IN THE SUPREME COURT OF FLORIDA

THOMAS ELWELL, **Petitioner,** v. **STATE OF FLORIDA,** **Respondent.**	**Case No. SC07-1003**

MERIT ANSWER BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Appellee accepts Appellant's Statement of the Case and Facts, for the purposes of this proceeding, with the following stated exceptions, clarification and/or additions, or as independently argued under each issue when same are in conflict with general or specific representations made by Appellant:

Upon motion by the Petitioner, an evidentiary hearing was held regarding the admissibility of child hearsay testimony at trial. (Vol. I, R. 63) The first part of the hearing was held before the Honorable Michael Andres, Circuit Judge in and for the Sixth Judicial Circuit, Pasco County, Florida on November 3, 2004. (Vol. I, R. 94-156) The evidentiary hearing was continued until November 15, 2004. (ST. 221-258) At the initial hearing the State presented the child victim and Officer Phillips as witnesses.

The child victim, who was eleven years old when the incident occurred, was twelve at the time of the hearing. (Vol. I, R. 100-139) Before beginning his testimony the trial judge briefly truth-qualified the child. (Vol. I, R. 100-101) When the prosecutor called the victim he also truth-qualified the child, made inquiries about his education and understanding of his surroundings, such as his school attendance, days of the week, and basic alphabet knowledge, before beginning his general questioning. (Vol. I, R. 101-107) After questioning the prosecutor moved to have the child victim qualified for truth, as well as for fact and fiction qualification. The trial judge ruled that the child victim had been properly qualified. (Vol. I, R. 107)

The child victim testified that on May 5, 2004, the Petitioner who he knew as "Tommy," was at his Aunt Wanda's house when he was there, they were helping to put up a new pool in his Aunt's backyard. (Vol. I, R. 107-108) After the pool was completed, the child victim and Tommy were swimming in the pool together; just the two of them. (Vol. I, R. 110) At first the Petitioner was simply throwing the child victim into the air, having fun. At some point his Aunt told them to stop because the pool was too shallow and she was afraid the child victim would get hurt. (Vol. I, R. 110-111)

At some point in time after the Petitioner had stopped throwing him in the air, while he was sitting on a pool raft, the Petitioner pushed the child victim against the side of the pool, placing his arms around the child, holding him. (Vol. I, R. 112) While he had him pinned to the side of the pool, the Petitioner put his hands down through the elastic waistband of the child victim's swimming trunks, placing both his hands, palms down, over the child victim's butt. (Vol. I, R. 113) The child victim told the Petitioner to stop; however, he continued to rub his hands over the child's butt. (Vol. I, R. 114) Shortly after he stopped rubbing the victim's butt, the Petitioner exited the pool and proceeded to pull down his swimming trunks to urinate by the side of the pool in full view of the child victim. (Vol. I, R. 114) Before turning away the child victim was exposed to the sight of the Petitioner's penis which he had pulled out of his trunks to urinate. While

doing this the Petitioner asked the child victim: “Can I see your penis?” To which the child victim responded: “No.” (Vol. I, R. 114-115) At that point the Petitioner told the child victim that he was going to get to see the child’s penis when the boy came to his house the next day. The Petitioner and the child victim had a scheduled fishing trip planned for the following day. (Vol. I, R. 115-116) The Petitioner also told the child that when he came to his house the two of them would “rub each other down with oil and stuff.” (Vol. I, R. 116) The Petitioner also told the boy that he could smoke and watch porno movies while at his house. (Vol. I, R. 116)

The child victim testified that he did not tell anyone else about what the Petitioner had done and said to him when it happened. He explained that the reason for not telling anyone was simply that he did not want to start any fights. At some point the child returned to his grandfather’s house that night. (Vol. I, R. 116) The next morning, on the day he was scheduled to go fishing with the Petitioner, the child victim told his grandfather what had happened in the swimming pool at his Aunt Wanda’s house the day before. (Vol. I, R. 117-118) After telling him, they called his Aunt Wanda and told her that she needed to come over so that the child victim could talk with her. When his Aunt Wanda arrived he told her everything that he had told his grandfather about what happened between him and the Petitioner the day before in the

swimming pool. (Vol. I, R. 117-118) After telling both his grandfather and his Aunt Wanda, they went to the police. (Vol. I, R. 118)

