IN THE SUPREME COURT OF FLORIDA

JOHN W. ELLIS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 96,551
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	

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AMENDED INITIAL BRIEF OF PETITIONER

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ON REVIEW FROM THE SECOND DISTRICT COURT OF APPEAL
LAKELAND DIVISION

APPEAL NO. 98-3330

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MARK A. GRUWELL
Law Offices of Mark A. Gruwell
747 North Washington Boulevard
Sarasota, Florida 34236
(941) 365-4402

Florida Bar No. 0946575
Attorney for Petitioner

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STATEMENT OF THE CASE

On October 21, 1997, the State filed an Information charging Petitioner with two counts of alleged criminal conduct: capital sexual battery and burglary of a dwelling with assault or battery. (I:175). Prior to trial, Petitioner filed a Motion to Suppress Statements, Admissions, or Confessions wherein Petitioner sought to suppress statements allegedly made to two detectives during an interrogation. (II:209). Petitioner alleged that he was intoxicated at the time of making the statements and that the detectives had elicited a quid pro quo confession. (I:68-70; II:209).

At the hearing, the detectives testified that they did not see any evidence of intoxication. (I:8,18-9,27). The detective conducting the interrogation stated that he read Petitioner his Miranda rights, although he did not have Petitioner complete a written Miranda acknowledgment form. (I:9-10,20). Petitioner allegedly told the detective that on the night of the alleged incident, he had consumed a large quantity of Busch beer. (I:12). Petitioner allegedly explained that at approximately 4:00am, he took a bicycle over to a trailer and noticed that the front door to the trailer was open. (I:12). Petitioner reportedly told the detective that he saw a girl inside the trailer and that he

allegedly told the girl that he was her daddy. (I:12-3,25-6). According to the detective, Petitioner said that he kissed the girl on the forehead, laid the girl down, and rubbed her stomach. (I:13-4,26). Petitioner reportedly admitted to touching the girl's leg, but denied touching her vagina, and further denied engaging in any type of sexual conduct with the girl. (I:14,22-3,26).

At this point in time, there was a lull in the interrogation and the second detective asked Petitioner whether he needed counseling.[1] (I:15). Petitioner responded in the affirmative and asked the second detective to leave the interrogation room. (I:15). When the second detective left the interrogation room, Petitioner asked about a possible deal. (I:16). According to the detective, Petitioner said that he would not deny the complainant's accusations or otherwise call the complainant a liar, although he did not confess to, or admit, any of the charges. (I:16-7). Petitioner refused to give a taped statement. (I:17-8).

Petitioner's mother testified that Petitioner was intoxicated when she brought Petitioner to the sheriff's department to be interrogated by the detectives. (I:38-9). Petitioner also testified that he was intoxicated when he went to the sheriff's

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1. The detective testified at trial that he had no authority, no ability, and no intention of offering Petitioner counseling. (IV:276).

department. (I:50). During the interrogation with the detectives, Petitioner testified that he denied any wrongdoing. (I:52). When the second detective asked Petitioner whether he needed counseling, Petitioner thought that the detectives were attempting to make a deal. (I:52-3). Petitioner denied making any admissions or confessions. (I:53). Petitioner testified that when he refused to give a taped statement, the first detective yelled at him, slammed some books down and, shortly thereafter, arrested Petitioner. (I:67).

Following the hearing, the court denied Petitioner's motion. (I:74). The court found that a preponderance of the evidence showed that the statements were freely and voluntarily made and that Petitioner understood his rights. (I:74-5). The court also indicated that Petitioner's mind was sufficiently clear and unhampered and that any questions relating to the need for counseling were not a factor in the interrogation. (I:75).

Prior to trial, the State filed a Notice of Intent to Offer Child Hearsay Statements Pursuant to Florida Statute §90.803(23), seeking to introduce four hearsay witnesses. (II:214). The first hearsay witness was the complainant's brother, who testified that following the alleged incident, the complainant told him that a man

referring to himself as the complainant's daddy[2] had entered her bedroom and touched and licked her private area. (I:87; II:214; III:109). Additionally, the complainant told her brother that the man had left a bicycle outside. (I:88; III:110). Her brother thought that the complainant was dreaming since he did not see or hear anyone in the trailer that night. (I:89,95; III:110,112-113). The State characterized these statements as spontaneous and excited utterances. (I:136; II:215).

The second hearsay witness was the complainant's mother, who testified that the complainant woke her up and told her that her daddy had entered her bedroom, rubbed the inside portion of her leg, kissed and licked her private part, spit on his finger, and inserted his finger into her private part. (I:98-99; II:215). The complainant also told her mother that the man, who was described as having gray hair, wanted the complainant to touch his private part, but she refused. (I:99,102; II:215). The complainant's mother spotted a bicycle in the driveway but did not see or hear anyone

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2. Petitioner is not the complainant's father and the complainant had never seen Petitioner before, except at the age of six months. (I:91,104). Petitioner had been married to the complainant's mother. (I:104). The marriage was described as turbulent. (I:106). At various times during the investigation, the complainant's mother verbally opined that Petitioner was the perpetrator. (I:92). These opinions were made known to a variety of individuals, including the complainant, the complainant's brother, and a guidance counselor. (I:93,105-06,119).

else inside the trailer that night. (I:100, 105). The police were then contacted. (I:102). The State characterized these statements as spontaneous. (I:138; II:215).

The third hearsay witness was a deputy sheriff who responded to the complainant's residence. (II:215). The deputy sheriff testified that the complainant said a man had entered her bedroom, woke her up, and touched her private area. (I:116; II:215-16; IV:224). The complainant further told the deputy sheriff that the man identified himself as her daddy, spit on his finger, put his finger into her private part, and moved it around. (I:116; II:216; IV:224). Additionally, the complainant told the deputy sheriff that the man had licked her private parts with his tongue and also wanted the complainant to touch his "wiener," which she described as fat. (I:117; II:216; IV:224). The State characterized the statements as spontaneous. (II:216).

The fourth and final hearsay witness was an investigator with the child protection team.[3] (II:216). The videotaped interview occurred three days after the alleged incident. (II:216-17). During the interview with the child team investigator, the

3. The child team investigator did not testify at the hearing. Instead, the court viewed the videotaped interview between the child team investigator and the complainant. (I:84). The State sought to introduce the videotape into evidence.

complainant initially denied that she had experienced a bad touch from anyone except her brother. She then later told the child team investigator that the man, who was described as being tall and having gray hair and no glasses, touched her private area, licked the outside of her private area, spit on his finger, and put his finger on the outside of her private area. (I:124-26; II:216-17; III:74-77,81-84,104). The complainant further told the child team investigator that the man wanted her to touch his "wiener," which she refused to do. (II:217; III:78). During the interview, the complainant told the child team investigator that she did not know the identity of the man, but that the man referred to himself as being her daddy. (I:124; III:75,81). She did tell the child team investigator that she would be able to recognize the man again. (III:87). Notably, the complainant also told the child team investigator that the man had been over to the trailer before with her brother's friends. (III:88). At the conclusion of the interview, the complainant told the investigator that she did not know the difference between the truth and a lie. (III:90). As with the other hearsay statements, the State characterized these statements as spontaneous. (II:217).

The complainant did not testify at the hearing because she claimed to have only a limited memory of the alleged incident.

