IN THE SUPREME COURT OF FLORIDA

STANLEY RIDER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent,

DCA CASE NO. 98-850
CASE NO. 95, 060

ON DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT

PETITIONER'S MERIT BRIEF

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES:

PRELIMINARY STATEMENT

In the decision sought to be reviewed the Fifth District Court of Appeal held that a challenge to the facial validity of a statute due to its overly broad restraints on freedom of speech was not preserved for purposes of appeal, citing as controlling authority a case currently pending review in the Florida Supreme Court, ***Maddox v. State***, 708 So.2d 617 (Fla. 5th DCA 1998), ***review pending***, Sup. Ct. Case No. 92, 805. Discretionary Jurisdiction was sought and accepted by this Court, pursuant to ***Jollie v State***, 405 So.2d 418 (Fla. 1981).

Petitioner respectfully submits that jurisdiction also exists for this Court to review other points of law presented in this brief.

> [O]nce we accept jurisdiction over a cause in order to resolve a legal issue in conflict, we may, in our discretion consider other issues properly raised and argued before this Court.

Savoie v. State, 422 So.2d 308 (Fla. 1982).

STATEMENT OF THE CASE AND FACTS

An information charging Petitioner Stanley Rider with two counts of lewd and lascivious assault on a child in violation of Fla. Stat. Section 800.04(3) (1997) was filed in the Circuit Court, Volusia County, on May 27, 1997. (R 56)

At trial on January 14, 1998, Judge William C. Johnson, Jr., defense counsel invoked the rule of sequestration. (T 14-16) The state announced that the mother of the alleged child-victim had expressed her desire to be present during the entire trial, and invoked her privilege "under the constitution and the statute." (T 16) Defense counsel suggested that the child's mother, who was a scheduled witness in the case, be allowed to testify first, so that both the mother's right to be present, and the defendant's right to have witnesses against him sequestered, could be accommodated. (T 17-18) The state argued that such was not provided "by the statute." (T 17) Whereupon the jury was sent out of the courtroom and the following conference took place:

> THE COURT: ...Well it isn't a very good sign when we send the jury out before we even begin opening statements.
>
> Who is to be the first witness?

MR. DYER: Your Honor, I intend to call the victim in the case, that would be [the child]. She does not intend-- even as the victim, she does not intend to sit through the trial.

THE COURT: That's the child?

MR. DYER: That's correct.

MR. DYER: That's going to be your first witness?

MR. DYER: That's correct.

THE COURT: And you wish to have the mother present during her testimony?

MR. DYER: Yes. Including the opening statements.

THE COURT: Is there anything in these rules or the statute, Mr.Gambert, that makes it mandatory that anyone who's a member of the family that's going to be present throughout the rest of the trial must have their testimony given first?

MR. GAMBERT: No, sir. I don't think that's the situation. The situation as I see it, Judge, is I have invoked the rule, I believe the rules provide that the mother can be in when the girl is testifying. I don't have a problem with that, but I don't believe there's anything in the rule that allows the state attorney to dictate the order the witnesses can come in. So if the mother testifies first, then the

rule can certainly be accommodated and then she can always be accommodated because she will have seen the entire trial.

THE COURT: Is there anything that dictates that the defense can tell the state in the manner-- the sequence in which they're to bring their witnesses?

MR. GAMBERT: Other than the fact I think the rule has been invoked, and by that the one witness is not allowed to hear the testimony of the other witness, which would be the daughter in this case.

THE COURT: Read me the statute and the rule about the presence of the mother or the parents of the child.

MR. DYER: Yes, Your Honor. The statute is Florida Statute 90.616, which states, subparagraph one, at the request of a party, the court may order witnesses excluded from the proceeding so that they cannot hear the testimony of other witnesses, except as provided in subsection two. Subsection two then reads, a witness may not be excluded if the witness is subparagraph (d) thereof in a criminal case, the victim of the crime, the victim's next of kin, the parent or guardian of a minor child victim or a lawful representative of such a person, unless upon motion the court determines such person's presence to be prejudicial.

THE COURT: Do I have a motion concerning

prejudice?

MR. GAMBERT: Your Honor, I would indicate that it would, in fact, be prejudicial in this situation. The whole purpose of the rule is to make sure that the witness cannot corroborate their testimonies.

THE COURT: Are there any grounds?

MR. GAMBERT: Just the fact that both the mother and the child are going to testify and that--

THE COURT: Does the statute say that if both the mother and child are going to testify that that's grounds for exclusion of one or the other?

MR. GAMBERT: I'm not asking for total exclusion, Judge. That's my point. I'm not asking for exclusion, I'm only asking that the order in which they are taken be such that both points in the rule be accommodated.

THE COURT: All right. The motion will be denied. Bring the jury in.

(T 17-20)

The state called five witnesses in its case in chief. (T 29-148) The child testified first, followed by the medical doctor who examined the child after the alleged incident, the child's mother, the mother's live-in boyfriend, and the New Smyrna Beach police officer who placed the Petitioner under arrest. (T 29-71; 78-86; 87-112; 114-124; 126-147) The facts

established by the testimony at trial, included the following:

When Stanley Rider had been down to visit from Connecticut, he had stayed with Andrew "Randy" Nichols at his home in New Smyrna Beach. (T 151) Stan had come down to the Daytona area many, many times over the period of approximately ten years during which he had known Randy. (T 151) Until his last visit on April 18, 1997, each time Stan had stayed at Randy's home, he had stayed in the spare bedroom. (T 160) However, since Stan's last visit, a woman and her two children had moved in with Randy. (T 160) On the night of April 18, 1997, six people-- three unrelated adult males, an adult female, and her twelve year old daughter and six year old son-- had all slept in the three bedroom, one bathroom home in New Smyrna Beach. (T 116)

After he had arrived at Randy's house at 5 or 5:30 p.m. on April 18, 1997 to spend the weekend, Stan Rider had taken a shower, before he, Randy, Bruce Goodwin, another friend, Travis, and a few of Travis' friends, had all gone out to a bar. (T 117, 131, 152) Bruce Goodwin, another houseguest had been staying with Randy "for less than a month." (T 91) First the group had gone to Breakers for about an hour, and then they had gone to Peanuts where they had shot some pool and drank some beer. (T 152) Randy's girlfriend, T[redacted] had joined the men later that

evening, after she had gotten off work. (T 153)

