IN THE SUPREME COURT OF FLORIDA

RAYMOND BAUGH,
Petitioner,

vs.

CASE NO.: SC04-21
LOWER CASE NO.: 2D02-2758

STATE OF FLORIDA,
Respondent.
_____/

PETITIONER'S BRIEF ON THE MERITS

On Discretionary Review from the
Second District Court of Appeal:
Certified Question of Public Importance

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PRELIMINARY STATEMENT

Petitioner, Raymond Baugh, was the Appellant before the Second District Court of Appeal and the Defendant in the Circuit Court criminal proceedings. Respondent, the State of Florida, was the Appellee before the Second District Court of Appeal and prosecuted Petitioner in the Circuit Court. References to Petitioner will either be Petitioner, Appellant or Defendant where appropriate. References to Respondent will be Respondent, Appellee or the State where appropriate.

The opinion of the Second District Court of Appeal (attached as Appendix I to this brief) contains most of the relevant facts for this cause. The opinion is 22 pages. References to the opinion will be Appendix followed by the appropriate page number. E.g. (Appendix I. 10) Petitioner's Motion for Rehearing, filed after the opinion, is attached as Appendix II. References to that motion will be Appendix II, followed by the appropriate page number. E.g. (Appendix II. 2) References to the record on appeal before the Second District Court of Appeal will be R., followed by the appropriate volume and page number. E.g. (R.II. 175)

STATEMENT OF THE CASE AND FACTS

A jury convicted Petitioner of capital sexual battery upon the 7 year old daughter of his former girlfriend; Petitioner received a life sentence. (Appendix 1) The Second District Court of Appeal upheld Petitioner's conviction in spite of the fact that the alleged victim recanted her pretrial statements that Petitioner made her commit oral sex on him; the Second District Court of Appeal found there was sufficient corroborating evidence to support the conviction pursuant to State v. Green, 667 So.2d 756 (Fla. 1995).

The opinion below stated:

The trial of this case took place about six months after the alleged molestation. (Appendix I. 1) The State's first witness was the child victim, C.P., who described a time when the Defendant, her mother's live-in boyfriend, came into her room and closed the door. (Appendix I. 1) C.P.'s mother had sent her to her room for "bugging" her while she was ordering lobsters from Publix on the phone, and the Defendant, whom she referred to as her daddy or Ray, came into her room to yell at her, closing the door behind him. (Appendix I. 1) The door was then accidentally locked because C.P. had fiddled with it earlier. (Appendix I. 1)

The Defendant was wearing only a towel because he had just come from the shower. (Appendix I. 1) After he finished yelling at her, he picked up some mice from a cage so that he could feed them to the pet snake. (Appendix I. 2-3) C.P. denied that Ray ever opened up his towel, at that moment or any other time. (Appendix I. 3) However, C.P. had seen some "very gross" pictures when she was snooping around in her mother's bedroom. (Appendix I. 3) The significance of that comment would emerge when the child hearsay statements were later admitted, because C.P. told investigators that the Defendant had shown her pictures to teach her how to perform oral sex. (Appendix I. 3)

When her mother began knocking on the door, C.P. opened it immediately, and her mother asked her what was going on. (Appendix I. 3) In response C.P. told a "fib" - that Ray made her suck her private - "but that was not true." (Appendix I. 3)

The prosecutor pressed the child about why she told this fib, and C.P. maintained that she made the story up because her older brother, who did not live with them, had told her about a similar event that had happened to him when he was about eight years old - that "a guy" (not the Defendant or anyone involved in this case) made him suck the guy's private. (Appendix I. 3) C.P. thought of telling that lie because she wanted to get Ray in a "little, but not that much trouble," because sometimes he

made her mad. (Appendix I. 3) She thought that it took her a couple of minutes to think of this lie before she told her mother, although the prosecutor questioned why she had not previously told him that she had thought about it for a few minutes before blurting it out. (Appendix I. 3)

According to C.P., the repercussions of her statement to her mother were immediate. (Appendix I. 3) There was a lot of yelling; her mother called the police; and the Defendant took some razor blades and went into the bathroom and slashed his wrists. (Appendix I. 3) C.P. recalled for the prosecutor that she did not speak to the police until a day or so later, when they went to the station and talked to Detective Venero. (Appendix I. 3) She told the detective that "it happened," that her daddy made her suck his private. (Appendix I. 3-4) She admitted that she told the detective that she had done it with Ray twelve times previously and that white stuff came out, which tasted out; on the stand, however, she denied that it happened and stated that she did not know how it tasted, but her brother had told her about it. (Appendix I. 4)