At the police station the child victim talked with Officer Phillips. (Vol. I, R. 119) The child victim told Officer Phillips all the details of what had happened the day before between him and the Petitioner in his Aunt's pool. (Vol. I, R. 119)

Upon cross-examination, the child victim testified that the swimming pool was approximately 10 feet from the screened-in porch where his Aunt Wanda and some other people were when the Petitioner reached into his swimming trunks. (Vol. I, R. 123, 129-130) In the pool that day when Petitioner said they would be able to "rub each other down with oil and stuff," it was not the first time Petitioner had said that to him. (Vol. I, R. 125) The Petitioner told the child victim not to tell anyone what had happened in the swimming pool. (Vol. I, R. 127) Although he seemed at times confused as to exactly when he told his grandfather, either later that same night or the next morning, the child victim testified that he did tell his grandfather everything that had happened while he was in the pool with the Petitioner. (Vol. I, R. 132) He testified that after he had been in his room for some period of time upon returning to his grandfather's house, his grandfather came into his room and asked him what was wrong, at that time he told his grandfather that he did not want to go fishing with the

Petitioner, then he told him why. (Vol. I, R. 134-135) As he recalled his Aunt was coming over the same night when they called to tell her that he needed to speak with her. (Vol. I, R. 135) He also thought that they went to the police station the same day as the incident, later in the evening. (Vol. I, R. 140)

The State also called Officer William Phillips at the initial evidentiary hearing. (Vol. I, R. 140) Officer Phillips testified that on May 9, 2004, the day following the incident in the swimming pool, at approximately 12:57 p.m., he came into contact with the child victim, the child's Aunt Wanda and his grandfather in the lobby of the police station. (Vol. I, R. 141, 145) Officer Phillips took the preliminary report, this type of case is routinely referred to a detective for further investigation. (Vol. I, R. 143) When describing how the victim informed him of the incident, Officer Phillips testified:

> It was a narrative. Basically, I asked him what happened, again, the reason that I didn't indicate a bunch was because I don't recall asking him any questions at all. He basically told me what happened. It almost startled me. He looked me right in the eyes. It was a very direct way in which he told me, basically, the circumstances and the order in which they occurred.

When asked if anything in the manner of the child victim indicated that he was not telling the truth, Officer Phillips responded:

> No, not at all, in my 17 years of interviewing people, I just found the young man to be extremely credible. I, you know, had no doubt in what the young man told me. I didn't see

> anything which indicated to me that he had, you know, that he had in any way distorted or fabricated, or that he - - his conversation with me was not much different than my conversation with you here today.

(Vol. I, R. 144-145)

Upon cross-examination, Officer Phillips testified that he did not tape record his interview with the child victim at the police station. (Vol. I, R. 149) Officer Phillips did not take contemporaneous notes of the interview. (Vol. I, R. 150) Officer Phillips conducted only a preliminary interview to determine the type of offense. (Vol. I, R. 152) The child victim had not related to Officer Phillips any information about the Petitioner telling him that they would watch porno movies, that he would allow him to smoke, that he wanted to be like a father to him, or that he intended to rub him down with oil. What he did tell Officer Phillips was that prior to the swimming pool incident the Petitioner had tried to get him into his Chevy van. (Vol. I, R. 152) Officer Phillips further testified that he did not have any special training in interviewing children. (Vol. I, R. 153)

On re-direct examination Officer Phillips testified that although the child victim's grandfather and aunt were in the room when he conducted the interview, neither spoke or in any way influenced the child's statements. (Vol. I, R. 154) The child made a "direct and forthright" statement explaining what had transpired. (Vol. I, R. 155)

Officer Phillips, in re-cross, acknowledged that he did not take contemporaneous notes and that he wrote the report three hours after meeting with the child victim. (Vol. I, R. 156)

On November 15, 2004 the second part of the evidentiary hearing was conducted before the Honorable Michael Andrews, Circuit Court Judge, in the Sixth Judicial Circuit, in and for Pasco County, Florida. (ST2, T. 221-258)

