IN THE SUPREME COURT OF FLORIDA

BRUCE W. GLOVER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	FSC CASE NO. SC02-1064
	)	
STATE OF FLORIDA,	)	FIFTH DCA CASE NO. 5D01-2462
	)	
Respondent.	)	
_____	)	

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S MERIT BRIEF

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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OTHER AUTHORITIES CITED:

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_____	)	

PRELIMINARY STATEMENT

The initials "AC" shall refer to the child complainant herein, with "MC" referring to his mother and "DC" referring to the child's second cousin. The letter "T" refers to transcript pages, with "R" referring to the non-transcript pages in the Record on Appeal.

STATEMENT OF THE CASE

Bruce Wayne Glover was charged with the sexual battery of AC, age 9, on March 8, 1999, attempted sexual battery with the same child on the same date, and with providing obscene material to the boy between January 1, 1999, and March 8, 1999. (Vol. I, R 166) These charges were later amended to allege reciprocal oral sex between March 8 and March 11, 1999 in two counts in violation of § 794.011(2), Fla. Stat. and attempted oral sex on the same dates in a third count (later dismissed). (Vol. II, R 219)

A Notice of Intent to Present Child Victim Hearsay was filed on April 28, 1999, seeking to utilize a videotaped interview of the child by police made March 12, 1999. (Vol. I, R 175; 181) The court ruled that the child's statements to his mother and the police were admissible. (Vol. I, R 190-191)

A motion to suppress statements made by Mr. Glover to police detectives on March 13, 1999, was also granted. (Vol. I, R 182-184; Vol. II, R 201)

The jury was sworn on May 21, 2001, and on May 24, 2001, found Mr. Glover not guilty of Count Two (receiving oral sex from the child), but guilty of Count One (providing oral sex to the child), a capital felony in violation of § 794.011(2), Fla. Stat. (Vol. IV, T 268; Vol. II, R 261-262; Vol. VI, T 767-768)

Defense counsel below moved for a new trial on May 29, 2001, and the

motion for judgment of acquittal was also renewed at this point. These were denied. (Vol. II, R 267-269)

On August 1, 2001, Mr. Glover was sentenced to life imprisonment on Count One. (Vol. II, R 276-278) The Office of the Public Defender was appointed for appellate purposes and a Notice of Appeal was timely filed on August 9, 2001. (Vol. II, R 284) In the Fifth District Court of Appeals, the conviction was affirmed. Glover v. State, 815 So.2d 698 (Fla. 5th DCA 2002)

STATEMENT OF THE FACTS

Bruce Wayne Glover is serving a life sentence for performing oral sex on nine year old AC, his conviction based on the uncorroborated and self-contradictory testimony of the boy. During the trial, the jury heard the boy's videotaped statement to police twice, his previous statement to his mother and to police, and heard the child's own trial testimony twice. The jury also heard the prosecutor and detective vouch for, or bolster the boy's credibility numerous times, despite objections.

Mr. Glover was arrested on March 13, 1999, for sexual battery on a child

under the age of 12 in Brevard County, Florida. (Vol. I, R 155) Specifically, he was charged with performing oral sex on the boy, AC, on March 8, 1999, attempting to receive the same from the child on that date, and it was charged that he showed obscene material to the same child between January 1, and March 8, 1999. (Vol. I, R 166)

On August 31, 1999, a hearing on the state's Notice of Intent to Present Child Victim Hearsay was held, and AC's mother (MC) testified then that Mr. Glover was their neighbor and that on March 11 or so, of the same year, the boy told her about Mr. Glover's request for oral sex. This information came as the boy dressed before his mother and at one point her testimony was that he appeared nervous. (Vol. I, T 6 - 9) She stated the boy was in special slow learner classes at school. (Vol. I, T 11-12)

At another point, the mother said her boy had *not* been acting differently during the days leading up to this revelation, but just volunteered that the 'same thing' had happened again. In reality, the trial judge inquired and learned that an earlier incident involved a teenager who apparently sodomized AC when he was four years old. (Vol. I, T 13-16) After that incident, the boy did act out when he came home. (Vol. I, T 16)

As played during the hearing, the detective's taped interview revealed that

AC did not know his home address, or how long he had lived there. (Vol. I, T 31-34) The tape revealed that the detective next asked the boy to identify body parts on a drawing, where he referred to the penis as a 'dick.' (Vol. I, T 41) AC said the man had touched his penis after pulling AC's pants down and AC immediately told him not to do that. The man placed his mouth on AC's penis and this happened after school one day when he played a computer or video game after walking over to the man's residence. (Vol. I, T 51-52) Alternatively, the child said this happened on a Wednesday, or a Friday or after he was off school for two days. (Vol. I, T 51-52)

The detective led the child: "So, you went ever (*sic*) to his house to play a game and while you were playing the game he pulled your pants down, and did he pull your underwear down also?" The responses were inaudible. As to the date, the boy said "Friday. Saturday (inaudible) Monday it happened." The detective followed that statement up with "This past Monday? How do you remember it happened on last Monday?" (Vol. I, T53-54)

The boy said this happened following him being bad at school that day. He decided this was on Monday, a "couple of days ago." He also announced the date of the interview was "Tuesday. I mean Friday." (Vol. I, T 54-56) Next, the child stated, regarding when he visited Mr. Glover's: "I only go on a Friday and a

Tuesday." Then he added "No, that Monday I (inaudible)." (Vol. I, T 57)

AC responded 'um-hum' when asked if he had been going to Mr. Glover's "a lot," but when asked moments later how many times he had been there since they'd met, he stated once. Then he corrected himself with "five." (Vol. I, T 57-58) Likewise, the child first shook his head when asked if this was the first time this activity had happened, but later he stated this was the only time "he did anything." (Vol. I, T 56; 59) The child also said Mr. Glover's house number was 3045 and apparently the interviewer requested the child to double check that fact. (Vol. I, T 59) The arrest report lists the number as 3038. (Vol. I, R 155)

It was unclear, without leading questions, in what sequence the movie-viewing, video games, and sex act took place at the accused's place. At that point in the interview, the detective placed the boy under oath. (Vol. I, T 70) In response to some leading, AC said he waited from Monday until Thursday to report this to his mother.

> DETECTIVE: ...Is there any reason why you waited until Thursday? Were you afraid?
> AC: Um-hum.

