IN THE SUPREME COURT OF FLORIDA

THOMAS ELWELL,
Petitioner,

vs.

CASE NO.: SC07-1003
Lower Tribunal No.: 2D05-907

STATE OF FLORIDA,
Respondent.
_____/

INITIAL BRIEF OF PETITIONER

ROBERT A. MORRIS, ESQUIRE and
JAMES C. BANKS, ESQUIRE *of*
Banks & Morris, P.A.
FL Bar Nos.: 0144680 & 281670
Special Assistant Public Defenders
Office of the Public Defender
Post Office Box 9000-PD
Bartow, Florida 33831

ATTORNEYS FOR PETITIONER

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PRELIMINARY STATEMENT

The "Petitioner" was the Defendant in the trial court and will hereinafter be referred to as "Petitioner." The Respondent will hereinafter be referred to as "State." The Record on Appeal consists of five (5) volumes. Volume 1, the Clerk's Record, will be referred to by use of the Volume number (Vol. 1) followed by the appropriate page number. Volumes 2 and 3, the Trial Transcripts, will be referred to by use of the Volume number (Vol. 2 / Vol. 3) followed by the appropriate page number. The supplemental record contains two (2) volumes; one filed March 29, 2005 (Vol. 4) and one filed August 2, 2006 (Vol. 5).

STATEMENT OF THE CASE AND FACTS

The Petitioner, Thomas Elwell was charged by Amended Information with one count of Lewd or Lascivious Molestation and one count of Failure to Register as a Sexual Offender. (Vol. 1, P.12).

The Petitioner filed a Motion To Dismiss Count Two of Information on the ground the Appellant was not required to register under section 943.0453(2) Fla. Stat. (Vol. 1, P.154). The State responded with a Traverse. (Vol. 1, P.25-49). The Petitioner filed a Motion to Sever the two counts of the Information. (Vol. 1, P.50). The Court severed the two counts and dismissed Count Two on October 26, 2004. (Docket Entry and Vol. 1, P.64).

The State filed a Notice of Intent to Use Hearsay Statement of Child Victim of Sexual Abuse. (Vol. 1, P.56-57). The defense filed a Motion to Strike said notice. (Vol. 1, P.64).

On November 3, 2004, the Honorable Michael F. Andrews held a hearing on the Petitioner's Motion to Strike Notice of Intent to Use Hearsay Statement of Child Victim and to Exclude Child Hearsay Testimony from Trial. (Vol. 1, P.56-57, 63, 94-157). At the hearing, twelve year old B.P. (Out of respect for the parties, the juvenile victim's name shall be omitted and referred to by use of the initials "B.P.") was "truth qualified" by the prosecutor. (Vol. 1, P.107-108). He

testified that on May 5, 2004 he was helping erect a pool at his Aunt Wanda's house. (Vol. 1, P.104-108). While he and the Petitioner were swimming the Petitioner pinned him near the side of the pool, and put his hands in B.P.'s pants and touched his butt. (Vol. 1, P.112-113). "He was like rubbing them and stuff." (Vol. 1, P.114). The Petitioner later "got out of the pool, and went to the side of the pool and he peed." (Vol. 1, P.114). The Petitioner asked, "Can I see your penis?" B.P. said, "no" and the Petitioner responded, "Why? I'm going to see it when me and you go to my house." (Vol. 1, P.115). The Petitioner and B.P. were planning on going on a fishing trip the following day. (Vol. 1, P.115). The Petitioner also told the boy, "Me and you can rub each other down with oil and stuff," and said they could watch porno movies. (Vol. 1, P.116). The boy did not tell anyone about these conversations that day. (Vol. 1, P.116). The next day he did tell his grandfather. (Vol. 1, P.117). He also told his Aunt Wanda. (Vol. 1, P.118). They eventually went to the police where the told Officer Phillips the same story. (Vol. 1, P.119).

During cross-examination he testified he told his grandfather what happened on the same day it happened - not the next morning. (Vol. 1, P.117, 124). He also stated the comment about rubbing oil on one another occurred two days earlier.

(Vol. 1, P.125). The comments about watching porno movies were made two or three days earlier. (Vol. 1, P.135-136).

