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# CHILD HEARSAY

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## **Rule: 90.803(23)**

This is commonly referred to as the Child Hearsay Rule. It is technically listed as an exception to the hearsay rule in which the availability of the declarant is immaterial.

### Elements:

1. The statement must have been made by a child victim with a physical, mental, emotional or developmental age of 11 or less. This only applies to victims, not witnesses.
2. The statement must describe one or more of the following:
  - a. An act of child abuse or neglect.
  - b. An act of sexual abuse against a child.
  - c. An act of child abuse or aggravated child abuse.
  - d. Any other offense involving an unlawful sexual act or contact, penetration or intrusion performed in the presence of, with, by or on the declarant child.
3. The court must make a finding (out of the presence of the jury) that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. The court may consider:
  - a. Mental and physical age and maturity of the child.
  - b. The nature and duration of the abuse or offense.
  - c. The relationship of the child to the offender.
  - d. The reliability of the assertion.
  - e. The reliability of the child victim.
  - f. Any other factor deemed appropriate.
  - g. Factors considered by appellate courts:
    1. The child was still emotionally affected by the situation when she reported it.
    2. The statements were spontaneous.
    3. The statements were made at first available opportunity.

4. The statements consisted of a child-like description of the act.
5. The use of terminology unexpected of a child of similar age.
6. The making of the statement to a number of people and not only to the mother.
7. The ability of the child to distinguish reality from fantasy.
8. Whether the statements were partially vague and contradictory.
9. The time of the incident relative to the time of the statement.
10. Was the statement elicited in response to questions from adults?
11. What was the mental state of the child when the abuse was reported?
12. Was there a motive or lack thereof to fabricate the statement?
13. Could the child distinguish between reality and fantasy?
14. Was there the possibility of improper influence on the child by participants involved in a domestic dispute?
19. Do not list other corroborating evidence to determine reliability.

4. The child must either:

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

5. The defendant shall be given notice of the intent to use these statements no later than 10 days before trial. This is very similar to the notice required for Williams Rule evidence. The notice shall include:

- a: A written statement of the content of the child's statement.

- b: The time at which the statement was made.
- c: The circumstances surrounding the statement which indicate its reliability.
- d: Such other particulars as necessary to provide full disclosure of the statement.

Note: Ehrhardt suggests that if you provide defective notice under this rule, it should result in a Richardson-type hearing where you may be able to argue that there was no prejudice to the defense.

- 6. The Court shall make specific findings of fact, on the record, as to the basis for its ruling under this subsection.

Comments:

- 1. It is a good idea to file a motion containing all of the significant statements of the child even if you think you will not need them. Children frequently clam up as the case gets closer to trial. This can result from family pressure, nerves, fear or any number of reasons. You should have your notice out as early as practical.
- 2. Remember to include any statements made to medical personnel or counselors. The judge will likely consider these as more reliable. This may also provide you with an argument that the statements were made for purposes of medical diagnosis or treatment. (Be careful to see the case law for this exception.)
- 3. Check with an ASA who has practiced before your particular judge to learn that judge's preferred manner in conducting these hearings. Some may want to have the hearing prior to trial, and some during trial. Since the rule specifies "outside the presence of the jury," it implies that the judge will make the determination during trial. It is obviously more convenient for the witnesses to do it this way. Keep in mind that the State loses its appellate rights once the jury is sworn. For this reason, it would be a tactical advantage to have the hearing before trial if you plan to appeal an adverse ruling by the judge.
- 4. Do not let the judge get in a hurry and fail to make the required findings under the rule. This will likely result in a reversal.

5. If the victim's trial testimony does not indicate that abuse occurred, the victim's out of court statements that the abuse occurred are not sufficient, by themselves, to support a conviction. Ticknor v. State, 595 So.2d 109 (Fla. 2d DCA 1992); Bell v. State, 569 So.2d 1322 (Fla. 1st DCA 1990).
  
6. Both the legislature and the appellate courts view this hearsay exception as a necessary evil. As opposed to other hearsay exceptions, there is nothing inherently reliable about what a child less than 12 years of age says. The courts have simply recognized that these cases are too difficult to prove otherwise. Since this is not a "favored" hearsay exception, it is crucial that the state prove the reliability of the statements. The appellate courts will not accept a boiler plate ruling of reliability by the judge. A case specific ruling must be made for each statement. For this reason, it is important to provide a well written notice including extensive indicia of reliability. This will provide an outline for the judge to follow when he makes his determination. If you provide a boilerplate notice, the judge may provide a boilerplate ruling that results in reversal.

## *Cases*

The available case law on the child hearsay issue is extensive. Most of the cases discuss whether the trial court made a sufficient finding of reliability. I have attempted to include representative cases from the various jurisdictions which cover the most frequently addressed issues. In doing your research in this area, remember that the Florida Supreme Court did not adopt the rule until October 30, 1986. see In re Amendment of Florida Evidence Code, 497 So.2d 239 (Fla. 1986).

Under each category, I have chronologically listed the most recent cases first, with the Florida Supreme Court cases preceding the district courts of appeal.

### **Age of Child**

Blanton v. State, 880 So.2d 798 (Fla. 5<sup>th</sup> DCA 2004):

Statutory hearsay exception applies where child victim was age 11 or less at the time she gave statement to police, but over age 11 at the time of hearing on motion to admit the statement.

State v. Campbell, 664 So.2d 1085 (Fla. 5th DCA 1995):

Order holding unconstitutional a portion of section 90.803(23)(a), on ground that the phrase "physical, emotional or developmental age" is vague departed from essential requirements of law.

Discussion: The victim was twelve years old, but a psychologist testified for the State that her mental age was seven or eight. The court proceeds to give a nice discussion of the common definitions of mental, developmental and emotional age. Cases using these terms are also cited. The lesson here is not to assume that child hearsay is inapplicable just because the child is over twelve. A defense attorney may also argue that a ten year old has the physical, mental, emotional and developmental age over twelve. Note that under this theory, the defense attorney would need to show that the child's development is over twelve in all four categories. We only need to show the victim is under twelve in one category.

## **Child's Presence at Hearing**

Perez v. State, 536 So.2d 206 (Fla. 1988):

Trial judge was not required to personally examine child abuse victim in order to determine that hearsay statements of child were admissible under evidence statute, but rather testimony of child's mother and police officer regarding statements was sufficient to determine that statements were reliable.

## **Constitutional Issues**

Idaho v. Wright, 497 U.S. 805, 110 S.Ct. 3139 (1990):

This United States Supreme Court case is cited frequently by Florida courts for various propositions. Among these are that physical evidence cannot be used as an indicia of reliability for a child hearsay statement. The Court also specifically declined to find the presence of leading questions to be proof of the statement's lack of reliability. The Court recognizes that the statements of children will arise in various different situations, and we should not follow hard line tests as to whether a particular type of statement is per se unreliable. This decision should be made based upon the totality of circumstances. The court frequently stresses that the statement must have "particularized guarantees of trustworthiness." It must be so trustworthy that cross-examination of declarant would be of marginal utility.

State v. Townsend, 635 So.2d 949 (Fla. 1994):

To make an admissibility ruling for child hearsay evidence, the court must first determine whether the hearsay statement is reliable and from a trustworthy source without regard to corroborating evidence. If the answer is yes, then the trial judge must determine whether other corroborating evidence is present. If the answer to either question is no, then the hearsay statements are inadmissible. Failure to follow this procedure will render this exception to the hearsay rule unconstitutional under the dictates of the United States Supreme Court's decision in Idaho v. Wright.

Glendening v. State, 536 So.2d 212 (Fla. 1988):

Statute which allowed admission of hearsay statements by children concerning sexual abuse did not violate *confrontation clause*.

Application at trial of statute which allowed admission of hearsay statements made by children regarding sexual abuse, which statute was not in effect at time of offense, did not violate prohibition against *ex post facto* laws; statute did not effect crime with which defendant was charged, punishment prescribed therefore, or quantity or degree of proof necessary to establish guilt.

Videotaped testimony of child sexual abuse victim was "testimony" under statute allowing admission of hearsay statements by children regarding sexual abuse when child testifies.

Allowing child sexual abuse victim's testimony to be videotaped and shown to jury rather than given live in open court did not violate defendant's *right to confront* witness; evidence showed that child would have suffered emotional and mental harm had the child been forced to testify in court, and defendant was permitted to watch testimony behind two-way mirror and conduct full cross examination of child.

Discussion: This case covers many issues of great importance. The case should be read carefully in that it can be used for various arguments we continually face. The 3 1/2 year old child in this case was ruled competent to testify. This sets good precedent for us if we choose to pursue to the issue. The determination of competency is within the sound discretion of the trial judge and the decision will not be disturbed absent a manifest abuse of discretion. The court also gives a good discussion of law in allowing a coordinator for the child protection team to testify as an expert witness in the area of interviewing children regarding the subject of child abuse. She was allowed to give an expert opinion that the child was sexually abused, but not the identity of the abuser.

Perez v. State, 536 So.2d 206 (Fla. 1988):

Child hearsay statute is not unconstitutionally vague, nor does it violate the defendant's right to confrontation.

### **Crawford v. Washington Issues:**

Crawford v. Washington, 124 S.Ct. 1354 (2004):

Court rejects testimonial hearsay based upon judicial finding of reliability when witness does not testify at trial. Such testimony violates confrontation clause.

Discussion: This was not a child hearsay case, but the court's ruling directly affects child hearsay statements when made for testimonial purposes.

Corona v. State, 2011 WL 2224777 (Fla. 2011)

A discovery deposition does not satisfy the United States Supreme Court's mandate concerning confrontation, outlined in Crawford v. Washington, that a defendant be given a prior opportunity to cross-examine a declarant of a testimonial statement.

Statement by defendant's daughter to sheriff's deputy that defendant had put his mouth on daughter's vagina were "testimonial" for purposes of determining their admissibility under Confrontation Clause in prosecution for capital sexual battery; daughter was interrogated by deputy, and the facts indicated that there was no ongoing emergency and that daughter's statements were taken to determine if criminal activity had occurred.

Defendant's daughter, the alleged victim, was "unavailable" for trial in prosecution for capital sexual battery for purposes of determining admissibility under Confrontation Clause of her statement to sheriff's deputy that defendant had put his mouth on her vagina, where state had anticipated that daughter and defendant's wife would testify at trial, both wife and daughter participated in depositions, wife later became uncooperative, and state was granted a certificate of interstate extradition but wife evaded subsequent attempts by investigators to contact her, thereby preventing any involvement of daughter at trial.

The Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.

Pretrial deposition of defendant's daughter in prosecution for capital sexual battery did not afford defendant an adequate prior opportunity to cross-examine daughter, who was unavailable for trial, as necessary under Confrontation Clause for admissibility of

daughter's testimonial statement to sheriff's deputy that defendant had put his mouth on her vagina.

Confrontation Clause violation, arising from admission in prosecution for capital sexual battery of statement by defendant's daughter to sheriff's deputy that defendant had put his mouth on her vagina, was harmful so as to entitle defendant to new trial; statements by daughter were among the most significant pieces of evidence introduced by state, particularly because there was no physical evidence of the sexual battery, state made repeated references in closing argument to daughter's "words," and defendant's statements and confession were rendered inadmissible based on corpus delicti rule because remaining admissible evidence did not establish prima facie case of crime as charged.