(Vol. I, T 72)

AC said he told his mother that the man *wanted* to put his mouth on his penis, not that he actually did. The man also wanted AC to put AC's mouth on his

penis on some undetermined evening. (Vol. I, T 85-86) After this tape played, and upon cross examination by defense counsel, the detective said MC told him she was alerted to the offense after noticing her son acting strange and moping around her house. She stated she confronted the boy several times and he finally told her Mr. Glover had requested oral sex. (Vol. I, T 88-90)

At the conclusion of the hearing testimony, the state argued that AC was not a child who could fabricate something of this nature, and that his mother "does not have the capacity to put thoughts into his mind." (Vol. I, T 94) The defense below argued that the mother's testimony was contradictory with what the detective quoted her as saying, and that the boy was not emotionally affected by what he described, but had to be reminded after leading or suggestive questions. (Vol. I, T 95-96) The trial court initially reserved ruling on this reliability issue, (Vol. I, T 96) but later ruled that the child's statements to his mother and the police were reliable. (Vol. I, R 190-191)

Defense counsel below also filed a motion to suppress statements made by Mr. Glover to police detectives at the police department. (Vol. I, R 182-184) In the suppression hearing, the defense offered testimony that upon the police arriving at Mr. Glover's residence, he instructed his wife to call his attorney and told police he was not willing to answer questions. When two detectives discussed their

search results in Mr. Glover's presence later at the station, this provoked Mr. Glover to ask them what his wife had said to them. (Vol. I, T 99-105) Det. Butler said that after he was told Mr. Glover would not agree to an interview initially, he repeated what the wife had said in front of Mr. Glover, where he could hear. (Vol. I, T 110-115) He acknowledged he knew it was important that a suspect had to reinitiate conversation once Miranda rights had been invoked and the detective told Mr. Glover that he would now have to 'beg' them to talk to him because of his prior invocation of rights. When Mr. Glover agreed, he was walked into the interview room, and told he would be videotaped. (Vol. I, T 107-108; 113-119)

The trial court ruled that Mr. Glover's statements to police were the result of unlawful interrogation and granted the motion to suppress, writing that "(a)ny statements or admissions made by the Defendant on March 13, 1999 were the result of that unlawful interrogation and are a violation of Miranda v. Arizona." (Vol. II, R 201)

The jury was sworn on May 21, 2001, without objection. (Vol. IV, T 268) Eleven-year-old AC testified with some difficulty: when asked where he lived, by the prosecution, his reply was Garden Street, Brevard County. "What city is that, though? What city do you live in?" the prosecution repeated. "Brevard County," was the reply, prompting the prosecutor to say "Okay. You live in Brevard County,

but do you remember what city you live in?" AC replied "No." Upon suggestive questioning, the boy agreed it was Titusville. (Vol. IV, T 315)

AC pointed out Mr. Glover in the courtroom and stated they formerly lived across from one another. (Vol. IV, T 316-317) When asked if Mr. Glover asked him to do something 'bad', over objection, AC stated Mr. Glover asked him to put his mouth on the adult's penis. (Vol. IV, T 319) AC now stated that he did place his mouth on the man's penis around the same time the boy was playing *Duke Nukem* on the Play Station. AC said it happened when the man told him to pull his pants down and asked him to perform oral sex. The boy stated the penis was inside his mouth. After that, the boy told him "no more." (Vol. IV, T 320; 322)

After going to rent another game, the boy said Mr. Glover asked him if he wanted oral sex performed on him and the boy said 'yes,' whereupon the man did so.

> State: Was his mouth onto your penis--I mean, was your penis in his mouth?
> A. Um–
> State: Was it just touching his mouth?
> A: Um-hum.
> State: So it was in contact with him?
> A: Um-hum.

(Vol. IV, T 321-322) The defense objection to the leading nature was overruled.

After this, Mr. Glover and the boy drew words on a pair of jeans bought for AC, with the man writing "suck it" and the word "f--k." The boy said he reported it to his mother because he wanted it to stop, and then he told the police about it the following day. (Vol. IV, T 323-327)

AC said he was a pretty big fan of the WWF (World Wrestling Federation) and described that the WWF's slogan, at least in 1999, was "suck it" which, the boy explained, meant "putting your mouth on your penis." (Vol. IV, T 331) This clever slogan would be chanted at wrestling matches and on television and there was even a symbolic gesture connoting the phrase, which the boy demonstrated to the jury. (Vol. IV, T 331-332) He had made this gesture to his friends while playing and he and Mr. Glover were both into wrestling and "(w)e'd play a lot, and I'd wrestle." (Vol. IV, T 334)

AC said he was playing a video game, lying on the floor stomach down when he stated Mr. Glover performed oral sex on him. (Vol. IV, T 336) Later, in response to leading questions from the prosecution, the boy testified he was sitting, while playing the game and while Mr. Glover performed fellatio, not lying on his stomach. (Vol. IV, T 367)

> STATE: No, you told (defense counsel) that you were laying on your stomach a minute ago.

A: No. I said I was sitting up like that.
Q: Okay. But when he laid down on the floor to show you, did you kind of indicate that that was what you were doing, or were you confused?
A: I was confused.

(Vol. IV, T 368) AC said he had the game controller with its buttons or squares or circles on it, in his lap and hand during the time that Mr. Glover was stated to be performing fellatio on him. (Vol. IV, T 373)

AC denied that he had been in trouble in school the same week that he reported something to his mother. When he was reminded of his videotaped statement that he was "being bad at school that Monday" he then recalled that he had been bad and that his mother learned of it the same day. (Vol. IV, T 338; 361-363)

He acknowledged that he only told his mother Mr. Glover *asked* him to do something bad, not that anything had actually happened. (Vol. IV, T 338-339) He testified that when he talked to the police, he changed his story from "He asked me to suck his dick" to "He did suck my dick." (Vol. IV, T 340) AC also recalled telling the police that he had *not* put his mouth on Mr. Glover's penis. (Vol. IV, T 341) A year later, however, he told authorities that he *had* placed his mouth on Mr. Glover's organ. (Vol. IV, T 343)

DEFENSE: Okay. And the people you tell that to are--is it Mr. Bowen that you told it to or was it Mr. Koenig, another state attorney? Remember David? Remember you had David as your state attorney before Mr. Bowen?

A. Yes.

Q. Okay. Is he the first person you told this to?

A. Yes.

Q. Okay. That was, like, right before we were ready to go to trial, wasn't it? Weren't we set to go to trial way back then?

A. Yeah.

Q. Back in March, right?

A. Yeah.

Q. Then you said, "Well, there's something else I want to tell you," and you came up with this additional information. Is that right?