Patrolman William Phillips testified B.P's grandfather brought B.P. to be interviewed about an incident which occurred the day before. (Vol. 1, P.140). Brian B.P. told him the Petitioner put both hands in B.P.'s bathing suit, rubbing his buttocks and saying, "Doesn't that feel good?" (Vol. 1, P.142). Patrolman Phillips found the boy to be extremely credible. (Vol. 1, P.145). B.P. did not tell him about being asked to watch porno movies or being rubbed down with oil. (Vol. 1, P.152).

The child hearsay hearing continued on November 15, 2004. B.P.'s grandfather testified that on the day after his grandson helped with his Aunt Wanda's pool he was supposed to go fishing with the Petitioner. (Vol. 5, P.228). "I went into the room and says, don't you have to go fishing. He says, Grandpa, I've got to talk to you about something. . . . I said, what's the matter. He said I don't want to go fishing with Tommy. I said, what happened. He says, Tommy put his hands on me in the swimming pool." (Vol. 5,P.229). The grandfather then went into detail about the conversation with his grandson. (Vol. 5, P.230-232). The child was then taken to the police station where he talked to Officer Phillips. (Vol. 5, P.234).

The trial judge ruled that everything the grandfather testified to came from the child which would give credence to the child's comments and would therefore be admissible against the Petitioner. (Vol. 5,P.254).

The case proceeded to trial on November 15 and 16, 2004, before the Honorable Michael Andrews. B.P., the alleged victim, testified his birthday was on October 5, 1992. (Vol. 2, P.130). On May 8, 2004 he went to his Aunt Wanda's house to help put up a pool. (Vol. 2, P.133). Several people including the Petitioner were there. (Vol. 2, P.134). Over Petitioner's objection he stated early that morning the Appellant asked if B.P. wanted to see the Petitioner's van with its bed, dresser, and play station. The Petitioner then asked if B.P. wanted to go to the store to purchase cigarettes. The victim declined. (Vol. 2, P.137-143). After putting the pool up, he and the Petitioner went swimming. (Vol. 2, P.144). They were having fun with the Petitioner throwing him around until Aunt Wanda told them to stop. (Vol. 2, P.145). The Petitioner pushed B.P. around the pool in an inner-tube and eventually pushed him over to the pool wall. (Vol. 2, P.146). The Petitioner put his hands inside B.P.'s swim trunks and rubbed his butt for five seconds. (Vol. 2, P.146-147). B.P. asked him to stop twice and the Petitioner did so. (Vol. 2, P.148). The Petitioner got out of the pool, walked around, "pulled down his pants and pee'd right in front of me." (Vol. 2, P.149-150). The Petitioner

asked if he could see the victim's penis. The victim shook his head "no." (Vol. 2, P.150). The Petitioner stated, "well I am going to see it when we get to my house" referring to a planned fishing trip the next day. (Vol. 2, P.150). The Petitioner also told the victim the Petitioner would rub him down with lotion and the victim could do the same to the Petitioner. (Vol. 2, P.153). Later on the porch, the Petitioner told B.P. he had beer in his refrigerator and the Petitioner would let him smoke. (Vol. 2, P.152). B.P. did not say anything to his Aunt Wanda because he was afraid "she would go all psycho and stuff and then get into a fight and I didn't want to see them fight." (Vol. 2, P.151).

Eventually B.P. went home. (Vol. 2, P.154). The next day he was supposed to go to the Petitioner's house. (Vol. 2, P.157). B.P. eventually told his grandfather what happened. (Vol. 2, P.157). He told his grandfather because he did not want to go fishing with the Petitioner as planned due to the events of the previous day. (Vol. 2, P.181). His grandfather and Aunt Wanda took him to the police station. (Vol. 2, P.158). During cross-examination B.P. stated the Petitioner told him he could be like his dad (who was deceased) and do father-like things with B.P.. B.P. did not want the Petitioner to replace his father. (Vol. 2, P.265).

B.P.'s aunt testified she was friends with the Petitioner. (Vol. 2, P.196-197). On May 8, 2004 she and others finished putting the pool up. (Vol. 2, P.198-199).