Although the four adults continued to drink after they returned home that evening, Rider testified that he had not been intoxicated. (T 153) The two children had been in bed asleep by the time the adults had arrived home. (T 153-154) When they had gotten home, they had drunk some "White Russians," made with vodka and Kahlua. (T 132) Although T[redacted] claimed that she had only had one beer that night after returning home, her daughter testified at trial that her mother was "drunk" on April 18, 1997. (T 50)

The sleeping arrangements for that night had not been clearly stated: Stan "was to either sleep on the couch, or whatever." (T 154) Stan who had been sleeping on the sectional couch in the living room, had awakened in the night, and Randy, who was up, had told him "to go and crash in the other room." (T 133, 154, 158) Stan doesn't know what time it was when he got up off the couch, went into the other bedroom and went to sleep, fully clothed, on the side of the full-size bed in which the twelve year old girl was sleeping. (T 133, 134, 157, 159) He woke up at about 7:15 or 7:30 a.m., went to the bathroom, talked to Mr. Goodwin, the other houseguest, and took a shower. (T 155) Stan borrowed Randy's truck at around 9:00 or 9:30 a.m., and

took the little boy with him, to visit a friend. (T 155) They returned around noon, and Stan watched some television and took a nap. (T 155-156) When he awoke, T[redacted] was standing over him, frantic, telling him to get out of the house, "[the child] said you raped her." (T 156) The child was taken to the hospital, and Stan went "out back with Mr. Goodwin" until the police arrived and arrested him. (T 156)

Stan Rider voluntarily spoke with the police, and never denied having "crashed" on the same bed in which the child had slept. (T 156, 129-141) However, Rider never wavered in his insistence that he had never engaged in any sexual contact with the twelve year old child. (T 134, 135, 136, 137, 138, 139, 140, 154, 155, 156, 161, 162)

The evidence against Stan Rider at trial, consisted of the testimony of the alleged child-victim concerning what she had claimed to remember, and what she had thought she had seen. (T 29-71) The child testified that around 5:30 a.m., on April 19, 1997, although it was still dark and no lights were on, she had opened her eyes "a little bit" and seen Stanley come into her room. (T 35, 36) Supposedly, he laid down on the bed, and started touching her. (T 37) She claimed that he took off his pants and underwear, and took off her clothes, laid on top of

her, and put his penis in her vagina. (T 37-39) Then he just got up and walked out the door. (T 40) When the child went to get up to leave, she claimed that Rider came back into the room, and told her to get back down on the bed. (T 40) The child alleged that Rider rolled her over onto her stomach and "put his penis into [her] butt." (T 41) The child stated that she had tried to push the man off of her, and had cried out for her mother once or twice. (T 56-57) After he stopped, the man took his clothes and just walked out of the room. (T 42-43) The child's reaction had been to put her clothes back on and go back to sleep. (T 43)

The child explained that she hadn't told her mother about the alleged incident because she was afraid that her mother wouldn't believe her. (T 60-61) She was not close to her mother, nor to her mother's boyfriend, Randy. (T 62) Even though Stan Rider was not in the house the next morning, the child claimed that her mother had still been sleeping when she arose, and so she had said nothing to anyone about the claimed attack. (T 61-62) The twelve year old had gotten up at ten o'clock, showered and dressed, and watched some TV, before going to the beach alone with Bruce Goodwin, the day following the alleged incident (T 61-62) The two left for the beach at 10:30

a.m. and stayed until approximately 4:00 p.m. (T 45) The child told Bruce about the incident, and he convinced her that they needed to go home and tell her mom. (T 45-46) When they returned home, Bruce whispered to Andrew (Randy), Andrew told T[redacted], and T[redacted] in turn, talked with the child. (T 46) The child only told her mom "part of it" because she was scared that her mom wouldn't believe her. (T 47) The defense attempt to cross-examine the child-witness about a statement her younger brother had made to their mother, that his sister lied, was defeated by a State hearsay objection. (T 63)

T[redacted], the child's mother testified that she worked two jobs, but had been up at around 8:00 or 8:30 or 9:00 a.m. and had said "good morning" to her daughter, who was up and about to take a shower. (T 99, 100, 107) She said that she had seen and spoken to her daughter a second time that morning, when the child had asked permission to go to the beach with Bruce. (T 100-101) Although T[redacted] stated that she had had only one beer to drink on the previous evening, and had gone to bed by 11:30, she claimed to be a heavy sleeper and had not heard her daughter cry out from the next room. (T 97, 99, 100, 107) T[redacted] had no idea why her daughter had testified that they had not seen each other before the child had gone off to the beach with Bruce on the morning

following that alleged assault. (T 107-108) The child's mother was re-called as a rebuttal witness following the Petitioner's testimony to address the size of bed which was in the child's room. (T 163-164) She confirmed that the room contained a full-size bed. (T 164)

Stan's friend Randy testified that he had lived at his New Smyrna Beach home for approximately eight years, and had been "boyfriend/girlfriend" with T[redacted] for a year and a half. (T 115) Stan Rider had been visiting him two to three times a year during the eight to ten years he had known him. (T 116-118) Randy had a little dog that barked a lot if "anything odd" happened, but he had not heard anything after going to bed on the night in question. (T 119) He didn't know if anyone had told Rider of the child's accusations that he had raped her, before T[redacted] had confronted Rider as he slept on the couch that afternoon. (T 120)

The physician who performed a full bimanual exam on the child, Dr. Pamela Carbiener identified irritation and dried secretions on the child which were "fairly recent," estimated as having occurred sometime in the last twenty four hours. (T 82, 83, 84) The doctor stated that even after a "good shower" followed by a trip to the beach, some of these secretions would

still be present. (T 84-85) Dr. Carbiener's examination had revealed a two inch tear at the "two o'clock" position, near the hymen and the vagina, but no other tears or obvious "erythema" to the vagina or anus. (T 82-83)

The investigating police officer, Daniel Kennedy, was "unaware" of any testing which had been done on the Rider's clothing which had been taken into evidence, and no evidence of the claimed assault had been available from the sheets. (T 142-143) Although he was aware of the doctor's finding regarding a vaginal tear in the child, the officer never went back to the scene to attempt to secure any blood evidence. (T 147)