A. Right.

(Vol. IV, T 343)

At the time of this accusation, the boy said he knew Mr. Glover had a cast on his arm from a car accident. The boy unbuttoned his own pants, he said during trial, but he also recalled saying during his deposition that Mr. Glover took them off him. (Vol. IV, T 344-346)

AC also confirmed that he said during his deposition that he had to turn around to look at Mr. Glover to tell him not to perform the oral sex. Despite AC claiming that Mr. Glover bit him while performing oral sex, AC said he was not taken to a doctor or nurse for examination or to be photographed by either police

or family. (Vol. IV, T 347-348)

During trial, the boy said that the actions of him performing fellatio on Mr. Glover and Mr. Glover reciprocating took place on different days. He could not recall which happened first. (Vol. IV, T 348) The boy did recall stating during his earlier deposition that the events *did* happen on the same day. (Vol. IV, T 350)

Regarding the jeans and the written obscenities, during trial AC testified the he did not tell Mr. Glover what to write on the jeans. However, his earlier deposition produced a different answer, although at trial AC said he couldn't remember that earlier testimony.

> DEFENSE: Do you remember being asked these questions and giving the following responses:
>
> Question: "And then what happened?"
>
> And you said, "Then he drawed on them and I--I told him what I wanted him to draw, like that ."
>
> * * * * *
>
> Question, "Is that--did you tell him to draw cuss words on there? Is that what you said before, he drew what you told him to?"
>
> "Um-hum."
>
> "Did you tell him to draw cuss words?"
>
> "Yeah."

(Vol. IV, T 350-351) During trial, defense also brought out contradictions in previous depositions by the boy as to why he left Mr. Glover's house after the sex acts. (Vol. IV, T 352-355) When the boy testified that Mr. Glover had *not* given

him a comic book as reward for the act, his August 1999 deposition revealed the opposite response. (Vol. IV, T 355)

When the defense sought to elicit testimony that the boy had not delayed in reporting an earlier incident of sexual abuse involving a fellow juvenile, in contrast to the four day delay here, the trial judge ruled that this was "not probative to any motive to fabricate. It's not coming in." (Vol. IV, T 357-359) When counsel sought to proffer the questions and answers for the record, the court told him to submit it in writing but without the child's answers as "it's not relevant." (Vol. IV, T 359-360) The proffer became Court Exhibit 10. (Vol. V, T 441)

In response to a jury question, the boy stated he did not know why he waited four days to tell his mother about the incident. (Vol. IV, T 366) DC testified that she was second cousin to AC and his present guardian the woman stated he had lived with her since August of 1999. (Vol. IV, T 378) AC had Attention Deficit Disorder, she testified over objection, and was taking medication. He had learning problems, comprehending at a kindergarten level. (Vol. IV, T 379-380)

MC, mother of AC, testified that the trial defendant was Mr. Glover, her former neighbor, and over objection to the child's hearsay being admitted, she stated the boy first reported this to her while she was in front of the bathroom and the boy was undressed. (Vol. IV, T 385-386) She stated AC came out and told

her he was asked “Would you suck my dick?” whereupon he ran out the door after telling the man ‘no.’ She stated AC was not in trouble with her at the time of this revelation. (Vol. IV, T 387) In fact, she added that she wasn’t aware of AC being in trouble that Thursday or that whole week, in school. (Vol. IV, T 388)

MC said that the boy told her the incident had taken place on the preceding *Tuesday*. (Vol. IV, T 389) On cross examination, MC said she remembered it was Tuesday, not Monday, because the boy asked her if she remembered the day she came home early. (Vol. IV, T 390) However, her deposition revealed her stating it was on a Monday as she sat in front of the computer. (Vol. IV, T 391-392) She stated it was not unusual for her to walk over to Mr. Glover’s while her son was over there, as she did that Monday--this was her normal practice and she said her son had his clothes on, was playing a game, and looked normal. MC also testified that her son watched wrestling on television. (Vol. IV, T 393-396; 399)

At trial, the lead detective testified over renewed hearsay objection and the trial court again relied upon its September 2, 1999, order to allow the hearsay in. (Vol. V, T 410) When the state sought to have the detective publish the edited video interview of the child to the jury, the defense renewed their objection. (Vol. V, T 411)

When the state asked the detective how old Mr. Glover was, defense counsel

objected that this was not within the officer's personal knowledge. The detective was permitted to recite the age given him by Mr. Glover during the booking process over objections based upon hearsay and Miranda grounds. (Vol. V, T 423-431) The trial judge ruled that the defendant's statement of age came in as an admission against interest. (Vol. V, T 430)

The videotaped interview of the child was played for the jury and during its play, it was revealed that the boy said "he's got a lot of nasty movies in the house." Defense counsel objected to this violation of its motion in limine with its resulting order, and moved for mistrial, which was denied with a curative instruction promised for later. (Vol. V, T 496) At the end of the video, the interviewer told the child "And I'm very happy that you were honest with me." (Vol. V, T 510)

The trial court granted the Motion for Judgment of Acquittal concerning Count Three. (Vol. II, R 260) On jury instructions, the defense requested only the lesser of simple battery. (Vol. V, T 538) The judge volunteered the lesser of sexual battery by a person *under* age 18 and the defense, while maintaining its position that the age was inadmissible and renewing its earlier objection, requested that instruction. (Vol. V, T 541-542) No other instruction objections were made. (Vol. V, T 544)

During closing arguments, the state argued that no reason had been shown

why AC would make up these stories and defense counsel objected, which was overruled. (Vol. V, T 591) Then, the state argued that "after seeing (AC) testify, I doubt seriously that he's capable of making something up like this." Defense again objected, and moved for a mistrial, which was denied, while the objection was sustained. (Vol. V, T 594)

The jury retired at 3 p.m. to deliberate. (Vol. VI, T 628) The jury later requested to see the video of AC's statement to police again and asked what the Count One allegation was again. (Vol. VI T 630) The entire boy's statement was replayed for the jury a second time. (Vol. VI T 630-705) The jury had another question about Count One: "is it that (*sic)* the count that involves (AC) doing Bruce?" The judge read the to-wit of that count and then, Count Two. One juror expressed further confusion: "Let me put it in my words, okay. Count One is where (AC) put his in Bruce's mouth, am I correct or am I lost here ?" (Vol. VI T 706-707) The judge responded: "Count One involves the sexual organ of (AC). Count Two involves the sexual organ of Bruce Wayne Glover." The judge then read the to-wits of the first two counts again, reminded the jurors of the presumption of innocence and ascertained there were no other instructions requested by the attorneys or objections. (Vol. VI T 708)