The prosecutor continued to press C.P. about her motivation to lie about this event and to continue to lie about it. (Appendix I. 4) C.P. basically said that she knew that she would get in trouble for lying, that she did not want to get in any

more trouble, and that she was afraid that the detective would tell her mother. (Appendix I. 4) Her mother scares her when she lies. (Appendix I. 4) Even though she was lying, C.P. knew the difference between a lie and the truth all along. (Appendix I. 4) One night when she was watching TV, however, she decided to tell her mother the truth because she thought maybe she could deal with getting in trouble. (Appendix I. 4) She was sad because her family had been broken apart and she thought it would help if she told the truth. (Appendix I. 4) C.P. also consistently insisted that she had not talked with her mother about these matters or about Ray except for the time when she decided to finally tell the truth. (Appendix I. 4)

Another line of inquiry pursued by the prosecutor, over defense objection, delved into some new rules C.P.'s mother had instituted for her household, most of which concerned wearing appropriate clothing and not locking doors. (Appendix I. 4) The inference the prosecution sought from this testimony was that C.P. would not be afraid to have the Defendant back in their household because these rules would prevent a further recurrence of this behavior. (Appendix I. 4) C.P., however, asserted that she was not afraid of him because he had never molested her in the first place. (Appendix I. 4) Although likening this testimony to evidence of subsequent remedial measures prohibited

in some civil contexts, the trial court admitted the evidence because it was inextricably intertwined with the credibility of each witness that the jury was going to have to evaluate. (Appendix I. 4-5)

On cross-examination the defense attorney elicited from C.P. that she had originally told the lie because she was mad at her mother and Ray for yelling at her, and she kept repeating it because she was afraid of her mother. (Appendix I. 5) She ultimately told the truth, though, because she was sad that her family was broken apart and she felt bad that her lie had gotten them into this situation, and, she thought, “maybe I can deal with the pressure.” (Appendix I. 5) It was a difficult decision, one she had to think about a long time. (Appendix I. 5) She again recounted that the story she had heard from her brother had stuck in her mind and supplied the details. (Appendix I. 5) Also, in nosying around her mother’s room she had come across one picture that she should not have seen, and that, too, was difficult to erase from her mind. (Appendix I. 5) As for the new rules, they made her feel safe, but Ray never had asked her to do anything naughty or showed her naughty pictures. (Appendix I. 5) She was afraid of him, thought, because when he does not take his medication he hurts himself. (Appendix I. 5) Finally, the defense elicited from C.P. that she

does not like her mother's former friend, Kristin, and that she would never tell her a secret.(Appendix I. 5)

At the conclusion of C.P.'s testimony, the State had demonstrated that the alleged victim had first accused the Defendant of molesting her, repeated that story to a number of different people, and then changed her story. (Appendix I. 5) C.P. was asked to identify the towel that Ray wore that night. (Appendix I. 5) She did so, but no physical evidence was ever obtained from that towel. (Appendix I. 5) The child protection team worker testified that her examination of C.P. revealed no evidence of abuse. (Appendix I. 5) Pornographic pictures were eventually recovered from the home, but there was never any direct testimony that the Defendant had shown them to C.P. (Appendix I. 5-6) The detective, the child protection team worker, and virtually every other witness repeated C.P.'s hearsay statements, but there was never any direct evidence demonstrating that events unfolded the way C.P. initially said they had. (Appendix I. 6)

Other than the child's prior inconsistent statements, the most damning piece of evidence was elicited from the mother. (Appendix I. 6) She testified that after she finished calling Publix about lobsters, she attempted to enter C.P.'s room but found that the door was locked. (Appendix I. 6) Within a few

seconds - fewer than thirty, according to her estimate - someone opened the door. (Appendix I. 6) She saw Raymond standing there, wrapped up in his towel, with white mice in his hand, and her daughter behind him. (Appendix I. 6) Both denied knowing the door was locked, but she wanted to find out what had happened, so she separated them. (Appendix I. 6) She took C.P. to her bedroom, asked what was going on, and the child's exact words were, "He made me suck on his dick." (Appendix I. 6) The mother immediately confronted Ray, spouting what she described as "colorful metaphors," slapping him several times and insisting that he leave immediately. (Appendix I. 6) During their heated argument Raymond said, "I want her to suck my dick, I want you to watch, and then I want to fuck you after." (Appendix I. 6)

C.P.'s mother testified on direct that Raymond made this remark in the heat of an argument to anger her, which it did. (Appendix I. 6) In fact, the first time the mother had indicated that she thought Raymond was less than serious when he made this remark, that he was describing what he wanted rather than what he did, was at the bond hearing, and by that time her daughter had changed her story and the mother was doing all she could to have Raymond released from jail. (Appendix I. 6)