B.P. and the Petitioner went swimming while she and others worked nearby in the house or on the porch. However they were unable to see anything going on between B.P. and the Petitioner. (Vol. 3, P.208-213, 230, 234). The next day after talking to her father they took B.P. to the police station. (Vol. 3, P.222).

Officer Robert Close of New Port Richey made contact with the Petitioner two days later. According to the Petitioner's driver's license the Petitioner was born January 11, 1957 and was 47 years old. (Vol.3, P. 241-242). Based on his experience in law enforcement he would not expect to find or collect any evidence where a child was merely touched. (Vol. 3, P.250).

B.P.'s grandfather knew there were plans for the Petitioner to take B.P. fishing on Sunday. (Vol. 3, P.254). B.P. liked going fishing. (Vol. 3, P.255). However, when morning came, B.P. was rather quiet, didn't want to go fishing, and told his grandfather about the touching. (Vol. 3, P.258). Over Petitioner's objections B.P.'s grandfather detailed the conversation with B.P.. (Vol. 3, P.259-263). Specifically, defense counsel objected to the grandfather's recollection of B.P.'s disclosures by stating, "Objection hearsay, Your Honor." The trial court overruled the objection. (Vol. 3, P.259). He testified that he and Aunt Wanda took B.P. to the police station after these disclosures. (Vol. 3, P.263).

The State rested its case. (Vol. 3, P.274). The defense moved for a judgment of acquittal. (Vol. 3, P.274). The Court denied same. (Vol. 3, P.275). The defense rested without calling any witnesses and renewed the same motion which was denied. (Vol. 1, P.277-278, 286).

The Court instructed the jury on Lewd and Lascivious Molestation, Attempted Lewd and Lascivious Molestation, and Battery without objection. (Vol. 3, P.311-313, 321). The jury returned with a verdict of guilty of the lesser-included offense of Attempted Lewd and Lascivious Molestation. (Vol. 3, P.325).

The State filed a Notice of Enhanced Penalty, (Vol. 1, P.58) and a Notice of Defendant's Qualification as a Prison Releasee Reoffender. (Vol. 1, P.60).

The jury found the Petitioner guilty of the lesser included offense of Attempted Lewd and Lascivious Molestation. (Vol. 1, P.85). The Petitioner filed a Motion for New Trial. (Vol. 1, P.165-166). The Court sentenced the Petitioner to 30 years as a Habitual Violent Offender on counts one and two to run concurrent. (Vol. 1, P.173-179). Notice of Appeal was timely filed on February 2, 2005. (Vol. 1, P.181, 185, 189).

The District Court of Appeal for the Second District of Florida affirmed the Petitioner's conviction. Elwell v. State, 954 So. 2d 104 (Fla. 2nd DCA 2007). This

Court granted review based on conflict among the districts and conflict with its own opinions. See Elwell v. State, 963 So.2d 227 (Fla. Sep 14, 2007).

POINTS OF ARGUMENT ON APPEAL

I. WHETHER THE TRIAL COURT ERRED IN ADMITTING CHILD HEARSAY IN THE ABSENCE OF MAKING THE REQUISITE FINDINGS PURSUANT TO FLORIDA STATUTE 90.803 (23)?

SUMMARY OF ARGUMENT

The trial court erred by admitting a child sexual abuse victims hearsay statements into evidence without first making a pre-trial determination of their reliability pursuant to Section 90.803(23). Perez v. State, 536 So.2d 206 (Fla. 1988); Griffin v. State, 526 So.2d 752 (Fla. 1st DCA 1988); Palazzolo v. State, 754 So.2d 731 (Fla. 2d DCA 2000); and Garcia v. State, 659 So.2d 388 (Fla. 2d DCA 1995).

ARGUMENT

I. THE PETITIONER'S CONVICTION SHOULD BE REVERSED AND REMANDED HOLDING THAT THE TRIAL COURT ERRED IN ADMITTING CHILD-HEARSAY TESTIMONY.

Standard of Review:

The standard of review of the reliability of hearsay statements and their admission into evidence is one of abuse of discretion. Garcia v. State, 659 So.2d 388, 392 (Fla. 2d DCA 1995).