Blanton v. State, 978 So.2d 149 (Fla. 2008):

Neither defense counsel's discovery deposition of child victim in sexual battery upon a child case, nor mere existence of rule permitting defendant to depose a witness to perpetuate testimony, provided defendant a prior opportunity for cross-examination of child victim, and thus admission of child victim's testimonial hearsay statement to police, at capital sexual battery trial, violated defendant's constitutional right of confrontation.

Rule authorizing discovery depositions was not designed as an opportunity to engage in adversarial testing of the evidence against the defendant, nor is the rule customarily used for the purpose of cross-examination; instead, the rule is used to learn what the testimony will be and attempt to limit it or to uncover other evidence and witnesses.

A discovery deposition is not intended as an opportunity to perpetuate testimony for use at trial, is not admissible as substantive evidence at trial, and is only admissible for purposes of impeachment.

Defendant's failure to exercise opportunity to depose child victim to perpetuate testimony did not constitute a waiver of right to confrontation.

When a State witness may be unavailable for trial, the burden is on the State to file a motion to perpetuate testimony.

State v. Contreras, 979 So.2d 896 (Fla. 2008):

Defense counsel's discovery depositions of alleged victim did not afford defendant an opportunity for cross-examination, and thus admission of victim's videotaped testimonial statement to coordinator of a Child Protection Team (CPT) regarding sexual activities committed upon her by defendant violated defendant's right to confrontation in trial for capital sexual battery and lewd and lascivious molestation; discovery deposition was not functional substitute of in-court confrontation, in that defendant was prohibited from being present, the motivation for deposition did not result in "equivalent of significant cross-examination," and the resulting deposition could not be admitted as substantive evidence at trial.

State v. Brocca, 979 So.2d 430 (Fla. 3<sup>rd</sup> DCA 2008):

Statements made by mentally disabled adult to his mother describing alleged sexual assault were nontestimonial in nature, and thus were not subject to the Confrontation Clause; the statements were not made to a government agent or under police investigation.

Statements made by mentally disabled adult to interviewer describing alleged sexual assault were testimonial in nature, and thus were subject to the Confrontation Clause; statement were made to a government agent, while there was an on going emergency, and the purpose of the interview was to establish or prove past events in connection with the criminal prosecution.

Hernandez v. State, 946 So.2d 1270 (Fla. 2d DCA 2007):

Questions that nurse, who performed sexual assault examination on child, directed to child and her parents, were functional equivalent of police interrogation, thus statements by child and her parents to nurse were testimonial in nature, such that child and parents absence at trial violated defendant's right to confrontation; nurse was member of child protection team (CPT), which by statute, was arm of law enforcement, CPT worked in concert with police in connection with investigation of alleged sexual assault on child, primary purpose of sexual assault examination was to gather facts for use in potential criminal prosecution, and there was no ongoing emergency when nurse conducted her examination of child.

Statements made to a law enforcement officer or other government official are testimonial if the primary purpose for which the statements are made is to provide information about past events for later use in a criminal prosecution; in short, statements made in response to official interrogation have a testimonial aspect when the purpose of the exercise is to nail down the truth about past criminal events.

Trial court's finding that defendant's confession in sexual abuse cases was trustworthy without first making specific findings of fact required by statute governing admissibility of confession in sexual abuse cases was error; trial court did not specify what it had heard at suppression hearing that led it to conclusion that defendant's statements were trustworthy, trial court merely recited language of statute instead of making case-specific findings on critical issue of trustworthiness, and trial court's repetition of boilerplate language of statute was insufficient. Section 92.565.

Discussion: Child victim made sexual abuse allegations and then disappeared to Mexico with his family. The defendant confessed to offense. The State tried to go forward using the defendant's confession pursuant to 92.565 and the testimony of the CPT worker who interviewed the child. The appellate court ruled that the child hearsay statement was barred under Crawford v. Washington because it was testimonial in nature and that the judge did not make a sufficient finding of reliability to introduce the defendant's confession. It should be noted that the appellate court ruled that the court could have considered the CPT worker's testimony for purposes of the 92.565 hearing, but not at trial.

State v. Pinault, 933 So.2d 1287 (Fla. 4<sup>th</sup> DCA 2006):

Admission into evidence of child hearsay evidence in form of videotape testimony of child victim would not violate defendant's confrontation rights in prosecution for sexual battery on person less than 12 years of age, by person 18 years of age or older, where victim would testify at trial, thereby giving defendant opportunity to confront and cross-examine victim about hearsay statement.

Although admission into evidence of child victim's hearsay statement did not pose confrontation clause violation, defendant could challenge admission of child's hearsay statement in prosecution for sexual battery on person less than 12 years of age, by person 18 years of age or older, if it appeared at trial that hearsay statement would be

primary purpose for state's calling victim to testify, or that prior inconsistent statement was sought to be used substantively when it was only evidence against defendant.

Corona v. State, 929 So.2d 588 (Fla. 5<sup>th</sup> DCA 2006):

*Crawford* , which bars admission of testimonial hearsay statement at trial unless declarant is shown to be unavailable and party against whom statement is admitted had opportunity for cross-examination, must be applied to all “pipeline” cases-that is, all cases pending on review or not yet final when the decision was issued.

Defendant failed to preserve for appellate review his contention that victim's hearsay statements to deputy were admitted in violation of *Crawford* , which bars admission of testimonial hearsay statement at trial unless declarant is shown to be unavailable and party against whom statement is admitted had opportunity for cross-examination, in prosecution for sexual battery; defendant made generic argument pretrial that his “confrontation” rights were being violated, defendant primarily contended that victim's statements were unreliable hearsay, and, at trial, defendant simply objected that testimony was impermissible hearsay.

State met burden of showing that victim of alleged sexual battery was “unavailable” for trial for purposes of *Crawford* , which bars admission of testimonial hearsay statement at trial unless declarant is shown to be unavailable and party against whom statement is admitted had opportunity for cross-examination; victim and her mother seemed cooperative until shortly before trial, which necessitated request for continuance by state, mother actively evaded numerous attempts to serve her and hung up when called by investigators, and it was mother's concerted efforts to avoid service that prevented state from securing presence of victim and mother at trial.

In order to prove that a witness is “unavailable” for the purposes of the Confrontation Clause, state must show it made a good-faith effort to obtain a witness's attendance at trial.

Defendant had constitutionally adequate opportunity to cross-examine victim of alleged sexual battery, as required by *Crawford* , which bars admission of testimonial hearsay statement at trial unless declarant is shown to be unavailable and party against whom statement is admitted had opportunity for cross-examination; defendant exercised opportunity to take pretrial deposition of victim and mother, examining both extensively

under oath, and there was nothing in record to suggest that defendant asked for and was denied right to be present when his victim was deposed.

Mencos v. State, 909 So.2d 349 (Fla. 4<sup>th</sup> DCA 2005):

Officer's testimony regarding statements child victim of sexual abuse made to him when he responded to victim's home was covered by *Crawford v. Washington*, but officer's testimony about what he overheard the victim was not testimonial and thus, not covered by *Crawford v. Washington*.

Defendant failed to preserve issue for appellate review by failing to make appropriate objection.

State v. Causey, 898 So.2d 1096 (Fla. 5<sup>th</sup> DCA 2005):

Ruling in *Crawford*, which requires that a defendant have an opportunity at some time prior to trial to cross-examine witness regarding witness's out-of-court statement, does not require the defendant or his counsel to be present at the time the witness's statement is made or to be given an opportunity to cross-examine the witness at that time.

Trial court, in issuing pretrial order barring any testimonial statements made by alleged child victim, was required to specifically set forth which of the child's several statements intended to be introduced by the State would be precluded under the terms of the order.

Statements made by a child victim during the time frame that a criminal investigation is ongoing are not testimonial, for purposes of confrontation clause, simply because they were made during that time frame.

Herrera-Vega v. State, 888 So.2d 66 (Fla. 5<sup>th</sup> DCA 2004):

U.S. Supreme Court's decision in *Crawford v. Washington*, which held that the admission of testimonial hearsay statements against an accused violates confrontation clause of U.S. Constitution if declarant is unavailable to testify at trial and accused had no "prior opportunity" to cross-examine," does not appear to include the spontaneous

statements made by child victim to her mother while being dressed or victim's later statements to her father.

*Crawford* made clear that where nontestimonial hearsay is at issue, such as that involved in instant case, individual states have "flexibility within their development of hearsay law" and can exempt such statements from confrontation clause scrutiny altogether.

Somervell v. State, 883 So.2d 836 (Fla. 5<sup>th</sup> DCA 2004):

Trial court did not err in admitting videotaped statement of child victim of attempted lewd and lascivious conduct given in response to police questioning where child victim testified at trial and was subject to cross-examination.

It was erroneous to admit child testimony from police officer regarding a statement made during forensic interview when child did not testify at trial.

Child hearsay was properly admitted where non-testifying child's mother testified to statements she heard child make out of court. The out-of-court statement was non-testimonial.

Discussion: This case interprets the hearsay restrictions imposed by *Crawford v. Washington*.

State v. Brocca, 842 So.2d 291 (Fla. 3<sup>rd</sup> DCA 2003):

Section 90.803(24) regarding hearsay exception for disabled adults is unconstitutional.

State v. Hosty, 835 So.2d 1202 (Fla. 4<sup>th</sup> DCA 2003):

Statute, which Supreme Court previously held unconstitutional as applied to elderly adults, is also unconstitutional as applied to disabled adults.

Class of adult declarants falling within definition of "disabled adult" is too broad, as is scope of testimony admissible under the exception.

Policies that supported upholding narrowly drawn child abuse hearsay exception are not present in broadly defined disabled adult context.

Question certified: As it applies to a disabled adult, is section 90.803(24), Florida Statutes (2001) violative of a criminal defendant's right to confront witnesses under the Florida and United States Constitutions?

State v. Campbell, 664 So.2d 1085 (Fla. 5th DCA 1995):

Order holding unconstitutional a portion of section 90.803(23)(a), on ground that the phrase "physical, emotional or developmental age" is vague departed from essential requirements of law.

Discussion: The victim was twelve years old, but a psychologist testified for the State that her mental age was seven or eight. The court proceeds to give a nice discussion of the common definitions of mental, developmental and emotional age. Cases using these terms are also cited. The lesson here is not to assume that child hearsay is inapplicable just because the child is over twelve. A defense attorney may also argue that a ten year old has the physical, mental, emotional and developmental age over twelve. Note that under this theory, the defense attorney would need to show that the child's development is over twelve in all four categories. We only need to show the victim is under twelve years of age in one category.

Seaman v. State, 608 So.2d 71 (Fla. 3d DCA 1992):

Confrontation clause did not require state to call child victim of sexual abuse to testify at trial via closed circuit television; confrontation clause did not allow defendant to direct state to call particular witnesses.

Discussion: The court cited Idaho v. Wright in acknowledging that it is inappropriate to consider physical evidence as an indicia of reliability, but ruled it was harmless error in this case. The court ruled that the child was unavailable as a witness because she would suffer severe psychological harm by testifying either in court or on closed circuit television.

