

IN THE SUPREME COURT OF FLORIDA

RAYMOND BAUGH,
Petitioner,

vs.

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

STATE OF FLORIDA,
Respondent.

REPLY BRIEF OF 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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STATEMENT OF THE CASE AND FACTS

Petitioner accepts the statement of facts in the answer brief of Respondent.

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. Admissibility of pretrial hearsay statements in light of recantation at trial.

Respondent essentially argues that the hearsay statements of the child were admissible because 1) the trial court found them to be sufficiently reliable under Section 90.803(23), Florida Statutes; 2) there is no requirement under Section 90.803(23), Florida Statutes that the pretrial hearsay statements be consistent with any trial testimony. There is a significant difference between inconsistency and total recantation and repudiation. Petitioner relies upon his arguments in the initial brief on this issue.

Respondent argues that Petitioner has not demonstrated **why** the hearsay statements in this case should not be admissible (in light of the finding of reliability). Section 90.803(23)(a) states that "unless the source of information or the method or

circumstances by which the statement is reported indicates a lack of trustworthiness..." The phrase "the source of information" could mean either the declarant (in this case the alleged victim) or the individual who recounts the statements of the alleged victim. A finding of reliability under 90.803(23) **assumes** that the victim will not/has not completely recanted the statements. Consequently, once the **victim under oath** at trial recounts the prior statements, then the prior finding of reliability is inherently suspect and is itself now unreliable.

The decision of this Court in Department of Health and Rehabilitative Services v. M.B., 701 So.2d 1155 (Fla. 1997) should not apply in full force to this case for two (2) reasons: 1) this case is a criminal (with the constitutional right of confrontation of the Defendant); 2) the standard of proof in this case is proof beyond a reasonable doubt, not the standard that is applicable in child dependency proceedings (preponderance). In a criminal case, the prior hearsay statements under 90.803(23) should not be substantive evidence once the victim repudiates the prior statements at trial. Otherwise, if the child lied before trial, but told the truth at trial, then a jury could convict on untruthful testimony.

Petitioner submits that **even** if this Court finds the pretrial statements were admissible as substantive evidence, the

question remains of whether this evidence was sufficient to constitute proof beyond a reasonable doubt. Respondent notes that neither the trial court or district court of appeal considered the question of whether the pretrial hearsay statements alone are sufficient to sustain a conviction. Respondent does not offer any argument as to why this Court should overrule its holding in State v. Green, 667 So.2d 756 (Fla. 1995) that such pretrial hearsay statements are insufficient (without corroboration) to sustain a conviction. Consequently, this Court must consider whether there was sufficient corroboration (in light of the recantation).

B. There was insufficient corroborative evidence to constitute proof beyond a reasonable doubt.

Respondent argues that there was sufficient corroborative evidence to make the pretrial hearsay statements sufficient to sustain a conviction. Respondent, then recounts (as the District Court did also) all the alleged corroborative evidence. Petitioner understands that this Court must look at the evidence in a light most favorable to the state - even if one does evaluate the "evidence" in a light most favorable to the state, this so-called corroborative evidence does not sufficiently corroborate because this "evidence" is not evidence at all but only a series of speculations.

Petitioner relies upon his arguments in the initial brief on the issue of the sufficiency of these inferences. For example, the "suicide" evidence may be evidence of guilt but **in this case** it could also be the acting-out of a disturbed person (Petitioner slashed his wrists when the electricity was cut off). The point in this case is that there **was no proof** that Petitioner slashed his wrists because he was guilty. The same analysis applies to **all** the other so-called corroborative evidence. Petitioner reiterates this argument that the corroborative evidence is actually a series of speculative inferences and this Court cannot stack these inferences upon each other to achieve a sufficient weight so as to corroborate the pretrial statements (in light of the complete recantation at trial).

Respondent argues that a jury must draw reasonable inferences to arrive at a verdict. Petitioner agrees with this assertion with the addition that such reasonable inferences must be of sufficient weight to constitute proof beyond a reasonable doubt. Stated another way, were these inferences of sufficient weight to make the pretrial hearsay statements proof beyond a reasonable doubt, in light of the recantation. Respondent's arguments demonstrate the insufficiency of these inferences and why they are speculative. Respondent argues: "The same (that

the testimony was only speculative inferences) can be said for the testimony about the Petitioner's attempt to influence the testimony. There is no direct evidence of this (except for the overheard conversation by the jail inmate). This does not mean the attempt here, successful according to the jury's finding of guilt, **was not** accomplished through a **third party.**" (e.s.) Answer brief, page 25.

There was no proof whatsoever that a third party influenced the testimony. The state's proof suggested such an influence (without any proof). Suggestions do not (no matter how numerous) add up to proof beyond a reasonable doubt. Petitioner acknowledges that these corroborative inferences do hint at or suggest guilt. However, these inferences are simply not strong enough to corroborate the pretrial hearsay statements.

This case is not a case of where the jury could determine that the child lied at trial. There was simply no impeachment (except for the prior pretrial statements). Neither the child victim or her mother testified to any coercion or undue influence.

The reasonable doubt standard under the United States and Florida Constitution will become meaningless if this Court upholds a conviction where the victim recants at trial under oath prior statements and gives a plausible explanation for the

prior statements. Why the child lied before trial is speculation - in a way it is meaningless because at trial the victim said she lied and the state offered no actual proof that she lied at trial. If this Court upholds the conviction, then it will pave the way for possible future convictions of innocent persons.

We want to believe that children never lie. Yet we know they do and we also know adults can influence them to lie. In this case, the state wanted the jury to believe that Petitioner or someone else influenced the victim to recant her prior accusations and lie at trial. If this were true, then it is equally true that someone could induce a child to make false accusations before trial. If the child then recants and tells the truth at trial, an innocent person could get convicted.

A conviction would be proper under the general circumstances of this case only if there was actual corroboration of the pretrial accusations: direct proof of actual coercion/influence that demonstrated the child lied when she recanted at trial; a direct confession that admitted guilt and not merely a statement of intent made during a heated and vicious arguments; other direct corroborative evidence like an eyewitness or physical evidence that corroborated the Defendant's guilt.

If this Court finds the evidence in this case to be sufficient, the risk of improper convictions will not be intolerably great. In State v. Green, *supra*, this Court held that there must be **corroborative** proof to avoid the risk of an improper conviction. This holding was another way of saying that when the victim makes accusations before trial and then recants those accusations at trial, there must be corroborative evidence of guilt. This holding itself demonstrates that the decision is not simply which version of the victim's statements the jury believes - there must be actual corroborative evidence to enable the jury to find proof beyond a reasonable doubt in light of the recantation.

CONCLUSION

This Court should set aside and vacate Petitioner's judgment and sentence and direct that he be discharged. Therefore, the Court should answer the certified question yes as applied to the facts of this case.

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 23rd day of March, 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.