At 5:47 p.m.,the jury recessed for deliberations again, with another question

at 7 p.m. to have AC's trial testimony read back from May 22, 2001, which was done after a dinner break. (Vol. VI T 709-764) After the readback, the jury requested adjournment for the evening at 10:20 p.m. (Vol. VI T 764) The next morning, the jury asked about where the boy's pants were and why they were not introduced at trial. Jurors also wanted to know if they could see the arrest report and wanted to know where Mr. Glover's son was and if he left, why he left. The court sent a note back that these matters were not in evidence. (Vol. VI T 766-767)

At 10:25 a.m. on May 24, 2001, the jury found Mr. Glover not guilty of Count Two, but guilty of Count One. (Vol. II, R 261-262; Vol. VI, T 767-768)

Defense counsel below moved for a new trial on May 29, 2001, arguing that the trial court erred in allowing the child hearsay in from the mother and the police tape, by denying the motion for mistrial when "nasty movies" was mentioned, and by permitting the state to vouch for witnesses during closing and allowing hearsay about Mr. Glover's age, *inter alia.* The motion for judgment of acquittal was also renewed at this point. (Vol. II, R 267-269) These were denied.

On August 1, 2001, Mr. Glover was sentenced to life imprisonment on Count One and statutory costs were waived. (Vol. II, R 276-278)

SUMMARY OF ARGUMENT

POINT ONE: Petitioner's age was not proven by admissible evidence and

the jury was not told that it had to find, beyond a reasonable doubt, that Petitioner was eighteen years of age or older, in order for him to be convicted of this capital crime. The case should be remanded for a new trial or in the alternative, remanded for sentencing on the lesser charge of Sexual Battery by a Person Under the Age of Eighteen Years.

POINT TWO: Petitioner should have his conviction reversed because of prosecutorial misconduct and witness vouching or bolstering by prosecution and law enforcement, which created fundamental error and deprived him of his right to a fair trial.

POINT THREE: The conviction herein should be reversed because it rests largely upon improperly-admitted child hearsay statements on videotape and on admittedly false hearsay statements to third parties.

POINT ONE

PETITIONER'S AGE WAS NOT PROVEN BY ADMISSIBLE EVIDENCE AND THE JURY WAS NOT INSTRUCTED CORRECTLY ON THIS AGE ISSUE. THEREFORE, PETITIONER SHOULD

HAVE HIS CASE REMANDED FOR A NEW TRIAL.

During the trial, the judge stated that the age of a defendant was not an element of the sexual battery offense, saying "I don't know why the standard jury instruction hasn't kept pace with it, but I don't really think it's an element of the crime." The judge further stated the question was one for the court, saying "I don't think it's a jury question." (Vol. V, T 431) Although the only evidence of Mr. Glover's age was his own statement given to police after he had requested an attorney and invoked his rights, the trial judge felt this was not an element to be proved. (Vol. V, T 430)

Ironically, the trial judge stated Miranda was not applicable here because this was just "biographical data." However, moments later he stated the hearsay would come in as an admission against interest. (Vol. V, T 430) Of course, the reason that particular hearsay has been traditionally admitted was the logical assumption that one would not knowingly lie *against* one's own interest, but for this theory to hold true, the speaker would have to know that his statement was indeed against his own interest. The trial judge's conclusion that this was simply biographical data supports the assumption that no suspect, save possibly an attorney with clear presence of mind, would predict that their age could be an element of their offense

and thus a harmful admission.[1] It is also worthwhile to note that the trial court's order granting suppression included the finding that "(a)ny statements or admissions made by the Defendant on March 13, 1999 were the result of that unlawful interrogation and are a violation of Miranda v. Arizona." (Vol. II, R 201)

When the jury was instructed, it was told that there were only two elements of the crime, and the elements read did not include Mr. Glover's age. Instead it was brought up on Count One as a factor to be considered for sentencing and was not part of the instruction included under those things which must be proven beyond a reasonable doubt. Further, when the trial judge instructed on Count Two, the age factor was muddied even more, as the jury was given an abbreviated version of the Count One instruction. (Vol. VI, T 612-613)

Fundamental error is present when a trial judge fails to instruct on an essential element of an offense charged. King v. State, 800 So.2d 734 (Fla. 5th DCA 2001). This may also apply to an incomplete or inaccurate jury instruction where, as here, it applies to an element. The fact that the standard jury instruction was followed does not "relieve the trial judge of his responsibility to properly and correctly charge the jury in each case." Dominguez v. State, 492 So.2d 1187, 1188 (Fla. 5th

[1]The age, over 18, of a defendant is one of the elements to be proved in this charge. D'Ambrosio v. State, 736 So.2d 44 (Fla. 5th DCA 1999).

DCA 1986) (quoting State v. Byran, 287 So.2d 73 (Fla. 1974))

The fifth district held in this case that the defendant's age is an element to be proven, citing conflict with the fourth in Jesus v. State, 565 So.2d 1361 (Fla. 4th DCA 1990). It also noted that the Standard Jury Instruction appears to be in error regarding this charge. (Glover at 699). Because this is a capital offense as charged and involves a standard instruction given to juries statewide, the issue of whether this is indeed an element and, as such, involves a fundamental error is an important one to resolve. Beyond that lies the question of whether it is reviewable under the 'harmless error' analysis despite being fundamental in nature.

This Court has held that it is "necessarily prejudicial to the accused" when an element is not defined for a jury:

> We will not dispose of this case under the harmless error statute. There is much at stake and the right of trial by jury contemplates trial by due course of law. See Section 12, Declaration of Rights, Florida Constitution. For that reason we will examine the propriety of the charge as applied to the facts of this case to see whether it correctly states the law of self defense. We have said that where the court attempts to define the crime, for which the accused is being tried, it is the duty of the court to define each and every element, and failure to do so, t*he charge is necessarily prejudicial* to the accused and misleading. See Croft v. State, 117 Fla. 832, 158 So. 454.

Motley v. State , 20 So.2d 798, 800 (Fla.1945)(*emphasis added)*. Florida Rules of Criminal Procedure 3.600 (b)(7) requires a court to grant a new trial "providing substantial rights of the defendant were prejudiced thereby." There is no more basic or substantial right of an accused than to have a jury decide whether a crime has been proved *beyond a reasonable doubt* against him, which necessarily includes each and every element, with no element being less important than another. This Court's opinion in Motley dictates that a new trial should be ordered under the above criminal rule.