Pinder v. State, 604 So.2d 848 (Fla. 5th DCA 1992):

State's presentation of nine year old child's videotaped statement accusing defendant of sexual abuse and state's reinforcing introduction of repetitive hearsay to the same effect with knowledge by the state, but not by the trial judge or defense counsel, that the child had recanted a critical portion of his statement prior to trial violated defendant's due process rights and deprived him of fair trial.

Defense counsel and trial judge were entitled to learn from State of child's recantation of statement relating to completed act of oral sexual abuse in connection with court's determination of admissibility of child's hearsay statements.

Discussion: The defendant was charged with two counts of capital sexual battery. The first count involved anal penetration and the second involved oral abuse. Prior to trial, the child gave three separate statements indicating a completed act on each count. The child recanted his testimony in reference to the oral sex two days before trial. The State did not bring this to the court's attention until after the child hearsay hearing.

Jaggers v. State, 536 So.2d 321 (Fla. 2d DCA 1988):

Allowing State to use, as sole evidence of defendant's sexual assault of his daughter and stepdaughter, prior unsworn, out of court statements which were not subject to cross-examination by defendant, after State had introduced exculpatory testimony of daughter and stepdaughter, violated defendant's Sixth Amendment right to confrontation. and cross-examination.

Discussion: The testimony of the victims was introduced at trial by means of their video taped depositions pursuant to section 92.53, Florida Statutes. In the video tape, the girls indicated that the defendant touched their vaginal areas, but did not penetrate them. The State offered testimony from various witnesses who indicated that the children had told them that there was penetration. The appellate court found this practice to be outrageous and discredited it every conceivable way.

## **Competency of Child**

State v. Townsend, 635 So.2d 949 (Fla. 1994):

Updated August 31, 2011

In order for declarant to be "unavailable" because of infirmity, so as to allow admission of hearsay statement, the infirmity need not arise after the statement was made.

If child victim is determined to be incompetent to testify, victim is "unavailable" for purposes of admitting hearsay statement, but judge may look to competency of victim in determining whether hearsay statement is otherwise admissible; competency of victim is factor that should be considered in determining trustworthiness and reliability.

The competency of the child is a factor that should be considered in determining the trustworthiness and reliability, and thus the admissibility, of hearsay statements attributable the child.

Discussion: The Supreme Court answered in the affirmative the following certified question: "Does a finding of incompetency to testify because one is unable to recognize the duty and obligation to tell the truth satisfy the legislative 'testify or be unavailable' requirement of section 90.803(23)(a)(2)?" This issue had been addressed in several District Courts of Appeal and there seemed to be developing a trend to answer the question in the negative. *see* Cherryhomes v. State, 635 So.2d 985 (Fla. 2d DCA 1994). The Townsend case provides an excellent discussion on several pertinent issues, including expert witness testimony. The Court also notes that cases involving domestic disputes will be viewed more cautiously.

Glendening v. State, 536 So.2d 212 (Fla. 1988):

Trial judge was not required to determine that child sexual abuse victim was competent to testify in order to allow, under evidence statute admission of hearsay statements made by child concerning sexual abuse, but rather was only required to determine that statements were trustworthy and reliable.

Discussion: This case covers many issues of great importance. The case should be read carefully in that it can be used for various arguments we continually face. The 3 1/2 year old child in this case was ruled competent to testify. This sets good precedent for us if we choose to pursue to the issue. The determination of competency is within the sound discretion of the trial judge and the decision will not be disturbed absent a manifest abuse of discretion. The court also gives a good discussion of law in allowing a coordinator for the child protection team to testify as an expert witness in the area of

interviewing children regarding the subject of child abuse. She was allowed to give an expert opinion that the child was sexually abused, but not the identity of the abuser.

Perez v. State, 536 So.2d 206 (Fla. 1988):

Trial judge was not required to determine whether child victim of sexual abuse was competent to testify before allowing admission, under evidence statute, of child's hearsay statements regarding abuse, but rather was required to determine whether statements were sufficiently reliable and trustworthy.

## **Non-Jury Trials**

A.E. v. State, 664 So.2d 1085 (Fla. 5<sup>th</sup> DCA 1996):

Trial court erred in admitting hearsay statements of child victim without setting forth findings required by statute. Statutory requirement applies to non-jury trials.

## **Notice Requirement**

N.C. v. State, 947 So.2d 1201 (Fla. 1<sup>st</sup> DCA 2007):

Court ruled that State's failure to provide timely child hearsay notice did not preclude its admissibility when no prejudice was shown:

“Here, Appellant received the State's Notice of Hearsay Evidence six days before the hearing and three days before Appellant announced he was ready for trial. Appellant could not explain how he was prejudiced by the untimely Notice, and acknowledged that he knew the child victim had made a statement to the child protection team member. We conclude that the State's failure to strictly comply with the notice requirement did not prevent the trial court from admitting the child victim's statement into evidence.”

Trial court did not make sufficient finding of reliability prior to introducing child hearsay statement.

There was no corpus for defendant's admission once child hearsay statement was excluded and thus, the error was harmful.

Williams v. State, 627 So.2d 1279 (Fla. 1st DCA 1993):

If state seeks in child sexual abuse prosecution to introduce hearsay testimony concerning statements victim made to state's witnesses, defendant is entitled to notice of such intent ten days prior to trial and, at admissibility hearing, trial court should allow defendant and state to present live testimony since demeanor of witness might be crucial in determining whether time, content, and circumstances of statement provide sufficient safeguards of reliability.

Detective would not be entitled in child sexual abuse prosecution to testify before jury that victim knew difference between truth and lie.

Kopko v. State, 577 So.2d 956 (Fla. 5th DCA 1991):

Although notice given by State of its intent to seek admission at trial of counselor's videotaped interview with alleged child sexual abuse victim was defective because State failed to identify circumstances surrounding interview that indicated reliability, defective notice did not constitute reversible error, as reliability arguments actually made by the State were discernible from viewing the tape, and none of the arguments were surprising.

Videotaped interview of child was admissible in prosecution of stepfather for sexual battery and lewd assault, notwithstanding that there was ample time for coaching, child appeared knowledgeable about sexual matters, and had an apparent motive to lie inasmuch as she was not fond of stepfather.

Discussion: This case was reversed by the Florida Supreme Court on other grounds. State v. Kopko, 596 So.2d 669 (Fla. 1992). The above mentioned rules of law are still valid.

Distefano v. State, 526 So.2d 110 (Fla. 1st DCA 1988):

State did not give defendant adequate notice of out of court statement of child victim of sexual offense where the notice given to the defendant contained no details indicating that the statements were trustworthy. The defendant was entitled to a Richardson type inquiry, at which the State's attorney has the burden of proving that defendant was not prejudiced by the error.

Trial court did not abuse its discretion in admitting statement where defendant had viewed videotape of the statement prior to trial and had interviewed the mother long before receiving the State's notice.

Discussion: This case makes a clear statement that the State had the burden to list the indicia of reliability in the hearsay notice. It also provides a Richardson type inquiry if the notice is ruled to be defective. Obviously, it is better practice to do the notice correctly the first time and not have to take your chances with a Richardson Hearing. This is an especially helpful case in that it provides us with the exact language in the State's notice. It then explains how the notice is deficient.

## **Other Corroborative Evidence of the Abuse or Neglect**

When the victim is unavailable as a witness, there must be other corroborative evidence of the abuse before the statement will be admissible. Corroboration is necessary to sustain a verdict if the victim testifies at trial inconsistently with the hearsay statements. This section will cover admissibility issues. Corroboration necessary to sustain a conviction will be covered in the "Inconsistent Victim" section.

Mikler v. State, 829 So.2d 932 (Fla. 4th DCA 2002):

Audio tape of child victim's statement to investigating detective was properly admitted and considered as substantive evidence, even in absence of corroborating evidence, where child testified at trial and was subject to cross-examination concerning the statement.

Requirement of section 90.803(23)(a)2.b. that there be "other corroborative evidence" does not apply when declarant testifies at trial and is subject to cross-examination.

Victim's out-of-court statement, in which she mentioned tongue-to-vagina battery on which one count of sexual battery was based, was not inconsistent with child's trial testimony in which she identified defendant as her attacker and described three other types of sexual battery that occurred one after the other.

Further, testimony of nurse practitioner, DNA expert, and defendant's statements to arresting officer provided other corroborating evidence that sexual attack occurred.

This testimony was probative on the tongue-to-vagina battery count because that battery occurred during the continuing sexual attack for which there was corroboration.

Evidence sufficient to sustain conviction on that count.

Durham v. State, 815 So.2d 745 (Fla. 1st DCA 2002):

Where trial court made numerous appropriate findings of reliability, court's utilization of a minimal amount of corroborating evidence to determine that hearsay statements of child victim would be admissible was not reversible error.

Discussion: This is a very brief decision with little discussion.

R.U. v. Department of Children & Families, 782 So.2d 1024 (Fla. 4th DCA 2001):

Family therapist's subjective impressions were not sufficiently specific to qualify as corroborative evidence for the admission of child hearsay statement.

Zmijewski v. B'Nai Torah Congregation of Boca Raton, Inc., 639 So.2d 1022 (Fla. 4th DCA 1994):

Affidavits of doctors and mother satisfied corroboration requirement of statute providing that out of court statement made by child victim describing act of child abuse is admissible if time, content and circumstances of statement provide sufficient safeguards of reliability and child either testifies or is unavailable as witness provided that there is other corroborative evidence of abuse; affidavits of doctors stated their professional

opinions that child was exhibiting signs of having been sexually abused, mother's affidavit stated that she had picked up child at school in dazed condition, that he was crying hysterically and that he had clear, white crusty substance from his mouth to his cheek and fact that doctors' affidavits suggested possible anal penetration, whereas mother's affidavit suggested oral molestation, did not make the two affidavits inconsistent since mother indicated that child had told her he had been molested numerous times, such that both types of molestation could have occurred.

Ghelichkhani v. State, 765 So.2d 185 (Fla. 4th DCA 2000):

Error to admit hearsay statements of child victim who was found unavailable as a witness at trial where state failed to establish that there was other corroborative evidence of the abuse or offense.

Evidence which established only that victim and defendant were alone for a few moments so that defendant had opportunity to commit the crime was insufficient other corroborative evidence.

Discussion: This is a thorough opinion with a good general discussion of the issue. The victim was 2 ½ years old and incompetent to testify.

State v. Greene, 667 So.2d 756 (Fla. 1995):

Prior inconsistent statement of alleged victim of child sexual abuse, even if said on multiple occasions, is not sufficient in and of itself to sustain conviction. Physician's testimony regarding size of victim's vaginal opening was not adequate to supply corroborating evidence necessary to permit admission of prior inconsistent statements as substantive evidence.

Anderson v. State, 655 So.2d 1118 (Fla. 1995):

Evidence consisting of hearsay statements made by child victim who was found incompetent to testify when there was no determination of statement's reliability and no corroborating evidence insufficient to sustain conviction. Conviction ordered reversed although there was no objection to hearsay evidence in trial court.