(I:122-23). During a discovery deposition, the complainant testified that a man with gray hair woke her up and touched and licked her private area. (I:123). She identified the perpetrator as Petitioner, claiming that she remembered seeing Petitioner when she was a baby. (I:123-24). However, she was unable to identify the photograph of Petitioner during a subsequent photo lineup. (I:127-28).

After the hearing, the court found each of the hearsay witnesses, including the videotape, individually admissible. (I:139). The court noted:

> "I think there was sufficient threshold reliability for the statements to be admissible. And beyond that it would be the jury's determination as to credibility. I consider the time, content and circumstances and I'm satisfied on each of these statements. There are sufficient safeguards of reliability. I find no reason not to believe, and I would find that each of the sources for purposes of the Court's required credibility, as to speak, in the determination of these hearings that the sources are reliable. There's no indication as to having any concerns about the mental maturity of the child to be able to describe what she has described. No indication related to her -- that she has an inability to distinguish reality from fantasy. There appears to be no reason as far as the child is concerned to believe that she had a relationship with the defendant that would cause her to testify falsely. She was still emotionally affected by the incident described at the time she reported it. The statements to [her brother] and her mother were spontaneous. The statements to all of the witnesses, [the deputy sheriff] and the videotape included, were basically in response to non-leading questions. The statements were made in the first available opportunity and consisted of an age appropriate

> childlike description of the allegation and used terminology that would be expected of a child with similar age. The statement was made to a number of people. The statements were, as far as admissibility, not vague or contradictory. There are contradictions that can be developed but not rising to the level to make it inadmissible, that would go to weight. There's insufficient showing of actual improper influence on the child beyond the suggestions that have been made. And again, that would be a jury issue. I'm not certain in making this ruling as to the credibility of the child because of the prior domestic situation. The relationship between the child and the mother and [her brother], there is no indication that there was anything other than a normal relationship between them as you would expect between a child and a mother and a child and a brother...I will add related to videotape, while you're thinking about this, I made a few notes on that, that she appeared alert to me, observant. She answered the general questions correctly and in a non-hesitant manner. It was a non-coercive environment. She had at different times indicated what I clearly thought to be some frustrations with having to continue to answer questions related to the subject when they're talking about certain area, but I felt that added to her credibility as opposed to detracting from it in the way I viewed the video." (I:139-141).

The court also found that the statements made to the complainant's brother and mother constituted excited utterances. (I:142).

The case proceeded to a jury trial. During trial, the complainant testified that she remembered a man coming into her room one night. (III:43). She did not know the identity of the man, although she described the man as wearing a red shirt and blue pants with a belt. (III:43). Upon questioning, the complainant either didn't know or didn't remember what happened that night and

denied that the man said anything to her during the alleged incident. (III:44).

A few minutes later upon further questioning, the complainant testified that her underwear had been pulled off and that the man licked her private area. (III:46). The complainant didn't remember anything else occurring and denied being touched by the man. (III:46).

After even further questioning, the complainant testified that the man exposed himself. (III:47). She said the man had a fat wiener. (III:47). The complainant testified that she told her brother what had happened. (III:49). She also remembered telling the child team investigator what had happened. (III:49). The complainant said she told the child team investigator the truth. (III:50).

At this point during the trial, the prosecutor sought to introduce the videotaped interview between the child team investigator and the complainant into evidence. (III:50). The court commented that playing the videotape was the equivalent of using a written statement to refresh the memory of a witness.[4]

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4. The court commented: "Let me hear both of your arguments as to how this would be similar or different from showing a witness a prior written statement or a deposition transcript, et cetera, how this procedure would relate to that procedure." (III:51).

(III:51). Petitioner objected. (III:50-56,61-63). The court overruled the objection and admitted the videotape into evidence for the purpose of refreshing the complainant's memory and as an exception to the hearsay rule. (III:53, 55).

The videotape was played for the jury. (III:65; IV:231). After the videotape was played, the complainant testified that the videotape helped her remember what had happened. (III:91). The complainant said that the man spit on his finger and then ran outside. (III:91). When asked whether the man touched her, the complainant answered in the negative. (III:91-92). Later, upon further questioning, she answered the question in the affirmative. (III:92).

During cross examination, the complainant said that she had been told by her mother that the man who allegedly molested her was Petitioner.[5] (III:98). The complainant told the jury that Petitioner was not her father. (III:98). She had no memory of ever seeing Petitioner. (III:99). Further, the complainant was unable to pick out the man from a photo lineup. (III:102). When asked whether Petitioner was the man who had entered her bedroom, the complainant indicated in the negative. (III:103). The

5. The complainant testified that her mother also told her brother and her guidance counsel that the man was Petitioner. (III:98).

complainant testified that she was sure that Petitioner was not the man.[6] (III:103).

The complainant's brother testified next. (III:105). The complainant's brother's testimony was largely consistent with the testimony adduced during the hearing on the admissibility of the hearsay statements. During cross examination, the complainant's brother admitted that her mother told him and the complainant that the man who molested his sister was Petitioner. (III:114). He also testified that a neighbor with the last name of Miller is a tall man with gray, curly hair. (III:115).

During a recess, the court engaged in general discussion about the admissibility of the testimony of the complainant's mother and the deputy sheriff. (IV:130-138). The court considered the testimony of the complainant's mother to be an excited utterance. (IV:133). However, the court instructed the prosecutor not to cover the same details of the alleged incident that would be covered by the testimony of the deputy sheriff. (IV:137-38).

The next witness was the complainant's mother, who testified that there was a security problem with the front door of the

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6. Since the complainant testified that the man did not wear glasses, trial counsel had Petitioner remove his glasses. The complainant still testified that she was sure that "this is not the man with the gray, curly hair you saw that night." (III:105).

trailer. (IV:139,145). She had been married to Petitioner for several years. (IV:147,153). Although her relationship with Petitioner was initially positive, it eventually turned sour and turbulent. (IV:148-50). Ultimately, Petitioner went to prison. (IV:151). The complainant's mother visited Petitioner prison on at least one occasion. (IV:151). She advised Petitioner that she wanted a divorce, and a restraining order was subsequently entered against Petitioner. (IV:151,156-57,158).

The complainant's mother then testified about the alleged incident, which was her birthday. (IV:166). She had put her children to sleep in separate bedrooms in the trailer. (IV:172). She was awakened by the complainant at approximately 4:30am. (IV:172). The complainant told her that a very tall man with gray hair had been in the trailer. (IV:173,178,180). After being told this, the complainant's mother picked up a bat and went outside. (IV:175-76). She confiscated a bicycle which she noticed out in front of the trailer. (IV:176-77). The complainant's mother assumed that the man was Petitioner and she subsequently contacted the police. (IV:182-84).

During cross examination, she admitted to living on a very tight budget. (IV:195). She had apparently contacted a personal injury lawyer in an attempt to get money from her landlord for the

alleged incident. (IV:197-98). The complainant's mother admitted that she told a guidance counselor that Petitioner was the man that molested her daughter, and further acknowledged that her daughter and son could have overheard her make the accusation about Petitioner. (IV:211,213-14). She also acknowledged that the complainant had a habit of masturbating in public. (IV:207-10).

The deputy sheriff testified next. (IV:217). The deputy sheriff's testimony was similar to the testimony he offered during the hearing regarding the admissibility of the hearsay witnesses. The deputy sheriff located a can of Busch beer outside the trailer. (IV:227). The deputy sheriff testified that the complainant described the man as having a belt buckle and smelling like beer. (IV:225-26). The complainant's mother accused Petitioner of being the man. (IV:229).