The State called the child victim's grandfather, Joseph Podolski. (ST2, T. 224) He testified to the statements made to him by the victim. Contrary to the child's recollection, Mr. Podolski further testified that he had the initial discussion with the victim on the day after the incident when the child was reluctant to go on a planned fishing trip with the Petitioner. (ST2, T. 228-229) The child victim told his grandfather that after the Petitioner and he were "fooling around in the pool," the Petitioner took him to the far end of the pool, about 25 feet from his Aunt's house where the Petitioner spoke to him about what they would do on the child's next visit to his house, including such things as "put lotion all over his body . . . " (ST2, T. 230-231) While still at the far end of the pool, the Petitioner then "put his hand inside his bathing suit on his butt and was feeling his butt."

At the conclusion of the evidentiary hearing, defense counsel argued first that section 90.803(23) did not apply because the child victim had now turned 12 years old. He admitted that the

incident had occurred with the child was only 11 years of age, however, he continued to argue that since the child had turned 12 the rule was no longer applicable. (SR2, T. 248-250) The trial judge disagreed with defense counsel's argument and advised that based upon the wording of the rule and current case law, since the child was "eleven or less at the time of the offense," he was applying the rule. (SR2, T. 249) Defense counsel continued to argue that because the child "testified most capably," the testimony of the grandfather was "repetitive and it's not necessary." (SR2, T. 250) Defense counsel further argued that Officer Phillips' testimony was not reliable. (SR2, T. 251-252) The trial judge agreed and excluded Officer Phillips' testimony. (SR2, T. 257) Defense counsel also argued that the child victim did not report the incident to an adult at the "first available opportunity." (SR2, T. 255) Defense counsel argued that he should have been permitted to make inquiries regarding why the child victim was still in fourth grade when he was 12 years old. The trial judge ruled that to be irrelevant and disallowed that line of questioning. During his argument, defense counsel again attempted to argue the relevancy of the child victim's being held back in school: "Well, I think it is relevant because it goes to - - it could go to a possible motive there." (SR2, T. 257) Defense counsel argued this would imply that the child was "consistently seeking attention and acting out." (SR2, T. 257) When challenged

to prove that by the trial judge: “Can you prove that? Can you establish through any means whatsoever that that’s how this child operates?” (SR2, T. 257) Defense counsel responded: “Not at this time, Your Honor.” Defense counsel then restated his argument:

> But, basically, though, Your Honor, I would still argue that he doesn’t - - there is no outcry at the first opportunity. And I think based on that and the 403 analysis that none of this should come in.

(ST2, T. 257) Disagreeing with defense counsel the trial judge ruled: “. . . I believe everything Mr. Podolski testified to today is admissible and relevant, and it will come in.” (ST2, T. 258)

At trial, during the grandfather’s testimony, the defense counsel objected after he had made the initial testimony regarding the child victim’s statement that the Petitioner had “put his hands on me.” (Vol. III, T. 258) The objection was as “to narrative.” (Vol. III, T. 259) The objection was sustained and the prosecutor asked the grandfather to tell the jury what his grandson told him when he asked what had happened. When the witness responded: “He said at first they were playing in the pool[],” defense counsel objected stating only: “Objection hearsay, Your Honor.” (Vol. III, T. 259) The objection was overruled and the grandfather’s testimony continued uninterrupted until the witness began to relate what his daughter, the victim’s Aunt, had said. At that point defense counsel objected and the objection was sustained. (Vol. III, T. 260) Shortly after that, the prosecutor asked the witness what else

his grandson had told him about what happened after he was touched in the pool. Defense counsel objected and a bench conference was held:

> State: He's just going to go into the part where the defendant got out of the pool and exposed himself to the child.
>
> Court: He's going to say that's what [child victim] told him?
>
> State: Absolutely.
>
> Defense: Your Honor, it doesn't go to the specific act of child abuse. He's already testified about the specific act of child abuse that was reported to him.
>
> Court: It may go to the lesser you are requesting which is the unnatural and lascivious act that you are asking me to read.
>
> Defense: If all he's going to get into is the urinating outside of the pool but we've gotten to a point where it seems to be a narrative and that is what I'm objecting to.