Discussion: This case is a perfect example of why you need to do your job correctly

even if the judge and defense counsel do not. Even though there was no objection to the evidence, the appellate court addressed the issue and reversed the conviction. The court makes a special note that this case is limited to its facts. The court refused to address the broader issues. If defense counsel cites this case, point out the court's statement limiting the facts.

State v. Townsend, 635 So.2d 949 (Fla. 1994):

To make an admissibility ruling for child hearsay evidence, the court must first determine whether the hearsay statement is reliable and from a trustworthy source without regard to corroborating evidence. If the answer is yes, then the trial judge must determine whether other corroborating evidence is present. If the answer to either question is no, then the hearsay statements are inadmissible. Failure to follow this procedure will render this exception to the hearsay rule unconstitutional under the dictates of the United States Supreme Court's decision in Idaho v. Wright.

Glendening v. State, 536 So.2d 212 (Fla. 1988):

Even if child sexual abuse victim's videotaped testimony was not "testimony" under statute allowing admission of hearsay statements of children regarding sexual abuse when child testifies and, requiring other corroborative evidence of abuse when child does not testify, child's hearsay statements were sufficiently corroborated by medical testimony and by two witnesses that testified that **defendant admitted** to them that he committed the sexual abuse.

"We also reject Glendening's argument that the trial court erred in determining that the child was competent to testify. We have been referred by Glendening to portions of the transcript of the competency hearing which focus on the child's weakness as a witness. Other portions, however, tend to support the child's competency to testify. As this Court has previously held, it is "within the sound discretion of the trial judge to decide whether an infant of tender years has sufficient mental capacity and sense of moral obligation to be competent as a witness, and his ruling will not be disturbed unless a manifest abuse of discretion is shown."

Note: The victim in this case was 3 1/2 years old. This is probably the youngest victim to be found competent in the appellate decisions.

Perez v. State, 536 So.2d 206 (Fla. 1988):

Police officer's testimony concerning *defendant's admission* to acts of sexual abuse was sufficient to corroborate hearsay statements of child victim so as to allow admission of child's hearsay statements when child was deemed to be unavailable for trial.

Reyner v. State, 745 So.2d 1071 (Fla. 1st DCA 1999):

No abuse of discretion in finding that *statement made by defendant to police* officer after his arrest was sufficient corroborative evidence under 90.803(23) to allow into evidence child victim's hearsay statement to her father.

Discussion: It should be noted that child hearsay is not admitted as substantive evidence when the victim is unavailable to testify unless there is other evidence to corroborate the child's testimony. The child hearsay in this case would not have been admissible had the defendant not made his admission to the police, thereby corroborating the victim's testimony.

Delacruz v. State, 734 So.2d 1116 (Fla. 1st DCA 1999):

Child's testimony was insufficient to establish that she was competent to testify in sexual abuse case; of 78 questions posed to her, she responded verbally to only 17, her responses to remaining questions consisted of either head-shaking or shrugs, there was nothing in child's testimony that established that she understood what it meant to tell the truth, the difference between telling the truth and telling a lie, or what would happen if she did not tell the truth, and there was nothing in child's testimony from which one might conclude that she was capable of observing and recollecting facts, or of narrating those facts to a jury.

Out-of-court statement by child victim to effect that her vaginal area hurt when her grandmother tried to wash her could not be used to satisfy corroboration requirement for victim's other statements to be admissible under hearsay exception for statement by child victims.

Out-of-court statements of the alleged child victim may not be used to satisfy the "other corroborative evidence" requirement of hearsay exception for statements by child victims.

Statement by defendant when he was arrested, admitting that he could have accidentally touched the child's vagina "a lot of times" while playing with her, was admissible as admission by party-opponent.

Trial court's improper reliance upon child's out-of-court statement that her vaginal area hurt, in determining that her other statements were sufficiently corroborated to be admissible under child victim exception to hearsay rule, required determination of issue on remand; even though trial court also properly considered defendant's statement, it could not be determined from the record whether the trial court would have found sufficient corroboration in defendant's statement, alone, to satisfy the requirement.

Discussion: This opinion gives a lengthy discussion on this area of the law and is a good reference case for a general understanding of the child hearsay exception. The opinion also cites relevant portions of the transcript where the judge tries to make a determination of the victim's competency. The appellate court made an interesting observation which may be helpful to you in future cases: "There is nothing in section 90.803(23)(a)2b that requires the state to present the "other corroborative evidence of the abuse or offense" at trial. The plain language of the section requires only that the trial court find that "there is other corroborative evidence of the abuse or offense." Normally, one would expect this to occur as the result of a hearing held either before the trial or during the trial, but out of the jury's presence."

Jones v. State, 728 So.2d 788 (Fla. 1st DCA 1999):

Out of court statements of child victim who is unavailable to testify at trial are admissible only if trial court finds that the statements satisfy reliability requirement of statute and that there is other corroborative evidence of the abuse or offense.

*Similar fact evidence* of other crimes, wrongs or acts may be used to satisfy requirement of other corroborating evidence of the abuse or offense.

Discussion: The victim was ruled incompetent to testify so the state had to rely on Williams Rule evidence to corroborate the hearsay evidence. This well written opinion is a very good source of information. There is a potential for reversal if it goes to the Florida Supreme Court, but it is very useful at this time. One must wonder if there is

any way around making the Williams Rule the feature of the trial under these circumstances.

Kertell v. State, 649 So.2d 892 (Fla. 2d DCA 1995):

**Defendant's confession** was improperly admitted prior to state's proof of corpus delicti, and therefore, confession could not corroborate trustworthiness and reliability of child-witness's testimony.

Discussion: This is a very important case to understand. A child hearsay statement has to be determined reliable independent of the defendant's confession. In this case, the defendant admitted to the detective that he put his penis in the child's mouth. Do not assume you have a good case merely because the defendant confesses.

Ready v. State, 636 So.2d 67 (Fla. 2d DCA 1994):

Uncorroborated hearsay statements cannot be used as sole evidence to prove penetration needed to support conviction for sexual battery by digital penetration.

L.E.W v. State, 616 So.2d 613 (Fla. 5th DCA 1993):

Corpus delicti was not established in child sexual abuse case, precluding use of **defendant's confession**; hearsay statement of victim, which was sole basis for establishing corpus delicti, had been repudiated by victim at trial and was consequently unusable as substantive evidence that act had occurred.

Discussion: This case basically states that if the State has a recanting victim with no corroborating evidence, it cannot rely on the defendant's confession and child hearsay to get a conviction.

Ticknor v. State, 595 So.2d 109 (Fla. 2d DCA 1992):

Unsworn, uncorroborated statements that are inconsistent with victim's trial testimony are insufficient as a matter of law to sustain conviction.

Discussion: The child victim in this case testified that the defendant stood over her and said "Is this what you want?" The child closed her knees and nothing else happened.

The state offered testimony through the lead detective indicating that the victim told her that the defendant rubbed his penis against her vaginal area and that she closed her knees in an attempt to stop him. Based upon this ruling, you should think twice about going to trial with a recanting witness unless you have corroborating evidence. Hearsay alone will not suffice. Also see Bell v. State, 569 So.2d 1322 (Fla. 1st DCA 1322).

### **Prior Consistent Statements by Victim:**

Bass v. State, 35 Fla. L. Weekly D716 (Fla. 1<sup>st</sup> DCA 2010):

Court properly allowed multiple child hearsay witnesses to testify about victim's statements.

The trial court properly ruled that the specific hearsay exception contained in [section 90.803\(23\), Florida Statutes](#), trumped the bolstering and prior consistent statement arguments advanced by the defense counsel. These objections did not preserve objection based upon probative versus prejudice.

Fleitas v. State, 3 So.3d 351 (Fla. 3d DCA 2008):

Officer's testimony regarding child molestation victim's prior consistent statements to State Attorney's Office was admissible nonhearsay; declarant testified at trial and was subject to cross-examination concerning statement, and record established that victim's prior statements were introduced to rehabilitate victim from defendant's implied argument of improper influence, motive or recent fabrication.

State v. Kopko, 596 So.2d 669 (Fla. 1992):

Hearsay statement of child victim is admissible even when child will testify fully and completely at trial.

Discussion: The Supreme Court addressed the following question as one of great public importance: "In a case in which the child victim of a sexual offense testified fully and completely at trial as to the offense perpetrated upon him or her, can it constitute reversible error to admit, pursuant to section 90.803(23), Florida Statutes (1989), prior, consistent out of court statements of the child which were cumulative to the child's

in court testimony or merely bolstered it." The court ruled that the 5th DCA was in error and quashed the decision and remanded with instructions to conduct proceedings consistent with the Pardo decision.

Pardo v. State, 596 So.2d 665 (Fla. 1992):

Child victim's hearsay statements may be admissible even when the child is able to testify fully at trial, notwithstanding its characterization as a prior consistent statement.

Admission of child hearsay statement is subject to a balancing of its probative value versus its potential for prejudice. (90.403)

Discussion: Although the Pardo case technically removes many objections to the child hearsay rule, it does not give the State a green light to overwhelm the jury with repetitive statements. The Pardo court recognizes the danger in channeling the words of a child through respectable adult witnesses. The court makes clear that if its probative value is outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence, the statement should be excluded under a 90.403 analysis.

Anderson v. State, 598 So.2d 276 (Fla. 1st DCA 1992):

"Although the admission of a child victim's hearsay statement is not excludable as hearsay or as a prior consistent statement under the statute, the admission of the statement is subject to the balancing test found in section 90.403."

"Consequently, a trial court must weigh the reliability and the probative value of a child victim's hearsay statement against the danger that the statement will unfairly prejudice the defendant, confuse the issues at trial, mislead the jury, or result in the presentation of needlessly cumulative evidence. In weighing these concerns, the courts will be able to balance the rights of criminal defendants with those of the child victims that the statute seeks to protect."

Discussion: This case contains a good discussion on the evils of channeling the child's testimony repeatedly through respected adults, especially when the child has already testified accurately at trial.

Stamper v. State, 576 So.2d 425 (Fla. 4th DCA 1991):

Testimony of sexual battery victim's statement to his stepfather, adduced through police officer, was hearsay testimony which impermissibly bolstered victim's testimony; though father testified and officer's testimony was allegedly offered to show how officer determined that she needed to speak to victim, officer provided only testimony which corroborated victim's testimony regarding specific acts alleged to have occurred.

Discussion: The lead detective testified on direct as to what she was told by the victim's stepfather. The stepfather told her what the victim had told him about the sexual acts. The state did not try to introduce this evidence through 90.803(23), but instead tried to admit it as non hearsay in that it was admitted only to show how the detective determined that she needed to speak with the victim. The court ruled that this impermissibly corroborated the victim's testimony. The court indicates that the officer should have testified that she determined to speak to the victim as a result of the statements made by the stepfather in an interview.

## **Prior Inconsistent Statements and Recantations by Victim**

Johnson v. State, 1 So.3d 1164 (Fla. 1<sup>st</sup> DCA 2009):

During sexual battery on a child trial, the state presented admissible child hearsay testimony concerning the abuse. At trial, the victim recanted and said he had lied about the abuse. When asked if he was telling the truth at trial, the child said he did not know.