Petitioner's mother testified next. (IV:231). She testified that Petitioner told her that he had been drinking on the evening before the incident, that he had loaded a bicycle on a friend's truck, and that he took the bicycle over to the trailer. (IV:236). Petitioner told her that he noticed the door to the trailer was open and that he could see a child inside the doorway. (IV:236). Petitioner told her that the child, after inviting him into the trailer, said that her mother was in bed with her uncle. (IV:236-

37). Petitioner explained that he then left the trailer, leaving the bicycle behind. (IV:237-38). Petitioner's mother told a detective what Petitioner had said about the incident. (IV:242). When Petitioner learned that he was being accused of committing a crime, Petitioner became visibly upset and demanded to go to the sheriff's department to clear his name.[7] (IV:243,249). Petitioner's mother acknowledged that she was not fond of Petitioner's former wife and testified that about two years prior to Petitioner's release from prison, the complainant's mother said that she was going to "tell them

something else to keep [Petitioner] in prison" and that she "never want[ed] [Petitioner] to ever get out." (IV:250-52,257).

The two detectives testified next. (IV:259). Their testimony was similar to the testimony elicited during the hearing on Petitioner's Motion to Suppress Statements, Admissions, or Confessions. The second detective testified that he prepared a photo package to show the complainant. (V:377,411). The photo package contained a photograph of Petitioner. (V:377, 411). The complainant did not identify Petitioner’s photograph. (V:377,411).

A pediatrician then testified. (IV:305). The pediatrician

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7. Petitioner's purpose for visiting the sheriff's department was not to turn himself in, but rather to clear his name. (IV:255).

examined the complainant approximately four days after the alleged incident and reportedly discovered a notch on the complainant's hymen. (V:311,321). The pediatrician opined that the notch was a possible indicator of penetration. (V:322-24). The pediatrician found no lacerations, abrasions, tears, or bruises on the complainant. (V:337-38). The pediatrician acknowledged that it was possible for a notch to form in the absence of sexual abuse, and that it is was also possible for an individual to be born with a notch on the hymen. (V:340-41). The pediatrician had no idea what caused the notch, did not know how long the notch had been present, and testified that her medical finding could have been the result of a straddle injury. (V:341,354).

Petitioner's cousin then testified. (V:361-62). Petitioner's cousin went out drinking at a bar with Petitioner on the night of the alleged incident. (V:363-64). They left the bar after closing, which was around 2:00am. (V:364). Petitioner had possibly mentioned something about wanting to see his former wife because he was still in love with her. (V:365). However, he testified that he did not take Petitioner over to the trailer that evening. (V:366). Approximately one week prior to trial, he received a telephone call from Petitioner, who said that he remembered being dropped off at the trailer later that night.

(V:367). With respect to the telephone call, Petitioner's cousin testified that he was never asked to change or otherwise falsify testimony; but rather he believed that Petitioner was merely conveying what he remembered that evening. (V:368).

At the close of the State's case, Petitioner moved for a judgment of acquittal on both counts. (V:418). The court denied the motion, stating that sufficient circumstantial evidence existed for the case to be submitted to the jury. (V:418-19).

The defense called an expert physician to testify. (VI:426). The physician studied photographs of the complainant's hymen and opined that the photographs depicted no physical injury whatsoever. (VI:429). The physician noted an irregularity on the complainant's hymen but with no evidence of any traumatic injury. (VI:430-31). After performing some research, the physician found a case wherein a six year old girl with no complaints about sexual abuse had a notch on her hymen similar in appearance to the complainant's irregularity. (VI:431). The physician opined that it was possible for an individual to be born with a notch on the hymen, and that it was also possible for a child engaging in masturbation to inadvertently inflict an injury on the hymen. (VI:432-33).

The defense then called a pediatrician. (VI:452). The pediatrician examined the complainant approximately one year prior

to the alleged incident after complaints that the complainant had been repeatedly rubbing her vagina in public. (VI:453-54,56-57). The results of the examination indicated normal findings. (VI:458). The pediatrician opined that he would have noticed the existence of a notch because it is a possible sign of sexual abuse,[8] although it is not diagnostic of sexual abuse. (VI:458,464,467). The pediatrician further opined the insertion of an object into the vagina while masturbating could alter the hymenal ring of an individual. (VI:459-60). Finally, the pediatrician opined that individuals may be born with a notch on the hymen. (VI:460-61).

The defense then called the complainant's mother's landlord. (VI:471). Approximately two months prior to Petitioner's release from prison, the complainant's mother told the landlord that she would not rest until "[Petitioner's] ass was back in prison." (VI:474).

The defense the called Petitioner's brother. (VI:483). Approximately six to eight weeks prior to Petitioner's release from prison, the complainant's mother said that she would do all she could to put Petitioner back in prison. (VI:484-85).

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8. The pediatrician indicated that a notch is consistent with a finger penetrating the vagina of a child. (VI:470).

Petitioner's brother acknowledged that Petitioner admitted to dropping off a bicycle at his former wife's trailer the night of the alleged incident. (VI:489). Petitioner told him that he went up to the door of the trailer, saw a girl, patted the girl on the back, told the girl to go back to sleep, and left the trailer. (VI:491-92).

The defense then called Petitioner's sister in law. (VI:496). Sometime during the 1990's, the complainant's mother said that Petitioner would never get out of prison and that if he did get out, she would do whatever it took to send Petitioner back to prison. (VI:497).

The defense also called a teacher. (VI:504). The teacher had witnessed the complainant masturbating in the classroom on different occasions. (VI:505). The teacher indicated that it was a common occurrence to see a child masturbate at school. (VI:506-07).

The defense then called a guidance counselor. (VI:508). The complainant's mother told the guidance counselor that she had actually caught Petitioner molesting the complainant and, upon being noticed, Petitioner ran out of the window. (VI:509). The complainant, who was a little frightened, was present when the accusation was made. (VI:509,513).

Petitioner did not testify and the defense rested. (VI:516). Petitioner renewed the motion for a judgment of acquittal, which was denied by the court. (VI:516-17). Closing arguments followed and, after reviewing the videotaped interview again, the jury returned a guilty verdict on both charges. (VI:625-26).

The prosecutor sought to sentence Petitioner as a prison releasee reoffender.[9] Petitioner argued that the Prison Releasee Reoffender Act was unconstitutional on its face in that it failed to provide any mechanism to notify a defendant about any intention to seek an enhanced sentence, and that it also placed the sentencing discretion with the prosecutor rather than the judge. (II:276-277; VI:629-30). The court denied Petitioner's motion and Petitioner was sentenced to life imprisonment on the capital sexual battery charge and a concurrent 30 years imprisonment on the burglary charge. (VI:634-35). A few days later, after the original sentencing, the court resentenced Petitioner to life imprisonment on the burglary charge. (VI:641).[10]

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9. The State served a Notice of [Petitioner's] Qualifications as a Prison Releasee Reoffender and Required Sentencing Term Pursuant to Florida Statute §775.082. (I:185).

10. The court commented: "I regret having to bring you back out for basically a technical resentencing on Count II...I've been advised that Count II, although styled as a first degree felony, did not make it clear that, by law, Count II burglary of a dwelling with an assault or battery, is a first degree felony punishable by life. And because of the prison releasee reoffender sentencing,

Petitioner appealed the judgment and sentenced to the Second District Court of Appeal. The appellate court affirmed Petitioner's judgment and sentence, but certified conflict with respect to the issue relating to the constitutionality of the Prison Releasee Reoffender Act. This review follows.

