IN THE SUPREME COURT OF FLORIDA

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

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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STATEMENT REGARDING TYPE

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STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts as accurate. Respondent adds the following facts:

On August 13, 1999, the Second District affirmed all of Petitioner's convictions. The opinion expressly affirmed the admission of the child victim hearsay and denial of the motion to suppress. The opinion further held there was sufficient evidence of Petitioner's identity and of his criminal conduct to support the denial of his motion for directed verdict.

The Second District rejected Appellant's challenges to the sentence imposed, expressly rejecting his attack as to the constitutionality of the Prison Releasee Reoffender Statute. The Court certified conflict as to the issue of separation of powers as it did in State v. Cowart, 24 Fla L. Weekly D1085 (Fla. 2d DCA April 28, 1999).

Petitioner has raised several issues in this brief other than the question certified by the Second District. Respondent will address these issues as well as the issue certified.

SUMMARY OF THE ARGUMENT

The court properly denied Petitioner's motion to declare the prison releasee reoffender statute unconstitutional. The statute does not violate the separation of powers and does not violate due process.

The trial court properly denied Petitioner's motion for judgment of acquittal. The state presented sufficient evidence of identification for a jury's determination of guilt.

The trial court made sufficient findings of reliability with regard to the child victim hearsay. Moreover, the hearsay was not unnecessarily cumulative.

The trial court properly admitted the testimony of the victim's mother and brother as excited utterances. Further, such testimony was properly admitted under the child victim hearsay exception.

The court did not err in denying Petitioner's motion to suppress his statements to police. Petitioner was not offered a deal, and there was no error.

Moreover, Petitioner was properly sentenced as a prison releasee reoffender.

ARGUMENT

ISSUE I

WHETHER THE PRISON RELEASEE REOFFENDER ACT IS UNCONSTITUTIONAL. (As restated by Respondent)

Petitioner alleges that the Prisoner Releasee Reoffender Punishment Act is unconstitutional. He alleges the statute violates due process due to the absence of notice provisions, as well as violating the separation of powers. In assessing a statute's constitutionality, this court is bound "to resolve all doubts as to the validity of the statute in favor of its constitutionality, provided the statute may be given a fair construction that is consistent with the federal and state constitutions as well as with the legislative intent." State v. Stadler, 630 So. 2d 1072, 1076 (Fla. 1994). Further, whenever possible, a statute should be construed so as not to conflict with the constitution. Id.[1]

The plain meaning of statutory language is the first consideration of statutory construction, and there is no room for alternate construction if the meaning of a statute is plain on its face. State v. Harvey, 693 So. 2d 1009, 1010 (Fla. 4th DCA 1997).

[1] The burden of proof below was on the movant to demonstrate that the statute was not constitutional by negating every conceivable basis for upholding the law. See, Gallagher v. Motors Ins. Corp., 605 So.2d 62, 68-69 (Fla.1992).

In the instant case the meaning of the statute is plain on its face and there is no room for alternate construction. In Young v. State, 719 So. 2d 1010 (Fla. 4th DCA 1998), the court held that the Prison Releasee Reoffender Act was not unconstitutionally ambiguous. The court further found that the act was not enacted in violation of the constitutional single subject requirement.

Petitioner asserts that the statute violates the separation of powers provision of the Florida Constitution. It is well established that who and when to prosecute for crimes is within the discretion of the prosecutor. See generally, State v. Montgomery, 467 So. 2d 387, 394 (Fla. 3rd DCA 1985); Cleveland v. State, 417 So. 2d 653 (Fla. 1982)(Court may not override prosecutor's refusal to consent to pretrial diversion of defendant, essentially a conditional decision not to prosecute); and State v. Brown, 416 So. 2d 1258 (Fla. 4th DCA 1982)(Court may not dismiss information based on victim's expressed desire not to prosecute in face of prosecutor's desire that prosecution go forward). In Stone v. State, 402 So.2d 1330 (Fla. 1st DCA 1981), the court rejected a separation of powers argument from a defendant who sought to reduce his sentence by providing substantial assistance but was refused the opportunity to do so by the prosecutor. The court noted that the "discretion to initiate the post conviction bargaining process is inherent in the prosecutorial function." Id. at 1332.