Defense motion for judgment of acquittal was denied. (T 149, 165) The jury returned its guilty verdict of guilt to lewd and lascivious assault on a child, as charged in each of the two counts. (R 89; T 234-235) The Petitioner was sentenced on March 17, 1998 before Judge Johnson. (R 1-17) The Petitioner was adjudicated guilty of two counts of lewd and lascivious assault upon on child, second degree felony violations of Fla. Stat. Section 800.04 (1997). (R 5, 90-91) He was sentenced to fifteen years in prison with credit for time three hundred and eighty three days time served on count one, to be followed by fifteen years probation on count two. (R 7, 92-95; 96-100) New

standard conditions of probation requiring registration as a sex offender, imposing mandatory curfew, and restricting where the Appellant might live and work following his release from prison, were read. (R 8-10; 98-99) The following was among the conditions:

> (15) (g) You shall not view or possess any obscene, pornographic or sexually stimulating visual or auditory material, including telephone, electronic media, computer programs or computer services that are relevant to deviant behavior patterns.

(R 10, 11, 98)

The Fifth District Court of Appeal affirmed the Petitioner's judgment and sentence on December 23, 1998, citing ***Maddox v. State***, 708 So.2d 617 (Fla. 5th DCA 1998), ***review pending***, Florida Supreme Court Case Number 92, 805, and ***Maxlow v. State***, 708 So.2d. 548 (Fla. 2d DCA 1995), as controlling authority regarding the defense failure to preserve by objection, below, its fourth point of argument on appeal, a challenge to the overly broad condition of probation. (See Appendix.) The Petitioner invoked the discretionary jurisdiction of the Florida Supreme Court, which was accepted on June 18, 1999, in Case Number 95, 060. This appeal follows.

SUMMARY OF ARGUMENT

On appeal, the Petitioner raised four issues: (1)legal insufficiency of the evidence; (2) violation of the due process rights of an accused under Article I, Sections 9 and 16 of the Florida Constitution, and (3) under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution by denial of the defense request to have witnesses sequestered, or, in the alternative to honor both the rights of the accused and the rights of the victim by having the victim's mother testify first, in favor of a contrary preference by the State regarding the order of testimony; and, (4) the unconstitutionality on its face of the statutory condition of probation which prohibits viewing, owning, or possessing "any obscene, pornographic, or sexually stimulating visual or auditory material, including telephone, electronic media, computer programs or computer services that are relevant to deviant behavior pattern," due to its overly broad proscription of protected first amendment freedoms. See Fla. Stat., Section 948.03(5)(a)7 (1997). The Fifth District Court of Appeal, affirmed the Petitioner's judgment and sentence, rejecting the four arguments made on appeal, and citing ***Maddox v. State***, 708 So.2d 617 (Fla. 5th DCA 1998)and ***Maxlow v State***, 636

So.2d 548 (Fla. 2d DCA 1994) as authority for its decision that the issue concerning the statutory condition of probation, challenged as a vague and overly broad restraint upon freedom of speech, was not preserved for purposes of appeal. In accepting jurisdiction, the Florida Supreme Court is asked to exercise its discretion to review the points raised on direct appeal concerning the legal insufficiency of the evidence, and the denial of State and federal constitutional due process protections.

POINT ONE: The only evidence that the child had been assaulted was the self-contradictive testimony of the child witness, uncorroborated by any other testimonial or physical evidence, and placed in question by other facts in evidence. No evidence of identity against the Appellant was introduced and the child's identification by her own admission was through partially opened eyes, in a dark room, unsupported by any of the other facts in evidence, and unwitnessed by any of the three other adults in close proximity within the "small" house. Her account was further placed in doubt be her own reported behavior, and the discrepancies between her testimony, and the other state witnesses. Based upon the legally insufficient evidence, the trial court abused its discretion in denying the defense motion

for judgment of acquittal.

POINT TWO: The trial court misapprehended the due process rights of the accused, as having been superseded by the victim's rights to be present at trial. The victim's rights are expressly subject to the protection of the constitutional rights of an accused, including the right to sequester material witnesses against him, to insure the integrity of their testimony, and the fairness of his trial. The trial court failed to exercise its discretion to carry out its responsibility to insure the just application of the rule of sequestration. Attributing its decision to the absence of express language in the rule which anticipated the specific circumstances at trial, the trial court denied the reasonable compromise suggested by defense counsel and subordinated the due process rights of the Appellant to the mere preference of the state, regarding the order of presentation of its witnesses. The decision of the trial court was legally erroneous, as it compromised the constitutional rights of the Appellant, and prejudiced the outcome in a close case.

The trial court's denial of the defense request to sequester the mother of the alleged child-victim, as a material witness, and the defense suggestion to accommodate her right to

be present by having her testify first, also compromised the Appellant's due process and confrontation rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. The failure of the trial court to safeguard the rights of the accused as provided by both the state law and constitution, compromised the fundamental fairness of the Appellant's trial, and introduced potentialities for distortion by a material witness. The trial court failed to satisfy its responsibility to meet situations as they arise in addressing the need to sequester key witnesses. As a result the Appellant's rights of confrontation and cross-examination were impaired. The close case must be remanded for a new trial.

POINT THREE: Condition seven of the new standard conditions of probation for sex offenders in Fla. Stat. Section 948.03 (5)(a) is overly facially over broad and vague in defining curtailed First Amendment freedoms. Even as measured by common understanding and practice, materials which might be "sexually stimulating," are hopelessly subjective in definition. The "viewing" or "owning" or "possessing" trichotomy poses serious problems of accountability. Because the host of exceptions threaten to swallow the rule, and because of the likelihood of unintentional violations, the condition is unconstitutionally

vague and must be stricken.

ARGUMENT

POINT ONE

THERE WAS INSUFFICIENT EVIDENCE AS A MATTER OF LAW TO SUBMIT THE CASE TO THE JURY.

