IN THE SUPREME COURT OF FLORIDA

RICK BEBER,

Petitioner,

v. Case No. SC03-1765

STATE OF FLORIDA,

Respondent.
_____/

RESPONDENT'S BRIEF ON THE MERITS

On Review from the District Court of Appeal
of the State of Florida
Fifth District

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STATEMENT OF THE CASE AND FACTS

Petitioner Beber was originally charged with two counts of capital sexual battery (counts one and four), three counts of lewd or lascivious molestation (counts two, five and six), one count of soliciting lewd or lascivious conduct (count three), one count of lewd or lascivious exhibition (count seven), and two counts of providing obscene material to a minor (counts eight and nine). (Vol. I, R98-100)

On April 19, 2002, a hearing took place on the State's Notice of Intent to Present Child Victim Hearsay pursuant to section 90.803(23), Florida Statutes. (Vol. I, R3-58; 109-111) The victim's mother, [NAME REMOVED TO PROTECT THE CHILD VICTIM], testified that she confronted her son [NAME REMOVED TO PROTECT THE CHILD VICTIM] concerning an inappropriate note referencing sex which had been found under his pillow. (Vol. I, R6-7) When asked who taught him such things, he eventually acknowledged that it was Beber, who was [NAME REMOVED TO PROTECT THE CHILD VICTIM]'s mother's boyfriend. (Vol. I, R7-9) When asked what Beber did to him, [NAME REMOVED TO PROTECT THE CHILD VICTIM] cried that Beber had touched his private. (Vol. I, R9)

Gayna Hansen of the Wuesthoff Hospital Child Protection Team (CPT) also testified at the hearing. (Vol. I, R27) Her testimony related to an interview she had conducted with [NAME REMOVED TO PROTECT THE CHILD VICTIM] on June 21, 2001, which was videotaped

and published to the court. (Vol. I, R30; 43)

In the tape, seven year old [NAME REMOVED TO PROTECT THE CHILD VICTIM] stated that Beber touched his private when he was staying over at his grandmother's house. (Vol. V, T358) He described an incident when he had to go the bathroom and Beber was taking a shower. [NAME REMOVED TO PROTECT THE CHILD VICTIM] stated that the shower curtain was open a little bit and that Beber was touching himself and that he heard Beber say that stuff was coming out of his private. (Vol. V, T364-366) [NAME REMOVED TO PROTECT THE CHILD VICTIM] also told Hansen that Beber got into the bathtub with him and that Beber put his mouth on [NAME REMOVED TO PROTECT THE CHILD VICTIM]'s private and "went like this with his mouth closed." (Vol. V, T372) He also stated that Beber put his mouth on [NAME REMOVED TO PROTECT THE CHILD VICTIM]'s private two times, once in the bathtub and once in the living room. (Vol. V, T379-380) [NAME REMOVED TO PROTECT THE CHILD VICTIM] also indicated a time when Beber made him touch Beber's private with his hand and shake it. (Vol. V, T374) [NAME REMOVED TO PROTECT THE CHILD VICTIM] stated also that Beber showed him magazines and videos that had naked people in them and that Beber took his private out and shook it while he watched the video. (Vol. V, T386) [NAME REMOVED TO PROTECT THE CHILD VICTIM] was six years old when the incidents occurred.

The lower court ruled that the statements to both [NAME

REMOVED TO PROTECT THE CHILD VICTIM] and Hansen were admissible under section 90.803(23), Florida Statutes, finding that:

> – the court will find that neither the source of the information or the methodology of the circumstances by which the statement was reported indicated a lack of trustworthiness.
>
> Second, the court will find that the time, content, and circumstances of the statement provided sufficient safeguards of reliability.

(Vol. I, R56)

Beber was tried on June 10, 2002, through June 13, 2002. At trial, [NAME REMOVED TO PROTECT THE CHILD VICTIM] testified that Beber pulled down [NAME REMOVED TO PROTECT THE CHILD VICTIM]'s pants and underpants, touched [NAME REMOVED TO PROTECT THE CHILD VICTIM]'s private with his hand and shook it up and down. (Vol. IV, T267) He stated that Beber touched his own private and would shake it up and down. (Vol. IV, T267; 269-270) He also said that Beber got into the bathtub with him and touched him. (Vol. IV, T270) The State asked [NAME REMOVED TO PROTECT THE CHILD VICTIM] if Beber had ever touched [NAME REMOVED TO PROTECT THE CHILD VICTIM]'s private with his mouth to which the defense objected and the objection was sustained. (Vol. IV, T270) He did not know if Beber ever touched him with anything else. (Vol. IV, T270) In addition, [NAME REMOVED TO PROTECT THE CHILD VICTIM] testified that he watched dirty movies with Beber and that he found or saw dirty magazines. (Vol. IV, T271-272) On cross-examination, [NAME REMOVED TO PROTECT THE CHILD VICTIM] was asked whether Beber ever touched

him with anything other than his hands to which [NAME REMOVED TO PROTECT THE CHILD VICTIM] responded no. (Vol. IV, T285)