Merits:

(The Hearsay Issue)

Section 90.803 (23) Fla. Stat. (2003) provides an exception to the rule against the admission of hearsay by providing for the admission of an out-of-court statement made by a child victim under 12 years of age describing an act of child abuse or sexual abuse against the child if in pertinent part:

> 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 . . . . and
>
> 2. The child either:
>
> a. Testifies . . .
>
> (c) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this subsection.

This hearsay exception only applies if the foundation requirements enumerated in the statute are complied with. C. Ehrhardt Florida Evidence Section 90.803.23 (2005 Edition). Before the statement of a child may be admitted under Section 90.803(23), the trial court is required to hold a hearing and determine

whether the circumstances surrounding the making of the statement demonstrate whether the statement is reliable. Perez v. State, 536 So.2d 206 (Fla. 1988). It is reversible error for the trial court to admit out-of-court statements under Section 90.803 (23) where the trial court fails to make specific findings of fact. Griffin v. State, 526 So.2d 752, 757-58 (Fla. 1st DCA 1988); Palazzolov. State, 754 So.2d 731, 738 (Fla. 2d DCA 2000); Garcia v. State, 659 So.2d 388 (Fla. 2d DCA 1995).

In the instant case, the trial court held a pretrial hearing on the Appellant's motion to exclude child hearsay testimony. (Vol. 1, P.63, 94-157, Vol.5, P.221-258). The court heard the testimony of the child, a police officer, and the child's grandfather, to whom the child reported the alleged offense. (Vol. 1, P.94-157, Vol. 5, P.221-258). At the conclusion of the hearing, the trial court ruled that everything the grandfather would testify to came from the victim, thereby giving credence to the child's comments. (Vol. 5, P.254). The trial court failed to make the findings required by Section 90.803(23) Fla. Stat. which is reversible error. Griffin, supra., Palazzolov, supra., and Garcia, supra.

The Appellant's conviction in this cause rests solely on the testimony of the alleged victim, and the corroborating testimony of the grandfather. Thus, the

corroborating hearsay testimony of his grandfather weighed heavily in the prosecution's favor. Allowing the grandfather to testify and thereby bolster the credibility of the only witness to the crime with his prior statements was prejudicial to the Petitioner. Elysee v. State, 31 Fla. L. Weekly D505 (Fla. 4th DCA February 15, 2006) *citing* Barnes v. State, 576 So.2d 439 (Fla. 4th DCA 1991). It cannot be said that the testimony of the victim after being impeached by defense counsel standing alone would have resulted in the same verdict. The failure of the trial court to rule on the reliability of the hearsay testimony of the grandfather constitutes reversible error.

Therefore this cause should be reversed and remanded for a new trial.

(Harmless Error)

This Court has recently articulated that the harmless error analysis is a question of "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" 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). It is inappropriate to uphold a jury verdict of guilty by concluding that the permissible evidence alone would support the verdict. Knowles

v. State, 848 So. 2d 1055 (Fla. 2003). Instead, the question for this Court is: "Do I, the judge, think that the error substantially influenced the jury's decision?" Id. at 1056 *citing* Goodwin v. State, 751 So.2d 537 (Fla.1999) (quoting O'Neal v. McAninch, 513 U.S. 432, 437, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995)).

The Petitioner's conviction in this case rests solely on the testimony of the alleged victim, and the corroborating hearsay testimony of the grandfather. Thus, the corroborating hearsay testimony of the grandfather weighed heavily in the prosecution's favor. Allowing the grandfather to testify and thereby bolster the credibility of the only witness to the crime with his prior statements was prejudicial to the Petitioner. Elysee v. State, 31 Fla. L. Weekly D505 (Fla. 4th DCA February 15, 2006) *citing* Barnes v. State, 576 So.2d 439 (Fla. 4th DCA 1991). It cannot be said that the testimony of the victim after being impeached by defense counsel standing alone would have resulted in the same verdict. Simply stated it is not clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. See 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). Further, it is inappropriate to uphold a jury's verdict of guilty in the Petitioner's case by concluding that the permissible evidence alone would support the verdict. See Knowles v. State, 848 So. 2d 1055 (Fla. 2003). The trial court's

error in admitting inadmissible hearsay substantially influenced the jury's decision. See Id. at 1056 *citing* Goodwin v. State, 751 So.2d 537 (Fla.1999) (quoting O'Neal v. McAninch, 513 U.S. 432, 437, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995)).

