s.) It added, "Relevancy of a medical expert's opinion is determined by the requirements set forth in sections 90.702 and 90.703, Florida Statutes (1993)." Id., n 2.

Sections 90.702 and 90.703, Florida Statutes provide:

> § 90.702. If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.
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> § 90.703. Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it includes an ultimate issue to be decided by the trier of fact.[7]

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[7]To aid him in his interpretation of Townsend, Hadden has gone beyond the opinion and quoted from the briefs that were filed in that case. (I.B. 17) This is clearly improper. A precedent is a judicial decision which contains a legal principle. To find that legal principle, one must take into account the facts treated by the court as material and its decision based on those facts. The facts in the opinion are conclusive. They cannot be altered by going behind the opinion and examining the record and briefs in the case. Adelman Steel Corp. v. Winter, 610 So. 2d 494, 502-503 (Fla. 1st DCA 1992);

There was nothing unusual about the Townsend holding, which was consistent with other decisions from this Court. See, e.g., Glendening v. State, 536 So. 2d 212, 220 (Fla. 1988) (expert can give an opinion on whether child has been sexually abused); Tingle v. State, 536 So. 2d 202, 205 (Fla. 1988) (expert can testify to whether child can separate truth from fantasy, whether medical evidence is consistent with child's story, and whether pattern of consistency in child's story is consistent with patterns found in stories of other child abuse victims); Flanagan v. State, 625 So. 2d at 829 (expert's testimony on "the various problems one encounters in interviewing children, and common reactions to abuse" was properly admitted) See also Justice Bleil, "Evidence of Syndromes: No need for a 'Better Mousetrap,'" 32 So. Tx. L. Rev. 37, 68 (1990) ("Neither the Frye test nor its alternatives should be applied to a mental health expert's opinion, which is based on the expert's education, training, and

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Arthur L. Goodhart, "Determining the Ratio Decidendi of a Case," 40 Yale L. J. 161, 169, 170, 172, 181-182 (1930). The importance of precedent to the orderly administration of justice cannot be overstated. Precedent provides certainty, uniformity, and continuity in the law, the absence of which would destroy the efficient functioning of society. Whenever a litigant is allowed to go behind the decision, precedent is rendered meaningless.

experience, about a person's behavior in a given set of circumstances").

That part of Flanagan v. State, supra, requiring application of the Frye test is distinguishable. The objectionable evidence at issue there was expert testimony "about common characteristics of the home environment where child sexual abuse occurs and about the characteristics of abusers." Id., at 828. This type of evidence seeks to show that because sexual abuse occurred in the past under certain circumstances by certain types of persons, it will probably occur again, given those same circumstances and personality traits. Such evidence is not admissible to prove the defendant's guilt, for the obvious reason that probability analysis does not establish the existence or nonexistence of an event, only the likelihood of it occurring. It is easy to see why a theory purporting to predict future events should be generally accepted by the scientific community before it is admitted at trial through expert testimony. By contrast, the expert in the case at bar focused on the victim's symptoms and offered an explanation for them. This type of testimony is not significantly different from expert testimony on the defendant's sanity or competency to stand trial.

Dr. Jones in the case at bar testified that T.H. exhibited symptoms consistent with sexual abuse. She was anxious, flat in her affect when discussing the abuse, and felt guilty and responsible. (T. 108-109, 114) Prior to the reported incident of abuse, she was a "happy-go-lucky" child. (T. 99, 104) She exhibited a "physiologic reaction" to any discussion of sexual abuse. (T. 99) There was nothing in her history, except the sexual abuse, that would explain her flat affect. (T. 103) Her parents argued, and she had disagreements with other students at school and on the bus, but her affect was very different when discussing these problems than when she was discussing the sexual abuse. (T. 103-104)[8] This evidence should be admissible as circumstantial evidence of the defendant's guilt.