Detective John Ackerman of the Rockledge Police Department testified that Beber denied molesting [NAME REMOVED TO PROTECT THE CHILD VICTIM] but he did admit taking a bath with him. (Vol. V, T330) Gayna Hansen also testified at trial and the videotape of the interview was played for the jury. (Vol. V, T336-393)

Judgment of acquittal was granted as to count eight (providing obscene material to a minor). (Vol. I, R173; Vol. V, T444-445) The jury found Beber guilty as charged in counts one, two, three, four, five, seven and eight (previously count nine), and not guilty of count six. (Vol. II, R213-220) Beber was sentenced on August 12, 2002, to life for counts one and four, fifteen years for counts two, three and seven, thirty years for count five and five years for count eight, all to be served consecutively. (Vol. II, R233-239)

Beber appealed his convictions and sentences to the Florida Fifth District Court of Appeal. The district court affirmed all convictions and sentences with the exception that it reversed and vacated the judgment and sentence for count nine (providing obscene material to a minor). *Beber v. State*, 853 So.2d 576 (Fla. 5th DCA 2003). (See appendix) Notice to Invoke Discretionary Jurisdiction was filed and this Court accepted jurisdiction on December 18, 2003.

SUMMARY OF THE ARGUMENT

The child hearsay statement was sufficient on its own to sustain Beber's two convictions of capital sexual battery. The out-of-court statement was surrounded by circumstantial guarantees of reliability and trustworthiness. The child hearsay exception does not require consistency and it does not require corroborative evidence as long as the child testifies.

Furthermore, the child victim's in-court testimony as to whether Beber placed his mouth on the child's penis was not a direct contradiction to his out-of-court statement. The child was never directly asked and an eight year old child may not connect a mouth as something with which he could be touched.

ARGUMENT

POINT ON REVIEW

THE DISTRICT COURT CORRECTLY AFFIRMED BEBER'S CONVICTIONS FOR CAPITAL SEXUAL BATTERY BASED SOLELY ON THE CHILD VICTIM HEARSAY STATEMENT WHICH WAS SUFFICIENT ON ITS OWN TO SUSTAIN THE CONVICTIONS DUE TO ITS SUFFICIENT SAFEGUARDS OF RELIABILITY.

Petitioner argues that the district court erred in affirming his two convictions for capital sexual battery because the only evidence consisted of the child-victim's statement to a child protection team worker which directly conflicted with his sworn deposition and trial testimony. Respondent disagrees.

Standard of Review

Pursuant to Article V, section 3(b)(3), of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv) this Court may have jurisdiction to review decisions of the district courts of appeal that expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law. Respondent maintains as argued in the Respondent's Brief on Jurisdiction that no express or direct conflict exists with the district court's opinion and this Court's decisions in *State v. Green*, 667 So.2d 756 (Fla. 1995) and *State v. Moore*, 485 So.2d 1279 (Fla. 1986). Respondent therefore urges this Court to find that review was improvidently granted in the instant case.

Should this Court disagree, the following arguments are made. A question involving sufficiency of the evidence is a test of legal adequacy. *Tibbs v. State*, 397 So.2d 1120 (Fla. 1981). Sufficiency of the evidence to support a particular criminal charge is a question of law and is therefore reviewed *de novo*. *Jones v. State*, 790 So.2d 1194 (Fla. 1st DCA 2001).

Merits

Section 90.803(23), Florida Statutes, provides in part:

> **(23)Hearsay exception; statement of child victim.--**
>
> (a) Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by a child victim with a physical, mental, emotional, or developmental age of 11 or less describing any act of child abuse or neglect, any act of sexual abuse against a child, the offense of child abuse, the offense of aggravated child abuse, or any offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:
>
> 1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the 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; and
>
> 2. The child either:
>
> a. Testifies; or

> b. Is unavailable as a witness, provided that there is other corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm, in addition to findings pursuant to s. 90.804(1).