In Crews v. State, 366 So. 2d 117 (Fla. 1st DCA 1979), the

court rejected a separation of powers argument raised by a defendant who was prosecuted under a state statute instead of a municipal ordinance. The court, recognizing the differences in the possible penalties, remarked that such discretion is inherent in our system of justice, and does not violate the separation of powers doctrine. Id. at 119.

Petitioner's position is no different than that of any other person accused of a crime. The prosecutor decides under which statute to proceed, to whom plea bargains should be extended, and which penalty to seek. These acts are inherent in our system of justice. However, simply because the prosecutor seeks punishment under that subsection does not mean such punishment is automatic. The prosecutor must still present evidence to the court.[2] As is the case in first degree murder cases wherein the state declines to seek the death penalty, by virtue of the choices provided by the legislature, the court has little discretion in sentencing upon conviction.[3] This, however, is the result of sentencing provisions

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[2] "Upon proof from the state attorney that establishes by a preponderance of the evidence that a defendant is a prison releasee reoffender as defined in this section." 775.082(a)(2), Florida Statutes (1997).

[3] See generally, Owens v. State, 316 So. 2d 537 (Fla. 1975)(upholding constitutionality of statute which requires imposition of life imprisonment with a minimum mandatory sentence of twenty-five years for a capital sexual battery); and Dorminey v. State, 314 So. 2d 134 (Fla. 1975)(upholding constitutionality of a statute which requires imposition of life imprisonment with a minimum mandatory sentence of twenty-five years for first degree murder).

properly enacted by the legislature. Leftwich v. State, 589 So. 2d 385 (Fla. 1st DCA 1991)(The length of the sentence actually imposed is generally said to be a matter of legislative prerogative). The role of the judiciary is to follow the laws enacted by the legislature, not to decide which penalties to seek. See, State v. Zardon, 406 So. 2d 61 (Fla. 3rd DCA 1981)(Order declaring statute unconstitutional was an unjustified intrusion into the exclusively legislative domain of determining relative seriousness and the appropriate respective penalties for statutory crimes); and Stone 402 So. 2d at 1332 (Fla. 1st DCA 1981)(The legislature determines the range of sentence for a particular crime, and the judge has the discretion to impose a sentence within that range).

The Fourth District in State v. Wise, 24 Fla. L. Weekly D 657, 558 (Fla. 4th DCA March 10, 1999),(which along with the Second District Court of Appeals in State v. Cotton, 728 So.2d 251 (Fla. 2d DCA 1998), *rev. pending* in State v. Cotton, No. 94,996 *oral argument scheduled November 3, 1999*, has held that the trial court, not the state attorney has the discretion not to impose the mandatory sentences required under the prison releasee reoffender act if any of the exceptions set forth in s. 775.082(8)(d)1.a-d, Fla. Stat. (1997)) has ruled that the court has the "discretion" to impose the mandatory sentence regardless of the victim's wishes:

> The trial court is not required to accept the victim's written statement in mitigation. It is left to the trial court in the exercise of its sound discretion whether or not to accept

> the victim's written statement in mitigation or reject it and sentence the defendant under subsection (8)(a)2.

Wise, *supra* at D658.

The Fifth District in Gray v. State, 24 Fla. L. Weekly D1610 (Fla. 5th DCA July 9, 1999) (which along with the First District in Woods v. State, 24 Fla. L. Weekly D 831 (Fla. 1st DCA March 26, 1999) and the Third District in McKnight v. State, 727 So.2d 314 (Fla. 3d DCA 1999) has held that the discretion whether or not to impose the mandatory sentences set forth in the prison releasee reoffender act if any of the exceptions set forth in s. 775.082(8)(d)1.a-d, Fla. Stat. (1997) exist, lies within the discretion of the state attorney, not the court) has rejected the argument that the mandatory sentence shall not be imposed if the victim does not so desire, and this does not violate the constitutional division between the executive and the judicial branches of government. Accordingly, either the court or the state attorney has the discretion not to impose penalties provided by the act. The operative word as used by all the district courts of appeal is "discretion." The victim's desire is not binding.