Professor Myers and a team of medical and mental health professionals found in 1989 that "many experts believe that enough is known about child sexual abuse to permit qualified professionals to formulate reliable clinical judgments about sexual abuse," and that "[a] substantial portion of the

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[8]As previously noted in its summary of the facts, the jury did not hear all of this evidence, only that T.H. exhibited a flat affect when discussing the sexual abuse, had difficulty describing the details of the abuse, and felt guilty and responsible. (T. 108-109, 114)

contemporary clinical literature supports the conclusion that experts on child sexual abuse can sometimes determine with reasonable clinical certainty whether a child's symptoms and behavior are consistent with sexual abuse, and are probably not the result of other events." J.E.B. Myers, et al., "Expert Testimony in Child Sexual Abuse Litigation," 68 Neb. L. Rev. 1, 73-74 (1989) (hereinafter Myers).

Posttraumatic stress disorder (PTSD) and adjustment disorders, on which Dr. Jones relied to form his opinion, are listed in the American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders (1994) (hereinafter DSM-IV). Sexual assault is a traumatic event which qualifies as a PTSD stressor, and "[f]or children, sexually traumatic events may include developmentally inappropriate sexual experience without threatened or actual violence or injury." DSM-IV, 424.[9]

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[9]Hadden quotes an author for the proposition that "the assessment and diagnostic systems utilized in psychiatry and clinical psychology do not rest upon any basis of soundly established scientific principles." (I.B. 22) If this statement is true and if the Frye test applies, then mental health experts can no longer testify on the defendant's competency to stand trial, or on his insanity defense raised to avoid conviction, or on the mitigating circumstances he relies on to avoid the death penalty.

The presence of a PTSD stressor (like child abuse) is not just assumed by the expert; he must identify it. If the patient describes an event that is too insignificant to qualify as a stressor for PTSD, some other diagnosis, but not PTSD, will be made. Likewise, if the patient describes an event that never took place, some other diagnosis, such as delusions or hallucinations, but not PTSD, will be made. The possibility always exists that the patient deceived the expert as to the existence or nonexistence of the stressor, but that goes to the weight of the opinion and not its admissibility. Cross-examination is the vehicle for ferreting out deception. Illustrative are civil cases in which the expert opines that his patient is suffering from some type of soft tissue injury, based solely on the patient's unverifiable subjective complaints of pain. Neck and back injuries immediately come to mind.

Other jurisdictions allow experts to testify to the child's anxiety symptoms to prove the defendant's guilt. See, e.g., Cohn v. State, 849 S.W. 2d 817, 819 (Tex.Cr.App. 1993) (expert's testimony "that anxiety behavior is at least consistent with sexual abuse, and that the children here exhibited such behavior in his presence was relevant evidence" which was admissible as substantive evidence in the prosecution's case in chief). Citing

with approval cases from Arizona, Idaho, and Nevada, the Alaska Supreme Court noted in Broderick v. King's Way Assembly of God Church, 808 P. 2d 1211, 1216 (Alaska 1991) that "[e]xpert testimony that a child has been sexually molested and is suffering from post-traumatic stress has routinely been admitted in court in other jurisdictions." See, also, State v. Resner, 767 P.2d 1277, 1279 (Kan. 1989) (expert could testify that "victim exhibited behavior consistent with a child who had been sexually abused"); State v. Bachman, 446 N.W. 2d 271, 277 (S.D. 1989) (in child sexual abuse case, "testimony of Dr. Curran on rape trauma syndrome met the requirements set forth in *Frye*"). These decisions are consistent with Ward v. State, 519 So. 2d 1082 (Fla. 1st DCA 1988); Kruse v. State, 483 So. 2d 1383 (Fla. 4th DCA 1986); and Toro v. State, 642 So. 2d 78 (Fla. 5th DCA 1994).