On cross-examination the mother testified that she believed C.P. when she changed her story, because her behavior had changed for the better after she received the attention she desired, so she assumed that C.P.'s motivation for telling the initial lie was simply to get attention. (Appendix I. 6-7) She denied that her daughter had ever acted out sexually, but she had caught her "playing doctor" with her brother. (Appendix I. 7) She described her daughter as extremely nosy, which explained her finding the pornographic pictures. (Appendix I. 7)

As for the blow-up that occurred once the bedroom door was unlocked, the mother admitted that when she became angry, it "was not a pretty sight," and she was mad at everyone before the door was even opened - at C.P. for being a pest and at Raymond for insisting on buying lobster for dinner when they could not afford it. (Appendix I. 7) Once C.P. accused Raymond of molesting her, she immediately believed what her daughter said was true and thought that Raymond was being serious when he described his desires toward her daughter. (Appendix I. 7) However, she noted that he did not have an erection when she walked into the room, and when they cleaned C.P.'s room the next day, she found no evidence of semen or sexual activity. (Appendix I. 7)

As for the suicide attempt, C.P.'s mother explained on direct that Raymond had attempted to take his life by slashing his wrists once before, when the phone had been cut off for nonpayment. (Appendix I. 7) She admitted that he needs significant counseling, but once she realized that her daughter had lied, she wanted him out of jail. (Appendix I. 7)

The statement the Defendant made to the mother, whether seriously or in jest, about what he desired to do to C.P., undoubtedly bolstered the prosecution's case against him. (Appendix I. 7) The prosecution made further inroads into C.P.'s credibility when it had the investigating detective repeat what the victim and her mother had told him two days after the incident. (Appendix I. 7) A number of details conflicted with C.P.'s testimony at trial. (Appendix I. 7)

Detective Venero detailed what the mother had told him during his initial investigation, which conflicted in several respects with her trial testimony.[1] (Appendix I. 8) For instance, she told him that she was off the phone in a matter of moments, went to the bedroom door, listened for a few minutes but did not hear anything, then knocked on the door. (Appendix I. 8) Raymond said, "the mice are out-hang on a minute." The

[1] We are unsure on what basis the mother's statements to Detective Venero were admitted, but the defense did not object to that line of testimony.

mother then banged on the door, did not see the mice out, and did not think he had time to put them away. (Appendix I. 8) Her daughter looked as if she had been caught doing something wrong. (Appendix I. 8) Therefore, she took C.P. to another room where her daughter said that her daddy made her suck his privates. (Appendix I. 8) This enraged her mother, leading to the verbal and physical confrontation with Raymond, who began packing his things and then went into the bathroom and slit his wrists and arms. (Appendix I. 8) The mother also relayed to Detective Venero the statement the Defendant had made about what he wanted to do, which occurred at the beginning of their protracted altercation, and she also said that he never at any point denied that he had done what he was accused of doing. (Appendix I. 8)

Over objection, the detective recounted C.P.'s hearsay statements concerning the event. (Appendix I. 8) According to C.P., when Ray opened his towel or other clothing and looked down, she knew that she was to perform oral sex on him. (Appendix I. 8) She knew how to do it because he showed her a picture, and she described with particularity where she put her hand, what she did, what came out of his penis, and how the white stuff tasted. (Appendix I. 8) She was "fairly articulate" about the white stuff - when it came out and when it did not. C.P. was pretty certain that she had done this twelve times in

the past. (Appendix I. 8) Then, a few days after his interview with C.P., the mother called Detective Venero and told him that she had found photographs of a woman performing oral sex on a man. (Appendix I. 8-9)

The detective further testified that C.P.'s examinations revealed no physical evidence of abuse or venereal disease. (Appendix I. 9) The Defendant's towel was examined for semen but none was found, nor did forensic examination of C.P.'s room reveal any evidence of semen. (Appendix I. 9)

A child protection team registered nurse practitioner related C.P.'s statements to her: that Ray made her suck his private, that white stuff came out, and that he had made her to do this twelve times. (Appendix I. 9) She found no physical manifestations of sexual abuse or of venereal disease. However, in the case of oral sex, it is highly unlikely that there would be any forensic material to be discovered. (Appendix I. 9)

A final line of questioning explored the credibility of C.P. and her mother concerning the child's decision to change her story. (Appendix I. 9) A jail inmate present when two women and a child came to visit the Defendant testified that he overheard some of their conversation. (Appendix I. 9) He claimed that the Defendant told the women that they had to get the little girl to "recamp" her story because otherwise he was

looking at life in prison. (Appendix I. 9) Furthermore, approximately two days before this visit the inmate overheard the Defendant's end of a telephone conversation in which the Defendant said something about a towel, suggesting that they could claim that both he and the little girl had used the same towel after bathing. (Appendix I. 9) This inmate had been convicted of seven felonies and was on sex offender probation at the time of trial, but the prosecutor had not promised him anything for his testimony. (Appendix I. 9)