(Vol. III, T. 261-262) The objection was overruled and questioning continued. (Vol. III, T. 262) Defense counsel cross-examined the victim's grandfather thoroughly. (Vol. III, T. 264-274)

At the conclusion of the grandfather's testimony the state rested and defense counsel moved for a judgment of acquittal. (Vol. III, T. 274) The motion was denied. (Vol. III, T. 275) Defense counsel advised the trial court that the defense would not be presenting any evidence. (Vol. III, T. 275) After proper

inquiry of the Petitioner by the trial judge, the court acknowledged that the defense had rested. (Vol. III, T. 275-277) The renewed motion for judgment of acquittal was denied. (Vol. III, T. 277-278)

The Petitioner was found guilty of the lesser included charge of attempted lewd and lascivious molestation. (Vol. III, T. 325)

Petitioner appealed his case to the Second District Court of Appeal; Case No. 2D05-907. On April 25, 2007 the District Court affirmed Petitioner's conviction. *Elwell v. State*, 954 So.2d 104 (Fla. 2d DCA 2007).

Petitioner sought review in this Honorable Court, arguing conflict with *Hopkins v. State*, 632 So.2d 1372 (Fla. 1994), as well as other alleged conflicts with sister district courts. Review was granted by this Court; *Elwell v. State*, 2007 Fla. Lexis 1743 (Fla., Sept. 14, 2007).

SUMMARY OF THE ARGUMENT

The facts of this case distinguish it from the holding of this Court in *Hopkins v. State*, 632 So.2d 1372 (Fla. 1994). The Petitioner failed to properly preserve any objection to the trial court's finding of admissibility relating to the child victim's statements to his grandfather which were introduced at trial under the child hearsay exception; § 90.803(23), Florida Statutes. A trial court's failure to provide an explanation or factual findings to support its conclusion that child hearsay statements are reliable is not fundamental error. *Townsend v. State*, 635 So.2d 949 (Fla. 1994). Lastly, the grandfather's testimony was cumulative; thus, if deemed error, the same was harmless.

ARGUMENT

ISSUE I

WHETHER THE SECOND DISTRICT COURT OF APPEAL ERRED IN FINDING THAT THE PETITIONER FAILED TO PRESERVE HIS OBJECTION TO THE INTRODUCTION OF SECTION 90.803(23), FLORIDA RULE OF EVIDENCE; CHILD HEARSAY TESTIMONY, PURSUANT TO SECTION 924.051, FLORIDA STATUTES (2003); THE SAME NOT CONSTITUTING FUNDAMENTAL ERROR, THEREBY BARRING APPELLATE REVIEW. (RESTATED)

The Second District Court of Appeal correctly ruled that Petitioner failed to properly preserve this issue for appellate review by failing to make an objection to the sufficiency of the trial court's findings as to the admissibility of the child hearsay statements communicated through the child victim's grandfather. *Elwell v. State*, 954 So.2d 104 (Fla. 2d DCA 2007). Since the Petitioner failed to raise the proper, timely objections below, the trial court was never placed on notice of any error with respect to its findings and, thus, was never given an opportunity to correct the deficiency in the findings. This issue is unpreserved for appellate review. *Id*.; *Harrell v. State*, 894 So.2d 935 (Fla. 2005). See also § 924.051(1)(b), Florida Statutes.

Lack of Fundamental Error

A trial court's failure to make specific findings required in section 90.803(23), Florida Statutes, does not constitute fundamental error. *Elwell*, *supra*; *Townsend*, *supra*; *Poukner v. State*, 556 So.2d 1231 (Fla. 2d DCA 1990); *Stone v. State*, 547 So.2d 657 (Fla. 2d DCA 1989).

Failure To Preserve Error For Appellate Review

Petitioner argues that in holding that this issue was not properly preserved for appellate review the Second District Court of Appeal in *Elwell v. State*, 954 So.2d 104 (Fla. 2d DCA 2007) misinterpreted this Court's holding in *Hopkins v. State*, 632 So.2d 1372 (Fla. 1994). Upon careful reading of the cases and review of the law in this area, Respondent respectfully disagrees with this argument.