Therefore, the Petitioner's conviction must be reversed and cannot be said to be harmless error.

(Preservation of the Issue [the real issue])

Florida Statute 90.104 (2003) states:

> (1) A court may predicate error, set aside or reverse a judgment, or grant a new trial on the basis of admitted or excluded evidence when a substantial right of the party is adversely affected and:
>
> (a) When the ruling is one admitting evidence, a timely objection or motion to strike appears on the record, stating the specific ground of objection if the specific ground was not apparent from the context; or
>
> (b) When the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer of proof or was apparent from the context within which the questions were asked.
>
> If the court has made a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.
>
> (2) In cases tried by a jury, a court shall conduct

> proceedings, to the maximum extent practicable, in such a manner as to prevent inadmissible evidence from being suggested to the jury by any means.
>
> (3) Nothing in this section shall preclude a court from taking notice of fundamental errors affecting substantial rights, even though such errors were not brought to the attention of the trial judge.

Where the State seeks to introduce child hearsay testimony pursuant to § 90.803 (23) Fla. Stat., the defense places the trial court on notice by written objection, a hearing is conducted and counsel makes a hearsay objection during trial the matter is preserved for appellate review. See Hopkins v. State, 632 So.2d 1372 (Fla. 1994); Heuss v. State, 660 So.2d 1052 (Fla. 4th DCA 1995); In Re: R.L.R., 647 So.2d 251 (Fla. 1st DCA 1995); and Mathis v. State, 682 So.2d 175 (Fla. 1st DCA 1996). Defense counsel is not required to specify each finding of fact to which they are objecting. See Hopkins v. State, 632 So.2d 1372 (Fla. 1994); Heuss v. State, 660 So.2d 1052 (Fla. 4th DCA 1995); In Re: R.L.R., 647 So.2d 251 (Fla. 1st DCA 1995); and Mathis v. State, 682 So.2d 175 (Fla. 1st DCA 1996).

In the instant case, the District Court of Appeals' decision in Elwell v. State, 954 So. 2d 104 (Fla. 2nd DCA 2007) held that the Petitioner failed to preserve his objection to the introduction of the child hearsay testimony and upheld the Petitioner's conviction. However, the record on appeal reflects the Petitioner filed

a Motion to Strike the testimony of the victim's grandfather (Vol. 1, P.64), a hearing was held on the Motion to Strike (Vol. 1, P.56-57, 63, 94-157), the Trial Court ruled the objectionable testimony was admissible without making any findings of fact (Vol. 5,P.254) and during the trial defense counsel raised an objection based on hearsay (Vol. 3, P.259).

The Petitioner submits the lower court misinterpreted Hopkins. The lower court distinguished Hopkins by contending that its holding was "predicated on the defendant's assertion of his confrontation rights." Elwell v. State, 954 So. 2d 104 (Fla. 2nd DCA 2007). However, this was not the basis of the Hopkins' opinion. To the contrary, Hopkins' constitutional right to confront witnesses against him was a supplemental part of the holding. Instead, the Court held that "[f]ailure to make specific findings not only ignores the clear directive of the statute, *but also* implicates the defendant's constitutional right to confrontation." Hopkins, Id. at 1377. (emphasis added). The Hopkins' opinion focused on the trial court's failure to meet the statutory mandates. Id. It focused on whether defense counsel's objection "necessarily called into question whether the statutory procedures had been followed." Id. at 1376.

Hopkins addressed two independent issues. The first was whether the requirements of Section 92.54(5) Fla. Stat. were met, and the other was whether

the requirements of Section 90.803(23) Fla. Stat. were met. Id. The Elwell court confused these issues and erroneously applied the reasoning behind the first issue to the latter, which is the question presented to this Court.

Hopkins did address defense counsel's general objection as it relates to the right to confrontation, but analyzed it according to section 92.54(5). Id. However, the Court undertook an independent analysis when reviewing section 90.803(23) Fla. Stat. requirements. Id. In this analysis, the Court looked at whether a general hearsay objection to the reliability of hearsay statements was sufficient to preserve the issue. Id.