A former family friend, Kristin, testified last. (Appendix I. 9) This was a person C.P. did not like, who had been thrown out of their home by the mother after the child recanted. (Appendix I. 9-10) Kristin testified about events the night of the incident as well as the circumstances under which C.P. changed her story. (Appendix I. 10) According to her former friend, C.P. told her that "it really did happen" but her mother wanted her to change her story. (Appendix I. 10) On the night that C.P. confessed that she had been lying, however, Kristin overheard the mother yelling at her child in the bathroom, exhorting her to tell the truth and warning that she would beat her within an inch of her life if she was lying. (Appendix I. 10)

The Second District Court of Appeal certified the following question of great public importance:

> IF A CHILD VICTIM OF SEXUAL ABUSE TOTALLY REPUDIATES HER OUT-OF-COURT STATEMENTS AT TRIAL, AND THE PROSECUTION ADDUCES NO EYEWITNESSES OR PHYSICAL EVIDENCE OF ABUSE, MUST THE TRIAL COURT GRANT A JUDGMENT OF ACQUITTAL EVEN IN THE FACE OF OTHER EVIDENCE CORROBORATING THE OUT-OF-COURT STATEMENTS AND THE DICTATES OF THE CONFRONTATION CLAUSE?

Petitioner filed a motion for rehearing (Appendix II). The motion for rehearing alleged:

1. This Court decided that although the victim's prior inconsistent statements were insufficient to sustain Appellant's conviction, there was other evidence which corroborated victim's statements that Appellant abused her; this court decided none of the alleged corroboration carried much evidentiary weight and each of these grounds, individually, would feel as sufficient corroboration. This court then held that the sum of the corroborative evidence was sufficient to sustain the conviction. This court has overlooked the fact that each item of the corroborative evidence required the jury to infer another fact from the corroborative evidence - in other words the jury had to

pile inference upon inference to arrive at a conclusion of guilt. This court has overlooked the fact that a jury cannot pile inference upon inference to arrive at a jury verdict.

2. The court's opinion itself acknowledges the speculative inferences the jury had to make in this case to arrive at guilty. The court notes the "suggestion that Defendant engaged in witness tampering." The court has overlooked the fact that there was no **direct** proof whatsoever of such tampering. The court itself notes that Appellant did not say he tampered with the witnesses - he merely stated he would have to stay in jail unless the victim changed her story.

The court has overlooked the fact that the jury would have had to speculated that Appellant or someone else (her mother) tampered with the witness. A rational trier of fact should not have made this speculative inference pursuant to Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed 2d 560 (1979). Such an inference violates due process. This court noted that although this evidence did not carry much weight, the question is not its weight, but its legal sufficiency. This court has overlooked the fact that evidence is not legally sufficient if it is based upon speculation or irrational inferences. This

court must consider the legal sufficiency - weight of the evidence to determine if there was proof beyond a reasonable doubt. This court has overlooked that fact.

The same analysis applies to Appellant's "admission" - this court acknowledges that the statement was not an admission but a statement of future desire made during an argument in a fit of anger. The jury would have to infer that this statement also referred to past conduct. This is another speculative inference and this court has overlooked this fact. The slashing of the wrists is also in this category. Given the other testimony about Appellant's past actions, the jury again would have to inferred that Appellant slashed his wrists because he abused the victim. At that time, Appellant denied the offense - so why would he slash his wrists? This court has overlooked this fact. The court itself states this proof is **suggestive** of guilt. Again, this court has overlooked the fact that this evidence requires the stacking of speculative inferences to **suggest** guilt. See Jones v. State, 589 So.2d 1001 (Fla. 3d DCA 1991); Lee v. State, 640 So.2d 126 (Fla. 1st DCA 1994).

The victim's statement at the time of the alleged incident also only **suggests** guilt because the victim repudiated this statement at trial. This statement only suggests guilt only if one speculates that someone made the victim recant her

testimony. As with the other corroborative evidence, this evidence only **suggests** guilt based upon the other speculative inference. This evidence is not legally sufficient under Jackson v. Virginia, *supra*. This court has overlooked the fact that this evidence has value **only** if one engages in the other speculative inferences noted above. The standard of proof is proof beyond a reasonable doubt - not an inference of guilt or a suggestion of guilt. See State v. Law, 559 So.2d 187 (Fla. 1989) This court has overlooked this legal principle. In the opinion, this court uses the terms suggest or infer several times. These phrases indicate that this court misapprehended the legal standard for sufficiency - in a light most favorable to the state the **proof** establishes **guilt** beyond a reasonable doubt; proof that establishes only suggestions of guilt is legally insufficient. Moreover, if such suggestions/inferences of guilt are possible only by piling inference upon inference, then such proof is also legally insufficient. This court has overlooked or misapprehended this principle. Consequently, this court should rehear this case and find that the evidence was legally sufficient.