It appears that Petitioner misconstrues this Court's holding in *Hopkins*, declining to acknowledge the proper underpinnings of the issue in that case to be the confrontation rights of the defendant, seizing upon dicta, improperly terming it as only a "supplemental part of the holding." See Petitioner's Initial Brief, pg. 18. Upon proper review of *Hopkins*, it is apparent that this Court's review of the application of 90.803(23), Florida Statutes, was directly tied to the core issue, that being, the implication of the defendant's constitutional right to confrontation and the availability of close circuit television for the broadcasting of a child victim's testimony at trial. In fact, the requisite objection to preserve the issue before the appellate court in *Hopkins* was based solely on the issue of the admissibility of the child victim's testimony via closed circuit television. 632 So.2d at 1376. Reviewing the nature of the objection, the basis therefore, and the context in which the objection was raised, this Court found that the issue had been properly preserved.

Such is not the case now presented for review in the case *sub judice*. Confrontation is not at issue in this case, nor are any other factors present that would raise the trial court's omission below to the level of fundamental error required for reversal. As held by the Second District Court of Appeal below:

> Prior to raising the issue in this appeal, Elwell never raised any objection concerning the sufficiency of the trial court's findings under section 90.803(23). ***Elwell's objection to the reliability of the child-hearsay statements was not sufficient to preserve the specific issue that he now raises on appeal.*** See [*State v.*] *Townsend*, 635 So.2d [954] at 958 [(Fla. 1994)] The trial court was never placed on notice of any error with respect to its findings and thus was never given an opportunity to correct the deficiency in the findings. See *Harrell,* 894 So.2d at 940. Accordingly, under the general rules governing preservation of error, the issue of the sufficiency of the findings was clearly unpreserved.

[Emphasis added] *Elwell*, 954 So.2d at 109. Specifically, Petitioner failed to object to the sufficiency of the findings by the trial court and did not raise any objection to the trial court below except in the nature of a general hearsay objection as to the content of the witness's testimony. The Second District Court of Appeal, reviewing this issue, directly found: "At no point in the pretrial or trial proceedings did Elwell offer an objection regarding the trial court's findings." *Elwell*, 954 So.2d at 105.

As provided in Section 924.051(3), Florida Statutes (2003):

> An appeal may not be taken from a judgment or order of a trial court unless a prejudicial

> error is alleged and is *properly preserved* or, if not properly preserved, would constitute fundamental error. A judgment or sentence may be reversed on appeal only when an appellate court determines after a review of the complete record that prejudicial error occurred and was *properly preserved in the trial court*, or, if not properly preserved, would constitute fundamental error.

[Emphasis added]. The court in *Elwell* went on to define the term preservation and its components:

> Preserved is defined to mean "that an issue, legal argument, or objection to evidence was timely raised before, and ruled on by, the trial court, and that the issue, legal argument, or objection to evidence was sufficiently precise that it fairly apprised the trial court of the relief sought and the grounds therefor. §924.051(1)(b) [emphasis added].
>
> Proper preservation thus involves these components:
>
> > First, a litigant must make a timely, contemporaneous objection. Second, the party must state a legal ground for that objection. **Third, "[i]n order for an argument to be cognizable on appeal, it must be *the specific contention* asserted as legal ground for the objection, exception, or motion below."** The purpose of this rule is to "place[] the trial judge on notice that error may have been committed, and provide[] him an opportunity to correct it at an early stage of the proceedings."

[Emphasis added] *Elwell*, 954 So.2d at 106; citing *Harrell v. State*, 894 So.2d 935, 940 (Fla. 2005)(citations omitted). The only objection raised by the Petitioner at trial when the witnesses

testified to what he had been told by his grandson was: “Objection, hearsay, Your Honor.” (Vol. III, T. 259)

Sufficiency of the trial court’s findings under Section 90.803(23), Florida Statues, is completely distinct from a general objection based upon only “hearsay.” This type of general objection does not serve to put the trial judge on notice that a defendant believes that an error may have been committed relating to the statutory sufficiency of his findings during or after the full-blown evidentiary hearing, nor does it give the trial judge the requisite opportunity to correct this alleged error at an early stage of the proceedings.