In those jurisdictions disallowing this type of evidence, the standard response is that the child's stress-related symptoms might be due to a stressful event other than sexual abuse. Technically that is true, but it is highly unlikely that a person will be suffering simultaneously from sexual abuse and some other traumatic event, like an earthquake, a hurricane, or an automobile accident. In the case at bar, defense counsel on

proffer explored the possibility of some other stressful event causing T.H.'s symptoms. Dr. Jones testified that T.H.'s observable behavior was very different when discussing sexual abuse than when discussing other issues, and that he found nothing else in her history that would account for her behavior. (T. 99, 103-104)

The second type of expert testimony admitted in the case at bar was rehabilitative. Children frequently exhibit post-incident conduct which appears to be inconsistent with sexual abuse. Since jurors do not have common experience with child sexual abuse victims, evidence to dispel myths which they might hold about such victims is admitted in almost all jurisdictions. See L. R. Askowitz et al., "The Reliability of Expert Psychological Testimony in Child Sexual Abuse Prosecutions," 15 Cardozo L. Rev. 2027, 2040 (1994) ("The overwhelming majority of jurisdictions will allow testimony based on CSAAS [child sexual abuse accommodation syndrome] when it is used to explain the significance of the child complainant's seemingly self-impeaching behavior, such as delayed reporting or recantation").

Dr. Jones explained two of these self-impeaching behaviors which related to T.H. He testified that it was not unusual for an abused child to disclose the sexual abuse piecemeal, first

disclosing fondling and then later penetration. (T. 107) See Myers at 87 ("When disclosure occurs, the child may refrain from telling the entire story, and may reveal a little at a time to 'test the waters' and see how adults react." Dr. Jones also testified that it was not unusual for an abused child to return to the perpetrator's home. (T. 112-113) See State v. Gokey, 574 A. 2d 766, 770 (Vt. 1990) (expert could testify that child's behavior in returning to the defendant's house, where her playmate lived, and remaining there when no other adult was present was consistent with the behavior of child sexual abuse victims generally).

Most arguments advanced against the admission of expert psychological testimony applies to expert testimony in general. The form of questions, cross examination, closing argument, and jury instructions (general and special) are the means by which these concerns are addressed. For example, with respect to rehabilitation evidence, the question on direct examination could be phrased as follows: "Dr. Jones, assuming that a child was sexually abused, do you have an opinion as to why she would repeatedly return to the perpetrator's home?" On cross examination, defense counsel could ask, "Dr. Jones, is this conduct also consistent with a child who has fabricated the

abuse?" Upon request by defense counsel, the jury could be instructed that this part of the expert's testimony was to be used solely to dispel myths about sexual abuse victims. Finally defense counsel could point out in closing argument that a child who repeatedly returned to the alleged perpetrator's home could be lying about the sexual abuse.

One argument advanced against expert testimony, however, does deserve special attention. Frequently opinions will state that the expert's testimony bolstered the victim's testimony. Judge Ervin, writing for the dissenting judges in the case at bar, stated, "I am unable to conclude beyond a reasonable doubt that the admission of the syndrome evidence, which had the effect of bolstering the child's credibility, may not have affected the verdict." 21 Fla. L. Weekly at D411 (e.s.). A claim of "bolstering" may arise in various contexts, only one of which is valid.

The first context is when expert testimony is offered as substantive evidence of the defendant's guilt. In this context, the evidence should not be excluded because it happens to "bolster" the testimony of an unimpeached witness. As recently stated by the Texas high court in Cohn v. State, 849 S.W.2d at 820:

> [E]vidence that corroborates another witness' story or enhances inferences to be drawn from another source of evidence, in the sense that it has an incrementally *further* tendency to establish a fact of consequence, should not be considered "bolstering." ***
>
> Dr. Roy's testimony that the children exhibited anxiety behaviors is circumstantial evidence that *something* traumatic happened to them. That this evidence in some small measure corroborates the children's own testimony that appellant sexually molested them does not make it any less relevant--in fact, quite the opposite. Of course, like all corroborating evidence, because it is consistent with the children's story, it also has a tendency to make their testimony more plausible. But we should not for that reason exclude it for unfair prejudice.... Unfair prejudice does not, of course, mean that the evidence injures the opponent's case--the central point of offering evidence. Rather it refers to an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one. [internal quotations and citations omitted]

The second context is when the expert testimony is offered to rehabilitate an impeached witness. It obviously should not be excluded because of its "bolstering" effect in this context because that is its purpose.