ISSUES PRESENTED

I. WHETHER THE PRISON RELEASEE REOFFENDER ACT IS UNCONSTITUTIONAL?

II. WHETHER THE COURT ERRED BY DENYING PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL?

III. WHETHER THE COURT ABUSED ITS DISCRETION BY ADMITTING HEARSAY UNDER THE CHILD VICTIM EXCEPTION TO THE HEARSAY RULE?

IV. WHETHER THE COURT ABUSED ITS DISCRETION BY ADMITTING HEARSAY UNDER THE EXCITED UTTERANCE EXCEPTION TO THE HEARSAY RULE?

V. WHETHER THE COURT ERRED IN DENYING PETITIONER'S MOTION TO SUPPRESS STATEMENTS, ADMISSIONS, OR CONFESSIONS?

VI. WHETHER THE COURT ERRED IN RESENTENCING PETITIONER ON COUNT II?

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that kind of charge also carries a life sentence, as opposed to a thirty year sentence." (VI:640).

SUMMARY OF THE ARGUMENT

First, the Prison Releasee Reoffender Act is unconstitutional because it violates the separation of powers clause set forth in the Florida constitution. Under the Prison Releasee Reoffender Act, the discretion as to whether to seek an enhanced sentence is vested entirely in the hands of the state attorney, a member of the executive branch of government. Once a defendant is declared to be a prison releasee reoffender, the court is required to sentence the defendant to the specified maximum sentence. In such a situation, the court does not possess any sentencing discretion whatsoever. Because sentencing is a function of the judicial branch of government rather than the executive branch of government, the Prison Releasee Reoffender Act impermissibly allows the executive branch of government to invade the functions of the judicial branch of government.

The Prison Releasee Reoffender Act is also unconstitutional because it violates due process. The Prison Releasee Reoffender Act does not contain any provision requiring the state attorney to notify a defendant that an enhanced sentence is being sought. Because the state attorney possesses discretion as to whether to seek an enhanced sentence under the Prison Releasee Reoffender Act, minimum due process requires a provision requiring the state

attorney to sufficiently notify a defendant about the possibility of an enhanced sentence, similar to the notice provisions set forth in the habitual offender statute. Since the Prison Releasee Reoffender Act does not contain any such provisions, it violates fundamental due process.

Second, the court erred by denying Petitioner's Motion for Judgment of Acquittal. The complainant testified at trial that Petitioner was not the man that had any sexual contact with her. Furthermore, the alleged victim was unable to identify Petitioner as the perpetrator during a photo lineup shortly after the alleged incident. Moreover, the description of the perpetrator given by the complainant did not match the physical attributes of Petitioner. Because of this, the State failed to prove the identity of Petitioner as the perpetrator beyond a reasonable doubt. And, because the only evidence indicating criminal conduct arose from prior inconsistent hearsay statements of the alleged victim, Petitioner's convictions cannot stand.

Third, the court abused its discretion by admitting hearsay into evidence under the child victim exception to the hearsay rule. The court failed to make sufficient findings of fact. The court's findings of fact consisted of conclusory statements in boiler plate language. In fact, some of the court's findings directly

conflicted with the evidence adduced during the hearing. Additionally, the hearsay evidence was cumulative and created a significant danger that the jury would place undue weight on the credibility of the complainant because of the repetitive nature of the hearsay evidence.

Fourth, the court abused its discretion by admitting hearsay into evidence under the excited utterance exception to the hearing rule. The evidence showed that the complainant had time for reflective thought prior to making the hearsay statements. Such a showing renders the hearsay inadmissible, even though the complainant may still have been experiencing emotional stress from the alleged event.

Fifth, the court erred in refusing to suppress statements made by Petitioner to two detectives during an interrogation. During a lull in the interrogation, one of the detectives asked Petitioner whether he needed counseling. From Petitioner's perspective, a deal was being offered. Given the fact that the detective asked the question about counseling for the sole purpose of engaging Petitioner in conversation, any response made by Petitioner was the product of quid pro quo conduct by the law enforcement officers. Additionally, evidence showed that Petitioner was intoxicated at the time of the interrogation.

Sixth, the court erred in resentencing Petitioner on Count II of the Information. The court initially imposed a 30 year sentence on Count II. A few days later, the court resentenced Petitioner to life imprisonment on Count II, even though the initial sentence received by Petitioner was a legal sentence. Since the court had no authority to increase Petitioner's original, lawful sentence, the court erred by resentencing Petitioner on Count II of the Information.

ARGUMENT

I. THE PRISON RELEASEE REOFFENDER ACT IS UNCONSTITUTIONAL.

A. THE PRISON RELEASEE REOFFENDER ACT VIOLATES THE SEPARATION OF POWERS CLAUSE OF THE FLORIDA CONSTITUTION.

Under Florida's Prison Releasee Reoffender Act, "[i]f the state attorney determines that a defendant is a prison releasee reoffender..., the state attorney may seek to have the court sentence the defendant as a prison releasee reoffender." §775.082(8)(a)(2), Fla. Stat. (1997)(emphasis added). Once the state attorney seeks to have the defendant sentenced as a prison releasee reoffender, the court is required to sentence the defendant to the maximum sentence under the law, assuming that the defendant is not subject to Florida's habitual offender statutes. See §775.082(8)(a)(2)(a)-(d), Fla. Stat. (1997) and §775.082(8)(d), Fla. Stat. (1997).

Following passage of the Prison Releasee Reoffender Act, an issue arose as to whether the court had any sentencing discretion with respect to a defendant who was determined to be a prison releasee reoffender. The Second District Court of Appeal held that despite the express language of the Prison Releasee Reoffender Act, the court nevertheless retains some degree of discretion in imposing the mandated sentence under the Prison Releasee Reoffender Act. State v. Cotton, 728 So.2d 251 (Fla. 2d DCA 1998). However,

the First and Third District Courts of Appeal reached contrary conclusions. See McKnight v. State, 727 So.2d 314 (Fla. 3d DCA 1999)(upon proof that the defendant is a prison releasee reoffender, court has no discretion to deviate from the mandated sentence under the Prison Releasee Reoffender Act) and Woods v. State, 24 Fla. L. Weekly D831 (Fla. 1st DCA March 26, 1999)(once the state attorney seeks to have a defendant sentenced under the Prison Releasee Reoffender Act, all sentencing discretion is removed from the court).

The correct conclusion is that the court does not possess any discretion in imposing a sentence under the Prison Releasee Reoffender Act. This conclusion is firmly supported by not only a plain reading of the statute, but also by the legislative history behind the Prison Releasee Reoffender Act, both of which make it clear that the court is required to impose the mandatory term of imprisonment once the defendant is classified as a prison releasee reoffender by the state attorney. McKnight, 727 So.2d at 315-16 (citations omitted); Woods, 24 Fla. L. Weekly at D832. The Second District Court of Appeal's holding to the contrary is simply wrong.

This issue is important because in Florida, the powers of the state government are strictly divided into three distinct branches: the executive branch, the legislative branch, and the judicial

branch. Art. I, §3, Fla. Const. See Woods, 24 Fla. L. Weekly at D832 ("Florida's Constitution absolutely requires a 'strict' separation of powers..."). Unless expressly authorized, one branch of state government may not exercise powers belonging to another branch of state government. Art. I, §3, Fla. Const. Sentencing is a function of the judicial branch of government, not the executive branch of government. See Thomas v. State, 612 So.2d 684 (Fla. 5th DCA 1993) and State v. Rome, 696 So.2d 976 (La. 1997).