The Second District Court of Appeal denied the motion without comment.

SUMMARY OF ARGUMENT

This Court should answer the certified question in the affirmative based upon the unique facts of this case. In this case, the alleged victim at trial completely recanted and repudiated her prior allegations of abuse. She explained why she lied before trial. The state produced no evidence that someone had induced the victim to change her story. Although the state produced innuendo to suggest why the victim changed her story, the state produced no valid proof to discount her trial testimony. The Second District Court of Appeal correctly found pursuant to State v. Green, 667 So.2d 756 (Fla. 1995), that the out-of-court pretrial statements (statements of abuse by Petitioner) were not sufficient by themselves to constitute proof beyond a reasonable doubt (in light of the alleged victim's total recantation at trial). The Second District Court of Appeal erroneously found that the corroboration evidence was sufficient to 1) corroborate the admission of the out-of-court statements; 2) to constitute proof beyond a reasonable doubt in connection with the out-of-court statements.

The corroboration evidence was insufficient because the "evidence" was not proof at all. The "proof" was merely a series of speculative inference of guilt based upon ambiguous facts. The Second District Court of Appeal improperly piled

speculative inference upon speculative inference to find sufficient proof beyond a reasonable doubt. Petitioner's conviction violated the due process standard of sufficient proof in a criminal case pursuant to Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed 2d 560 (1979).

If Petitioner is correct about the insufficiency of the corroboration evidence, then the Second District Court of Appeal also erroneously decided that the trial court properly admitted the pretrial hearsay statements pursuant to Section 90.803(23), Florida Statutes. If the corroboration evidence was not sufficient, then the hearsay evidence was not sufficiently reliable under State v. Green. If this evidence was not admissible, then there was nothing for the corroboration evidence to corroborate. By definition, the evidence was then completely insufficient.

Although the certified question is a general question, this court should answer the question yes specifically as to this case; in general, this Court should answer the question as yes if the evidence which allegedly corroborates the **recanted** hearsay statements is inference piled upon inference. This Court should hold that the corroboration evidence must either be valid direct proof or valid circumstantial proof (a valid fact

and not a speculative inference or an inference piled upon an inference).

I.

IF A CHILD VICTIM OF SEXUAL ABUSE TOTALLY REPUDIATES HER OUT-OF-COURT STATEMENTS AT TRIAL, AND THE PROSECUTION ADDUCES NO EYEWITNESSES OR PHYSICAL EVIDENCE OF ABUSE, MUST THE TRIAL COURT GRANT A JUDGMENT OF ACQUITTAL EVEN IN THE FACE OF OTHER EVIDENCE CORROBORATING THE OUT-OF-COURT STATEMENTS AND THE DICTATES OF THE CONFRONTATION CLAUSE?

A. Standard of review.

The certified question involves the issue of whether the evidence in this case, in light of the total recantation of the alleged victim at trial, was legally sufficient. Consequently, the de novo standard of review applies to this issue. Pagan v. State, 830 So.2d 792 (Fla. 2002) This court has the discretion to consider other issues raised in this case outside of the certified question of great public importance. Savoie v. State, 422 So.2d 308 (Fla. 1982)

B. Merits: Issue of legal sufficiency of evidence in light of recantation of alleged victim.

The certified question poses the issue of whether the evidence in this cause was legally sufficient in light of the total repudiation of the alleged victim of her out-of-court statements at trial (with no eyewitnesses or physical evidence) **and** other evidence which purportedly corroborated the out-of-

court statements. In his initial brief and his motion for rehearing before the Second District Court of Appeal, Petitioner alleged that the evidence against him was legally sufficient pursuant to State v. Green, 667 So.2d 756 (Fla. 1995) and Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed 2d 560 (1979). A rational trier of fact could not properly find proof beyond a reasonable doubt under the circumstances of this case. Petitioner also argued that the so-called corroborating evidence was not in fact direct proof but a series of speculative inferences that the jury would have to stack upon each other to reach an inference of guilt.

The opinion below correctly found that the evidence of the out-of-court statements (which became inconsistent statements in light of the recantation at trial) themselves alone were insufficient to constitute proof beyond a reasonable doubt. The opinion below then concluded that the totality of the corroborating "evidence" was sufficient to constitute proof beyond a reasonable doubt.