The third context, which is closely related to the second, is when the evidence is offered to rehabilitate a self-impeaching witness, like a child victim. Sexually abused children engage in postincident conduct that seems to contradict their story of sexual abuse. Expert testimony should be admissible to explain such conduct as it relates to the victim in the case and of which

the jury has been made aware, even though it "bolsters" the victim's testimony. This is where the child sexual battery accommodation syndrome (and incidentally the battered spouse syndrome) come into play. See People v. Peterson, 537 N.W. 2d 857, 868 & n 13 (Mich. 1995) (regardless of how or by whom the child's behavior was introduced into evidence, the prosecutor may present expert testimony explaining the behavior if it "might be incorrectly construed by the jury as inconsistent with that of an abuse victim or to rebut an attack on the victim's credibility"). As previously stated, in the case at bar, Dr. Jones explained two of T.H.'s postincident behaviors which appeared to contradict her story of abuse. She continued to visit the home of the perpetrator, and she disclosed the abuse piecemeal.

It is primarily this category of evidence which has troubled the Second District. See, e.g., Ball v. State, 651 So. 2d 1224 (Fla. 2d DCA 1995). The Second District held that "when the testifying victims are of a certain age, the jury does not need an expert's help to decide whether or not the incidents actually occurred." Id., at 1225. The Ball court seems to equate chronological age with emotional maturity, but that may be inaccurate. The children, although older, still may not

understand why they behaved as they did, and lacking that insight, they surely cannot explain it to the jury. Indeed, with the battered spouse syndrome, the expert is allowed to explain the spouse's conduct, though she be an adult.

The fourth and last context is when the sole purpose of the expert testimony is to convince the jury that a witness is worthy of belief simply because the expert believes her. This type of evidence is inadmissible on the ground of impermissible "bolstering."[10]

Harmless Error Analysis. Hadden was charged with three counts of capital sexual battery by putting his finger inside the child's vagina. (R. 03) He was found guilty of the lesser offense of lewd and lascivious acts. (R. 7) The jury, therefore, either was unconvinced of Hadden's guilt of sexual battery or, alternatively, it believed he committed the crime but pardoned him anyway. Either way, the jury was not significantly influenced by the testimony of either the victim or the expert.

Since the jury's verdict is consistent with Hadden's admissions in this case, any evidence that was erroneously admitted was clearly harmless beyond a reasonable doubt.

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[10]The province of the jury can never be completely invaded because jurors are always free to draw their own conclusions.

The dissenting judges in the Hadden opinion appear to have overlooked the crimes with which Hadden was actually convicted. In addition, they gave Hadden's confession no credence, stating:

> Although a sheriff's investigator testified regarding Hadden's confession, she said that the defendant gave numerous accounts--both inculpatory and exculpatory--of his involvement with the child. Moreover, Hadden testified and denied that he had given a confession. Id., 21 Fla. L. Weekly at D411.

Investigator Peavy talked to Hadden on three occasions. She initiated the first interview which was held on April 7th. He denied everything. (T. 75-76) Shortly thereafter, Hadden contacted Peavy and told her that if anything had happened, his eleven-year-old son had done it. (T. 76) After he was arrested, Hadden again contacted Peavy, and this time his statement was recorded. (T. 77) It is this last statement, which the jury heard Peavy refer to as a "tape-recorded statement," in which Hadden admitted fondling T. H. (T. 77-79) He said that the incident in the car never happened, but that instead T.H. tried to throw herself on him and he rejected her. (T. 78) Apparently this is when his hands touched her chest. (T. 77-78) Hadden said that T.H. again threw herself at him inside the house, and on that occasion, he fondled her vaginal area. (T. 79)

At trial, Hadden denied touching T.H. and accused Peavy of lying. (T. 119, 122) This testimony was completely unreliable because the jury knew Hadden's statement had been tape recorded.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN ADMITTING THE UNOBJECTED-TO HEARSAY STATEMENTS OF THE CHILD VICTIM THROUGH THE TESTIMONY OF A SCHOOL GUIDANCE COUNSELOR AND A POLICE OFFICER. (RESTATED)

Hadden asks the Court to grant him a new trial because the trial court admitted T.H.'s hearsay statements through the testimony of June Perry, school guidance counselor, and Michele Peavy, investigator for Sheriff's Department. The State respectfully disagrees for several reasons.