Petitioner fails to show that the prison releasee reoffender statute's minimum mandatory sentencing scheme is any different from any other minimum mandatory. All minimum mandatory sentences strip the court of the power to sentence below the mandatory sentence. State v. Ross, 447 So. 2d 1380 (Fla. 4th DCA 1984) (holding that

the minimum mandatory sentencing statute operates to divest the trial court of its discretionary authority to place the defendant on probation and remanding for imposition of the minimum mandatory term of imprisonment). The prison releasee reoffender statute is, as the legislative history notes, a minimum mandatory sentence like any other minimum mandatory. Minimum mandatory sentences do not violate separation of powers. Accordingly the statute is constitutional.

The First District in Turner v. State, 24 Fla. L. Weekly D 2074 (Fla. 1st DCA September 9, 1999) rejected the argument that the prison releasee reoffender act violates due process of law by giving the victim of the offense authority to preclude application of the Act to a defendant who committed the offenses against the victim, that the Act creates a "veto power" in the hands of the victim, which allows the Act to be applied in an arbitrary manner. The First District stated that this provision of the Act merely expresses the legislative intent that the prosecution give consideration to the preference of the victim when considering the application of the Act. *Id.* at 2075.

Petitioner also alleges that the statute is unconstitutional since it violates the due process clauses of the state and federal constitutions (Issue IB). The courts of Florida have routinely rejected such challenges in the context of the habitual offender and habitual violent offender statutes. See, Tillman v. State, 609

So. 2d 1295 (Fla. 1992)(Habitual felony offender statute is not ambiguous and is rationally related to purpose of enhancing sentences of recidivist criminals); Ross v. State, 601 So. 2d 1190 (Fla. 1992)(same); Eutsey v. State, 383 So. 2d 219 (Fla. 1980)(same); Seabrook v. State, 629 So. 2d 129 (Fla. 1993)(Habitual felony offender statute does not violate due process of law or equal protection provisions of the State or federal constitutions, and it does not violate separation of powers doctrine of state constitution); and Reeves v. State, 612 So. 2d 560 (Fla. 1993)(Habitual felony offender statute does not violate constitutional principles of equal protection, due process, double jeopardy or ex post facto).

Moreover, at least three federal courts have rejected similar challenges to the federal "three strikes" statute. See, U.S. v. DeLuca, 137 F.3d 24, 40 (1st Cir. 1998)(Federal three strikes law does not violate Eighth Amendment's prohibition against cruel and unusual punishment); U.S. v. Washington, 109 F.3d 335 (7th Cir. 1997)(Federal three strikes law does not violate constitutional prohibitions against cruel and unusual punishment, ex post facto laws, double jeopardy provisions, equal protection clause, due process clause nor separation of powers doctrine); and U.S. v. Farmer, 73 F.3d 836 (8th Cir. 1996)(Upholding federal three strikes law against challenges alleging cruel and unusual punishment, ex

post facto, equal protection, double jeopardy violations).[4]

The Florida Supreme Court, in State v. Benitez, 395 So. 2d 514, 518 (Fla. 1981), rejected a challenge to the mandatory minimum sentences imposed for drug trafficking offenses. In doing so, the Court reiterated, "This Court has consistently upheld minimum mandatory sentences, regardless of their severity, against constitutional attacks arguing cruel and unusual punishment." Id. "The dominant theme which runs though these decisions is that the legislature, and *not the judiciary* determines maximum and minimum penalties for violations of the law." Id.