The only evidence against the Petitioner at trial consisted of the accusations of a child whose related testimony was corroborated only by a single circumstantial fact, and no other physical evidence, and was controverted on several key points. There were three unrelated adult males sleeping in the home on the night of the alleged assault of the twelve year old girl. Only two of them were even heard from at trial. No physical evidence was produced or placed before the court, regarding the source of "the secretions" identified during the child's examination, or regarding the clothes of the Petitioner, the bed linens, the bed, or the room. The guilty verdict rested entirely upon the charges of the twelve year old girl, whose testimony contradicted her mother's on events of the morning following the incident, and whose greatest fear was that her mother would think that she was lying about the assault. In an unlit house before dawn, the child claimed to have identified the Petitioner as the man who entered her room, assaulted her, dressed, left, returned and assaulted her again. In a "small," crowded house with a dog

that barks easily, no one heard the commotion or the child's several cries, and after the assault, the child put her clothes back on and fell asleep "in a couple minutes." Apart from the swearing contest between the alleged child-victim and the Petitioner, the only other evidence of identity were the remote circumstantial facts that the Petitioner had "crashed" on the side of the child's bed, and that the child had sustained a vaginal tear within twenty four hours of this occurrence. While these two facts are suggestive, without any other competent evidence of identity, there was insufficient evidence as a matter of law to support submission of the matter to the jury. Only when assumptions corresponding to these circumstances are "impermissibly pyramided," can the otherwise unsupported conclusion that the Petitioner was guilty of lewd and lascivious conduct involving a child, be formed. ***I.Y.D v. State***, 711 So. 2d 202 (Fla. 2d DCA 1998).

When facts are in dispute at trial, the standard for review on appeal is whether the court abused its discretion in apprehending the evidence, when viewed in a light most favorable to the state. ***VanWagner v. State***, 677 So.2d 314 (Fla. 1st DCA 1996). When the review of a motion for judgment of acquittal is

based upon a claimed failure to prove the element of identity, the test for sufficiency of the evidence is whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. ***McCann v. State***, 711 So.2d 1290 (Fla. 4th DCA 1998).

The Fourth District Court of appeal summarized the legal standards applicable to the sufficiency of the evidence to prove the element of identity beyond a reasonable doubt, and review of that requirement on appeal in ***Currelly v. State***, 644 So.2d 139 (Fla. 2d DCA 1994).

> It is a basic principle of Florida law that the state must prove the identity of a defendant as the perpetrator of the crime charged beyond a reasonable doubt. ***Davis v. State***, 438 So.2d 973 (Fla. 2d DCA 1983). If the state fails to meet this burden then "the case should not be submitted to the jury and a judgment of acquittal should be granted." ***Ponsell v. State***, 393 So.2d 635, 637 (Fla. 4th DCA 1981). In reviewing the sufficiency of the evidence necessary to sustain the state's burden, an appellate court "must decide whether the evidence presented during the State's case was legally sufficient to support" a conviction. ***Walker v. State***, 604 So.2d 475, 477 (Fla.1992) (emphasis added). The court may not look to evidence furnished by the defendant

> to supply proof of an essential element of the state's case. ***State v. Pennington***, 534 So.2d 393 (Fla.1988).

Currelly v. State, 644 at 140.

In the instant case, the Petitioner admitted that he had crashed on the edge of the child's bed on the night in question. However, apart from the testimony of the child, no other medical, physical, testimonial or even circumstantial evidence supported the child's allegations. In a house full of people, including another, younger child, and a dog that barked at anything unusual, the alleged child-victim's claimed yells to her mom were unheralded, and there was no sign or corroboration of any of the asserted criminal acts. The vaginal tear sustained withing twenty four hours of the alleged incident, is not inconsistent with the Appellant's claims of innocence. It is an unfortunate reality in the 1990's that sexual activity is not uncommon in twelve year old children. The child's own behavior is both contraindicative of her account of the sexual encounter, and itself suggestive of a possible alternative hypothesis for the presence of the vaginal laceration. The child stated that she rolled over and was asleep within minutes of the intruder's departure, she was afraid that her own mother would not believe

her story, and so she went off to spend the day at the beach with another adult male whom she had known for less than a week. The testimony of this other adult male was another conspicuous omission in the state's case at trial.

The facts adduced from the circumstantial evidence at trial pose far less than the "reasonable and moral certainty that the accused and no one else committed the offense charged," if indeed, there was an offense. ***I.Y.D.*** The reasonable hypotheses of innocence in this case are too numerous to mention, given the unexplored evidence and the number and nonaccounting of other individuals in the residence on the night in question. ***See McClain v. State***, 709 So.2d 136 (Fla. 1st DCA 1998). Even taken in a light most favorable to the state, the conflict-laden testimony of a twelve year old child, unsupported by any other evidence, and contradicted by other facts, is too flimsy a basis upon which to submit a case to a jury. The trial court abused its discretion in denying the defense motion for judgment of acquittal. The jury verdict should be set aside, and the Petitioner discharged.

POINT TWO

DENIAL OF THE DEFENSE REQUEST THAT THE CHILD-VICTIM'S MOTHER TESTIFY FIRST TO ACCOMMODATE HER RIGHT TO BE PRESENT, WHILE ALSO HONORING THE DEFENDANT'S RIGHT TO SEQUESTRATION OF THE WITNESSES VIOLATED THE DUE PROCESS RIGHTS OF THE ACCUSED UNDER ARTICLE I, § 9 AND § 16 (b) OF THE FLORIDA CONSTITUTION, AND THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

At the beginning of trial, defense counsel invoked the rule of sequestration, the witnesses were placed under oath, and the court explained the rule of procedure of sequestration. The state announced that the mother of the alleged child-victim had expressed her desire to be present during the entire trial, and invoked her privilege "under the constitution and the statute." Defense counsel suggested that the child's mother, who was a scheduled witness in the case, be allowed to testify first, so that both the mother's right to be present, and the defendant's right to have witnesses against him sequestered, could be accommodated. The state argued that such was not provided "by the statute." Whereupon the jury was sent out of the courtroom and the following conference took place:

> THE COURT: ...Well it isn't a very good sign when we send the jury out before we even begin opening statements.
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THE COURT: That's the child?

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MR. DYER: That's going to be your first witness?

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THE COURT: And you wish to have the mother present during her testimony?

MR. DYER: Yes. Including the opening statements.

THE COURT: Is there anything in these rules or the statute, Mr.Gambert, that makes it mandatory that anyone who's a member of the family that's going to be present throughout the rest of the trial must have their testimony given first?