Regarding the standard of review applicable here, Petitioner submits a *de novo* review is required where the legality of the jury instructions given, and their inclusion of the required elements, is concerned. Palmer v. Board of Regents, 208 F.3d 969, 973 (11th Cir.2000) The California Supreme Court holds that "[w]hether or not to give any particular instruction in any particular case entails the resolution of a mixed question of law and fact that, we believe, is however predominantly legal. As such, it should be examined without deference." People v. Waidla, 996 P. 2d 46 (Cal. 2000).

Trial counsel was correct in arguing that this hearsay evidence of Mr. Glover's age should not have been admitted at all, in relation to either count. But where here, not only did the evidence consist of inadmissible hearsay which was

the subject of a timely objection, but also the judge failed to instruct the jury that Mr. Glover's age had to be proven beyond a reasonable doubt, the error was compounded.

In stating that it was harmless error for the trial court to omit the element of Mr. Glover's age, the fifth district wrote that while the jury wasn't told it must make the age determination beyond a reasonable doubt, "it certainly implies it." Glover at 700. And while Mr. Glover did not attempt to use his age as a defense here, other than to seek to require the state to prove it by admissible evidence, this does not mean this element is less important than any other element in the offense. In Scott v. State, 808 So.2d 166 (Fla. 2002), where the fifth district ruled that it was harmless error to give a requested instruction on lack of knowledge because the defendant there had not based his defense upon that issue, this Court held that the requirement that an instruction be given is not dependent upon the defense espoused. *Id.* at 171.

Regarding Mr. Glover's age, the district court stated that "under the facts of this case, the jury could not reasonably have found defendant to have been less than eighteen." Glover at 700. This substitution of a judge or judges as trier of fact rather than a jury of peers on one element of a crime is troubling to

constitutional authorities:

> ...I believe that depriving a criminal defendant of the right to have the jury determine his guilt of the crime charged--which necessarily means his commission of *every element* of the crime charged--can never be harmless.

Neder v. U.S., 527 U.S. 1, 30 (1999)(*original emphasis)* There, Justice Scalia, joined by Justices Souter, Ginsburg and with concurrence from Justice Stevens, disagreed with the majority when it determined that the harmless error analysis could be applied to missing elements in jury instructions.

Pointing out that our right to a jury trial is the only right to appear in both the Constitution and the Bill of Rights,[2] Justice Scalia termed this right the 'spinal column' of American democracy and logically asked "why, if denying the right to conviction by jury is structural error, taking *one* of the elements of the crime away from the jury should be treated differently from taking *all* of them away--since failure to prove one, no less than failure to prove all, utterly prevents conviction." *Id.* at 33.(*original emphasis)*

Criticizing the narrow majority's approach, the concurring opinion stated: "We know that all elements cannot be taken from the jury, and that one can. How

[2]Art. III, § 2, cl. 3, U.S. Const. and its Sixth Amendment

many is too many (or perhaps what proportion is too high) remains to be determined by future improvisation." *Id.* at 33.

> "(H)owever *convenient* {intrusions on the jury right} may appear at first, (as doubtless, all arbitrary powers, well executed, are the most *convenient,)* yet let it be again remembered that delays and little inconveniences in the forms of justice are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread to the utter disuse of juries in questions of the most momentous concern." 4 Blackstone, Commentaries 350

Id at 39. (*emphasis by Court)*

Mr. Glover was deprived of his right to have a jury decide all of the elements of his charge beyond a reasonable doubt. Instead, one of the three branches of government later decided what it thought a jury would have done, had it been aware of the need to find, *beyond a reasonable doubt,* that the accused exceeded a certain age. While the instant example may appear to be a relatively harmless practice, the precedent would represent a "slippery slope"[3] of the erosion of one of our oldest and most basic rights in this country.

Therefore, the conviction herein should be reversed, and the case remanded

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[3]Often, carving out exceptions to constitutional principles can lead one to the top of a "slippery slope." J.L. v. State , 727 So.2d 204, 209 n..3 (Fla.1998)

for a new trial. In the alternative, Mr. Glover's judgment and sentence should be vacated and the case remanded for a new sentencing on the reduced charge of Sexual Battery where the defendant is less than 18 years of age.

POINT TWO

PETITIONER SHOULD HAVE HIS CASE REMANDED FOR A NEW TRIAL BECAUSE THE OVERALL CUMULATIVE EFFECT OF PROSECUTORIAL MISCONDUCT AND IMPROPER VOUCHING, TAKEN TOGETHER WITH THE POLICE EMPHASIS ON THE COMPLAINANT'S TRUTHFULNESS, CREATED FUNDAMENTAL ERROR THAT DEPRIVED PETITIONER OF HIS RIGHT TO A FAIR TRIAL. HIS MOTION FOR MISTRIAL WAS IMPROPERLY DENIED.

"(AC) is, in fact, the key." (Vol. V, T 583) During closing, the prosecutor summed his predicament up concisely in that statement as he proceeded to bolster the boy's testimony with his personal opinions of the boy's credibility, then to violate the "Golden Rule", and finally, to state his own personal belief in Mr. Glover's guilt while putting himself into the 'seventh chair.'

When responding to the question of why there were many, many inconsistencies in the boy's stories to authorities and the jury, the prosecutor argued to the jury:

> I'll tell you why, because this really happened. It happened two years ago.

(Vol. V, T 588)

The prosecutor not only bolstered AC's testimony with his opinion on AC's veracity, as an officer of the court, but he managed to violate the "Golden Rule" when he speculated how bad it must be for AC to have to answer the questions he was posing to the boy. In responding to the theory that AC made up this story because he wanted to divert his mother's attention or anger from *him,* "to cover his butt," the prosecutor argued to the jury that "(i)t's not the facts."

> And the reason that didn't unfold is because this wasn't made up. (AC) wasn't making up anything. He was telling you about what happened.
>
> * * * * *
>
> And (AC) says, "Well, people put their dicks in your mouth." Where did that come from? You know where it came from, it came from that man right there having (AC) put his mouth on his dick.
>
> * * * * *
>
> Now, when (AC) was up here testifying, you know, he had a lot of difficulty answering some of the questions, yet he tried to be straightforward and honest... I can't imagine how it was for him, to have to answer those questions.

(Vol. V, T 586-588) After an objection that the prosecutor was attempting to shift the burden to the defense, the prosecutor responded in part:

> My point is that the reason that he said that, is because there is no explanation, because it wasn't made up. It wasn't made up. These things happened to (AC) and that's what he testified to, what happened to him.