Petitioner's allegation that the statute is unconstitutional because it violates the due process clauses of the state and federal constitutions is without merit. The statute defines prison releasee reoffenders, contains an effective date, and proscribes specified conduct. Mr. Ellis meets the definition of a prison releasee reoffender. Clearly, he was on notice that his conduct would subject him to enhanced punishment. See generally, Barber v. State, 564 So. 2d 1169, 1171 (Fla. 1st DCA 1990); State v. De La Llana, 693 So. 2d 1075, 1077 (Fla. 2d DCA 1997); Lite v. State, 617

[4] See also, State v. Angehrn, 90 Wash.App. 339, 952 P.2d 195 (Wash. Ct. App. 1998)(State's three strikes statute does not constitute ex post facto punishment); State v. Oliver, 298 N.J.Super. 538, 689 A.2d 876 (N.J. Super. Ct. Law Div. 1996)(Rejecting challenges to constitutionality of three strikes law based on separation of powers, cruel and unusual punishment, and equal protection arguments); and People v. Gray, 1998 WL 598677 (Cal. App. Ct. 1st Dist. 1-998)(Upholding California's three strikes law against cruel and unusual punishment, separation of powers, and ex post facto attacks).

So. 2d 1058, 1059 (Fla. 1993); and Schmitt v. State, 590 So. 2d 404, 413 (Fla. 1991) (In other words, a due process violation occurs if a criminal statute's means is not rationally related to its purposes and, as a result, it criminalizes innocuous conduct. Art. I, Sec. 9, Fla. Const.).

Accordingly, the statute is not unconstitutional.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL.(as restated by Respondent)

Petitioner argues that his motion for judgment of acquittal should have been granted. Petitioner claims there was insufficient evidence of identity **(ISSUE II A)** and the only evidence arose from hearsay statements. **(ISSUE II B)**. At trial, the defense moved for judgment of acquittal based on the lack of identification. Issue B regarding only hearsay statements showing criminal conduct was not raised at trial and is not preserved.

The jury properly found the Petitioner guilty based on the evidence presented at trial. The State presented a prima facie case of guilt, and the evidence was sufficient for the trier of fact to find the Petitioner guilty of the capital sexual battery.

In Lynch v. State, 293 So. 2d 44, 45 (Fla. 1974), the Florida Supreme Court stated: "The courts should not grant a motion for judgment of acquittal unless the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law."

Further, "it is the trial judge's proper task to review the evidence to determine the presence or absence of competent evidence from which the jury could infer guilt to the exclusion of all other inferences. That view of the evidence must be taken in the light most favorable to the State." State v. Law, 559 So. 2d 187, 189

(Fla. 1989). "The state is not required to rebut conclusively every possible variation of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events." State v. Rudolph, 595 So. 2d 297 (Fla. 5th DCA 1992).

Here there was sufficient evidence for the case to go to the jury. Victim A.T. testified a man who said he was her daddy came into her room and licked her private. (V. 3: T. 46, 81). He also spit on his finger and put it in her private. (V. 3: T. 92). Lucas Thompson, the victim's brother testified she told him her daddy touched her private. (V. 3: T. 109). Annette Thompson, the child's mother testified A.T. said her daddy did things to her. (V. 4: T. 174). A bicycle was left behind in the driveway. (V. 4: T. 177). Ms. Thompson further testified Petitioner always wanted to be the children's daddy. (V. 4: T. 182).

Dr. Katherine Keely examined the victim and determined she had a notch on her hymen at 9 o'clock. The notch indicated penetration. (V. 5: T. 321-322). Petitioner told Detective Brewer and Ross he brought a bike to his ex-wife's house. He told the little girl he was her daddy and rubbed her stomach and touched her thigh area. (V. 4: T. 269). Petitioner told Detective Ross he rubbed the child's inner thigh and moved up towards her pelvic area. He initially denied licking her vagina or inserting his finger. (V. 5: T. 390). However, when the detective went over the

specific details of abuse as alleged by the child, and asked Mr. Ellis if the child was lying, he said, “No.” (V. 5: T. 393).

In addition to the victim’s testimony acknowledging she was raped, there was medical evidence establishing penetration. When this is combined with Petitioner’s incriminating statements, and the hearsay statements, there is sufficient evidence for the case to be given to the jury.