“If the only evidence of guilt is a child victim's out-of-court statement admitted under section 90.803(23), and if the child has recanted the accusation in court, the trial court must grant a motion for judgment of acquittal.”

“The most that could be said of M.J.'s trial testimony is that it leaves open the possibility that his earlier accusation was true. That is not proof of guilt. The child was reluctant and equivocal, but at no point did he adopt or support the accusation he had made in his out-of-court statement. The state has the burden of proving beyond a reasonable doubt that the defendant is guilty of the crime charged. That burden cannot be established by testimony that the victim does not know whether he is telling the truth by

retracting an earlier accusation. It can only be established by affirmative evidence that the crime was committed.”

Collier v. State, 982 So.2d 1281 (Fla. 1<sup>st</sup> DCA 2008):

Minor victim's pre-trial statements, which were later recanted during her in-trial testimony, were insufficient to support defendant's conviction absent corroborating evidence of defendant's guilt.

Baugh v. State, 961 So.2d 198 (Fla. 2007):

Evidence was insufficient to corroborate child victim's recanted out-of-court statements that defendant sexually abused her, and thus such statements were insufficient to support conviction for capital sexual battery; defendant's purported “admission” to victim's mother after abuse allegedly occurred, that he wanted victim to perform fellatio on him, only showed that defendant had thoughts about committing the offense, fact that defendant slashed his wrists after being confronted by victim's mother might have been “suggestive of guilt,” but was also consistent with a troubled defendant in need of psychotherapy, and while testimony given by both inmate imprisoned with defendant and former family friend about victim's recantation could have indicated that victim was pressured to change her story, it also reflected reality of the situation, which was that defendant would not get out of jail as long as victim alleged that he committed the crime.

Recanted statements can sustain a sexual battery conviction when other proper corroborating evidence is admitted.

Discussion: Read this case carefully before you consider taking a case to trial where the victim is going to recant. The court is very restrictive in what it considers corroborating evidence.

Beber v. State, 887 So.2d 1248 (Fla. 2004):

Videotape of child's out-of-court statement, admitted pursuant to child hearsay rule, was insufficient to sustain defendant's conviction of capital sexual battery.

Court's decision in *State v. Green*, that a child victim's prior inconsistent hearsay statement, which was admitted as substantive evidence, was insufficient, standing alone, to sustain a criminal conviction is dispositive.

Discussion: The victim's child hearsay video indicated that the defendant performed fellatio on him, but at trial, the child said the defendant only fondled him. Since the defendant was charged with fellatio, there was insufficient to sustain the conviction.

Baugh v. State, 862 So.2d 756 (Fla. 2d DCA 2003): *Reversed*

Given child victim's in-court testimony that there was never any sexual abuse, child's out-of-court hearsay statement alone could not sustain defendant's conviction for capital sexual battery.

Conviction affirmed because there was other evidence that would give rise to inference that defendant committed crime, including defendant's "admission" to mother during fight immediately after alleged incident, defendant's consciousness of guilt as evidenced by his suicide attempt and suggestions that defendant engaged in witness tampering, adduced form testimonies of prison inmate and former friend of victim's mother. *Question certified.*

Discussion: This is a lengthy case that goes into great detail to incorporate the evidence heard at trial with the legal rulings. Whenever you encounter a case where a child witness recants in court based on pressure from the defendant or family, you should read this case on how to proceed with your child hearsay evidence.

Beber v. State, 853 So.2d 576 (Fla. 5<sup>th</sup> DCA 2003): *reversed*

Videotapes of child's out-of-court statement, admitted pursuant to section 90.903(23), was sufficient to sustain defendant's conviction of sexual battery by fellatio, even though there was no true corroborating evidence, other than the child's in court testimony that defendant perpetrated various other sexual crimes on him, and even though child contradicted his videotaped statement in court by testifying the defendant' touched him only with his hands, where circumstances of the taped interview were surrounded with multiple safeguards of reliability, and noting in the record suggested a basis for appellate court to lack confidence in the criminal conviction.

Evidence insufficient to support conviction for providing obscene material to a minor because the magazine and photography admitted in evidence at trial were not identified by child as the ones he had been shown. It was error to admit them in evidence and to permit jury to infer that these were the materials defendant had shown to the child.

Discussion: The victim gave a videotaped interview to a CPT forensic interviewer in which he stated the defendant performed fellatio on him on two occasions. The defendant was charged accordingly. At both deposition and trial, the child said the defendant only touched his penis with his hand. The court ruled that in spite of this conflict, the defendant could be convicted. The court gives a review of the other appellate decisions that address the admissibility of child hearsay when a victim recants or changes his story in trial. In reference to the obscenity charge, the court stated that in most cases, the jury will need to see the picture to convict of this charge, not simply a child's vague description.

D.W.G. v. Department of Children and Families, 833 So.2d 238 (Fla. 4th DCA 2002):

Court held hearing to determine whether circumstances surrounding statements provided sufficient safeguards of reliability and made findings, supported by specific facts, that child's statements to caseworker and school teacher were reliable.

Hearsay statements did not need to be consistent with child's testimony at trial in order to be admissible.

Department of Health and Rehabilitative Services v. M.B., 701 So.2d 1155 (Fla. 1997):

Child's out-of-court statement that stepfather sexually abused her was admissible as substantive evidence of abuse, even though at dependency hearing she did not repeat her accusation that her stepfather was the perpetrator; fact that prior statement was inconsistent with trial testimony did not require trial court to limit its use to impeachment evidence.

Out-of-court declarations that are inconsistent with child's in-court testimony are "statements," within meaning of statute making child's demonstrably reliable hearsay statements regarding sexual abuse admissible as substantive evidence of such abuse, given lack of any statutory reference to consistency and given legislative intent to permit additional means of providing child's evidence for the trier of fact.

Child's later testimony that "someone" sexually abused her did not exonerate stepfather or clearly "recant" earlier hearsay statements in which she identified stepfather as perpetrator and, thus, did not make hearsay statements insufficient to support dependency adjudication.

Discussion: The Florida Supreme Court answered the following questions in the affirmative:

DOES THE TERM "STATEMENT" IN SECTION 90.803(23), FLORIDA STATUTES, PERMIT THE ADMISSION OF A CHILD VICTIM'S PRIOR UNSWORN STATEMENT WHICH IS INCONSISTENT WITH THE CHILD'S IN-COURT TESTIMONY, IF THE EVIDENCE SUPPORTS A DETERMINATION THAT THE EARLIER UNSWORN STATEMENT MEETS SUFFICIENT SAFEGUARDS OF RELIABILITY?

IF SECTION 90.803(23) PERMITS A CHILD VICTIM'S PRIOR INCONSISTENT STATEMENTS TO BE ADMITTED AS SUBSTANTIVE EVIDENCE, IF FOUND TO BE TRUSTWORTHY AND THE RECORD SUPPORTS SUCH A FINDING, IS THE COMBINATION OF SUCH STATEMENTS AND THE CORROBORATING MEDICAL EVIDENCE, INDICATING ONLY THE POSSIBILITY THAT ABUSE MAY HAVE OCCURRED, SUFFICIENT TO ESTABLISH THE DEPENDENCY OF THE CHILD UNDER THE PREPONDERANCE OF THE EVIDENCE OR THE GREATER WEIGHT OF THE EVIDENCE STANDARD?

Footnote 4 in the opinion discusses numerous studies conducted regarding the reliability and trustworthiness of child hearsay statements. If you are ever doing research in this area, this section of the case is a good resource tool.

State v. Greene, 667 So.2d 756 (Fla. 1995):

When alleged victim of child abuse recants at trial, victim's prior inconsistent statement that was taken as part of discovery deposition pursuant to rule 3.220 is not admissible under section 90.801(2)(a), which excludes from definition of hearsay certain prior inconsistent statements.

"Deposition," as term is used in section 90.801(2)(a), does not include discovery depositions taken pursuant to rule 3.220.

Prior inconsistent statement of alleged victim of child sexual abuse, even if said on multiple occasions, is not sufficient in and of itself to sustain conviction. Physician's testimony regarding size of victim's vaginal opening was not adequate to supply corroborating evidence necessary to permit admission of prior inconsistent statements as substantive evidence.

Discussion: This case reverses the case of State v. Greene, 667 So.2d 789 (Fla. 1st DCA 1995). This is a thorough opinion which should be read in its entirety to fully understand the issues. The 1<sup>st</sup> DCA case has been removed from the manual. This case was later distinguished by Department of Health and Rehabilitative Services v. M.B., 701 So.2d 1155 (Fla. 1997), which held that out of court statements inconsistent with trial testimony could be admitted.

Brantley v. State, 692 So.2d 282 (Fla. 1st DCA 1997):

Prior unsworn, inconsistent, and uncorroborated statements cannot constitute the only substantive evidence to sustain a conviction regardless of whether the prior inconsistent statement is admitted under section 90.801(2) or section 90.803(23). When the child victim's testimony at trial in the instant case was not inconsistent with her hearsay statements admitted pursuant to 90.803(23), the latter statements constituted competent evidence supporting the jury verdict.

Dennis v. State, 649 So.2d 263 (Fla. 5th DCA 1994):

In prosecution for capital sexual battery, where victim testified in court, videotaped deposition of victim was admissible for substantive purposes and to impeach victim once she recanted her testimony.

Discussion: This decision was actually made pursuant to 90.801(2)(a) which declares such a statement not to be hearsay. The child had indicated during her sworn deposition that certain sexual acts took place. During trial, she recanted her testimony and said the defendant never touched her. Had the child not taken the stand and been subjected to cross examination, the deposition would not have been admissible. It should be noted that the defendant had also confessed to the crime which added the necessary corroboration. *see* Green v. State, 667 So.2d 789 (Fla. 1st DCA 1995)

State v. Grego, 648 So.2d 743 (Fla. 2d DCA 1994):

Record did not support finding that children's statements were not spontaneous because they were made in response to questions by adults, were made in stressful environments, were made after events in which the children had incurred the displeasure of their caretakers, and because both children were squirmy and fidgeting in their depositions. Record did not support finding that children's terminology was not age appropriate or child-like. Record did not support finding that children were adept at not remembering different things at different times and lack of videotaping and questions geared to a specific response are not inappropriate in obtaining admissible out of court statements.

Discussion: This case addresses many common objections to the reliability of child hearsay statements. The court ruled favorably for the state on each point. The court ruled that the trial court's rulings for the defense were a clear abuse of discretion.

L.E.W v. State, 616 So.2d 613 (Fla. 5th DCA 1993):

Corpus delicti was not established in child sexual abuse case, precluding use of defendant's confession; hearsay statement of victim, which was sole basis for establishing corpus delicti, had been repudiated by victim at trial and was consequently unusable as substantive evidence that act had occurred.

Discussion: This case basically states that if the State has a recanting victim with no corroborating evidence, it cannot rely on the defendant's confession and child hearsay to get a conviction.

Pinder v. State, 604 So.2d 848 (Fla. 5th DCA 1992):

State's presentation of nine year old child's videotaped statement accusing defendant of sexual abuse and state's reinforcing introduction of repetitive hearsay to the same effect with knowledge by the state, but not by the trial judge or defense counsel, that the child had recanted a critical portion of his statement prior to trial violated defendant's due process rights and deprived him of fair trial.