First, not only is this issue beyond the scope of the certified question, but it is completely unrelated to it. It should not be addressed. Flanagan, 625 So. 2d at 830 n 4 ("We do not address Flanagan's other points on appeal which were not encompassed by the certified question").

Second, this issue was not preserved for appeal because no objection to the reliability of the hearsay statements was made. Feller v. State, 637 So. 2d 911, 914 (Fla. 1994). It was the prosecutor, not defense counsel, who asked for a ruling from the court. (T. 4) The only objection defense counsel raised to June Perry's testimony was that she lacked the qualifications to testify that T.H. appeared "relieved" after disclosing the sexual abuse. (T. 44, 46-49) Defense counsel stated:

> Well, Your Honor, I will not object to that in front of the jury, but I would like to make an objection at this time, that I feel it's one thing to admit hearsay that the alleged victim told somebody the same thing at a different time, but it's quite another thing to allow a witness who's not qualified in human behavior to express an opinion or describe events that would convey to the jury the feeling that they felt that the witness was being truthful. (T.47-48)

That objection was partially sustained and so noted by the court. (T. 47, 49) As to Investigator Peavy, defense counsel made no objection whatever to the hearsay testimony and, in fact, did not even cross examine her on the hearsay testimony in the jury's presence. (T. 59-72, 80-84) It thus is abundantly clear that defense counsel never gave the trial court a clue that he was questioning the reliability of the statements. Allowing a defendant to appeal rulings to which he did not object would give him the best of both worlds at the expense of society. He could proceed to trial with a ruling that actually fit in with his trial strategy and then raise the issue on appeal in the event of a conviction.

Third, the issue is without merit. As to Perry, the trial court considered T.H.'s age, her relationship with Perry, and the setting in which the statements were disclosed, (T. 48-49) He found the statements to be reliable based on their voluntary disclosure without influence from Perry, T.H.'s description of

the abuse in her own language, and disclosure to a third party who was not a relative. (T. 48-49) As to Peavy, he incorporated the findings previously made with respect to Perry, with special emphasis on the fact that the statements were made to a third party, not a parent. (T. 71) The court gratuitously added that both statements were essentially consistent. (T. 71)

Fourth, if any error occurred, it was clearly harmless. Since T.H., the hearsay declarant, testified at trial and was subject to full cross examination, there was no confrontation clause violation. U.S. v. Owens, 484 U.S. 554, 559 (1988); California v. Green, 399 U.S. 149, 158 (1970). In addition, whatever "corroborative" value Perry's and Peavy's testimony may have provided was neutralized by its impeachment aspects. T.H. gave inconsistent statements. She told Perry that only fondling occurred, whereas she told Peavy fondling and penetration took place. (T. 52,55-57, 73) Finally, as discussed under the certified question, the jury rejected all testimony of penetration and in fact convicted Hadden of a lesser offense involving fondling, to which he had admitted.

ISSUE III

WHETHER POINTS FOR VICTIM INJURY WERE IMPROPERLY SCORED ON THE GUIDELINES SCORESHEET FOR THE OFFENSE OF LEWD AND LASCIVIOUS ACTS. (RESTATED)

Hadden asks the Court to reverse his sentence because of a scoresheet error. The State respectfully disagrees for several reasons.

First, this issue is independent of and beyond the scope of the certified question. It, therefore, should not be addressed.