At the end of a lengthy pretrial hearing, concerning the admissibility of the statements, Hopkins made a general objection. Id. The Court found that "defense counsel objected to the admissibility of the hearsay statements, arguing that there was no showing of reliability." Id. The trial court ruled the statements were admissible and began trial immediately. Id. During the first witness's testimony, defense counsel objected three times to the admission of the hearsay statements. Id. Defense counsel then requested a continuing objection, which the trial court denied. Id. After the first witness, defense counsel made no further objections to the hearsay evidence. Id.

The Hopkins Court found that:

> "Although it would have been preferable for defense counsel to object each time the hearsay testimony was introduced, we find that the issue was preserved for appeal. The trial court was put on notice of the potential error by the pretrial hearing and by defense counsel's request for a continuing objection during trial."

Id. Furthermore, "defense counsel's objection to the reliability of the evidence necessarily encompassed the sufficiency of the judge's findings as to that

> reliability.

Counsel was not required to specify each finding of fact to which he was objecting." Id. As a result, the Court found that the issue of whether the trial court had sufficiently made specific findings of fact as to the reliability of the child's statement under section 90.803(23) Fla. Stat. was preserved. Id.

Similar to Hopkins, the Petitioner's counsel argued at the pre-trial hearing that the "child did not make the statements at the first viable opportunity and that the child may have had a motive to make his story up." Elwell v. State, 954 So. 2d 104 (Fla. 2nd DCA 2007). As the District Court noted, "[t]hese arguments relate to the reliability of the child-hearsay statements." Id.; Also see State v. Townsend, 635 So.2d 949, 957-58 (Fla. 1994) (holding that in determining whether the statements are reliable, the court may consider "whether the statement was made at the first available opportunity following the alleged incident" and thereof the motive to fabricate the statement).

Since the trial court recognized the basis for the objection, the court was put on sufficient notice of defense counsel's general objection concerning the reliability of the statements. This is particularly true in the Petitioner's case as the issue was argued over the course of several days of hearings. Additionally, this general objection encompasses the sufficiency of the trial court's findings as to the reliability of the statements. See Hopkins, 632 So.2d at 1376. However, there is some divergence of opinion among the district courts.

In Heuss v. State, 660 So.2d 1052, 1056 (Fla. 4th DCA 1995), the court found that although the appellant had not made a specific objection as to the lack of specific findings concerning the reliability of the statements, that his other objections as to the admission of the statements were sufficient. The court also found that appellant's pretrial motions challenging the trustworthiness and reliability of the child-victims' statements supported preservation of the issue. Id.

The Second District Court of Appeals decision in this cause conflicts with Heuss which supports reversal of the case at hand. Although the Petitioner did not make a specific objection regarding the lack of factual findings surrounding the reliability of the statements, he had made an objection based on hearsay during the trial and also filed a pretrial motion to strike the statements. Elwell v. State, 954 So. 2d 104 (Fla. 2nd DCA 2007). Under Heuss, the pretrial motion and objection

during trial are sufficient to preserve the issue. Heuss, 660 So.2d at 1056.

The Second District Court of Appeals decision in Elwell also conflicts with In re R.L.R., 647 So.2d 251 (Fla. 1st DCA 1995) which further supports preserving this issue based on the Petitioner's general objection to the reliability of the statements. The In re R.L.R. court used Hopkins to find that counsel's general objection as to the reliability of the statements under section 90.803(23) Fla. Stat. was sufficient to encompass the sufficiency of the judge's factual findings. Id. at 253. Womack v. State, 855 So.2d 1236 (Fla. 1st DCA 2003) also used In re R.L.R. and Hopkins to hold that appellant's general objection to the child hearsay statements preserved the issue for appeal.

Finally, Mathis v. State, 682 So.2d 175 (Fla. 1st DCA 1996) found that appellant's general objection regarding the reliability of the child-hearsay statements was also recognized by both the State and the trial court as questioning the legal sufficiency of the court's findings. The First District found "unpersuasive the State's argument that this issue was not preserved for appellate review." Id.