In Stone v. State, 547 So. 2d 657 (Fla. 2d DCA 1989), this Court upheld a capital sexual battery conviction where an eight year old victim testified the defendant got on top of her and hurt her private. The victim could not define the word “private” and was uncertain whether her private was below her waist. However, she testified the defendant licked her private. “The jury could reasonably infer from the evidence that the defendant made contact between his mouth and the sexual organ of the victim.” Stone, 547 So. 2d at 658.

Petitioner’s reliance upon State v. Green, 667 So. 2d 756 (Fla. 1995) is misplaced. Green held that the victim’s prior inconsistent statement pursuant to the child victim hearsay exception under Section 90.803(23) is insufficient to prove guilt when standing alone. Green is distinguishable from the instant case where there was medical evidence and Petitioner’s incriminating statements supporting the crime. Moreover, the victim in Green was a recanting victim. Such is not the case here.

Furthermore, the Florida Supreme Court's holding in Department of Health and Rehabilitative Services v. M.B., 701 So. 2d 1155 (Fla. 1997) puts the holding of Green into question and limits Green to it "unique circumstances". M.B, 701 So. 2d at 1162. The Court in M.B. held that a child's inconsistent out of court statements are admissible as substantive evidence and analogizes it to statements of identification.

> Under section 90.801(2)(c),the codification of the Freber holding, this out-of-court statement of identification is considered non-hearsay and, thus, "is admissible in court to prove the truth of the matter asserted, e.g., to prove that the person identified was the person who committed the act." Charles W. Ehrhardt, Florida Evidence § 801.9, at 592 (1996). More importantly, no in-court consistency requirement attaches as the "failure of the witness to repeat the identification in court does not affect the admissibility of evidence of the prior identification." Id. at 582. The same may be said of the provisions of section 90.803(23). (emphasis supplied).

M.B, 701 So. 2d at 1161. Therefore, Petitioner's reliance on Green is misplaced. The statements were properly admitted as substantive evidence.

Here, the victim's statements, combined with her testimony, Petitioner's admissions, and the medical evidence constitute competent evidence. There is clear evidence linking Mr. Ellis to the sexual abuse. Looking at the evidence in the light most favorable to the state, there clearly was sufficient evidence to deny Appellant's motion for judgment of acquittal. In the instant

case, the trier of fact was able to weigh the evidence, observe the witnesses and evaluate their credibility. The jury found Petitioner guilty as charged. A determination by the trier of fact when supported by substantial competent evidence, will not be reversed on appeal. Law, supra.

ISSUE III

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY ADMITTING HEARSAY UNDER THE CHILD VICTIM EXCEPTION TO THE HEARSAY RULE.
(as restated by Respondent)

In the instant case, the State introduced child hearsay statements of victim A.T., through the testimony of her brother Lucas, her mother Annette Thompson, Deputy David Felix, and CPT investigator Doug Staley. A hearing was held, and the court properly determined that the child hearsay statements were reliable pursuant to section 90.803(23), Fla. Stat. (1993) and admitted the statements into evidence. (V. 2:R. 308).

On appeal, Petitioner claims the trial court failed to make sufficient findings of reliability and trustworthiness in order to warrant the admission of the hearsay statements. At trial, defense counsel merely objected to the admissibility of the statements. (V. 1: T. 142). Petitioner failed to timely object to the court's findings of reliability and has waived this issue for appeal.

Since defense counsel failed to argue that the trial court's ruling was inadequate under Section 90.803(23) or that the statement itself was unreliable, appellant has waived this argument on appeal. See Jones v. State, 610 So. 2d 105 (Fla. 3d DCA 1992), rev. denied, 620 So. 2d 761 (Fla. 1993)(issue of whether findings were sufficient under section 90.803(23) not preserved for review because no contemporaneous objection was made to the findings),