MR. GAMBERT: No, sir. I don't think that's the situation. The situation as I see it, Judge, is I have invoked the rule, I believe the rules provide that the mother can be in when the girl is testifying. I don't have a problem with that, but I don't believe there's anything in the rule that allows the state attorney to dictate the order the witnesses can come in. So if the mother testifies first, then the

rule can certainly be accommodated and then she can always be accommodated because she will have seen the entire trial.

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THE COURT: Read me the statute and the rule about the presence of the mother or the parents of the child.

MR. DYER: Yes, Your Honor. The statute is Florida Statute 90.616, which states, subparagraph one, at the request of a party, the court may order witnesses excluded from the proceeding so that they cannot hear the testimony of other witnesses, except as provided in subsection two. Subsection two then reads, a witness may not be excluded if the witness is subparagraph (d) thereof in a criminal case, the victim of the crime, the victim's next of kin, the parent or guardian of a minor child victim or a lawful epresentative of such a person,unless upon motion the court determines such person's presence to be prejudicial.

THE COURT: Do I have a motion concerning prejudice?

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THE COURT: Does the statute say that if both the mother and child are going to testify that that's grounds for exclusion of one or the other?

MR. GAMBERT: I'm not asking for total exclusion, Judge. That's my point. I'm not asking for exclusion, I'm only asking that the order in which they are taken be such that both points in the rule be accommodated.

THE COURT: All right. The motion will be denied. Bring the jury in.

(T 17-20)

The Fifth District court of Appeal held that the rule of sequestration of witnesses is not to be applied as a strict or absolute rule of law, the court has broad discretion to determine the order of presentation of evidence and witnesses, and no prejudice was demonstrated nor abuse of discretion shown. However, because the record reflects that the trial judge ruled

as he did expressly due to the absence of language in the law giving him discretion to determine the order of presentation of evidence and witnesses, this decision is in error.

The Petitioner contends that the lower court misapprehended its authority and erred as a matter of law, by basing its denial of the defense motion upon the absence of express statutory language specifically authorizing the court to adjust the order of witnesses so that both the rights of the accused to due process and a fair trial, and the victim's rights to be present, could be honored. Rather, it is the court's *responsibility* to exercise its broad powers to safeguard both the rights of the accused and the rights of victims, consistent with the constitution and the law. ***Geders v. U.S.***, 425 U.S. 80 (1976).

Article I, Section 16 of the Florida Constitution addresses the rights of the accused, and the rights of victims. At issue in the instant case, is the right of victims, in paragraph (b) of the Section, as adopted in 1988.

> (b) Victims of crime or their lawful representatives, including the next of kin of homicide victims, are entitled to the right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, *to the extent that*

> *these rights do not interfere with the constitutional rights of the accused.* [Emphasis added.]

Fla. Const. Art. I, § 16 (1988). Fla. Stat. Section 90.616 provides that:

> (2) a witness may not be excluded if the witness is:
> ....
> (d) In a criminal case, the victim of the crime, the victim's next of kin, the parent or guardian of a minor child victim, or a lawful representative of such person, *unless, upon motion, the court determines such person's presence to be prejudicial.* [Emphasis added.]

Both the constitutional provision and the statute subordinate the victim's rights to be present, to the constitutional rights of the accused. The due process right of an accused to a fair trial encompasses his right to invoke the sequestration rule on witnesses, both to prevent the "tailoring" of testimony to that of earlier witnesses, and to aid in detection of testimony that is less than candid. ***Geders***. at 87.

The reason for the rule on sequestration of witnesses is to avoid coloring of witnesses testimony by what they have heard from other witnesses who have preceded them on the stand. ***Spencer v. State***, 133 So.2d 729 (Fla. 1961). While exception to

the rule of sequestration in the case of a nonmaterial witness has been determined to be within the court's discretion, material witnesses are generally sequestered to avoid prejudice to a defendant's fundamental rights. ***Gore v. State***, 599 So. 2d 978 (Fla. 1992).

Florida courts have not yet addressed the precise factual scenario in the instant case. However, in analogous situations, the courts have been cognizant of, and attentive to their responsibility to safeguard the rights of the accused in implementing the victim's rights provisions. In ***Bellamy v. State***, 594 So.2d 337 (Fla. 1st DCA 1992), the First District Court of Appeal affirmed a trial court's determination that a victim could remain in the courtroom, where the state did not attempt to call her as a rebuttal witness, and her presence was not alleged to have altered or affected presentation of the state's case. ***Id***. at 338. In the instant case, the court denied the defense request to allow the child's mother, as a critical state witness to testify first so that she could observe the entire trial, based upon the absence of any specific statutory provision or rule which addressed the ability to alter the order of witnesses to safeguard corresponding rights. In a close case,

where the only evidence of identity was from the alleged child-victim, the child's mother gave her direct testimony corroborating some of the facts asserted by the child, after having heard and observed the testimony of her daughter and the state's examining doctor-expert. Then after observing the entire trial, including the Appellant's testimony, the child's mother was called as a rebuttal witness. This was prejudicial legal error.

It is within the discretion of the trial court to invoke the rule of sequestration of witnesses. ***Lambert v. State***, 560 So. 2d 346 (Fla. 5th DCA 1990). However, the rule on witness sequestration must not be enforced in such a manner that it produces injustice. ***Wright v. State***, 473 So.2d 1277 (Fla. 1985). A trial court errs where it fails to exercise needed discretion in applying the rule to the circumstances. ***Id***. The First District Court of Appeal has distinguished the crime victim's right to be "present" at all crucial trial proceedings pursuant to the constitutional provision, from any perceived right of victims and their families to actively participate in the conduct of trial, by sitting at counsel table or being introduced to the jury. ***Hall v. State***, 579 So. 2d 329 (Fla. 1st DCA 1991).

The circumstances of the instant case posed the need to accommodate the dual rights of accused and victim. The Florida Supreme Court has interpreted the constitutional right of the victim to mean that at a resentencing hearing in a capital case, a homicide victim's wife and son were properly allowed to *remain in the courtroom after their testimony*. ***Sireci v. State***, 587 So. 2d 450, 454 (Fla. 1991). The trial court looked for express language within the corresponding statute to resolve the problem posed to it, and finding none, wrongfully denied the reasonable suggestion presented by the defense counsel which would have reconciled the twin needs of the victim's rights, and accused's due process. ***See*** Fla. Stat. Section 90.616 (1997).