Although none of the appellate courts have declared the Prison Releasee Reoffender Act unconstitutional under the separation of powers clause of the Florida constitution, at least one appellate court has expressed some degree of discomfort in its holding that the Prison Releasee Reoffender Act does not violate Florida's separation of powers clause. The appellate court in Woods wrote:

> "While we are reasonably confident that we have reached the correct conclusion, we confess that we find somewhat troubling language in prior Florida decisions suggesting that depriving the courts of all discretion in sentencing might violate the separation of powers clause." Id. at D832 (citations omitted).

Thus, even though the appellate court in Woods upheld the constitutionality of the Prison Releasee Reoffender Act with respect to the separation of powers argument, it nevertheless certified a question of whether the Prison Releasee Reoffender Act violates the separation of powers clause of the Florida

constitution.

Judge Sharp espouses the best argument to date that the Prison Releasee Reoffender Act violates the separation of powers clause of the Florida constitution. In his dissenting opinion in Lookadoo v. State, 24 Fla. L. Weekly D1804 (Fla. 5th DCA July 30, 1999), Judge Sharp begins his analysis by noting that the Prison Releasee Reoffender Act places sentencing discretion entirely in the hands of the state attorney, a member of the executive branch of government. Id. at D1804. As Judge Sharp notes, "The judicial branch is shut out of the process entirely." Id. In making these observations, Judge Sharp expressly disagrees with the Second District Court of Appeal's holding in Cotton, which held that the court retains some discretion in imposing a sentence under the Prison Releasee Reoffender Act. Id.

Judge Sharp also correctly observes that sentencing is "traditionally a function of the judiciary." Id. (citations omitted). Because the Prison Releasee Reoffender Act removes all sentencing discretion from the court, it violates Florida's separation of powers clause. Id. Indeed, Judge Sharp's dissenting opinion cites a variety of cases in other jurisdictions wherein statutes have been declared unconstitutional "when the judiciary loses its independence in the sentencing process." Id. (citations

omitted). Quoting Justice Schauer, Judge Sharp agrees that:

> "Constitutional jurisdiction of the court to act cannot be turned on and off at the whimsy of either the district attorney or the Legislature. The power to act under our system of government means the power of an independent court to exercise its judicial discretion, not to servilely wait on the pleasure of the executive." Id. (citation omitted).

Noting that the express language set forth in the Prison Releasee Reoffender Act "makes quite clear that the discretion to seek the mandatory sentence is to be exercised primarily by the prosecutor," Judge Sharp concludes that the Prison Releasee Reoffender Act violates the separation of powers clause of the Florida constitution. Id. at D1804-D1805.

Indeed, the enactment of the Prison Releasee Reoffender Act is part of a growing trend to decrease, and ultimately eliminate, the court's discretion in imposing a sentence upon a defendant. For example, Florida's habitual felony offender statute requires the imposition of certain minimum mandatory sentences for defendants who qualify as habitual offenders. See §775.084, Fla. Stat. (1997). And, several years ago, the adoption and revision of the sentencing guidelines require the imposition of a certain range of imprisonment upon a defendant. See §921.0016, Fla. Stat. (1997).

Although supporters of the Prison Releasee Reoffender Act often cite the habitual offender laws and the sentencing guidelines

in support of their argument that the Prison Releasee Reoffender Act does not violate the separation of powers clause under the Florida constitution, there is an important distinction between the two groups of laws. Under the habitual offender statute, the court retains discretion not to impose the mandated sentence upon a defendant who is determined to be a habitual offender "[i]f the court finds that it is not necessary for the protection of the public to sentence the defendant as a habitual...offender..." §775.084(3)(a)(6), Fla. Stat. (1997). And, under the sentencing guidelines, the court retains discretion to deviate from the recommended sentence either upward or downward by 25%. §921.0016(1)(b), Fla. Stat. (1997). In fact, the court may deviate beyond the 25% limitation upon the finding of certain mitigating or aggravating factors. §921.0016(2), Fla. Stat. (1997). The Prison Releasee Reoffender Act, on the other hand, does not allow the court to exercise any sentencing discretion whatsoever. Unlike the habitual offender law and the sentencing guidelines, the court has no authority to depart from the mandated sentence under the Prison Releasee Reoffender Act once the state attorney utilizes his or her discretion to have the defendant declared to be a prison releasee reoffender.

It is clear that the prison releasee reoffender statute allows

the executive branch of government to encroach upon the judicial branch of government. Under the Prison Releasee Reoffender Act, the state attorney, a member of the executive branch of government, has the sole discretion to decide whether a defendant should be declared a prison releasee reoffender. If the decision is made in the affirmative, the court must impose the mandated sentence. Accordingly, a defendant's sentence is determined at the moment the state attorney decides to declare a defendant to be a prison releasee reoffender. In such a situation, it is the state attorney, and not the court, who determines the defendant's sentence. Because the court has no sentencing discretion whatsoever under the Prison Releasee Reoffender Act, the court is merely acting upon the whim of the state attorney, a practice which, as Judge Sharp concludes, impermissibly invades the judicial branch of government. Accordingly, this Court should declare the Prison Releasee Reoffender Act unconstitutional and remand for resentencing.

B. THE PRISON RELEASEE REOFFENDER ACT VIOLATES DUE PROCESS.

Under the Prison Releasee Reoffender Act, a defendant who reoffends within three years after being released from prison is subject to a maximum mandatory penalty. §775.082(8), Fla. Stat. (1997). As previously observed, the state attorney has the

discretion to have the defendant sentenced under the Prison Releasee Reoffender Act. This is apparent from a plain reading of the statute. However, unlike the habitual offender statute, the Prison Releasee Reoffender Act does not contain any provisions requiring the state attorney to notify the defendant that an enhanced sentence under the Prison Releasee Reoffender Act is being sought. See §775.084(3)(a)(2), Fla. Stat. (1997).

When the state attorney has discretion to impose an enhanced sentence, principles of due process require that the statute contain a provision requiring the state attorney to sufficiently notify the defendant that an enhanced sentence is being sought. See Rhodes v. State, 704 So.2d 1080 (Fla. 1st DCA 1998)(notice provisions relating to habitual offender statute involve fundamental due process); Bogush v. State, 597 So.2d 420 (Fla. 2d DCA 1992)(notice provisions relating to habitual offender statute involve due process), reversed on other grounds, 626 So.2d 189 (Fla. 1993); and State v. Haddix, 668 So.2d 1064 (Fla. 4th DCA 1996)(discretionary nature of habitual offender statute dictates need for notice).

The Prison Releasee Reoffender Act does not contain any mandatory notice provisions whatsoever, even though the statute is discretionary in nature. Accordingly, it is entirely possible for

a defendant to appear at sentencing and learn for the first time that the state attorney is attempting to impose an enhanced sentence under the Prison Releasee Reoffender Act. Such a situation would clearly violate even the most conservative notions of due process. In light of the discretionary nature of the Prison Releasee Reoffender Act, and as evidenced by the preceding cases addressing the requirements of sufficient mandatory notice provisions in favor of defendants subject to enhanced sentences, minimum due process mandates a notice provision similar to that set forth in the habitual offender statute. Because the Prison Releasee Reoffender Act contains no provision requiring the state attorney to notify the defendant that an enhanced sentence is being sought, it does not meet minimum due process standards and, accordingly, is unconstitutional. Therefore, this Court should declare the Prison Releasee Reoffender Act unconstitutional and remand for resentencing.