Defense counsel and trial judge were entitled to learn from State of child's recantation of statement relating to completed act of oral sexual abuse in connection with court's determination of admissibility of child's hearsay statements.

Discussion: The defendant was charged with two counts of capital sexual battery. The first count involved anal penetration and the second involved oral abuse. Prior to trial, the child gave three separate statements indicating a completed act on each count. The child recanted his testimony in reference to the oral sex two days before trial. The State did not bring this to the court's attention until after the child hearsay hearing.

Ticknor v. State, 595 So.2d 109 (Fla. 2d DCA 1992):

Unsworn, uncorroborated statements that are inconsistent with victim's trial testimony are insufficient as a matter of law to sustain conviction.

Discussion: The child victim in this case testified that the defendant stood over her and said "Is this what you want?" The child closed her knees and nothing else happened. The state offered testimony through the lead detective indicating that the victim told her that the defendant rubbed his penis against her vaginal area and that she closed her knees in an attempt to stop him. Based upon this ruling, you should think twice about going to trial with a recanting witness unless you have corroborating evidence. Hearsay alone will not suffice. Also see Bell v. State, 569 So.2d 1322 (Fla. 1st DCA 1322).

Williams v. State, 582 So.2d 89 (Fla. 4th DCA 1991):

Otherwise inadmissible videotaped deposition of child victim was not admissible for purposes of impeachment by the State, where child, called by State as witness, failed to respond to numerous questions by State and child was not subject to questioning by defense.

Child victim's otherwise inadmissible videotaped deposition was not admissible to impeach statements made to mother by child, about which mother had properly testified.

Discussion: The child in this case testified at trial, but evidently not as the state would have liked. As a result, the state attempted to admit a videotaped deposition to impeach its own witness under section 90.608. The state never argued that the video was admissible under 90.803(23).

Bell v. State, 569 So.2d 1322 (Fla. 1st DCA 1990):

In sexual battery prosecution where only evidence presented by State was prior, unsworn, inconsistent, and uncorroborated statement of minor victim, crime was not proven beyond a reasonable doubt. see Ticknor v. State, 595 So.2d 109 (Fla. 2d DCA 1992).

Jaggers v. State, 536 So.2d 321 (Fla. 2d DCA 1988):

Admission of child hearsay statement is also subject to other evidentiary rules, including rule that prior inconsistent statements may not be used substantively as sole evidence to convict.

Discussion: The testimony of the victims was introduced at trial by means of their video taped depositions pursuant to section 92.53, Florida Statutes. In the video tape, the girls indicated that the defendant touched their vaginal areas, but did not penetrate them. The State offered testimony from various witnesses who indicated that the children had told them that there was penetration. The appellate court found this practice to be outrageous and discredited it every conceivable way.

## **Reliability Factors**

State v. Townsend, 635 So.2d 949 (Fla. 1994):

If child victim is determined to be incompetent to testify, victim is "unavailable" for purposes of admitting hearsay statement, but judge may look to competency of victim in determining whether hearsay statement is otherwise admissible; competency of victim is factor that should be considered in determining trustworthiness and reliability.

In determining reliability of child victim's hearsay statement, court may consider statement's spontaneity, whether it was made at first opportunity, whether it was elicited in response to questions, child's mental state when abuse was reported, terminology used by child, motive to fabricate, ability of child to distinguish between reality and fantasy, vagueness of accusations, possibility of improper influence, and contradictions.

Mere boilerplate language by court in determining reliability is improper.

The competency of the child is a factor that should be considered in determining the trustworthiness and reliability, and thus the admissibility, of hearsay statements attributable the child.

To make an admissibility ruling for child hearsay evidence, the court must first determine whether the hearsay statement is reliable and from a trustworthy source without regard to corroborating evidence. If the answer is yes, then the trial judge must determine whether other corroborating evidence is present. If the answer to either question is no, then the hearsay statements are inadmissible. Failure to follow this procedure will render this exception to the hearsay rule unconstitutional under the dictates of the United States Supreme Court's decision in Idaho v. Wright.

Rodriguez v. State, 2011 WL 3586154 (Fla.App. 3 Dist.)

Trial court did not abuse its discretion in prosecution for sexual battery on a person less than 12 years of age by concluding that child victim's hearsay statements were reliable, so as to be admissible pursuant to the child sexual abuse hearsay exception; trial court found that child provided a detailed account of the assaults, that child's reports to various witnesses were consistent, that questions posed to child were open-ended and not leading, that child's answers used words consistent with her age, that there was no evidence the statements or the method of obtaining them were untrustworthy, and that child had no motive to lie and there was no evidence she was coached.

For a child's hearsay statements to be admissible under the child sexual abuse hearsay exception, the reliability of the statements must be determined independent of any corroborating evidence.

Elghomari v. State, 2011 WL 3476877 (Fla.App. 4 Dist.): *On motion for rehearing*

Trial court complied with statute that required it to make specific findings of fact regarding basis for allowing admission of seven-year-old's testimony under child victim exception to hearsay rule and, thus, testimony was admissible in prosecution for sexual battery and lewd molestation; trial court made all requisite findings of reliability and set them out in detail, including that victim understood difference between truth and lie, right and wrong, described crimes in age appropriate language but, with significant detail that

would not otherwise be available to typical seven-year-old concerning sex acts and bodily fluids.

State committed no discovery violation when it described during its opening statement two incidents of molestation that, although charged in the information, were not previously referenced or identified in the victim's statements provided as part of the discovery process; statements were oral, defendant was charged with the incidents, information was filed well before the victim's deposition, and defense counsel had the opportunity to ask specific questions about those two counts.

Discovery rules do not require state to disclose unrecorded oral statements.

Trial court abused its discretion in admitting irrelevant testimony by the victim's mother regarding the weakening of mother's sexual relationship with defendant around the time he abused the victim in prosecution for sexual battery and lewd molestation.

Error in admission of testimony by the victim's mother regarding the weakening of mother's sexual relationship with defendant around the time he abused the victim was harmless, where testimony was an insignificant part of the trial, and State made only brief, isolated references to the testimony during closing argument.

Miranda v. State, 35 Fla. L. Weekly D2844 (Fla. 4<sup>th</sup> DCA 2010):

*We find that the order admitting the child's hearsay merely tracked the statutory language of § 90.803(23) and was therefore insufficient to support the admission of such statements at trial. ... Without the detailed findings of fact as to reliability and trustworthiness required by statute, we are unable to conclude that her hearsay statements were admissible.*

Ferreiro v. State, 936 So.2d 1140 (Fla. 3<sup>rd</sup> DCA 2006):

Child's spontaneous statements to her father, police detective, and child abuse investigator about sexual abuse by defendant were admissible pursuant to statute which allows admission of hearsay statements by children concerning sexual abuse; witnesses testified regarding circumstances surrounding child's spontaneous statements to her father, and statements made by the child during subsequent interviews with police

detective and with child abuse investigator, and each of the statements was reliable and trustworthy.

Saffold v. State, 911 So.2d 255 (3<sup>rd</sup> DCA 2005):

Hearsay statements of child victim were reliable, and thus admissible under exception to rule against hearsay for statements of child victim, in prosecution for sexual battery and other offenses; child testified at pre-trial hearing and at trial, and interview with child victim with children's unit in state attorney's office was videotaped.

G.H. v. State, 896 So.2d 833 (Fla. 1<sup>st</sup> DCA 2005):

The trial court's statement: "I find specifically that the statements are reliable and trustworthy, the testimony I've heard in this trial thus far," was conclusory and inadequate.

Womack v. State, 855 So.2d 1236 (Fla. 1<sup>st</sup> DCA 2003):

The court erred in allowing introduction of child hearsay statements without making specific findings of fact on the record as required by statute.

Appellate court rejected state's argument that reliability of statements was established through testimony of other witnesses because reviewing court should not look behind trial court's finds to determine whether evidence is sufficient to sustain trial court's ruling regarding admissibility.

Tussey v. State, 793 So.2d 1188 (Fla. 5th DCA 2001):

Error to allow child victim's mother to testify that child told her that defendant exposed himself to child and fondled child in absence of specific findings as to reliability.

Discussion: The judge's finding regarding reliability was rejected by the appellate court as not being sufficiently specific:

*THE COURT: As far as the reliability and trustworthiness of the statement, the Court finds after having read the depositions, listening to the testimony of [J. S.]*

*this morning, and just listening to the testimony that the state elicited at this hearing on the hearsay rule, that there are -- there exists consistencies and reliability and trustworthiness and that's between the statements that were made and the time and content of the statements for them to be admissible according to this Court.*

*I know what you are saying, Mr. Abercrombie [defense counsel]. He is a child and both of you did a very good job this morning, but when you sit back and listen, there were a couple times he said he was watching TV, and I have in my notes he was also watching TV by the bureau.*

*I mean, I don't know the configuration of the house, but evidently it is all very close. I mean, where he was standing by this bureau, which evidently is next to the kitchen, you can also see the TV.*

*[DEFENSE COUNSEL]: No.*

*THE COURT: Well, you can gather that from the way the testimony goes. No one drew a picture, so I can't picture it in my mind. And then he answered that -- a lot was in response to questions that you asked him, so I don't think that that's enough confusion or enough inconsistency for it not to be reliable.*

Hanks v. State, 786 So.2d 634 (Fla. 1st DCA 2001):

Trial court's failure to make case specific findings of reliability of hearsay by child victim of sexual battery did not constitute fundamental error.

Discussion: This case contains few facts and is only useful for the proposition that fundamental error does not apply.

Thomas v. State, 760 So.2d 1138 (Fla. 5th DCA 2000):

State failed to show that change in approved residence without permission of probation officer was willful where defendant moved from his current approved residence with his girlfriend back to original approved residence with his mother over a holiday weekend because of a domestic quarrel.

Trial court lacked proper basis to revoke defendant's probation based on sexual battery of minor where revocation was based solely upon hearsay statements of child victim, which even if deemed reliable, were uncorroborated.

Record did not support finding of reliability where child's statements were contradictory, there was possibility of improper influence on child by his mother, who was involved in domestic dispute with defendant, and mother admitted that child had dispute with defendant, and mother admitted that child had problem with lying.

Discussion: The court points out that revocation of probation cannot be based solely on hearsay evidence.

Ingrassia v. State, 747 So.2d 445 (Fla. 4th DCA 1999):

Findings made by trial court regarding reliability and admissibility of child's statements were sufficiently case-specific to meet the requirements of the statute.

Discussion: The court ruled "the record reflects that the court cumulatively weighed numerous potential facts, such as time, circumstances, credibility, demeanor, spontaneity, internal consistency of the individual's statement, and maturity of the child. These are some of the types of facts that you should stress in your child hearsay motion. The Appellate Court also approved the trial court's findings of reliability based upon the following:

- a. The source, Detective Ulvang, is an attorney and seven year veteran with Broward Sheriff's Office and a credible witness.
- b. Statement was given to Detective Ulvang six days after the alleged crime was reported by the child and her mother.
- c. The statement detailed incidents of unlawful sexual touch in genital contact covering a period of approximately two months.
- d. The statement itself demonstrates narrative responses in terms common to a child of the victim's age and a product of non-leading questions.
- e. There is no evidence of a turbulent relationship between the child and the defendant. Quite to the contrary, the child maintained a harmonious relationship with the Defendant.