In the instant case, there was no rational or legal basis for the court's refusal to adjust the order of the state's witnesses to provide for the mother's exercise of her victim's rights in a way which did not abridge the rights of the accused to a fair trial.

The trial court's error in refusing to exercise its discretion also violated the federal constitutional, due process rights of the Petitioner. The basic test for denial of due process in a criminal proceeding is that the likely result of the

challenged ruling is the absence of fundamental fairness which is essential to the concept of justice. ***U.S. v. Rouse***, 111 F. 3d 561 (C.A. 8 (S.D.) 1997). Potentialities for distortion of the trial created by a key witness is sufficient to violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution. ***Estes v. Texas***, 381 U.S. 532 (1965). The constitutional principles of fundamental fairness, on the one hand, and the absence of "potentialities for distortion," on the other hand, require that in a trial by jury in a criminal case, at the very least that evidence developed against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's rights of confrontation, cross-examination and of counsel. ***Turner v. Louisiana***, 379 U.S. 466 (1965). On of the key safeguards securing fairness, and balance in the accused's confrontation and cross-examination of witnesses, is the broad power of the trial judge to sequester witnesses. ***Geders***. In its acknowledgment of the discretion of the trial court to insure truth and fairness, the ***Geders*** Court cautioned:

> A criminal trial does not unfold like a play with actors following a script; there is no scenario and can be none. The trial judge must meet situations as they arise and to do

> this must have broad power to cope with the complexities and contingencies inherent in the adversary process. To this end, he may determine generally the order in which parties will adduce proof; his determination will be reviewed only for abuse of discretion...[citations omitted] *If truth and fairness are not to be sacrificed, the judge must exert substantial control over the proceedings.* [Emphasis added.]

Id. at 86.

In the instant case, the trial court abused its discretion by refusing to exercise it to defend the rights it was charged with upholding. The carefully circumscribed right of a victim's family to be "present" during the trial was allowed to supersede the Petitioner's right to have material witnesses against him sequestered. ***See*** Fla. Stat. Section 90.616 (2)(d) (1997). Because the corresponding statute did not expressly anticipate the particular circumstances confronted by the trial judge, the eminently reasonable suggestion of the defense that the witness in question testify first was refused by the court.

In the instant case, the trial court misapprehended its responsibility to safeguard the constitutional rights of an accused and its authority to control the sequestration process, in order to protect the integrity of the testimony by the various witnesses. By so doing, the trial court compromised the

Petitioner's due process and confrontation rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution. U.S. Const. Amend. V, VI, XIV. Accordingly, if the Petitioner is not acquitted pursuant to the first point of argument, the judgment and sentence must be vacated in this close case, and the matter remanded for new trial.

POINT THREE

THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL HEREIN INCORRECTLY CONCLUDES THAT AN OVERBREADTH CHALLENGE TO THE FACIAL CONSTITUTIONALITY OF A STATUTE RESTRICTING FIRST AMENDMENT FREEDOMS MUST BE PRESERVED FOR PURPOSES OF APPEAL.

On appeal, the Petitioner challenged the unconstitutionality on its face of the statutory condition of probation which prohibits viewing, owning, or possessing "any obscene, pornographic, or sexually stimulating visual or auditory material, including telephone, electronic media, computer programs or computer services that are relevant to deviant'S behavior pattern," due to its overly broad proscription of protected First Amendment freedoms. See Fla. Stat., Section 948.03(5)(a)7 (1997). The opinion of the Fifth District in the instant case found that because no objection to the overly broad condition of probation was made below, the issue was not preserved for appellate review. The Fifth District Court cited ***Maddox v. State***, 708 So.2d 617 (Fla. 5th DCA 1998), which case is currently pending review by this Court as Case No. 92, 805, and ***Maxlow v. State***, 636 So.2d 548 (Fla. 2d DCA 1994).

In ***Maddox***, in an ***en banc*** opinion, the Fifth District Court of Appeal held that The Criminal Appeal Reform Act abolished the

concept of fundamental error in the sentencing context. ***Id.***; Fla. Stat. Section 924.051 (1996). ***Maddox*** is currently pending review by this Court. Therein, that petitioner has argued that that decision conflicts with ***State v. Hewitt***, 702 So.2d 633 (Fla. 1st DCA 1977); ***Chojnowski v. State***, 705 So.2d 915 (Fla. 2d DCA 1997); ***Pryor v. State***, 704 So.2d 217 (Fla. 3d DCA 1998) and ***Callins v. State***, 698 So.2d 883 (Fla. 4th DCA 1997). More recently, the case also conflicts with ***Mizell v. State***, 716 So.2d 829(Fla. 3d DCA 1998). Petitioner Maddox has urged this Court to overturn the Fifth District Court of Appeal's holding in his case upon the plain meaning of the statute, and in the interests of fairness, due process and judicial economy.

The Fifth District Court erred by citing as controlling authority a case currently pending review in the Florida Supreme Court, ***Maddox v. State***, Sup. Ct. Case No. 92,805 -- ***see Jollie v. State***, 405 So.2d 418 (Fla. 1981).

Furthermore, by affirming imposition of the probationary condition on the authority of ***Maddox***, the Fifth District Court of Appeal has now extended the conflict of the ***Maddox*** line of cases to decisions of the United States Supreme Court, the Florida Supreme Court and other district courts of appeal which hold that

the facial validity of a statute due to overbreadth applies to conduct protected by the First Amendment of the United States Constitution and can be raised for the first time on appeal. ***Thornhill v. Alabama***, 310 U.S. 88 (1940); ***State v. Barnes***, 686 So.2d 633 (Fla. 2d DCA 1996), ***review denied***, 695 So.2d 698 (Fla.), ***cert. denied***, 118 S. Ct. 257 (1997); ***Ladd v. State***, 715 So.2d 1012 (Fla. 1st DCA 1998; ***Trushin v. State***, 425 So.2d 1126 (Fla. 1982).