As a result, this Court should find the Second District Court of Appeals decision in Elwell is incorrect. Several of district courts in Florida and this Court hold that a general objection as to the reliability of the statements encompasses the sufficiency of the trial court's factual findings. See Hopkins v. State, 632 So.2d

1372 (Fla. 1994); Heuss v. State, 660 So.2d 1052 (Fla. 4th DCA 1995); In re R.L.R., 647 So.2d 251 (Fla. 1st DCA 1995); Mathis v. State, 682 So.2d 175 (Fla. 1st DCA 1996); Womack v. State, 855 So.2d 1236 (Fla. 1st DCA 2003).

The Second District Court of Appeals attempted to use State v. Townsend, 635 So.2d 949 (Fla. 1994) to contradict this holding. Elwell v. State, 954 So. 2d 104 (Fla. 2nd DCA 2007). However, Townsend is distinguishable from the case at hand. Townsend argued that the failure of the trial judge to make sufficient findings of fact was properly preserved for appeal. Townsend, 635 So.2d at 959. However, this Court noted that no objection was made to the issue. Id. In response, Townsend argued that an objection was not necessary because the trial court's failure constituted fundamental error. Id. This Court found that "the failure of a trial judge to make sufficient findings under the statute, in and of itself, does not constitute fundamental error." Id. However, in the case at hand, defense counsel did in fact make an objection as to the introduction of the statements. As a result, the reasoning in Townsend does not apply because Townsend made no such objection.

The Petitioner's objection as to the reliability of the child-victims' hearsay statement during the pre-trial hearing and his general hearsay objection during trial preserve the issue of whether the trial court's factual findings were sufficient. This

Court should hold the Second District Court of Appeals decision in Elwell v. State conflicts with the cases mentioned earlier and reverse the opinion of the Second District Court of Appeals.

CONCLUSION

The trial court erred by admitting a child sexual abuse victims hearsay statements into evidence without first making a pre-trial determination of their reliability pursuant to Section 90.803(23). Perez v. State, 536 So.2d 206 (Fla. 1988); Griffin v. State, 526 So.2d 752 (Fla. 1st DCA 1988); Palazzolo v. State, 754 So.2d 731 (Fla. 2d DCA 2000); and Garcia v. State, 659 So.2d 388 (Fla. 2d DCA 1995).

/S/_____
ROBERT A. MORRIS, ESQUIRE and
JAMES C. BANKS, ESQUIRE *of*
Banks & Morris, P.A.
Florida Bar Nos.: 0144680 & 281670
Special Assistant Public Defenders
Office of the Public Defender
Post Office Box 9000-P.D.
Bartow, Florida 33831

ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing INITIAL BRIEF OF PETITIONER has been furnished by U.S. MAIL to the SUPREME COURT OF FLORIDA, Tallahassee, Florida; and a true and correct copy of same has been furnished by UNITED STATES MAIL to: Assistant Attorney General, Office of the Attorney General, Concourse Center #4, 3507 E. Frontage Road, Suite 200, Tampa, Florida 33607; and a copy of same has been furnished by UNITED STATES MAIL to the Appellant/Defendant, Thomas Elwell DOC#R40096, c/o Gulf Correctional Institute, 500 Ike Steele Road, Wewahitchka, Florida 32465-0010, on this 11th day of October, 2007.

_____

ROBERT A. MORRIS, ESQUIRE

CERTIFICATE OF COMPLIANCE
WITH FONT STANDARDS

I HEREBY CERTIFY that this brief complies with the Times New Roman 14-point font requirement Fla. R. App. P. 9.210.

_____
ROBERT A. MORRIS, ESQUIRE

IN THE SUPREME COURT OF FLORIDA

THOMAS ELWELL,
Petitioner,

vs.

CASE NO.: SC07-1003
Lower Tribunal No.: 2D05-907

STATE OF FLORIDA,
Respondent.
_____/

APPENDIX

ROBERT A. MORRIS, ESQUIRE and
JAMES C. BANKS, ESQUIRE *of*
Banks & Morris, P.A.
FL Bar Nos.: 0144680 & 281670
Special Assistant Public Defenders
Office of the Public Defender
Post Office Box 9000-PD
Bartow, Florida 33831

ATTORNEYS FOR PETITIONER

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_____

ROBERT A. MORRIS, ESQUIRE