II. THE COURT ERRED BY DENYING PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL.

A. THE STATE FAILED TO PROVE THE IDENTITY OF THE ACCUSED AS THE PERPETRATOR.

It is well established that the identity of the accused as the perpetrator must be proved beyond a reasonable doubt. In I.F.T. v. State, 629 So.2d 179 (Fla. 2d DCA 1993), a defendant was charged

with burglary and theft. The evidence at trial showed that a witness observed two individuals near a recreation center at approximately 4:00am. The police arrived but, after not seeing anyone, left the area. The individuals returned and the witness called the police again. When the police returned, they noticed that someone had apparently been inside the building. At trial, the witness testified that he did not see any of the perpetrators inside the courtroom. The appellate court found that the state failed to prove identity beyond a reasonable doubt and reversed the defendant's convictions.

In Ponsell v. State, 393 So.2d 635 (Fla. 4th DCA 1981), the defendant was charged with burglary. The evidence at trial showed that police officers responded to an alarm call at a business at approximately 3:30am. One of the police officers observed an individual running into a wooded area. Eventually, a police officer entered the wooded area with a police dog. The police officer located a young male who fled from the police. However, a short time later, the police located an unoccupied vehicle. While staking out the vehicle, the police observed a young male approach the vehicle. The individual was arrested and charged with the crime.

At trial, though, one of the police officers testified that

the defendant was not the person she initially saw run into the woods. Although the other police officer testified that the defendant was the individual arrested that night, the police officer could not testify that the defendant was the same person he encountered in the woods because he had never seen that person's face. The trial court denied the defendant's motion for judgment of acquittal on grounds of identity but the appellate court reversed, reasoning that a fundamental principle of criminal law is that the identity of the perpetrator must be proved beyond a reasonable doubt.

In State v. Green, 667 So.2d 756 (Fla. 1995), the defendant was charged with sexual battery and lewd and lascivious conduct. Although the child identified the defendant as the perpetrator via hearsay statements to others, at trial the child testified that the defendant was not the perpetrator. According to a pediatrician, an examination of the child's vagina indicated evidence of penetration. The trial court denied the defendant's motion for judgment of acquittal on the identity issue but this Court reversed, reasoning that the child's inconsistent statements were insufficient to support a conviction.

Finally, in Owen v. State, 432 So. 2d 579 (Fla. 2d DCA 1983), a case similar to the facts of the instant case, the defendant was

charged with burglary and sexual battery. The evidence showed that when the alleged victim returned to her house, she went to bed and fell asleep in her bedroom. Later, a man appeared in the alleged victim's bedroom. The man disrobed and attempted to have sexual intercourse with the alleged victim. Eventually, the alleged victim escaped outside and went to a neighbor's house. When the alleged victim arrived at her neighbor's house, the neighbor instructed her son and his friend to check out the alleged victim's house. When the neighbor's son and friend arrived at the alleged victim's house approximately a minute later, they observed an individual run out from the garage area, flee through a vacant lot, enter a car, and drive off. Based upon descriptions given by the neighbor's son and his friend, the defendant was arrested and charged with the criminal offenses.

The trial court denied the defendant's motion for a judgment of acquittal relating to the identity of the accused as the perpetrator at the conclusion of the state's case. The appellate court initially observed that the state's case rested upon circumstantial evidence. The appellate court cited well established principles of law which hold that cases involving circumstantial evidence of identity "must be of a conclusive nature and tendency, leading on the whole to a reasonable and moral

certainty that the accused and no one else committed the offense charged." Id. at 581 (emphasis preserved). As the appellate court also observed, "[i]t is not sufficient that the facts create a strong probability of, and be consistent with, guilt. They must eliminate all reasonable hypotheses of innocence." Id. The appellate court reversed the defendant's convictions, finding that the evidence was insufficient to exclude a reasonable hypothesis of innocence, and that the state did not prove beyond a reasonable doubt the identity of the accused as the perpetrator of the charged offense. The appellate court reasoned that the defendant could have been a mere prowler.

In the case at bar, the complainant testified at trial that Petitioner was not the man who did any sexual acts on her. In fact, the complainant testified that she was sure that Petitioner was not the perpetrator. The complainant's testimony is supported by other evidence, including evidence indicating that the man had gray hair, not blonde or brown hair like Petitioner had. Also, the man was described as being very tall, unlike Petitioner. Lastly, the evidence showed that there was a man with gray hair who lived nearby. According to the complainant, she had seen this man over at the trailer before. When this evidence is considered in light of the fact that there was a security problem with the front door

to the trailer, it is clear that the State failed to prove Petitioner as the perpetrator beyond a reasonable doubt.

The State failed to exclude a reasonable hypothesis of innocence that Petitioner arrived after someone else had committed an offense against the alleged victim. The record is replete with evidence to support Petitioner's assertion of a reasonable hypothesis of innocence. First, the door to the trailer was already open when Petitioner arrived. Second, Petitioner saw the alleged victim was distraught and crying. Third, the alleged victim testified that Petitioner was not the perpetrator. Fourth, the description of the perpetrator as given by the alleged victim did not match the description of Petitioner. And, fifth, an individual who generally matched the description of the perpetrator lived down the road. The foregoing evidence does not exclude Petitioner's reasonable hypothesis of innocence and, accordingly, does not, and cannot, establish that Petitioner was the perpetrator beyond and to the exclusion of a reasonable doubt.

This case undoubtably squarely tests our confidence in the criminal justice system. In the case sub judice, the alleged victim testified in open court that Petitioner was not the individual who molested her which, of course, was consistent with her inability to identify Petitioner as the perpetrator during a

photo lineup shortly after the alleged incident. Yet, the trial and appellate courts have upheld Petitioner's convictions, presumably based upon Petitioner's alleged statements given to the detectives during the interrogation. However, during the interrogation, Petitioner denied engaging in any sexual conduct. Petitioner also denied any wrongdoing. In the end, this Court has to ask itself whether, given the complainant's clear testimony that Petitioner was not the man who molested her, it has sufficient confidence to uphold Petitioner's convictions. Petitioner submits that the complainant's testimony indicating that Petitioner was not the perpetrator significantly erodes the confidence of Petitioner's convictions. Accordingly, this Court should reverse Petitioner's convictions.

B. THE ONLY EVIDENCE OF CRIMINAL CONDUCT AROSE FROM INCONSISTENT HEARSAY STATEMENTS.

In Green, a case referred to above, this Court held that prior inconsistent statements of an alleged victim of child abuse are insufficient, in and of themselves, to sustain a conviction. In the instant case, the only evidence of criminal conduct (i.e. sexual battery and burglary) arose from the complainant's prior inconsistent statements. At trial, the complainant initially testified that she remembered a man coming into her bedroom, but nothing else. It was only after further questioning and the

playing of the videotaped interview that the complainant made more detailed accusations which, of course, contradicted her earlier testimony. Considering the fact that Petitioner did not admit or confess to any crimes whatsoever, the only evidence of criminal conduct came from the complainant's prior inconsistent statements. This is especially true given the fact that the medical evidence was in dispute. Consistent with the holding and rationale in Green, this Court should find that there was insufficient evidence to uphold Petitioner's conviction and reverse.