- f. The reliability of the child's statement to Detective Ulvang has been established by clear and convincing evidence.

Reynolds v. State, 660 So.2d 778 (Fla. 4th DCA 1995): (Judge Eade)

Trial court record properly reflects that the court cumulatively weighed numerous potential facts, such as time, circumstances, credibility, demeanor, spontaneity, internal consistency of the individual statements, and maturity of the child.

Use of corroborative evidence to determine trustworthiness is proscribed by both the Florida and U.S. Supreme Courts. Corroboration may be considered, if otherwise admissible, only after reliability has been resolved.

There is no requirement under section 90.403 that the court must make findings on the record or otherwise, to cause the record to reflect the specific reasoning applied by the court in overruling an objection that evidence is cumulative.

Estopinan v. State, 710 So.2d 994 (Fla. 2d DCA 1998):

Error to admit out of court statements of victim without making sufficient findings of fact to establish reliability of statements. Without findings of fact as to reliability of statements appellate court precluded from determining whether they were reliable.

Barton v. State, 704 So.2d 569 (Fla. 1st DCA 1997):

Abuse of discretion to determine that victim's hearsay statements were reliable and therefore admissible upon findings consisting only of determination that statements were made in "private" and "one-on-one" conversations.

Allison v. State, 661 So.2d 889 (Fla. 2d DCA 1995):

This case was decided by the 2d DCA on a rehearing from Allison v. State, 20 Fla. L. Weekly D1931 (Fla. 2d DCA August 23, 1995). The previous decision is withdrawn, but please see my previous summary for more information.

Videotaped and audiotaped testimony of child of murder victim may be admissible if use of alternative to face-to-face confrontation at trial was necessary to protect welfare of

child and if tapes had sufficient indicia of reliability. Record supports determination that use of alternative procedure was necessary where child was unavailable at time of trial because she could not remember events, and psychologist testified that refreshing child's memory with pictures of crime scene would cause severe emotional trauma.

Reliability element was not met where neither defendant nor defense counsel had opportunity to cross-examine child, jury had no opportunity to observe demeanor of child at time it listened to tapes, and audiotape contained no information establishing ability of child to understand duty to tell the truth.

Heuss v. State, 660 So.2d 1052 (Fla. 4<sup>th</sup> DCA 1995):

Findings of trial court regarding reliability of victims' hearsay statements merely tracked statutory language of section 90.803(23) and therefore were insufficient. (Judge Backman)

Garcia v. State, 659 So.2d 388 (Fla. 2d DCA 1995):

Trial court's limited, summary findings were insufficient to satisfy case-specific requirements of child hearsay statute because they failed to address why the time, content, and circumstance of each individual statement provided sufficient safeguards of reliability. Trial court's determinations regarding child's mental maturity and reliability were factually insufficient to satisfy statutory requirements.

Discussion: The appellate court seemed to be particularly concerned that several of the child's statements were inconsistent. As is usually the case, when the facts are weak, the appellate courts are more likely to look for reasons to reverse. The court also placed a great emphasis on the judge's failure to focus on the time of the hearsay statements relative to the criminal act. The judge also made comments on things such as the child's maturity without elaborating on the facts which led him the conclusion.

Moore v. State, 658 So.2d 600 (Fla. 1st DCA, 1995):

Conviction for lewd and lascivious conduct with minor reversed and remanded where trial court allowed state to introduce hearsay statements of victim without making case specific findings justifying admission of the statements.

Discussion: This is a very short opinion with very little analytical value.

Arney v. State, 652 So.2d 437 (Fla. 1st DCA 1995):

In prosecution for aggravated child abuse and child abuse, trial court's errors in admitting child's hearsay statements without making findings required by statute and in admitting hearsay statements attributed to non-victim child witness were not harmless error.

Seaman v. State, 608 So.2d 71 (Fla. 3d DCA 1992):

Any consideration by trial court of corroborating physical evidence of sexual abuse of child in determining reliability of child victim's hearsay statements was harmless, where trial court found child hearsay statements reliable on multiple grounds amply supported by record.

Confrontation clause did not require state to call child victim of sexual abuse to testify at trial via closed circuit television; confrontation clause did not allow defendant to direct state to call particular witnesses.

Discussion: The court cited Idaho v. Wright in acknowledging that it is inappropriate to consider physical evidence as an indicia of reliability, but ruled it was harmless error in this case. The court ruled that the child was unavailable as a witness because she would suffer severe psychological harm by testifying either in court or on closed circuit television.

Kopko v. State, 577 So.2d 956 (Fla. 5th DCA 1991):

Although notice given by State of its intent to seek admission at trial of counselor's videotaped interview with alleged child sexual abuse victim was defective because State failed to identify circumstances surrounding interview that indicated reliability, defective notice did not constitute reversible error, as reliability arguments actually made by the State were discernible from viewing the tape, and none of the arguments were surprising.

Videotaped interview of child was admissible in prosecution of stepfather for sexual battery and lewd assault, notwithstanding that there was ample time for coaching, child

appeared knowledgeable about sexual matters, and had an apparent motive to lie inasmuch as she was not fond of stepfather.

Discussion: This case was reversed by the Florida Supreme Court on other grounds. State v. Kopko, 596 So.2d 669 (Fla. 1992). The above mentioned rules of law are still valid.

Davis v. State, 569 So.2d 1317 (Fla. 1st DCA 1990):

Trial court was not required to balance indicia of unreliability with indicia of reliability in determining whether hearsay statements of child victims were admissible in prosecution for sexual battery of a child and lewd and lascivious acts in the presence of a child.

Jesus v. State, 565 So.2d 1361 (Fla. 4th DCA 1990):

Trial court's findings concerning child victim's hearsay statements sufficiently encompassed time, content, and circumstances of statements and permitted admission of statements in prosecution for sexual battery; trial court averred to highway trooper's testimony concerning victim's statements when he ran out of bushes on side of road; and trial court noted that defendant was at scene when victim approached trooper and that content of victim's statements was consistent with other facts of case and statements to physician.

Discussion: The statement in this case could probably have been admitted as an excited utterance also. The opinion contains the trial court's findings of fact and they do not appear to be very good. The 4th DCA also considered the consistency of the child's statements to various people as an indicia of reliability.

Lacue v. State, 562 So.2d 388 (Fla. 4th DCA 1990):

Trial court erred by not making specific findings of fact on the record as to basis of reliability of child hearsay statements and merely reciting the boiler plate language of the statute is also reversible error.

State v. Romanez, 543 So.2d 323 (Fla. 3d DCA 1989):

Findings supported by evidence, that alleged child sexual abuse victim had severely

disturbed mental condition which greatly affected her ability to distinguish reality from fantasy and truth from untruth, and that alleged victim's statements were vague, lacking in details and partially contradictory in critical respects, required exclusion of hearsay statements of child.

Fuller v. State, 540 So.2d 182 (Fla. 5th DCA 1989):

Requirement that trial court find hearsay statement of child victim be reliable prior to admission in criminal trial is not eliminated because child will testify; thus, State must reveal circumstances under which hearsay statements were made so as to its reliability.

Discussion: Both parties agreed that the indicia of reliability requirement would be satisfied by virtue of the child testifying in court. The judge agreed. This case has an interesting discussion on improper comments by the ASA.

Jaggers v. State, 536 So.2d 321 (Fla. 2d DCA 1988):

Out of court statements of daughter and stepdaughter who were allegedly victims of sexual battery by father, which were often contradictory and not made at time close to alleged occurrence, were not sufficiently reliable to warrant admission into evidence.

Discussion: The testimony of the victims was introduced at trial by means of their video taped depositions pursuant to section 92.53, Florida Statutes. In the video tape, the girls indicated that the defendant touched their vaginal areas, but did not penetrate them. The State offered testimony from various witnesses who indicated that the children had told them that there was penetration. The appellate court found this practice to be outrageous and discredited it every conceivable way.

## **Requirement for Child to be Victim of Offense**

State v. Dupree, 656 So.2d 430 (Fla. 1995):

In prosecution for murder, no error in concluding that hearsay exception for child victims was not applicable to child's statements because child was not the victim of the charged offense. For hearsay statements of child to be admissible under section 90.803(23), prosecution of defendant must be based upon victimization of the child

whose statements are being related.

Discussion: This case was presented to the Supreme Court as a conflict between Dupree v. State, 639 So.2d 125 (Fla. 1st DCA 1994) and Russell v. State, 572 So.2d 940 (Fla. 5th DCA 1990). The opinion in *Dupree* was approved and the decision in *Russell* was disapproved to the extent it conflicts with this decision.

Sheets v. State, 668 So.2d 295 (Fla. 1<sup>st</sup> DCA 1996):

In prosecution for sexual battery upon a child less than 12 and for lewd act upon a child less than 16, trial court erred in admitting hearsay statements of a child witness who was not the victim.

Allison v. State, 661 So.2d 889 (Fla. 2d DCA 1995):

This case was decided by the 2d DCA on a rehearing from Allison v. State, 20 Fla. L. Weekly D1931 (Fla. 2d DCA August 23, 1995).

Child hearsay statements cannot be admitted under section 90.803(23) unless case involves prosecution of defendant for victimization of child who made statements.

Discussion: This is a murder case where a four year old child was apparently a witness to his father choking his mother to death. The court first ruled that child hearsay is not applicable because the child is not a victim. The court then analyzed the statements under the ruling of State v. Ford, 626 So.2d 1338 (Fla. 1993) which permits the court to employ a procedure that is necessary to further an important public policy interest even if that procedure is not authorized expressly by the supreme court or otherwise authorized by law. Once the court rules that the procedure is necessary, it must then ensure that the child's testimony taken by alternative procedures has sufficient indicia of reliability. This issue is discussed in my Closed Circuit/Video Chapter.

Arney v. State, 652 So.2d 437 (Fla. 1st DCA 1995):

In prosecution for aggravated child abuse and child abuse, trial court's errors in admitting child's hearsay statements without making findings required by statute and in admitting hearsay statements attributed to non-victim child witness were not harmless error.

Bryant v. State, 586 So.2d 1369 (Fla. 1st DCA 1991):

Neither amended nor unamended version of hearsay exception for statements of child victim of sexual abuse or sexual offense applied to statements of child describing nonabuse crime against adult victim. see Russell v. State, 572 So.2d 940 (Fla. 5th DCA 1990).

Russell v. State, 572 So. 2d 940 (Fla. 5th DCA 1990) : *overruled*, State v. Dupree, 656 So.2d 430 (Fla. 1995):

Abuse of two year old girl in the presence of her four year old brother was sufficient to make him a "victim" of lewd and lascivious acts within the meaning of the hearsay exception for statements of child victims of sexual abuse, in light of the statutory purposes of protecting children as victims or witnesses in the judicial system as a result of their age and vulnerability.

Discussion: The court points out that a child does not have to be a charged victim to qualify under this rule. On its face, this case seems to be inconsistent with the Bryant decision, but a careful reading reveals the controlling distinction. The child in the instant case was actually made a victim by witnessing the assault on his sister.