Second, this issue was not raised in the trial court, and the error does not affect the legality of the sentence. It, therefore, is not reviewable for the first time on appeal. Davis v. State, 661 So. 2d. 1193 (Fla. 1995). Hadden received a 12-year sentence. (R. 25, 30-36) Subtracting 60 points from the scoresheet would change both the recommended and permitted ranges. However, it appears that 25 points should have been added for aggravated assault, for which Hadden was sentenced at the same time as he was sentenced on the sex crimes. (R. 26-27, 30-36) Subtracting 60 points and adding 25 points produces a new score of 284, which places Hadden within the permitted range of 5 1/2 to 12 years' imprisonment. Since the sentence he received falls within that range, the error he complains of clearly does not make his sentence illegal. In substance what Hadden seeks is

a mere opportunity to persuade the judge to impose a more lenient sentence.

Third, Hadden should not prevail on the merits. At the time of Hadden's offenses, the scoresheet for sex crimes, Florida Rule of Criminal Procedure 3.988(b), included sexual offenses defined in Chapter 794, Chapter 800, section 826.04, and section 491.0112, Florida Statutes. All felonies (life, first, second, and third degree), except a capital felony, were covered. The sentencing matrix took into account the differences in crimes committed by exhibitionists, child fondlers, and rapists. For example, a first-time offender who had no contact with the victim (exposed himself or masturbated in presence of a child) would receive a sentence in the first cell; if he had contact but no penetration (fondled the breast or genitalia of a child), he would receive a sentence in the second cell; and if he penetrated the victim's body orifices (statutory rape or rape by threatening to use nondeadly force), he would receive a sentence in the third cell.

This was the status of the law when Karchesky v. State, 591 So. 2d 930 (Fla. 1992) was decided. The unintended result of Karchesky was not only to make the punishment for all of these crimes the same but to make it the most lenient possible. Absent

the availability of points for victim contact or penetration, the above-discussed crimes, which were all second-degree felonies, would be lumped together in the same cell, which was the first cell (any nonstate prison sanction).[11] This is why Karchesky was superseded by statute three months later. Ch. 92-135, § 1, Laws of Florida.

At issue in Karchesky, as well as in Pinacle v. State, 654 So. 2d 908 (Fla. 1995), was whether points could be scored for penetration under the category of "victim injury." The instant case is distinguishable, in that points were scored for contact without penetration. The State respectfully urges the Court not to extend Karchesky to this situation. Two wrongs do not make a right; they compound the error.

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[11]The calculation is easy. A second-degree felony scored out to 158 points. The recommended score was any nonstate prison sanction. Adding 20 points for victim contact but no penetration bumped it up one cell (community control or 12-30 months incarceration), and adding 40 points for penetration bumped it up two cells (2 1/2 to 3 1/2 years' imprisonment). Fla.R.Crm.P. 3.988(b) (Sexual Offenses) (1992 and earlier).

CONCLUSION

Based on the foregoing discussion, the State respectfully asks this Honorable Court to affirm the First District's decision in this case.

Respectfully submitted,

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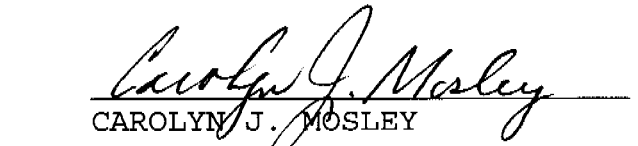

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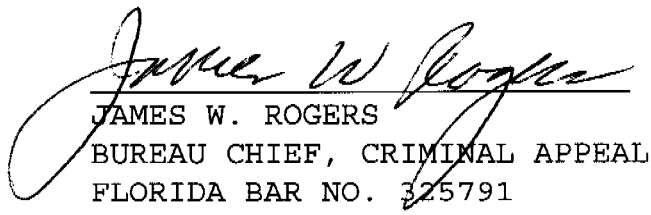

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief was furnished by U.S. mail to P. Douglas Brinkmeyer, Assistant Public Defender, and to Kimberly A. Johnson, Certified Legal Intern, Leon County Courthouse, Suite 401, North, 301 South Monroe Street, Tallahassee, Florida 32301, this 29th day of April, 1996.

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