III. THE COURT ABUSED ITS DISCRETION BY ADMITTING HEARSAY UNDER THE CHILD VICTIM EXCEPTION TO THE HEARSAY RULE.

A. THE COURT MADE INSUFFICIENT FINDINGS OF FACT.

Florida Statute §90.803(23) creates a hearsay exception relating to statements made by child victims involving certain sexual abuse offenses. Before such hearsay is admissible, the trial court is required to make specific findings of fact in support of its ruling. §90.803(23)(c), Fla. Stat. (1997). Absent sufficient findings of fact, the hearsay statements are not admissible.

In Garcia v. State, 659 So.2d 388 (Fla. 1995), the state charged the defendant with lewd and lascivious conduct. The state sought to introduce hearsay testimony from a certified facilitative listener, the child's aunt, the child's teacher, and a child team

investigator.[11] The trial court found the statements to be admissible and made summary findings relating to: the child's age; the child's mental status; the child's credibility; the length of time over which the child gave the statements; vagueness and consistency of the child's statements; lack of outside influence on the child; and lack of cumulativeness.

This Court reversed, reasoning that the trial court's findings of fact were insufficient. This Court observed that the trial court is required to set forth specific reasons in the record in support of its ruling. Boiler plate findings that merely track the language of the statute, and findings that are otherwise conclusory in nature, are insufficient. Id. at 391-92 (citing Feller v. State, 637 So.2d 911 (Fla. 1994) and Diaz v. State, 618 So.2d 346 (Fla. 2d DCA 1992)). This Court placed great emphasis on the specific nature of the findings of fact since the child victim hearsay exception is necessarily intertwined with concerns relating to a criminal defendant's constitutional right to confrontation. Id. at 392 (citing Hopkins v. State, 632 So.2d 1372 (Fla. 1994)).

Accordingly, in making findings of fact under the hearsay exception, a trial court must specifically address why the time,

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11. The interview between the child and the child team investigator was videotaped.

content, and circumstance of each individual statement provides sufficient safeguards of reliability. Id. at 392 (emphasis added). This is especially true in situations where the trial testimony of a child contradicts the child's hearsay statements. Such contradictions cannot simply be ignored as a jury issue. This Court wrote:

> "We pause at this juncture to emphasize that our observations regarding the inconsistencies between the hearsay statements and the child's trial testimony, as well as between some of the statements themselves, should not be construed as comments on the child's credibility. Instead, our analysis was intended to underscore the prejudice which may befall a defendant, accused of one of the most heinous and widely condemned crimes known to society, when a trial court allows child hearsay statements into evidence without following the stringent, constitutionally-mandated requirements of §90.803(23)..." Id. at 393.

In the end analysis, this Court found that in light of the insufficient findings of fact, the trial court abused its discretion by admitting the hearsay evidence at trial. It reversed and remanded.

Other appellate courts have reached similar results. In Kertell v. State, 649 So.2d 892 (Fla. 2d DCA 1995), the defendant was charged with capital sexual battery. The state sought to introduce hearsay statements of the child. A hearing was held and the trial court found the statements admissible, reasoning that the child gave candid statements which contained a graphic nature of

the allegations. The appellate court held that the trial court made only summary findings which were insufficient to justify the admission of the hearsay evidence. The appellate court reversed and remanded.

In Barton v. State, 704 So.2d 569 (Fla. 1st DCA 1997), the defendant was charged with capital sexual battery. The state sought to introduce child hearsay statements from the child's stepmother, a nurse, and a police officer. The trial court allowed the evidence in at trial, which also included testimony from a nurse that the child had scarring of the hymen, an indicator of penetration. The appellate court ruled that the trial court abused its discretion in admitting the child hearsay into evidence because the trial court merely tracked the language set forth in the child hearsay exception. The appellate court reversed and remanded.

Lastly, in Mathis v. State, 682 So.2d 175 (Fla. 1st DCA 1996), the defendant was charged with sexual battery. The state sought to introduce child hearsay statements made to a police officer. The trial court noted:

> "I think the child -- well, obviously, the child has, in fact, testified in the case. The court does find the child can be led. On the other hand, the details supplied by [the police officer] as to the directions to the airport, the specific detail as to rough, smooth, then rough, the overall description provide enough indicia of reliability that the statement should be admitted. I think the relationship of the child to the

> offender is such that the child obviously knows him. I mean, he's -- I don't think that's really in doubt at all. I think the big question for the jury, of course, is going to be the -- whether this-- whether this actual [sic] took place of sexual misbehavior. I think everything else, though, is pretty clear, is going to relate. The child's testimony clearly, somewhat hesitantly. I think the child is able to relate. I think that the hearsay testimony provided is proper in this case because I don't think the child's testimony in and of itself is -- it's weak, in that I think she does have a hard time understanding things. She had a difficult time understanding before and after. But I think that her taking [the police officer] around was reliable testimony. I think [the police officer] has demonstrated, through his training, experience, that he's dealt with cases and understands that you do let them do the talking and that you don't try to put words in their mouth." Id. at 177.

The appellate court reiterated the requirement that findings of fact cannot be founded upon mere boiler plate language. In analyzing the trial court's findings of fact, the appellate court found that they were insufficient. The appellate court reversed and remanded.

Consistent with the foregoing cases, the court's findings in the case at bar are insufficient. It is clear that the court's findings of fact consist of boiler plate language in a summary and conclusive fashion. The court gives very little, if any, reasons why there were sufficient safeguards of reliability; why the sources were reliable; why the court had no concerns about the mental maturity of the complainant; how and why the child could

distinguish between fantasy and reality; the facts supporting the court's conclusion that the complainant was still emotionally affected when she made the statements; why the statements were not vague and contradictory[12]; why there was no improper influence; and the facts supporting the court's conclusion that the complainant enjoyed a normal relationship between her mother and brother.[13] In sum, the court's findings were insufficient. Accordingly, the court abused its discretion by admitting the hearsay testimony.

Clearly, the error in admitting the hearsay testimony was not harmless. When the record is viewed without the admission of the prejudicial hearsay statements, there is no substantial competent evidence against Petitioner. This is true because not only did the alleged victim not identify Petitioner as the perpetrator, but the alleged victim affirmatively testified that Petitioner was not the man who molested her. Furthermore, the medical evidence was in dispute and there were clear motives on the part of the alleged victim's mother to fabricate the incident. Indeed, most of the trial could be considered a credibility contest. Unfortunately,

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12. This was certainly not the case at trial wherein the complainant's initial testimony conflicted with the hearsay evidence.

13. This finding of fact is questionable since the complainant did not first seek out her mother and, additionally, had indicated she experienced bad touches from her brother.

the admission of the prejudicial hearsay statements tilted the contest against Petitioner to the extent that but for the admission of the alleged victim's hearsay statements, it cannot reasonably be said that the verdict was not affected by the evidence.

B. THE HEARSAY STATEMENTS WERE CUMULATIVE.

Hearsay evidence admitted under the child victim hearsay exception is subject to a cumulative analysis. In Pardo v. State, 596 So.2d 665 (Fla. 1992), the defendant was charged with multiple counts of capital sexual battery. The state sought to introduce hearsay statements from nine individuals. This Court noted that Florida Statute §90.403 must be considered when admitting the hearsay evidence. This Court wrote:

> "When the witness has merely testified on direct examination, without any impeachment, proof of consistent statements is unnecessary and valueless. The witness is not helped by it; for, even if it is an improbable or untrustworthy story, it is not made more probable or more trustworthy by any number of repetitions of it..." Id. at 668 (emphasis preserved).