Specifically in this the case *sub judice*, the court was never made aware that the Petitioner intended to challenge the sufficiency of ***its findings***. The pre-trial Motion to Strike Notice of Intent to Use Hearsay Statement of Child Victim and to Exclude Child Hearsay Testimony From Trial, filed by defense counsel below, in summary, set forth as its basis four points:

(1) The notice was not timely filed by the State;

(2) The notice did not specify any reasons why the State believed the hearsay statements were trustworthy under section 803.23, Florida Statutes;

(3) The notice was not sufficiently specific, as it did not state with particularity the exact statements the State intended to introduce at trial, giving a narrative rather than specifics; and

(4) The child was 12 at the time of the hearing, therefore, the child hearsay exception was inapplicable.

(Vol. I, R. 063) After the evidentiary hearing was concluded on November 15, 2004, after testimony was taken from the child victim, Officer Phillips and the child's grandfather, defense counsel argued to the trial court that:

> (1) Section 803.23 was inapplicable because the child, since the incident, had turned 12 years old. Consequently, although the child was only 11 at the time of the incident, he was now 12 and the rule should not be applied to him.

The trial judge denied that argument, advising that he would follow the rule which provided that section 803.23 was applicable when a child victim was eleven or less at the time of the offense. (Vol. SR2, T. 249) Defense counsel next argued that:

> (2) Because the child had "testified most capably" at the hearing, that even if section 803.23 applied, under a section 403 analysis the testimony should be kept out because it was repetitive and unnecessary;
>
> (3) That the child did not tell an adult at the first opportunity, waiting until he had returned home to his grandfather's house to report what had happened; and
>
> (4) That the State had not specifically said what statements it intended to introduce at trial.

(SR2, T. 252-253, 255) The rest of defense counsel's argument related to the testimony of Officer Phillips, successfully arguing that the officer's recollection of the events when he briefly interviewed the child, his mother and grandfather, as more of a intake interview, did not meet the reliability standard required for admissibility. (SR2, T. 251-252, 257)

At best, it can be argued that Petitioner raised only one possible point of review relating to reliability of the *assertion*, i.e., that the child did not report the incident immediately to his aunt, rather, he waited until returning to his grandfather's home to tell about what had happened. In his argument to the court, defense counsel implied that the child victim may have made the allegation merely to get attention. This claim was made in connection with an unsubstantiated argument that the child may have been held back a grade in elementary school for "acting out." (SR2, T. 256) As the court aptly observed:

> You can't establish that that's the reason he's in the fourth grade. He might be in the fourth grade because he didn't do well in school. That doesn't mean that - - I mean, you don't have any evidence of that.You can't establish - - even if you can, how does that qualify as relevant?

(SR2, T. 256-257) Defense counsel's response that it could be relevant to the court's review, "[i]f he is consistently seeking attention and acting out," was not based upon facts, it was merely speculative inquiry. (SR2, T. 257) When asked directly by the trial judge: "Can you prove that? Can you establish through any means whatsoever that that's how this child operates[]," defense counsel acknowledged that he could not. Ultimately defense counsel based his argument to keep out the grandfather's testimony upon his allegation that the child failed to tell immediately that the Petitioner had molested him in the pool and a 403 analysis of relevancy. (SR2, T. 257)

Unlike the facts in *Hopkins*, this underlying objection does not serve to preserve the gambit of constitutional implications that were the basis of the Court's decision in *Hopkins*, in which this Court found that the pre-trial objections and arguments supported a finding that the defendant had adequately preserved his argument that the trial court's findings were insufficient to establish reliability.

Section 90.803(23), Florida Statutes, provides:

> (a) Unless the source of information or the method or circumstancesby 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 . . .

The child victim in this case did testify, at both the evidentiary hearing and at trial and was subject to extensive cross-examination.