(Vol. V, T 591)

Later, the prosecutor personally offered his own judgment of AC's credibility on the witness stand in blatantly obvious terms, leading trial counsel to move for a mistrial:

> STATE: Now after--after seeing (AC) testify, I doubt seriously that he's capable of making something up like this.
>
> DEFENSE: Objection, Your Honor. His personal opinion is irrelevant. He's vouching for the witness. That's inappropriate and we would move for a mistrial.
>
> COURT: I'll deny the motion for a mistrial. It's your opinion and your opinion only as to what the evidence proves on the credibility that counts in this cause, members of the jury. I would sustain the objection.

(Vol. V, T 594)

Despite the prosecutor's opinion to the jury to the contrary, the boy had testified that he already knew about this sex act since he was a big fan of the WWF (World Wrestling Federation)-- that group's slogan, at least in 1999, was "suck it"

which, the boy had explained, meant "putting your mouth on your penis." (Vol. IV, T 331) The youngster even demonstrated the associated fan gesture to the jury. (Vol. IV, T 331-332) The prosecutor (Mr. Bowen) further personalized the case and placed himself in the jury box with his final request of the jurors:

> Think to yourself and ask yourself, "How would Mr. Bowen respond to this, to what they're saying, 'What would be the rebuttal?'
>
> * * * * *
>
> I have no doubt that when you have gone back and deliberated, that your verdicts will be guilty as charged on both counts...

(Vol. V, T 595-596)

The trial judge also denied Mr. Glover's motion in limine and decided to allow the jury to hear, during the videotape of the child's interview, the detective state his pleasure at AC's truthfulness. (Vol. III, T 10) At the end of the video, the jury, twice, heard the interviewer tell AC: "And I'm very happy that you were honest with me." (Vol. V, T 510)

Earlier, before swearing AC in during the video, but after asking AC most of his questions, the detective told the boy it was "very very important to tell the truth," and when the boy replied he was, the jury heard the detective state: "Okay. So you're telling the truth. Okay." (Vol. V, T 493) Then the boy was sworn in

for the video. The trial judge also decided to allow the jury, over defense objection, to hear the detective's comments to the effect that AC would never make this up, and also to allow the jury to hear a comment "Thank you for being honest." (Vol. III, T 10)

A ruling on a motion for mistrial is within the sound discretion of the trial court. Cole v. State, 701 So. 2d 845, 853 (Fla. 1997); s*ee* Power v. State, 605 So.2d 856, 861 (Fla.1992). But a motion for mistrial should be granted when it is necessary to ensure that the defendant receives a fair trial. This is not the situation, as it was in Merck v. State, 664 So.2d 939, 941 (Fla.1995) where one offensive reference was isolated and inadvertent and was not focused upon.

Instead, in the instant appeal, the repeated references by the detective, and the prosecutor, to the boy's truthfulness, combined with the repeated replay of the boy's videotape and the detective's praise of his truthfulness, all worked together with the prosecutor's vouching, to bolster very shaky testimony--testimony upon which Mr. Glover's life sentence totally rests.

The fifth district has previously held that it is not harmless error where a crucial witness has their credibility bolstered by the state. Freeman v. State, 717 So.2d 105 (Fla. 5th DCA 1998); *See* Myers v. State, 788 So.2d 1112 (Fla. 2d DCA

2001). There, the district court stated the standard for appellate review in this area was whether the error committed was so prejudicial as to vitiate the entire trial. There also, like the instant situation, *all* comments were not objected to by defense counsel below. [4] But Freeman held that while no one comment in isolation was particularly sufficient to rise to the level of fundamental error, each contributed to the overall, cumulative effect of the prosecutorial misconduct in that case.

Traditionally, courts did not allow a witness to express an opinion on the 'ultimate issue' in trial because that invaded the province of the jury. Although this prohibition has been loosened somewhat, the goal is to allow the jury to hear all evidence that will *help it make a decision*, not make the decision for it. Here, the boy's testimony was the only evidence of guilt and constituted the entire state's case. Whether he was truthful was the *only* question here, and there were ample inconsistencies, self-contradictions, and physical impracticalities here, together with the boy's own degree of mental impairment, to make this question a very tough jury question.

This Court has declared before that an examination of the "permissible evidence on which the jury could have legitimately relied and the impermissible

[4]Unlike in Freeman, however, the prosecutor herein was not admonished for his remarks.

evidence which might have influenced the jury's verdict" is necessary. Martinez v. State, 761 So.2d 1074, 1081 (Fla. 2000). The state's bolstering and vouching constituted harmful, reversible, and fundamental error. Jones v. State, 449 So.2d 313 (Fla. 5th DCA 1984).

> The supreme court has made clear that where prosecutors violate the judicial restrictions on the content of closing argument, such prosecutorial misconduct should be remedied. Here, defense counsel did his job by objecting and objecting very specifically. Ruiz v. State, 743 So.2d 1 (Fla.1999). S*ee al*so Henry v. State, 743 So.2d 52 (Fla. 5th DCA 1999). The case will have to be retried.

Jorlett v. State, 766 So.2d 1226, 1227 (Fla. 5th DCA 2000).

The Petitioner therefore requests that this case be remanded for a new trial.

POINT THREE

PETITIONER'S CONVICTION RESTS ON INADMISSIBLE VIDEOTAPED CHILD HEARSAY STATEMENTS WHICH WERE PLAYED FOR THE JURY TWICE AND ADMITTEDLY FALSE HEARSAY STATEMENTS TO THIRD PARTIES. HIS CONVICTION SHOULD BE REVERSED.

The child's out-of-court statements on video and to his mother and police were clearly hearsay and normally inadmissible. However, the state filed notice pursuant to § 90.803(23) Fla. Stat. that the statements were admissible thereunder. That notice was deficient under the statutory requirements in that it did not include "the time at which the statement was made," (actually two statements), or "the circumstances surrounding the statement which indicate its reliability," and for 'particulars' the state simply said "see the video tape and/or transcripts provided in discovery." (Vol. I, R 175)

In the seminal Perez v. State, 536 So.2d 206 (Fla. 1988), which found the child sexual abuse hearsay exception constitutional, the court quoted Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1965) regarding the problem of balancing the confrontation clause with hearsay exceptions:

> The Confrontation Clause operates in two

> separate ways to restrict the range of admissible hearsay. First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity.
>
> * * * *
>
> If the evidence does not fall within a firmly rooted hearsay exception, there must be a showing of "particularized guarantees of trustworthiness." *Id.* 448 U.S. at 66 (FN4)

Perez at 208. The Supreme Court of Florida went on to point out that this particular hearsay exception is *not* a firmly rooted exception.