The opinion itself described the nature and strength of this evidence:

In responding to the motion for judgment of acquittal in this case, the prosecutor described the corroborating evidence as follows: the spontaneous statement from C.P. to her mother

immediately after the event; the Defendant's "admission" ("I want her to suck my dick while you watch"); the Defendant's consciousness of guilt as evidenced by his suicide attempt; and the suggestion that the Defendant engaged in "witness tampering," adduced from the testimonies of the prison inmate and the mother's former friend. None of this alleged corroboration carries much evidentiary weight. Of course, the question is not its weight but its legal sufficiency.

In our view, each of these grounds, individually, would fail as sufficient corroboration of Mr. Baugh's guilt. Labeling C.P.'s out-of-court statement as a spontaneous statement really is not helpful to the state, because, in spite of the court's jury instruction to the contrary, the statement did come in as substantive evidence pursuant to Section 90.803(23); putting another name on it would not have made it any more corroborative of the event, especially considering that the jury knew that C.P.'s initial accusation occurred very close in time to the alleged crime. The Defendant's "admission" is not really an admission at all, but a statement of desire and not of a completed act ("I want her to suck my dick while you watch"), although the jury might infer past conduct from the statement. The fact that the Defendant slashed his writs almost immediately after the charges were made, when viewed as required in the

light most favorable to the state, is suggestive of guilt, even though his action is equally susceptible of an interpretation that he was despondent over the accusation and was in need of intensive psychotherapy. Finally, the testimony of the jail inmate and the former friend concerning C.P.'s recantation, which the state argued indicated that Mr. Baugh engaged in "witness tampering," reveals that Mr. Baugh knew that he would never get out of jail unless C.P. changed her story. That was true; as long as C.P. alleged that Mr. Baugh committed the crime, he had little hope of being released. However, that does not indicate that her original story was either true or corroborative of his guilt.

In spite of our hesitation to say that one piece of "corroboration" would be sufficient, together with the out-of-court statements, to sustain this conviction, all of the inferences that the jury could draw from the sum total of the evidence lead us to the conclusion that the trial court correctly denied Mr. Baugh's motion for judgment of acquittal. Although close, this case is not one in which we determine that C.P.'s out-of-court testimony was so diminished by her in-court denial of all of the events that we do not have sufficient confidence in the conviction to allow it to stand. Cf. M.B., 701 So.2d at 1162 (commenting on Green, 667 So.2d at 760).

As to the certified question, the question this court must answer is whether the corroborating evidence had sufficient legal weight so as to constitute proof beyond a reasonable doubt such that a rational trier of fact could rely upon that evidence under the due process standard enunciated in Jackson v. Virginia, *supra*. A close examination of this evidence, in a light most favorable to the state, will demonstrate it was legally insufficient, in light of the recantation of the victim. Petitioner will address individually each item of this alleged corroboration.

Petitioner's spontaneous statement.

The alleged victim's (C.P.) mother testified that after she finished calling Publix about lobsters (this caused an argument between Petitioner and the mother), she tried to enter C.P.'s room but the door was locked. (Appendix I 6) Within a few seconds (less than 30), someone opened the door; Petitioner was wrapped in a towel with white mice in his hand - C.P. was behind him. (Appendix I. 6) Petitioner and C.P. denied that they locked the door; the mother took C.P. to her room and asked what happened. C.P. said "he made me suck his dick." (Appendix 1. 6) The mother immediately confronted Petitioner - spouting what she described as colorful metaphors, slapping Petitioner several

times and insisting that Petitioner leave immediately. (Appendix I. 6)

During this heated argument, Petitioner said, “I want her to suck my dick, I want you to watch, and then I want to fuck you after.” (Appendix I. 6) C.P.’s mother testified that Petitioner made the statement in anger; the mother was angry - she was mad at everyone before the locked door was opened - at C.P. for being a pest and at Petitioner for insisting on buying lobster when they could not afford it. Although she believed her daughter’s statement, she noted that Petitioner did not have an erection when she went into the room (literally seconds after the alleged sexual act) and she did not find any evidence of sexual activity or semen the next day when she cleaned the room.

The Second District Court of Appeal correctly found that Petitioner’s statement made in anger was not an admission but a statement of future desire. The obvious motivation of this statement was not to express necessarily Petitioner’s desire - the intent of the statement was to injure C.P.’s mother during the heated argument (after she cursed him and slapped him several times). This statement is not direct proof that corroborated the out-of-court statements. The statement is not an admission. The Second District Court of Appeal below found that this statement below was **not** sufficient to corroborate the

out-of-court statements. Petitioner did not otherwise admit the alleged sex act. Although the statement was hurtful and vicious (as to C.P.'s mother), it was not an admission. Petitioner has not found a case remotely similar to this statement that held such a statement may be evidence of consciousness of guilt. At best, this statement suggests a **speculative inference** that the alleged act may be true in light of this statement.