cited with approval in, State v. Townsend, 635 So. 2d 949, 959 (Fla. 1994); Poukner v. State, 556 So. 2d 1231 (Fla. 2d DCA 1990)("This issue [admission of child hearsay] was not preserved for our review as no objection was made when the trial court found the statements admissible."); Diaz v. State, 618 So. 2d 346, 348 (Fla. 2d DCA 1993)(defense counsel failed to preserve child hearsay issue for appeal where counsel did not argue how the statements appeared to lack trustworthiness and made no objection to the sufficiency of the court's finding). Further, as the Florida Supreme Court observed in Rodriguez v. State, 609 So. 2d 493, 499 (Fla. 1992), cert. denied, 114 S. Ct. 99, 126 L. Ed. 2d 66 (1993), "It is well settled that the specific legal ground upon which a claim is based must be raised at trial and a claim different than that raised below will not be heard on appeal." (citations omitted).

Even assuming this issue has been preserved, the question of reliability is a matter solely within the discretion of the trial court. Thus, this Court can neither disturb the lower court's finding on appeal nor reweigh the evidence absent a clear showing of abuse. Perry v. State, 593 So. 2d 620 (Fla. 2d DCA 1992). The record indicates that the trial court complied with the statute in every respect and properly admitted the child hearsay statements. Perry, supra.

A. T. testified that a man came into her room wearing a red

shirt and blue pants. He pulled off her underwear and licked her private. (V. 3: T. 43, 46). He also spit on his finger and touched her private. (V. 3: T. 92). The child's testimony was consistent with the hearsay testimony of the other witnesses.

A.T.'s brother Lucas testified she woke him up. She said her daddy was touching her private.(V. 3: T. 109). A.T.'s mother Annette Thompson testified A.T. woke her about 4:30 in the morning and said her daddy was there. She said he did things to her. (V. 3: T. 173-174). She described the man as having gray hair, lighter than her blond hair, tall, wearing blue jeans, a red shirt, boots and a belt buckle. He left a bicycle in the driveway. A.T. also told her mother the man said not to worry because mommy was in the other room doing this to somebody else. (V. 3: T. 180). Lucas and Ms. Thompson did not go into details of what the child stated regarding specific sexual contact.

Detective Felix interviewed the child. She said a white male awoke her by rubbing her private. He said, "I'm your daddy." When A.T. asked for her mom, the man said, "She's in the other room licking some man off." (V. 3: T. 224). The man spit on his finger and put it inside her private. He also licked her private, and tried to get her to touch his "weiner." She further mentioned the man smelled like beer. (V. 3: T. 226).

The child also was interviewed by Doug Staley of CPT and a tape of that interview was played to refresh her recollection. On

the tape she said a man woke her up by rubbing her tummy. He said he was her daddy. (V. 3: T. 79, 81). He licked her private one time, then spit on his finger and put it in her private three times. He also asked her to touch his penis. (V. 3: T. 75-77, 78).

The trial court's findings were much more than merely a boiler plate recitation of the statutory requirements. In State v. Townsend, 635 So. 2d 949, 958 (Fla. 1994), the trial court simply "listed each of the statements to be considered and summarily concluded, without explanation or factual findings, that the time, content, and circumstances of the statements to be admitted at trial were sufficient to reflect that the statements were reliable." Here, unlike Townsend, the trial court listed what circumstances it considered in finding the various statements reliable.

A.T.'s testimony at trial was consistent with the hearsay statements. The court properly determined the time, content, and circumstances established the reliability of the statements, and the probative value outweighed any prejudice to Petitioner. The trial court explained in detail the reasons it believed the testimony was reliable. There was no abuse of discretion in the admission of the statements. Perry, supra.

The trial court determined each source was reliable, and there was no concern about the mental maturity of the child. She was still affected by the incident when it was reported. The

statements to her mother and brother were spontaneous. The statements to detectives and on the video were made with non-leading questions. The statements were made at the first available opportunity and contained age appropriate childlike descriptions. They were not vague or contradictory. (V. 1. T. 140).

Lucas was the first person to whom A.T. made statements. She ran into his room immediately following the incident. (V. 3: T. 308). When Lucas told her she was dreaming, she went to her mother. (V. 3: T. 309). The statements to the detective were detailed and consistent. The child also demonstrated frustration during the video when answering questions about certain sexual acts. The trial court found this added to her credibility. All the statements were given in close context to the time of the abuse. (V. 3: T. 310).