> The initial clause of section 90.803(23) provides if "the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness" the exception will not be recognized.
>
> Section 90.803(23)(c) requires the court to make specific findings of fact on the record *before* it admits evidence under the exception.

Charles W. Ehrhardt, *Florida Evidence* Sec. 803.23 at 720 (1997 ed.)

There is a 'high standard' for the reliability that must be shown *before* a child victim's hearsay may be admitted, and the supreme court has emphasized the 'heavy responsibility' upon the trial court. Dept. of Health and Rehabilitative Services v. M.B., 701 So.2d 1155 at 1159 (Fla. 1997), citing Townsend[5]. "Our

[5] State v. Townsend, 635 So.2d 949 (Fla.1994)

decisions in Jones[6] and Townsend stand for the dual conclusions that strict standards of reliability must be applied *before* admitting child hearsay statements, and, *once those standards have been met*, such statements may be admitted and considered as substantive evidence by the trier of fact." *Id*. at 1160 (emphasis added).

Here, by AC's own admission, he deliberately failed to tell his mother the true story of what happened at Mr. Glover's residence. During subsequent versions, he changed the story of *what* happened, *how* he responded to it, *who* did *what* to *whom*, and apparently what day or days this took place. Then, he later gave varying accounts of why he told a different version to his mother.

During his *trial* version of the events, and when asked if Mr. Glover asked him to do something 'bad', over objection, AC stated Mr. Glover asked him to put his mouth on Mr. Glover's penis. (Vol. IV, T 319) AC now stated that he did place his mouth on the man's penis around the same time the boy was playing *Duke Nukem* on the Play Station. AC said it happened when the man told him to pull his pants down and asked him to perform oral sex. The boy stated the penis was inside his mouth. After that, the boy told him "no more." (Vol. IV, T 320;

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[6] Jones v. State, 423 So.2d 513 (Fla. 5th DCA 1982)

322)

On cross examination, the boy stated he had watched his own videotaped statement the preceding Friday at the prosecution's request. He stated he couldn't read, and when asked how old he was when these things took place, answered "I was eight. No, nine. Nine." (Vol. IV, T 329-330)

He acknowledged that he only told his mother Mr. Glover *asked* him to do something bad, and not that anything had actually happened. (Vol. IV, T 338-339) He testified that when he talked to the police, he changed his story from "He asked me to suck his dick" to "He did suck my dick." (Vol. IV, T 340) AC also recalled telling the police that he had *not* put his mouth on Mr. Glover's penis. (Vol. IV, T 341) A year later, however, he told authorities that he *had* placed his mouth on Mr. Glover's organ. (Vol. IV, T 343)

> DEFENSE: Okay. And the people you tell that to are--is it Mr. Bowen that you told it to or was it Mr. Koenig, another state attorney? Remember David? Remember you had David as your state attorney before Mr. Bowen?
>
> A. Yes.
>
> Q. Okay. Is he the first person you told this to?
>
> A. Yes.
>
> Q. Okay. That was, like, right before we were ready to go to trial, wasn't it? Weren't we set to go to trial way back then?
>
> A. Yeah.

Q. Back in March, right?

A. Yeah.

Q. Then you said, "Well, there's something else I want to tell you," and you came up with this additional information. Is that right?

A. Right.

(Vol. IV, T 343)

At the time of this accusation, the boy said he knew Mr. Glover had a cast on his arm from a car accident. The boy unbuttoned his own pants, he said during trial, but he *also* recalled saying during his deposition that Mr. Glover took them off him. (Vol. IV, T 344-346)

AC said he was playing a video game, *lying* on the floor *stomach down* when he stated Mr. Glover performed oral sex on him. (Vol. IV, T 336) Later, in response to leading questions from the prosecution, the boy testified he was *sitting*, while playing the game and while Mr. Glover performed fellatio, *not lying* on his stomach. (Vol. IV, T 367)

STATE: No, you told (defense counsel) that you were laying on your stomach a minute ago.

A: No. I said I was sitting up like that.

Q: Okay. But when he laid down on the floor to show you, did you kind of indicate that that was what you were doing, or were you confused?

A: I was confused.

(Vol. IV, T 368)

AC said he had the game controller with its buttons or squares or circles on it, in his lap and hand during the time that Mr. Glover was stated to be performing fellatio on him. (Vol. IV, T 373) AC *also* confirmed that he said during his deposition that he had to *turn around* to look at Mr. Glover to tell him not to perform the oral sex. (Vol. IV, T 347-348)

Another key conflict concerning possible motive for lying, (by creating a diversionary tale) involved whether AC was trying to diminish trouble he had gotten into, in school. AC denied that he had been in trouble in school the same week that he reported something to his mother. When he was reminded of his videotaped statement that he was "being bad at school that Monday" he then recalled that he *had* been bad and that his mother learned of it the same day. (Vol. IV, T 338; 361-363)

During trial, the boy said that the actions of him performing fellatio on Mr. Glover and Mr. Glover reciprocating took place on *different* days. He could not recall which happened first. (Vol. IV, T 348) The boy did recall stating during his earlier deposition that the events *did* happen on the *same* day. (Vol. IV, T 350) MC said that the boy told her the incident had taken place on the preceding

Tuesday. (Vol. IV, T 389) On cross examination, MC said she remembered it was Tuesday, not Monday, because the boy asked her if she remembered the day she came home early. (Vol. IV, T 390) However, her deposition revealed her stating it was on a Monday as she sat in front of the computer. (Vol. IV, T 391-392) She stated it was not unusual for her to walk over to Mr. Glover's while her son was over there, as she did that Monday--this was her normal practice. (Vol. IV, T 393-396)

Regarding the jeans and the written obscenities, during trial AC testified the he did *not* tell Mr. Glover what to write on the jeans. However, his earlier deposition produced a different answer, although at trial AC said he couldn't remember that earlier testimony.

> DEFENSE: Do you remember being asked these questions and giving the following responses:
>
> Question: "And then what happened?"
>
> And you said, "Then he drawed on them and I--I told him what I wanted him to draw, like that ."
>
> * * * * *
>
> Question, "Is that--did you tell him to draw cuss words on there? Is that what you said before, he drew what you told him to?"
>
> "Um-hum."
>
> "Did you tell him to draw cuss words?"
>
> "Yeah."