The trial court in the instant case found the child's videotaped statement made to child protection team worker Gayna Hansen and the child's statement to his mother to be admissible pursuant to this section. The court found that:

> Neither the source of the information, methodology employed by Ms. Hansen, nor circumstances by which [NAME REMOVED TO PROTECT THE CHILD VICTIM]'s statement was reported indicate a lack of trustworthiness. [NAME REMOVED TO PROTECT THE CHILD VICTIM]'s language and demeanor during the interview were consistent with that of a six-year-old child. There was no evidence that [NAME REMOVED TO PROTECT THE CHILD VICTIM] had been coached or conditioned as to what to say. [NAME REMOVED TO PROTECT THE CHILD VICTIM] had not been interviewed numerous times. [NAME REMOVED TO PROTECT THE CHILD VICTIM]'s description of what allegedly happened to him consisted of childlike descriptions. Therefore, the Court finds that the time, content, and circumstances of the statements made by [NAME REMOVED TO PROTECT THE CHILD VICTIM] to Ms. Hansen provide sufficient safeguards of reliability.

(Vol. I, R145) Beber did not challenge this finding on appeal but now argues that the statement was rendered unreliable and inadmissible as substantive evidence by subsequent events. (Merits Brief, p. 12)

The child victim was asked on direct examination whether Beber had ever touched the child's penis with his mouth. (Vol. IV, T270) The defense objected and the objection was sustained. When questioned further whether Beber had ever touched the child's private with anything other than his hand, the child responded that he did not know. (Vol. IV, T270) On cross-examination when the same question was asked the child responded "no." (Vol. IV, T285) In the video-taped interview of the child with Gayna Hansen the child told Hansen after prompting that Beber had put his mouth on the child's penis two times, once in the bedroom and once in the bathroom. (Vol. V, T371; 379-380) Petitioner argues that the trial testimony constituted a denial that fellatio occurred and therefore, the unsworn child hearsay statement cannot form the sole basis of the conviction where there is no other corroborating evidence. He relies on *State v. Moore*, 485 So.2d 1279 (Fla. 1986), wherein this Court held that prior inconsistent statements standing alone do not constitute sufficient evidence to sustain a conviction.

It is the Respondent's position that the child victim's in-court testimony was not a direct contradiction to the video-taped interview as to whether Beber placed his mouth on the child's penis. To "recant" means to withdraw or repudiate formally and publicly. *Black's Law Dictionary* at 1139 (5th ed. 1979). The child did not recant his prior testimony concerning the oral sex. The

child was never allowed to answer when asked this question.

It is entirely possible given his answers that the eight year old child never made the connection between being touched with a hand and being touched with a mouth. Clearly, he used child-like descriptions in his statement to Hansen. An eight year old may not relate a mouth as something with which someone could be touched as opposed to a hand or an object in the hand. This is most clearly demonstrated through the child's statement to Hansen:

> MS. HANSEN: Did he ever touch his private with something else?
> [NAME REMOVED TO PROTECT THE CHILD VICTIM] LESEUER: Uh-uh.
> MS. HANSEN: Besides his hand? Not his mouth or his private?
> [NAME REMOVED TO PROTECT THE CHILD VICTIM] LESEUER: Wait. Yeah, he put my private in his mouth.
> MS. HANSEN: He put your private in his mouth?
> [NAME REMOVED TO PROTECT THE CHILD VICTIM] LESEUER: (Nods head.)

(Vol. V, T370-371)

The prosecutor should have been allowed to lead in this instance on direct examination so that the child could clarify. Instead, the defense attorney immediately objected before the prosecutor even finished his question of whether Beber had ever touched the child's penis with his mouth. (Vol. IV, T270) Obviously, the defense attorney did not want the child to answer that question because he knew it would have been yes. A negative answer would have cleared Beber of the sexual batteries.

It is the Respondent's position that the child's in-court testimony supports his out-of-court statements. He testified in court consistently as to all of the other charges he had alleged out-of-court. (Vol. IV, T266-271) Petitioner touched the child's private in both the bathroom and the living room. Petitioner masturbated the child in the living room, Petitioner touched himself in the living room, Petitioner masturbated himself, Petitioner touched himself in the bathtub or shower and masturbated himself. All of those in-court allegations clearly demonstrate the reliability of the out-of-court statements. Although some of the details of the molestations may have been inconsistent, the child **never recanted**.