The instant Petitioner first argues that even assuming, that the District Court of Appeal is correct in its interpretation that any unpreserved sentencing error cannot be addressed on appeal, to the extent that the result would be a denial of the constitutional right to appeal, and a violation of the separation of powers, the Criminal Appeal Reform Act would then be unconstitutional. ***See*** Fla. Const., Article II, Section 3. Applying ***Maddox*** to the case ***sub judice***, would mean that the fundamental, constitutional right to freedom of speech would require preservation by objection, to be protected. Clearly, no court in this land would have such power to abrogate or otherwise encumber fundamental rights provided by the United States Constitution.

The condition of probation at issue derives from Fla. Stat. Section 948.03 (5)(a) 7. (1997).

> 7. Unless otherwise indicated in the treatment plan provided by the sexual offender treatment program, [the court must impose] a prohibition on viewing, owning, or possessing any obscene, pornographic, or sexually stimulating visual or auditory material, including telephone, electronic media, computer programs, or computer services that are relevant to the offender's deviant behavior pattern.

Special condition number seven for sex offenders, is tantamount to a prohibition from living in the late 1990's. Attempts to enforce the condition promise to unleash a flood of faultless violations, and corresponding challenges. Television, videos, print media, t-shirts, the Internet, and living near "the world's most famous beach," would all appear to be proscribed by the condition.

The Petitioner maintains that this overly broad proscription of protected First Amendment behavior is unconstitutional on its face. ***See Ladd v. State***, 715 So.2d 1012 (Fla. 1st DCA 1998). Such a challenge to the facial validity of a statute due to overbreadth can be raised for the first time on appeal, based

upon federal and State case authority. ***Trushin v. State*** (the facial validity of a statute, including an assertion that the statute is infirm because of overbreadth, can be raised for the first time on appeal); ***State v. Barnes*** (the doctrine of overbreadth applies only to legislation which is susceptible of application to conduct protected by the First Amendment of the United States Constitution); ***Thornhill v. Alabama*** (the existence of a penal statute which sweeps within its ambit activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press, and which readily lends itself to harsh and discriminatory enforcement...results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview). The Fifth District Court's citation to ***Maxlow v. State***, is inapposite as that case concerned a non-statutory condition of probation, which had not been preserved for appeal.

The test for statutory vagueness is whether the language, read from the perspective of a normal reader conveys sufficiently definite warning as to the proscribed conduct, when measured by common understanding and practice. ***Johnson v. State***, 710 So. 2d 367 (Fla. 2d DCA 1997). Any ambiguity in a condition of

probation pronounced at sentencing must be construed favorably to the accused, and will affect the state's ability at a later date to establish a willful violation of the condition. ***Id.*** Where the possibility of unintentional violation of a condition of probation has been demonstrated, that condition has been held to be impermissibly broad. ***Rowles v. State***, 682 So.2d 1184 (Fla. 5th DCA 1996); ***Swatzell v. State***, 691 So.2d 594 (Fla. 3d DCA 1997).

Even if the "common understanding" proviso salvages many of the routine media which ostensibly fall within the banned activities, the stack of exceptions will almost certainly tower above the rule itself. In addition the condition poses a serious problem of subjectivity, in attempting to define "sexually stimulating material." Furthermore, the fact that the condition distinguishes in offending behaviors, among "viewing" versus "owning" or "possessing" promises confusion in accountability, enabling selective enforcement by probation personnel, and punishment for blameless behavior. A statute such as this one, which is overly broad regarding First Amendment freedoms, justifies a concern with vagueness "on its face" because it deters constitutionally protected and socially desirable conduct.

United States v. National Dairy Products Corp., 372 U.S. 29, (1963).

Because of the likelihood that the overly broad condition will result the restriction of protected First Amendment freedoms as well as violations of probation for unintentional, nonsubstantial, and/or socially desirable activities, the statutory condition must be stricken.

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein, the Petitioner requests that this Honorable Court vacate the decision of the Fifth District Court of Appeal, and reverse the judgment and sentence of the trial court based upon insufficient evidence that the act charged in the information occurred, or alternatively, remand for a new trial; and declare Section 948.03 (5)(a)7, Florida Statutes, and the corresponding condition of probation which it establishes, unconstitutionally over broad, on its face.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, via his basket at the Fifth District Court of Appeal, and mailed to: Stanley Rider, this 13th day of July, 1999.

ROSEMARIE FARRELL
ASSISTANT PUBLIC DEFENDER

STATEMENT CERTIFYING FONT

I hereby certify that the size and style of type used in this brief is 12 point Courier New font, a font that is not proportionally spaced.

ROSEMARIE FARRELL
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

STANLEY RIDER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	DCA CASE NO. 97-2308
	)	CASE NO. 95, 060
STATE OF FLORIDA,	)	
	)	
Respondent,	)	
	)	

APPENDIX

Appendix A- ***Rider v. State***, 24 Fla. L. Weekly D50 (Fla. 5th DCA December 23, 1998)

Criminal law—Lewd and lascivious assault on child—No error in denial of motion for judgment of acquittal where there was substantial, competent evidence which identified defendant as the assailant and which addressed the fact that the assault had taken place—Sequestration of witnesses—No showing of prejudice as result of allowing victim's mother, who was exempt from rule of sequestration, to testify after hearing testimony of victim—Claim that condition of probation was overly broad not preserved for appellate review by objection in trial court

STANLEY RIDER, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 98-850. Opinion filed December 23, 1998. Appeal from the Circuit Court for Volusia County, William C. Johnson, Jr., Judge. Counsel: James B. Gibson, Public Defender, and Rosemarie Farrell, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Steven J. Guardiano, Assistant Attorney General, Daytona Beach, for Appellee.

(ORFINGER, M., Senior Judge.) Appellant was charged with two counts of lewd and lascivious assault on a child and convicted after a jury trial. An earlier probation was revoked, and he was sentenced to fifteen years in state prison followed by fifteen years of probation. He appeals, raising four points, two of which involve the issue of witness sequestration, which we consider together. Finding no error, we affirm.

(a) Sufficiency of the Evidence

Appellant was visiting in the home of Andrew Nichols, a friend. Residing with Nichols at the time was a woman and her two children, and another male houseguest. The adults spent the evening visiting some bars and drinking, then returned home and drank some more. The children had been in bed and asleep when the adults returned home. The twelve year old child victim testified that appellant came into her room, got into her bed and started touching her. She stated that he took off his pants and underwear, took off her clothes, laid on top of her and put his penis in her vagina. He then left the room, but shortly returned, and as the child was trying to get up, made her get back into the bed, rolled her over onto her stomach and "put his penis into [her] butt." The child told no one about this until the next day when she told it to Nichols' other friend who convinced her to tell her mother.