As demonstrated by the record, the Petitioner failed to preserve this issue. Although he now raises on appeal an issue relating to his allegation that the trial court erred in failing to make the specific findings required by section 90.803(23), Florida Statutes, that was not his argument to the trial court at the evidentiary hearing, or subsequently at trial before admitting the child hearsay statements into evidence. Unlike *Hopkins*, the defense counsel at no time advised the trial court that he was challenging the court's findings based upon the trial court's alleged insufficiency of making specific findings as to the reliability of the statements under 90.803(23). *Elwell*, 954 So.2d at 106, 107. The ruling of the Second District Court of Appeal was correct, Petitioner failed to preserve this argument for appellate review. This appeal should be denied.

If the Petitioner is allowed to raise this issue without the proper preservation then this type of alleged error will be elevated to a level tantamount to that of fundamental error. The law does not intend this to be so. As this Honorable Court held in

State v. Townsend, 635 So.2d 949, 959 (Fla. 1994): ". . . the failure of a trial judge to make sufficient findings under the statue, in and of itself, does not constitute fundamental error." The defining distinction from the *Hopkins* case is that there was more to the objection than just the trial court's alleged insufficient findings under 90.803(23); there was an inextricably intertwined issue of the defendant's constitutional confrontation rights because the child victim in that case did not testify at the trial and the defense's challenge to those findings under a section 92.54 review which encompassed the sufficiency of the trial court's ruling. In the case now before this Court for review, the child victim did testify at trial, confrontation is not an issue, and this review is limited to section 90.803(23).

This Court in *Hopkins* did not hold that once a defendant had made an objection to the introduction of child hearsay testimony that the matter is preserved for appellate review on all matters contained within the evidentiary hearing. Rather pointedly this Court determined that "any shortcomings in the statutory findings must be brought to the trial court's attention by an objection in order to preserve the issue for appellate review." *Hopkins*, 632 So.2d at 1375. While discussing this in the context of section 92.54, the logic is applicable to the same statutory requirements presented by section 90.803(23), Florida Statutes. See also *Townsend, supra*; Section 924.051, Florida Statutes.

As the record below demonstrates, the Petitioner did not raise any objection, at any time during or after the evidentiary hearing, regarding the trial court's statutory findings, or lack thereof. Moreover, that was not the objection raised at trial, the single statement: "Objection, hearsay, Your Honor," did not serve to timely put the trial court on notice that the Petitioner was in any manner challenging the sufficiency of the trial court's prior statutory findings. Irrespective of Petitioner's argument otherwise, his objections below did not provide a sufficient basis to now allege that he properly challenged the sufficiency of the trial court's ruling under section 90.803(23), Florida Statutes.

This Court in ***Hopkins*** specifically narrowed its ruling based upon the circumstances of that case, which included and was dependent upon the defendant's Sixth Amendment Confrontation rights. 632 So.2d at 1375. There is no confrontation issue raised in the case ***sub judice***. In reaching its holding, this Court articulated:

> Under the circumstances of this case, we find that this objection properly preserved the issue for appellate review. Although the objection did not specifically address the sufficiency of the factual findings under *section* 92.54, it properly raised the issue of Hopkins' constitutional right "to be confronted with the witnesses against him." U.S. Const. amend. VI; *see also* art. I, § 16(a), Fla. Const. ("In all criminal prosecutions the accused . . . shall have the right . . . to confront at trial adverse witnesses. . . . ").

This is important because the requirement raised here is that a proper foundational objection must have been raised below, in *Hopkins* it was that he was effectively denied confrontation because ". . . the factual findings required by section 92.54 are necessarily related to the constitutional right to confrontation." *Ibid*. Thus, this Court determined that:

> Once defense counsel has made a general objection to the admissibility of testimony *via* closed circuit television on an appropriate legal ground and has been overruled by the trial judge, counsel should not be required to continue arguing over the legal sufficiency of the court's factual basis for its ruling.

Ibid. Given the nature of the arguments raised by Hopkins' defense counsel at trial and at the evidentiary hearings preceding trial, this general objection served to encompass the issues of sufficiency, such is not the case *sub judice*. The facts, arguments and objections are distinctively different and, as such, this issue was not properly preserved for appellate review. The ruling of the Second District Court of Appeal should be affirmed and this appeal denied.