(Vol. IV, T 350-351)

During trial, defense also brought out contradictions in previous depositions by the boy as to why he left Mr. Glover's house after the sex acts. (Vol. IV, T 352-355) When the boy testified that Mr. Glover had *not* given him a comic book as reward for the act, his August 1999 deposition revealed the opposite response. (Vol. IV, T 355)

DC testified that she was second cousin to AC and he had lived with her since August of 1999. (Vol. IV, T 378) AC has Attention Deficit Disorder according to her and was taking medication. He had learning problems, comprehending at a kindergarten level. (Vol. IV, T 376-377; 379-380) This led to the prosecutor telling jurors "... that's something that affects his comprehension and his ability to remember all the specific details. Those are some things that you can consider." (Vol. V, T 584)

Explaining to jurors why the boy's testimony had inconsistencies with his prior videotaped statement, the prosecutor said "...if you look at the video and then compare it with how he testified on the stand, he did a lot better today than he did two years ago, and yet he still has trouble." (Vol. V, T 588)

Ordinarily, a decision on the admissibility or exclusion of evidence would

rest on the standard of abuse of judicial discretion. SanMartin v. State, 717 So.2d 462 (Fla. 1998); Sexton v. State, 697 So.2d 833 (Fla. 1977). However, in the unique circumstance herein, where such decision is based on a series of factual determinations, Petitioner argues that the standard of whether the decision is supported by competent substantial evidence should be applied. In Caso v. State, 524 So.2d 422 (Fla. 1988), the Court ruled that such determinations are clothed with a presumption of correctness-- however, as pointed out in State v. Gandy, 766 So.2d 1234 (Fla. 1st DCA 2000), such presumption can be overcome.

Townsend made clear that in order to strike a balance among otherwise excludable hearsay, the difficulties of child testimony in such cases, and a defendant's constitutional right to confrontation of witnesses, special heightened safeguards must be taken for evidence offered under Section 90.803(23) to be admissible. Those include a separate and distinct determination first of the trustworthiness and reliability of the statements, without reference to any corroboration, and then the determination that the statements are supported by some corroborating evidence.

In analyzing Mr. Glover's trial court's findings, first as to MC's[7] recitation

[7]MC herself had problems in testifying consistently: At the 90.803 hearing, the mother said her boy had *not* been acting differently during the days leading up

of AC's hearsay to her, Petitioner argues that, while the reliability order touches on the statutory concerns, it ignores, for example, the mother's contradictory statements about whether the boy *volunteered* information to her or whether he responded to pressure from her. (Vol. I, R 190) It also ignores the possible motive of AC to create a diversion due to problems at school. It also ignored the four day delay in reporting the incident. The order did not make specific findings of fact as required by the hearsay statute--only general ones or mere conclusions.

This order is insufficient to provide this Court meaningful review of the lower court's consideration of the "time, content and circumstances" pursuant to Section 90.803(23):

> [T]he court may consider the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate.

The "other factors" discussed in Townsend, supra., are as follows (at p.

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to this *voluntary* revelation by him. (Vol. I, T 13-16) Meanwhile, the detective apparently knew that MC told *him* she was alerted to the offense after noticing her son acting strange and moping around her house. She stated she confronted the boy several times and he finally told her Mr. Glover had requested oral sex. (Vol. I, T 88-90)

957):

> Other factors may include, but are not limited to, a consideration of the statement's spontaneity; whether the statement was made at the first available opportunity following the alleged incident; whether the statement was elicited in response to questions from adults; the mental state of the child when the abuse was reported; whether the statement consisted of a child-like description of the act; whether the child used terminology unexpected of a child of similar age; the motive or lack thereof to fabricate the statement; the ability of the child to distinguish between reality and fantasy; the vagueness of the accusations; the possibility of any improper influence on the child by participants involved in a domestic dispute; and contradictions in the accusation. [citations omitted.]

With regard to the videotaped statement to police, the trial court pointed out that the interviewer "asked leading questions, was judgmental, and inappropriately communicated emotion," but concluded that the "above pitfalls in the interview did not affect the reliability of the statement." (Vol. I, R 191)

And, although the boy *admitted on tape* that he gave differing statements to his mother and the police on the critical issue of *attempt* vs. *completed crime*, the trial judge's order summarized that the child did *not* give inconsistent statements to them. Petitioner submits that this conclusion is not supported by any facts recited by the trial judge and not supported by the facts in the record. In similar hearings,

the courts have held that an appellate court is not "bound to accept a trial court's determination of questions of fact at a motion to suppress hearing when the determination is clearly shown to be without basis in evidence or predicated upon an incorrect application of the law." State v. Navarro, 464 So.2d 137, 139 (Fla. 3d DCA 1984).

In *Townsend*, the court stated that, "[a] mere conclusion that a child's statements are reliable or a mere restatement of the statute in a boilerplate fashion is insufficient to meet the requirements of the confrontation clause." *Id.* at 957. The present order states mere conclusions and is subject to *de novo* appellate review.

The fifth district recently reviewed this issue in Tussey v. State, 793 So.2d 1188 (Fla. 5th DCA 2001), further citing Hopkins v. State, 632 So.2d 1372, 1377 (Fla. 1994), which said "absent the specific finding of reliability mandated by the statute, a reviewing court cannot determine whether the statements were in fact reliable. Failure to make specific findings not only ignores the clear directive of the statute, but also implicates the defendant's constitutional right to confrontation."

The Petitioner's constitutional rights of due process and to confrontation have been violated by the trial court's failure to specify its findings of trustworthiness and reliability. Mr. Glover's counsel preserved his objections

pretrial and during trial. Due to the court's failure to specify its findings, and the resulting violation of rights, the Petitioner's conviction must be reversed.

CONCLUSION

Based on the foregoing cases, argument and authorities, Petitioner respectfully requests this Honorable Court to reverse the conviction herein and remand for a new trial on Count One before a newly empaneled jury with directions to the trial court. In the alternative, Petitioner requests that his judgment and sentence herein be vacated and that his cause be remanded for resentencing on the lesser offense of Sexual Battery by a Person Under the Age of Eighteen.

Respectfully submitted,

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_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand-delivered to the Honorable Richard E. Doran, Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to: Mr. Bruce W. Glover, Inmate # E14299, F3111U, Gulf Correctional Institution, 500 Ike Steele Road, Wewahitchka, Florida 32465-2428, this 3rd day of December 2002.

_____

MARVIN F. CLEGG
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I HEREBY CERTIFY that the font used in this brief is 14 point proportionally spaced Times New Roman.

_____

MARVIN F. CLEGG

ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

BRUCE W. GLOVER,)
)
Petitioner,)
)
vs.)
) DCA No. SC 02-1064
STATE OF FLORIDA,)
)
Respondent.)
_____)

A P P E N D I X

Fifth District Court of Appeal's opinion.

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