The court below admitted the statement above alone was insufficient corroboration. Therefore, this court must consider whether Petitioner's suicide attempt was sufficient corroboration, coupled with the above evidence and the other so-called corroborating evidence.

The suicide evidence only supports a grossly speculative inference about consciousness of guilt. C.P.'s mother testified that Petitioner had previously slashed his wrists due to the disconnection of the phone for nonpayment of the phone bill. Petitioner obviously had some serious mental health problems. In this case, there was no proof whatsoever that Petitioner slashed his wrists because he molested C.P. the heated argument (including the physical abuse by C.P.'s mother) and the mere allegation may have caused Petitioner to "act out" by attempting suicide. The relevant point is that one has to **speculate why** Petitioner did this act - there was not proof whatsoever why he

did this. The direct corroborative value of the evidence is zero. Therefore, if one adds this evidence to Petitioner's spontaneous statement, one still has no corroborating evidence worth proof beyond a reasonable doubt.

The court below also considered the corroborative "evidence" that Petitioner engaged in witness tampering. There was **no** evidence that Petitioner or anyone tampered with C.P. to get her to change her testimony. C.P. did not testify that Petitioner or anyone else convinced (or coerced) her to change her story. A close examination of the jail inmate testimony will establish that there was no proof that Petitioner tampered with C.P.'s testimony.

Michael Allis was in the same jail cell as Petitioner (testimony at pretrial hearing). (R.III. 350) He went to video presentation at the jail; Petitioner also went and sat next to Allis. (R.III. 351-352) Allis could **not** hear what the persons on the screen (C.P.'s mother and Kristin Roth) were saying - he could hear what Petitioner said. (R.III. 353) Although Allis said he could not remember the specifics, he opined that Petitioner was basically saying to get the child to retract the story she made up. (R.III. 353) He supposedly heard Petitioner talking to a neighbor on the phone - he asked the neighbor to talk to the mother to get the little girl to recamp (sic) her

story. (R.III. 357) Allis admitted he did not hear Petitioner say I did it and you've got to get her to lie and change her story - Petitioner could have been saying you need to get a child who is lying to tell the truth. At trial, Allis also testified Petitioner was trying to get the girl to recamp (sic) her story.

Even in a light most favorable to the state, Allis's testimony was at best that Petitioner could have been saying you need to get the child who is lying to tell the truth. Allis never testified that he heard Petitioner tell Roth or C.P.'s mother to make C.P. lie - he was telling them to tell C.P. to tell the truth. This testimony simply does not even support an inference that Petitioner tampered with C.P. unless tampering with a witness is an exhortation for that witness to tell the truth. Although the state below suggested that C.P. changed her story at trial because she did not want to break up with her family where was no evidence whatsoever that this is why C.P. recanted. C.P.'s mother testified that she did not try to get C.P. to change her story. (R.III. 303) Kristin Roth did testify that C.P. told her it happened but her mother wanted her to say it didn't happen. (R.VII. 456) Roth did not testify about any other evidence of tampering. Roth admitted that she was not

friends with C.P.'s mother - they had a pretty heated breakup. (R.VII. 458)

The combination of Roth's and Allis's testimony does not support corroboration (proof beyond a reasonable doubt). A close examination of Allis's testimony will establish that he **opined** that Petitioner was trying to get the victim to (recamp) - Allis did not even know the correct term. Allis did not testify that he heard Petitioner say he did it and someone must get C.P. to lie. Allis's testimony only supports, if it supports anything, a speculative inference that Petitioner was trying to get C.P. to recant her pretrial statement (for her to now tell the truth). There was no direct proof of such an attempt by Petitioner.

The jury would have to speculate and infer that 1) Allis correctly interpreted Petitioner's statements (in light of the fact that he was hearing only one side of the conversation) that he was trying to get C.P. to lie; 2) that Petitioner's statements indicated a consciousness of guilt instead of an innocent man hoping a lying witness would tell the truth. Otherwise, Petitioner could get convicted and get life in prison.

Roth's testimony simply does not support an inference of witness tampering. She testified that at one point (before C.P.

recanted) that C.P. told her the abuse happened but her mother wanted her to say it didn't happen. (R.VII. 456) There was no other explanation of this statement. C.P.'s mother and C.P. both testified that her mother exhorted her to tell the truth. Even if C.P. did tell Roth this statement, the statement could have meant that her mother 1) wished it was not true; 2) wanted C.P. to make sure she was telling the truth. Both C.P. and her mother denied that anyone told/coerced C.P. into recanting her pretrial statements.