In the dependency case of *Department of Health And Rehabilitative Services v. M.B.*, 701 So.2d 1155 (Fla. 1997), this Court noted that there was an on going debate about the reliability of children's out-of-court statements about sexual abuse. *Id.* n.4. This Court recognized a New Jersey Supreme Court case which stated that "a child's out-of-court statements are often more reliable than a child's in-court testimony due to the lapse of time between the assault and the trial as well as the stress of testifying, especially when the defendant is a family member or authority figure." *Id.*, quoting *R.S. v. Knighton*, 125 N.J. 79, 592 A.2d 1157, 1163-1164 (1991).

In the instant case, the child was testifying to events that

had happened two years previously when he was only six years old. In addition, there had to be some friction within the family because Beber's live-in girlfriend, who was the child's grandmother, testified on Beber's behalf and stated that the child's mother, her daughter, taught the child to grab his penis. (Vol. VI, T510; 512-513) She admitted on cross-examination that she never called the Department of Children and Families or anyone else over the behavior. (Vol. VI, T515-516) She testified that the child victim was **never** left alone with Beber, even when Beber and the child bathed together. (Vol. VI, T511-512; 529; 545) Because the child was never given the opportunity to deny that Beber had placed his mouth on his penis, it is the Respondent's position that the in-court testimony was not inconsistent. Respondent admits that there are some minor conflicts in the testimony as to be expected from an eight year old testifying about several incidents which had taken place two years previously. However, the minor conflicts involved the details of the various molestations, not that they did not occur.

The standard of review is not whether a child victim's testimony and out-of-court statements contain any inconsistencies, but whether they were so ambiguous, so unreliable or so incredible that no reasonable juror could find a defendant guilty beyond a reasonable doubt. *Means v. State*, 814 So.2d 1136 (Fla. 1st DCA 2002). In the instant case, the inconsistencies were not

incredible or unreliable due to the age of the child and the surrounding circumstances of the events. The child often responded with "I don't know" or that he could not remember. He never wavered that he was molested and that it was Beber who molested him. It is entirely unreasonable that an eight year old child would have the sexual knowledge that this victim indicated both in the out-of-court statement and the in-court testimony unless he had in fact been abused. It is highly unlikely that Beber did not put his mouth on the child's penis when quite clearly he bathed with the child, masturbated in front of the child, touched the child's penis and made the child touch his penis on several occasions.

Petitioner contends that out-of-court statements contradicted by trial testimony are nothing more than prior inconsistent statements that may not be used substantively as the sole evidence of guilt. First, it should be noted that this Court has refused to establish "a blanket rule that no conviction can stand based solely on hearsay testimony." *Anderson v. State*, 655 So.2d 1118, 1120 (Fla. 1995). Further, Petitioner's reliance on *Jaggers v. State*, 536 So.2d 321 (Fla. 2d DCA 1988), as well as *State v. Moore*, *supra*, and *State v. Green*, 667 So.2d 756 (Fla. 1995), is misplaced. Respondent contends that these cases are distinguishable from the instant case and do not control.[1]

[1]Respondent still maintains that there is no conflict with either *Green* or *Moore* and that jurisdiction was improvidently granted.

In *Jaggers, supra*, the out-of-court statements consisted of the victims' statements made to several persons who testified at trial as to prior statements made to them by the victims that were consistent with vaginal penetration. The child victims did not testify at trial and the videotaped testimony of two of the victims specifically indicated that the defendant did **not** penetrate the vagina. There was no finding of reliability of the out-of-court statements by the trial judge and the second district concluded that evidence of such prior unsworn, inconsistent statements, not subject to cross-examination at the time they are made, cannot constitute the sole evidence upon which to sustain the defendant's convictions of the sexual battery by penetration. That is not true for the instant case. As argued above, the child victim never specifically denied that Beber put his mouth on the victim's penis and the out-of-court statement containing the child-like descriptions of the six year old was unquestionably reliable and trustworthy.

In *Moore, supra*, the case did not involve the child hearsay exception but solely a prior inconsistent statement. As in *Jaggers*, there was no finding of reliability or trustworthiness. Finally, in *State v. Green*, *supra*, this Court held that in a criminal prosecution, a prior inconsistent statement standing alone is insufficient as a matter of law to prove guilt beyond a reasonable doubt. In *Green*, however, the child victim had

specifically testified at trial that the defendant did not commit the abuse on her and identified someone else. The child victim in the instant case **never** accused anyone other than Beber.