This Court further wrote:

> "The salutary nature and the necessity of such a rule are clearly apparent upon reflection in cases like the present, for without that rule a witness's testimony could be blown up out of proportion to its true probative force by telling the same story out of court before a group of reputable citizens, who would then parade onto the witness stand and repeat the statement time and again until the jury might easily forget that the truth of the statement was not backed by those citizens but was solely founded upon the integrity of the said witness. This

> danger would seem to us to be especially true in criminal cases like the present where the prosecutrix is a minor whose previous out-of-court statement is repeated before the jury by adult law enforcement officers." Id. at 668 (emphasis preserved).

Accordingly, this Court held that a trial court is required to consider the danger of admitting such cumulative evidence at trial pursuant to Florida Statute §90.403.

The court in the instant case abused its discretion in admitting the hearsay statements of the complainant's brother and the deputy sheriff. Prior to this evidence being admitted, the court allowed the prosecutor to play the videotaped interview between the complainant and the child team investigator. The videotape was relatively lengthy and covered nearly all aspects of the alleged incident.

Because of the detailed nature of the videotape, the testimony of the complainant's brother and the deputy sheriff added little, if any, probative value to the complainant's testimony. Indeed, the genuine sole purpose in having the complainant's brother and the deputy sheriff testify as to the hearsay statements made by the complainant was to bolster the credibility of the complainant, concerns which were specifically addressed in Pardo.[14] Due to the

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14. This is somewhat related to the adage that a lie, if repeated enough, becomes the truth.

cumulative nature of the hearsay testimony, there was a significant danger of the jury placing undue weight on the complainant's accusations not because of her testimony, but because the complainant's hearsay statements were repeatedly paraded back and forth in front of the jury. Since the court did not properly consider the cumulative nature of the hearsay testimony of the complainant's brother and the deputy sheriff, the court abused its discretion in allowing the hearsay statements into evidence. This Court should reverse and remand.

IV. THE COURT ABUSED ITS DISCRETION BY ADMITTING HEARSAY UNDER THE EXCITED UTTERANCE EXCEPTION TO THE HEARSAY RULE.

An excited utterance is an exception to the hearsay rule. §90.803(2), Fla. Stat. (1997). Statements are admissible under the excited utterance exception when three conditions are met. First, the event must be startling enough to cause nervous excitement. Second, the statement must be made before there was time for reflection. And, third, the statement must be made while the person making the statement was still under the stress of the excitement of the startling event. Charlot v. State, 679 So.2d 844, 845 (Fla. 4th DCA 1996)(citations omitted). If one of the conditions is absent, the statement is not admissible, even if the person making the statement is still in an excited state. Id.

In Charlot, the defendant was charged with armed trespass,

armed false imprisonment, and aggravated battery. The state sought to introduce hearsay evidence related by the alleged victim to a police officer who responded to the scene of the incident. The police officer testified that the alleged victim was in a state of panic. The alleged victim showed the officer around the apartment and, while doing this, told the police officer what had transpired. The appellate court ruled that the trial court erred in admitting the hearsay evidence because there was no showing that the alleged victim did not have time for reflective thought.

In Burgess v. State, 644 So.2d 589 (Fla. 4th DCA 1994), the defendant was charged with sexual battery. The state sought to introduce hearsay evidence from a vice principal, teacher, and police officer which was given approximately 45 minutes after the alleged incident. The appellate court ruled that the trial court erred in admitting the hearsay statements into evidence, reasoning that the hearsay statements were not admissible as excited utterances because the evidence showed that the alleged victim had time for reflective thought. The appellate court reversed and remanded.

The case sub judice requires a similar finding. The evidence showed that the complainant first approached her brother and then her mother. Because it is unclear how much time passed, it cannot

be said, or otherwise established, that the complainant did not have time for reflective thought. Furthermore, additional time passed before the deputy sheriff arrived at the scene. Since the complainant did not have a telephone in the trailer, the complainant and her mother had to walk to a pay phone and wait for the deputy sheriff to arrive. When the deputy sheriff arrived, the parties were eventually separated to be interviewed. Again, this shows that the complainant had time for reflective thought. This is especially true since the complainant's mother admitted that her daughter may have overheard her tell the deputy sheriff that she suspected Petitioner as being the man who entered the trailer. Furthermore, the evidence indicates that the deputy sheriff went inside the trailer with the complainant to look around and to have the complainant explain what happened.[15] This is similar to the situation in Charlot. Consequently, the complainant had time for reflective thought. The fact that she was still experiencing stress from the alleged incident does not trump the reflective thought requirement.

The error was not harmless. A significant portion of the damaging testimony against Petitioner arose from the hearsay

15. There is also evidence to indicate that the complainant's mother did this prior to contacting the deputy sheriff.

exceptions relating to child victims and excited utterances. If the evidence had not been admitted, the only evidence would have involved the alleged victim's testimony, which indicated that Petitioner was not the perpetrator, and which also involved vague and, in some instances, contradictory statements. Clearly, the evidence admitted under the excited utterance exception to the hearsay rule affected the verdict. Since it cannot reasonably be said that the evidence did not affect the verdict, the error was not harmless. Accordingly, this Court should reverse and remand.

V. THE COURT ERRED IN DENYING PETITIONER'S MOTION TO SUPPRESS STATEMENTS, ADMISSIONS, OR CONFESSIONS.

Confessions or admissions arising out of statements made by a law enforcement officer suggesting leniency are subject to suppression if the law enforcement officer's statements establish a quid pro quo bargain for a confession or an admission. Lages v. State, 640 So.2d 151 (Fla. 2d DCA 1994). In the case at bar, it is undisputed that one of the detectives asked Petitioner whether he needed counseling. From the perspective of Petitioner, a deal was being offered. This is not an unreasonable perspective since the evidence showed that the reason behind asking such a question was to get a defendant to continue talking.[16] It is a ploy which, at

16. According to the detectives, they had no authority, desire, or intention of offering any type of counseling to Petitioner. Notably, the question concerning the need for

the very least, created the impression in Petitioner's mind that the detectives were offering something in exchange for an admission or confession. Accordingly, the court should have suppressed the statements Petitioner made to the detectives. This Court should reverse and remand.

VI. THE COURT ERRED IN RESENTENCING APPELLANT ON COUNT II.

Although a court can correct an illegal sentence at anytime, there is no authority to increase a sentence previously imposed. Fla. R. Crim. P. 3.800. The court initially sentenced Petitioner to 30 years imprisonment on Count II. This was a legal sentence, since it fell within the acceptable range of imprisonment for a first degree felony. However, a few days later, the court resentenced Petitioner to life imprisonment on Count II, despite the fact that the original sentence imposed on Count II was a legal sentence. The court had no authority to increase Petitioner’s sentence on Count II and, accordingly, this Court should remand for resentencing.

CONCLUSION

For the foregoing reasons, this Court should reverse Petitioner's convictions or, barring that, this Court should

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counseling was asked during a quell in the interrogation for the specific purpose of attempting to get additional statements from Petitioner.

reverse and remand for a new trial or resentencing, as appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to John M. Klawikofsky, Esq., Attorney General Office, 2002 North Lois Avenue, Suite #700, Tampa, Florida 33602 via U.S. mail this 29th day of October, 1999.

MARK A. GRUWELL
Law Offices of Mark A. Gruwell
747 North Washington Boulevard
Sarasota, Florida 34236
(941) 365-4402
Florida Bar No. 0946575
Attorney for Petitioner