Pursuant to the Florida Supreme Court's holding in Pardo v. State, 596 So. 2d 665 (Fla. 1992), the trial court subjected the child hearsay statements to analysis under section 90.403, Fla. Stat. (1993). **(Sub Issue III B of Initial Brief)**. The record reveals that the trial court weighed the reliability and probative value of the child hearsay statements against the danger that the statements would unfairly prejudice Petitioner, confuse the issues at trial, mislead the jury, or result in the presentation of needlessly cumulative evidence. Id. at 668.

"Such determinations are within the sound discretion of the

trial court on a case-by-case basis." Perry, 593 So. 2d at 621. The court determined that the statements were reliable. The court found the time, content and circumstances of the statement provided sufficient safeguards for reliability. The statements to the brother and mother were excited utterances. Lucas and Annette Thompson's testimony intentionally avoids specific sexual detail in order to avoid unnecessarily cumulative testimony.

Even if it was error to admit such hearsay testimony, any error is harmless in light of the substantial competent evidence against Petitioner. Any error in the admission of the child hearsay testimony did not constitute reversible error, did not contribute to the verdict, and is harmless. Seifert v. State, 636 So. 2d 716 (Fla. 1994).

ISSUE IV

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

(as restated by Respondent)

In the absence of a showing of abuse of discretion, the appellate court will not disturb a trial court's evidentiary ruling. Maggard v. State, 399 So. 2d 973 (Fla. 1981). In the instant case, the trial court properly admitted the testimony of the victim's brother and mother under the child victim hearsay exception. However, such statements could further have been admitted under the first complaint exception or excited utterances.

In McDonald v. State, 578 So. 2d 371 (Fla. 1st DCA), review denied, 587 So. 2d 1328 (Fla. 1991), the testimony of the friend of a sexual battery victim was admissible under the "first complaint" exception to the hearsay rule and as an excited utterance. The testimony in the instant case is similarly admissible.

The statements were also properly admitted as excited utterances, pursuant to Section 90.803(2), Fla. Stat. (1992). Jackson v. State, 419 So. 2d 394 (Fla. 4th DCA 1982), provides the elements for this exception as follows:

(1) there must be an event startling enough to cause nervous excitement;

(2) the statement must have been made before there was time to contrive or misrepresent;

(3) the statement must be made while the person is under the stress of excitement caused by the event.

The record clearly establishes the statements were made to the brother and mother immediately after the abuse occurred. Based on the foregoing, a proper predicate for the testimony was laid. There clearly was a startling event, the statements were made before there was time to contrive, and the statements were made while still under the stress caused by the event.

Even assuming any out of court statements were improperly admitted, such error did not contribute to the verdict and is harmless. Therefore, any hearsay statements were merely corroborative of other properly considered evidence establishing Petitioner's guilt, and there is no reasonable possibility that any error contributed to the conviction. Cox v. State, 473 So. 2d 778 (Fla. 2d DCA 1985).

ISSUE V

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS STATEMENTS, ADMISSIONS, OR CONFESSIONS.
(as restated by Respondent)

The trial court's ruling on a motion to suppress comes to the appellate court clothed in a presumption of correctness. Henry v. State, 613 So. 2d 429 (Fla. 1992); State v. Rizo, 463 So. 2d 1165 (Fla. 3d DCA 1984). The appellate court will interpret evidence and the reasonable inferences derived therefrom in the manner most favorable to the trial court. Freeman v. State, 559 So. 2d 295 (Fla. 1st DCA 1990); State v. Bravo, 565 So. 2d 857 (Fla. 2d DCA 1990). A reviewing court should not substitute its judgment for that of the trial court, but, rather, should defer to the trial court's authority as a fact-finder. Wasko v. State, 505 So. 2d 1314 (Fla. 1987).