In *Department of Health and Rehabilitative Services v. M.B., supra*, this Court found that:

> Our decisions in *Jones* 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. This Court further held that the admission and subsequent consideration of the statements as substantive evidence does not require that the child's testimony at trial be consistent with the out-of-court statements, and if there was an in-court testimony consistency requirement, it would ignore the major purpose of section 90.803(23) and render at least part of it meaningless.

> Surely, at least one purpose of the act was to allay the problems inherent in a child victim's live appearance and testimony at trial, and to permit an additional means of providing a child's evidence for the trier of fact.

Id. at 1161. This Court also agreed with the commentary:

> There is some authority that, if the victim's trial testimony does not indicate that abuse occurred, the victim's out-of-court statements that the abuse occurred are not sufficient, by themselves, to support a conviction. The rationale for these decisions is not clear.

> If the rationale is that the out-of-court statement is lacking the necessary reliability as a result of the circumstances in which it was made, the analysis is appropriate. Section 90.803(23) and the defendant's confrontation rights require this analysis. *If the basis is that, because the out-of-court statement which is admissible under a recognized hearsay exception, is inadmissible simply because it is inconsistent with the in-court testimony of the witness, the reasoning should not be followed*. Although a prior statement which is admitted pursuant to section 90.801(2) is not sufficient by itself to support a conviction, the rationale should not be extended to statements admitted under a section 90.803 hearsay exception. These exceptions are surrounded by circumstantial guarantees of reliability which are not necessarily present when a statement is offered under section 90.801(2).

Id. at 1161, quoting, Charles W. Ehrhardt, *Florida Evidence* §803.23, at 702 (1996 ed.)(footnote omitted)(emphasis added).

Respondent urges this Court to extend the reasoning expressed in *M.B.* to the instant criminal case. The reliability and trustworthiness of the out-of-court statement is unquestionable. The trial court in making this finding properly considered the mental and physical age of the child as well as his maturity. It also considered the nature of the abuse and the relationship of the child to the offender. To find the out-of-court statement unreliable just because there were some minor inconsistencies would be an injustice to the child hearsay exception. It does not require consistency. Furthermore, it does not require corroborative evidence if the child testifies. §90.803(23)(a)2. In

Williams v. State, 714 So.2d 462, 466 n.5 (Fla. 3d DCA 1997), the third district expressed the view that a "child victim hearsay statement is sufficient, on its own, to sustain a conviction if the statement is determined to carry the 'sufficient safeguards of reliability' ... required by section 90.803(23)."

Similarly, in *Mikler v. State*, 829 So.2d 932 (Fla. 4th DCA 2002), the fourth district also expressed some doubt as to whether corroborative evidence was required when the child testifies at trial. Just as in the instant case, *Mikler* had been charged with multiple counts of sexual battery as well as lewd and lascivious molestation. The victim in *Mikler* testified at trial but failed to mention that defendant put his tongue on her vagina. Those allegations were, however, included in the out-of-court statement. The court found:

> Considering the rationale for requiring corroboration, it makes no sense to require "other corroborative evidence of abuse" where the child testifies at trial and is available for cross-examination. The extra modicum of reliability provided by some corroboration is rendered unnecessary by the ability to cross-examine the child; cross-examination acts "as a safeguard of the reliability of criminal proceedings" since cross-examination is "'the greatest legal engine ever invented for the discovery of truth'."

Id. at 934-935.(Citations omitted). The *Mikler* court affirmed the convictions after finding that assuming, arguendo, that corroborative evidence was required to admit the victim's out-of-court statement, such requirement was satisfied.

It was up to the jury whether to believe all or only part of the child's testimony in the instant case. The out-of-court statement was properly admitted as substantive evidence and this Court should affirm Beber's convictions.

CONCLUSION

Based on the arguments and authorities presented herein, Respondents requests this honorable Court to either deny review as improvidently granted or to affirm the district court's opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Respondent's Brief on the Merits has been furnished by interoffice mail/delivery to Dee Ball and Nancy Ryan, Assistant Public Defenders, 112 Orange Avenue, Suite A, Daytona Beach, FL, 32114, this ___ day of February, 2004.

_____
Robin A. Compton
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and type of font used in this brief is 12 point Courier New, a font which is not proportionately spaced.

_____
Robin A. Compton
Assistant Attorney General