Appellant admitted to "crashing" in the bed in which the child slept, but testified that he was fully clothed and never touched the child. A physician who examined the child the day the alleged attack was reported, testified that there was a two inch tear in the child's vagina, the area was bloody and tender, and there was evidence of dried secretions. The outside area of the thighs and buttocks showed a lot of redness and irritation. The doctor testified that these findings were of rather recent origin, within the past twenty-four hours.

Appellant contends that the trial court erred in not granting his motion for judgment of acquittal. He asserts that "[e]ven in a light most favorable to the state, the conflict-laden testimony of a twelve year old child, unsupported by any other evidence, and contradicted by other facts, is too flimsy a basis upon which to submit a case to a jury." However, there was substantial, competent evidence admitted which identified appellant as the assailant and which addressed the fact that the assault had taken place. As was said in *Hufham v. State*, 400 So. 2d 133 (Fla. 5th DCA 1981):

> "Appellant says that the testimony of the victim is conflicting and is not credible. . . but he addresses this issue to the wrong tribunal. It was for the jury to determine the credibility of the witnesses and the victim, as well as the defendant who testified here. Once competent substantial evidence has been submitted on each element of the crime, it is for the jury to evaluate the evidence and the credibility of the witnesses . . . (citations omitted).

400 So. 2d at 135, 136.

(b) Sequestration of Witnesses

At the commencement of the trial, the court granted appellant's request and invoked the rule of sequestration of witnesses. Although appellant acknowledged the child's mother to be exempt from the rule, Sec. 90.616(2)(d), Fla. Stat. (1997), appellant nevertheless requested that the court require the mother to testify prior to the child's testimony, but when the state objected, the court denied the request. Therefore, says appellant, he was prejudiced by the mother's ability to hear the child's testimony before she, the mother, testified. Although appellant makes this bold assertion of prejudice, none is demonstrated.

A trial court has broad discretion to determine the order of presentation of evidence and witnesses. *Quarrells v. State*, 641 So. 2d 490 (Fla. 5th DCA 1994). Appellant contends that it was legal error to deny his sequestration request, but the rule of sequestration of witnesses is not to be applied as a strict or absolute rule of law, and the trial court has discretion to determine whether a particular witness should be excluded from the courtroom during the trial. *Burns v. State*, 609 So. 2d 600 (Fla. 1992). No abuse of the court's discretion is shown.

(c) Condition of Probation

As required by sec. 948.03(5)(a)7, Fla. Stat. (1997), the court imposed the following condition of probation:

> "You shall not view, own or possess any obscene, pornographic, or sexually stimulating visual or auditory material including telephone electronic media, computer programs or computer services that are relevant to deviant behavior pattern."

Appellant contends that this provision is overly broad and could result in violation of probation for nonsubstantial and unintentional activities. Nonetheless, no objection to this condition was made below, thus it was not preserved for appellate review. *See Maddox v. State*, 708 So. 2d 617 (Fla. 5th DCA 1998), *rev. granted*, 718 So. 2d 169 (Fla. 1998); *Maxlow v. State*, 636 So. 2d 548 (Fla. 2d DCA 1994) (claim that condition of probation was invalid because too vague was waived by not raising it in trial court either when condition was imposed or by motion to strike).

AFFIRMED. (DAUKSCH and THOMPSON, JJ., concur.)

* * *

Torts—Contracts—Securities—Action by receiver for insolvent life insurance company alleging that defendants misrepresented or failed to mention nature and riskiness of collateralized mortgage obligations and their suitability as investments for life insurance company—Error to dismiss tort claims against defendants with whom plaintiff did not have a contractual relationship on ground that claims were barred by economic loss rule—Error to dismiss unjust enrichment claims against parties with whom plaintiff had no contract on ground that plaintiff had adequate legal remedy—Court properly entered summary judgment on breach of contract and breach of warranty claims in favor of defendant with whom plaintiff was not in privity of contract—Error to dismiss fraud claims on ground that plaintiff did not adequately plead fraud—Fraud claim can be based on misrepresentations as to past experience or promises of future action where at the time the statement was made the maker had no intent to perform—Error to dismiss Florida Securities Act claim as barred by statute of limitations—Issue as to statute of limitations is not resolvable on motion to dismiss unless from the face of the complaint the application of the defense is apparent

DONNA LEE WILLIAMS, etc., Appellant, v. BEAR STEARNS & CO., etc. et al., Appellees. 5th District. Case Nos. 97-2404 & 97-2405. Opinion filed December 23, 1998. Appeal from the Circuit Court for Orange County, Walter Komanski, Judge. Counsel: Peter N. Smith and Leon Handley and Ronald Harrop of Gurney & Handley, P.A., Orlando, for Appellant. Peter Carr of Bernard H. Dempsey, Jr. of Dempsey & Sasso, Orlando, and Gary G. Staab, Scott S. Balber of Morgan, Lewis & Bockius, New York, for Appellees Charles Ramsey and Frank R. Ramirez. Michael R. Levin and Suzanne M. Barto of Rumberger, Kirk & Caldwell, P.A., Orlando, for Appellee Franklin Resources Incorporated. No Appearance for Appellee Bear Stearns & Co., Inc.

(GOSHORN, J.) In this consolidated appeal, Donna Lee Williams ("Appellant"), in her capacity as the insurance commissioner of the State of Delaware and the appointed receiver for National Heritage Life Insurance Company ("NHL"), appeals several orders disposing of NHL's claims against Appellees Charles Ramsey, Frank Ramirez, and Franklin Resources, Inc. ("Franklin"). We affirm in part and reverse in part.

NHL, an Orlando-based insurance company, hired various entities to manage its investment portfolio in the early 19[illegible] beginning with Bear Stearns and Company, Inc. ("Bear Stearns") in 1991. While Bear Stearns was its advisor, NHL first acquired its portfolio investments known as "collateralized mortgage obligations" or "CMOs."[1] During 1992, NHL sought investment advice from MMAR Group, for whom Ramsey and Ramirez worked. Allegedly, Ramsey and Ramirez recommended CMOs