Harmless Error

Without compromising Respondent's argument herein regarding Petitioner's failure to preserve the issue for appeal, and in direct response to Petitioner's sub-issue, Respondent argues that should this Honorable Court deem the admission of the grandfather's testimony under the child hearsay exception; § 90.803(23), Florida Statutes, to be error, the same must be deemed harmless error.

The record below demonstrates that the trial court personally examined the child victim and the circumstances surrounding his hearsay statements during the November 3, 2004, hearing on the State's motion to introduce the statements. The child victim was also subjected to cross-examination by Petitioner's trial counsel at the pretrial hearing as well as during the trial. (Vol. I, R. 120-139) In each instance, the record shows unequivocally that the child victim was capable of separating facts from fantasy and understood his duty to tell the truth. In addition, the child's testimony both before and during the Appellant's trial was specific and remained consistent as to the time and manner of the circumstances surrounding the offense itself. Moreover, the record shows details of the victim's testimony was sufficiently corroborated by this grandfather and Officer Phillips. (Vol. I, R. 140-154) These facts demonstrate adequate safeguards of reliability and Petitioner was not deprived his right to a fair trial.

Petitioner's allegations that his trial counsel sufficiently impeached the child victim at trial is unimpressive and carries no weight in his argument before this Court. The only possible points of impeachment were as to inconsequential matters of little or no significance as to the actual act of lewd or lascivious molestation against the victim. The child's statements to his relatives, to the police and his testimony at trial remained consistent as to the act of molestation, the Petitioner pinned him to the side of the

pool, thrust both his hands down the top of his swimming trunks, and rubbed the child's bare butt before letting him go. Immediately upon releasing the child, the Petitioner exited the pool and exposed himself to the child while making explicit inquires of the child concerning his male genitalia.

Given the foregoing and the record below, it is clear beyond a reasonable doubt that a rational jury would have found the Petitioner guilty even without the testimony of the grandfather. *Galindez v. State*, 955 So.2d 517 (Fla. 2007) citing *Neder v. United States*, 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); *State v. DiGuilio*, 491 So.2d 1129 (Fla. 1986).

Additionally, at the evidentiary hearing, Petitioner's counsel argued to exclude the child victim's grandfather's testimony based upon the fact that it was cumulative under section 403, that the child had "testified most capably," and therefore the testimony of the grandfather was repetitive and unnecessary. (SR2, T. 250) If the grandfather's testimony was merely cumulative as argued by Petitioner at the evidentiary hearing, then, most assuredly if it's admission is deemed to have been error at all, it must be considered as harmless error. See *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); *Williams v. State*, 947 So.2d 577 (Fla. 3rd DCA 2006); *DiGuilio*, *supra*.

Further, considering the United States Supreme Court's ruling in *Crawford*, Respondent argues that as Petitioner was given the opportunity to fully cross-examine the child victim and the

grandfather at the pre-trial evidentiary hearing as to the statements introduced at trial, there is no basis for a claim of prejudice. In *Townsend*, it was articulated that the legislative purpose forimposing the stringent criteria under section 90.803(23) was to balance the need for reliable out-of-court statements of child abuse victims against the confrontation and due process rights of those accused of child abuse. *Id*. at 954. The fact that below the Petitioner was afforded the full right to confront the child victim, and to thoroughly examine him, defeats Petitioner's argument that he suffered cognizable harm by the introduction of the grandfather's testimony at trial.

Any error recognized by this Court in the admission of the grandfather's testimony at trial is harmless and cannot constitute fundamental error; consequently, since this matter has not been properly preserved for appellate review. This appeal should be denied.

CONCLUSION

Respondent respectfully requests that this Honorable Court uphold the rulings of the Second District Court of Appeal and affirm Petitioner's conviction.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Robert A. Morris, Esq., and James C. Banks, Esq., Banks & Morris, P.A., Special Assistant Public Defenders, P.O. Box 9000—Drawer PD, Bartow, Florida 33831-9000, this _____ day of December 2007.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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COUNSEL FOR RESPONDENT