Petitioner claims that his confession was coerced by police promises for counseling. Detective Brewer merely asked Mr. Ellis if he had a problem and needed some counseling. No offers for counseling were made. (V. 1: T. 27). The trial court determined the question regarding counseling was not a promise. (V. 1: T. 75). The detective's mentioning of counseling was not a quid pro quo. See Lages V. State, 640 So. 2d 151 (Fla. 2d DCA 1994) (statements suggesting leniency are only objectionable if they establish an express quid pro quo bargain for confession, and court must look to

totality of circumstances to determine voluntariness).

"The rule in Florida generally is that the trial court's conclusion on the issue of voluntariness will not be upset on appeal unless clearly erroneous." State v. Crosby, 599 So. 2d 138 (Fla. 5th DCA 1992); Thompson v. State, 548 So. 2d 198, 204 (Fla. 1989). In order to find a confession involuntary within the meaning of the Fourteenth Amendment, there must first be a finding that there was a coercive police action. Colorado v. Connelly, 479 U.S. 157, S. Ct., L. Ed. 2d (1986).

The test of determining whether there was police coercion is determined by reviewing the totality of the circumstances under which the confession was obtained. The detective's statements did not render the statement or confession inadmissible. Maqueira v. State, 588 So. 2d 221 (Fla. 1991)(an agreement to make a defendant's cooperation known to the prosecutor or other authorities does not render confession involuntary); Bowen v. State, 565 So. 2d 384 (Fla. 5th DCA 1990)(confession not inadmissible because the police tell the defendant that it would be easier on him if he told the truth); and State v. Williams, 358 So. 2d 1094 (Fla. 1st DCA 1978)(officer telling defendant that if parole board contacted him, the officer would advise board of defendant's cooperation not a promise of leniency).

Further, the officer's conduct is insufficient to show coercion. Peterka v. State, 640 So. 2d 59 (Fla. 1994)(an officer

advising the defendant of different degrees of murder and further advising that the officer was meeting with the State Attorney's Office to determine whether to charge the defendant with first-degree murder was held insufficient to show coercion).

When the totality of the circumstances is reviewed in context of the facts of this case and the relevant case law, none of the factors suggested by Petitioner render his statement involuntary. The record reflects a consistent pattern of understanding and voluntariness which meets or exceeds the knowing and intelligent threshold for waiver of Miranda rights. Crosby, 599 So. 2d at 142.

"The fact is that persons of ordinary intelligence often waive their right not to incriminate themselves and do confess to crimes for reasons other than overreaching, coercive police conduct." Crosby, 599 So. 2d at 141. The trial court had ample opportunity to observe the detective and Mr. Ellis testifying at the suppression hearing and to assess their motivation and credibility.

The court found neither an implied promise nor other impermissible inducement or coercion and ruled that Petitioner's statements were admissible. As previously stated, the record reflects a consistent pattern of understanding and voluntariness which meets or exceeds the knowing and intelligent threshold for waiver of Miranda rights. Crosby, 599 So. 2d at 142.

Further, Petitioner was not in custody at the time of the interview. Miranda was not required to be given, and Petitioner's

voluntary presence at the police station further contradicts his claim of coercion.

Moreover, there is substantial competent evidence establishing petitioner's guilt. Therefore, even if it was error to admit this statement, any error was harmless with regard to the conviction. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN SENTENCING PETITIONER ON COUNT II.
(as restated by Respondent)

Petitioner has not been prejudiced by the court's sentence. Petitioner must be sentenced to life in prison on the capital sexual battery count. Therefore, there is no prejudice, regardless of the implementation of the Reoffender Act. Nonetheless, the court properly sentenced Petitioner to life on Count 2 since life is the maximum sentence for the first degree felony punishable by life. (V. 6: T. 640). Therefore, there is no error.

CONCLUSION

Based on the foregoing facts, argument, and citations of authority, Respondent respectfully requests that this Court affirm the decision of the Second District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. mail to Mark A. Gruwell, 747 North Washington Blvd, Sarasota, Florida 34236, this 29th day of October, 1999.

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