The above statements, even considered together, do not constitute sufficient corroboration under the Jackson v. Virginia due process standard for the sufficiency of the evidence (by a rational trier of fact). The only way for the jury in this case to find adequate corroboration was to stack speculative inference upon speculative inference. If the individual items of alleged corroboration were a part of a mathematical equation, the equation would read 0 (the out-of-court statements which the Second District Court of Appeal found to be insufficient without sufficient corroboration)+0+0+0+0=0. Each part of the corroborative evidence was equal to 0; even if one added them up (as the Second District Court of Appeal did), the end result is still zero.

The adding up of the individual items was the stacking of inference upon inference. Each of these items was circumstantial proof (as to each items there was no direct proof). Therefore, this cause is analogous to a circumstantial evidence case where the trier of fact must stack inference upon inference to arrive at guilt. In Lee v. State, 640 So.2d 126 (Fla. 1st DCA 1994) and Jones v. State, 589 So.2d 1001 (Fla. 3d DCA 1991), the First and Third District Courts of Appeal held that the jury could not stack inference upon inference to arrive at a guilty verdict.

In this case, the jury **had** to stack speculative inference upon inference to arrive at a guilty verdict. The stacking of speculative inferences upon speculative inference also violated Jackson v. Virginia, *supra*. Under Jackson v. Virginia, a rational trier of fact must find proof beyond a reasonable doubt, based upon the evidence in a light most favorable to the state. In this case, the evidence in a light most favorable to the state supported only speculative inferences.

The Second District Court of Appeal correctly held that each speculative inference alone was insufficient. Consequently, the only way the trier of fact could arrive at guilt would be to pile inference upon inference. This is not rational; this stacking of inference upon inference is **not** proof beyond a

reasonable doubt. By definition, this **cannot** be proof beyond a reasonable doubt because each speculative inference by definition could have another equally plausible explanation. By definition, these inferences cannot constitute proof beyond a reasonable doubt because they cannot exclude other explanations.

C. Merits: Whether there was sufficient evidence of corroboration to justify the admission of pretrial hearsay statements.

The opinion below held that in light of the total recantation of the victim, the hearsay statements were sufficiently reliable (to be substantive evidence) because of the corroborating evidence. This issue is intertwined with the issue discussed above. If the evidence of corroboration was insufficient, then the pretrial statements could not have been substantive evidence. Without this substantive evidence, the alleged corroborative evidence would have had nothing to corroborate.

Pursuant to this court's decision in State v. Green, 667 So.2d 756 (Fla. 1995) and State v. Moore, 485 So.2d 1279 (Fla. 1986), the prior inconsistent statements (pretrial statements of abuse) were admissible as substantive evidence only if there was sufficient indicia of reliability through other corroboration. In Green, *supra*, this court found that medical evidence of abuse

did not corroborate the prior inconsistent statements as to the identity of the perpetrator. Similarly, in this case, the alleged corroboration did not corroborate the prior statements that the abuse occurred. Petitioner will not now recount all of the arguments made above on the issue of lack of corroboration. Petitioner relies upon those arguments for this issue. If Petitioner is correct that the evidence of corroboration was insufficient, then the trial court improperly admitted the pretrial hearsay statements. If the trial court erroneously admitted the statements, then the evidence was otherwise insufficient. See Williams v. State, 560 So.2d 1304 (Fla. 1st DCA 1990); Brantley v. State, 692 So.2d 282 (Fla. 1st DCA 1997).

D. Answer to certified question.

Based upon the unique facts of this case, this Court should answer the certified question in the affirmative. This Court should answer the question in the affirmative because the corroborating evidence lacked the requisite legal sufficiency to corroborate the out-of-court statements. The corroborating evidence was legally insufficient because the evidence was speculative inferences. In a more general way, this Court should hold that under the general circumstances of this case, any corroborating evidence must be of sufficient weight as to constitute valid corroboration of the hearsay statements.

Stated another way, the corroborating evidence must not be inference piled upon inference. In this case, the Second District Court of Appeal held that no one of the individual items were legally sufficient. Although the out-of-court statements (could be substantive evidence if properly corroborated) could be direct evidence, this evidence was not valid substantive evidence (due to lack of corroboration). The so-called corroboration evidence was insufficient inferences. Therefore, this court should answer the certified question by holding that the corroboration evidence must be either direct proof or valid circumstantial evidence (that is a circumstance proved by the evidence and not a speculative inference based upon a fact).

CONCLUSION

This Court should set aside and vacate Petitioner's judgment and sentence and direct that he be discharged.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 9th day of February, 2004 to: Richard M. Fishkin, Office of the Attorney General, Criminal Appeals, Concourse Center #4, 3507 East Frontage Road, Ste. 200, Tampa, Florida 33607.

James T. Miller

CERTIFICATION OF TYPEFACE COMPLIANCE

Appellant certifies the type size and font used in this brief is Courier New 12.