## **Statements to Doctors and Counselors**

Esteban v. State, 967 So.2d 1095 (Fla. 4<sup>th</sup> DCA 2007):

Examining physician's testimony that victim told him that she knew her attacker was inadmissible at sexual-battery trial under exception to hearsay rule for statements made for purposes of medical diagnosis or treatment; physician noted that he did not usually ask for such information, and victim's statement was not made for purpose of medical diagnosis.

State v. Townsend, 635 So.2d 949 (Fla. 1994):

When expert testifies as to how child behaved with anatomically correct dolls, expert is

repeating communications of child and court must evaluate testimony under requirements of child victim exception to hearsay rule. Contacts between child and expert evaluating child for sexual abuse should be videotaped to ensure trustworthiness of communications and to ensure that expert did not lead child during evaluation.

State v. Jones, 625 So.2d 821 (Fla. 1993):

Statements to medical personnel by child sexual abuse victims identifying their abuser are not admissible under medical diagnosis and treatment exception to rule against hearsay; instead, admissibility of such statements is controlled by special hearsay exception for child's out of court statements of abuse.

Discussion: This case gives an excellent analysis of both the child hearsay rule and the hearsay exception relating to statements made for medical diagnosis or treatment. Both federal cases and law review articles are cited. It should be noted that federal courts have expanded the medical diagnosis and treatment exception in cases involving child victims. The Florida Supreme Court has specifically refused to follow the lead of the federal courts, because it feels that the child hearsay exception adequately covers the matter and adds the protection of an independent determination of reliability. Statements describing symptoms and the inception or cause of an illness or injury are admissible under the medical diagnosis or treatment exception if they are reasonably pertinent to diagnosis or treatment. Statements of fault, however, are not admissible.

Douglas v. State, 913 So.2d 1234 (Fla. 3<sup>rd</sup> DCA 2005):

Stepdaughter's statements to rape treatment center physician regarding alleged abuse by defendant were admissible, pursuant to medical diagnosis hearsay exception, in prosecution for sexual battery, lewd and lascivious molestation, and lewd and lascivious battery; stepdaughter's statements were reasonably pertinent to physician's diagnosis or treatment of stepdaughter, and stepdaughter knew the statements were being made for the purpose of diagnosis and treatment.

Herrera v. State, 879 So.2d 38 (Fla. 4<sup>th</sup> DCA 2004) *Cohen*

Statements made by victim to nurse practitioner at county's sexual assault treatment center that victim was forced to have sex and that semen was sprayed in her face were admissible as statements made for medical diagnosis or treatment.

Fundamental error occurred when defendant was convicted of both sexual battery and simple battery, as lesser included offense of false imprisonment charge, where there was no testimony that defendant intentionally or accidentally touched victim against her will except for hit touching that occurred during sexual battery.

Claridy v. State, 827 So.2d 1088 (Fla. 1st DCA 2002):

Error to admit testimony of nurse that, in the course of a medical examination, victim identified defendant as the person who sexually assaulted her.

Such testimony was not properly admitted under medical diagnosis and treatment exception to hearsay rule.

Error to admit child hearsay testimony through defendant's cousin without first making case-specific findings required by statute.

Lemon v. State, 767 So.2d 620 (Fla. 3rd DCA 2000):

Testimony of physician who examined victim of sexual battery concerning her narration of pertinent events was properly admissible.

Discussion: This is a very brief opinion with little research value.

Griffith v. State, 723 So.2d 860 (Fla. 1st DCA 1998):

Error to permit child's counselor to testify concerning child's statement to her without making a determination of the reliability of the hearsay statement and without making specific findings required by statute. Mere finding that counselor was an expert does not assure reliability.

Corpus v. State, 718 So.2d 1266 (Fla. 2d DCA 1998):

Hearsay testimony of pediatrician who examined victim regarding victim's statement that attacker attempted to have anal intercourse with him was admissible under section 90.803(4) because it was reasonably pertinent to diagnosis and treatment.

Child's statement to pediatrician that person fondled his penis and kissed him, which were matters that could have no medical ramification, was governed by statute permitting introduction of hearsay statements by child victim of abuse provided that prior notice is given and judicial assessment of reliability is made.

Butler v. State, 715 So.2d 337 (Fla. 1st DCA 1998):

Error to admit hearsay testimony from doctor and victim's stepmother regarding statements purportedly made to them by child victim regarding identity of her abuse without a hearing to determine reliability of testimony and without making findings required by statute.

Schroeder v. State, 715 So.2d 331 (Fla. 5th DCA 1998):

Error to admit testimony of psychotherapist under hearsay exception for statements made for medical diagnosis or treatment where psychotherapist testified about what victim told her about his encounter with defendant where there was no evidence that victim made statements to therapist for purpose of diagnosis or treatment, and it was clear that therapist did not rely on victim's identification of defendant to support her conclusion that the victim suffered from a mental disease or defect.

Bauta v. State, 698 So.2d 860 (Fla. 3rd DCA 1997):

No abuse of discretion in rulings admitting child's hearsay statements to mother and physician.

## **Unavailability of Child**

Peterson v. State, 810 So.2d 1095 (Fla. 5th DCA 2002):

No error in allowing introduction of victim's tape-recorded interview with Child Protection Team where victim appeared in courtroom, began weeping, answered

general questions put to her by prosecutor and testified that defendant came into her room and did something to her, but then continued to cry and refused to answer more questions about sexual acts involved in the case. The judge was correct in declaring her "unavailable."

State v. Cherryhomes, 647 So.2d 841 (Fla. 1994):

DOES A FINDING OF INCOMPETENCY TO TESTIFY BECAUSE ONE IS UNABLE TO RECOGNIZE THE DUTY AND OBLIGATION TO TELL THE TRUTH SATISFY THE LEGISLATIVE "TESTIFY OR BE UNAVAILABLE" REQUIREMENT OF SECTION 90.803(23)(a)(2)? This certified question was answered in the affirmative.

State v. Townsend, 635 So.2d 949 (Fla. 1994):

In order for declarant to be "unavailable" because of infirmity, so as to allow admission of hearsay statement, the infirmity need not arise after the statement was made.

If child victim is determined to be incompetent to testify, victim is "unavailable" for purposes of admitting hearsay statement, but judge may look to competency of victim in determining whether hearsay statement is otherwise admissible; competency of victim is factor that should be considered in determining trustworthiness and reliability.

Perez v. State, 536 So.2d 206 (Fla. 1988):

Trial judge's determination that forcing child victim of sexual abuse to testify in open court would result in substantial likelihood of severe emotional or mental harm to child, thus allowing admission of hearsay statements by child, was supported by sufficient evidence including testimony from county medical health association representative and child's mother.

Allison v. State, 661 So.2d 889 (Fla. 2d DCA 1995):

This case was decided by the 2d DCA on a rehearing from Allison v. State, 20 Fla. L. Weekly D1931 (Fla. 2d DCA August 23, 1995).

Videotaped and audiotaped testimony of child of murder victim may be admissible if use

of alternative to face to face confrontation at trial was necessary to protect welfare of child and if tapes had sufficient indicia of reliability. Record supports determination that use of alternative procedure was necessary where **child was unavailable** at time of trial because she could not remember events, and psychologist testified that refreshing child's memory with pictures of crime scene would cause severe emotional trauma.

Reliability element was not met where neither defendant nor defense counsel had opportunity to cross-examine child, jury had no opportunity to observe demeanor of child at time it listened to tapes, and audiotape contained no information establishing ability of child to understand duty to tell the truth.

Discussion: This is a murder case where a four year old child was apparently a witness to his father choking his mother to death. The court first ruled that child hearsay is not applicable because the child is not a victim. The court then analyzed the statements under the ruling of State v. Ford, 626 So.2d 1338 (Fla. 1993) which permits the court to employ a procedure that is necessary to further an important public policy interest even if that procedure is not authorized expressly by the supreme court or otherwise authorized by law. Once the court rules that the procedure is necessary, it must then ensure that the child's testimony taken by alternative procedures has sufficient indicia of reliability. This issue is discussed in my Closed Circuit/Video Chapter.

Coleman v. State, 592 So.2d 788 (Fla. 3d DCA 1992):

Because the State demonstrated that it had been "unable to procure the child victim's attendance or testimony by process or other reasonable means" she was "unavailable as a witness" within the meaning of Section 90.803(23)(a)2.b.

Discussion: This case does not elaborate on the facts, but it may help us in cases involving reluctant witnesses.

## Other Issues

Farinacci v. State, 29 So.3d 1212 (Fla. 4<sup>th</sup> DCA 2010):

Detective's demonstration and testimony about how child victim told detective that defendant touched him was inadmissible hearsay; detective's evidence all came from

something communicated to him by child, detective did not actually see conduct he described, his testimony depended entirely on accuracy and believability of statements and nonverbal conduct communicated to him by child, and evidence was undeniably used to portray out-of-court statements by victim to detective for sole purpose of establishing defendant's guilt.

Detective's demonstration and testimony about how child victim told detective that defendant touched him was not admissible to refute contention child was either lying or recently fabricated story; to be admissible for this purpose, statement was required to have been made before improper influence, not afterwards, statement did not meet statutory definition if basis for fabrication existing at trial also existed when statement was made, and only purpose of detective's evidence was to buttress or strengthen testimony of child.

Detective's demonstration and testimony about how child victim told detective that defendant touched him was not harmless error; circumstances lacked clarity, child did testify that defendant squeezed cheek of his buttocks, but video did not make that apparent, video was not definite and clear as to precisely what defendant touched or how he might have done so, scene failing to show child's posterior, child said that touching was "wrong" because it differed from what his teammates sometimes did, and detective's evidence did not merely repeat child's trial testimony, which involved no elaboration or demonstration, but instead added substantially to it.

It is error to instruct the jury generally on molestation, and without specifying the body part lewdly touched, when the charging document and evidence specify touching specific genitalia.

Note: The State did not file a notice to introduce child hearsay, so the case was not argued based upon that rule.

Elwell v. State, 954 So.2d 104 (Fla. 2d DCA 2007):

Defendant's general objection to reliability of child victim's hearsay statements to grandfather was insufficient to preserve for review on direct appeal claim that trial court failed to make specific written findings regarding reliability of statements, in trial for lewd and lascivious molestation; trial court was never placed on notice regarding alleged

deficiencies in findings and therefore, was not given opportunity to correct any such deficiencies.

Defendant's confrontation rights were not implicated by admission of child victim's hearsay statements to grandfather, in trial for lewd and lascivious molestation, where defendant had opportunity to cross-examine child.

Hunter v. State, 905 So.2d 977 (Fla. 1<sup>st</sup> DCA 2005):

Out-of-court statements from child sexual assault victims were not excludable as cumulative evidence from capital sexual battery trial, where jury heard virtually no overlapping hearsay in statements recounting the children's statements.

Blanton v. State, 880 So.2d 798 (Fla. 5<sup>th</sup> DCA 2004):

Statutory hearsay exception applies where child victim was age 11 or less at the time she gave statement to police, but over age 11 at the time of hearing on motion to admit the statement.

Right to confrontation of witnesses not infringed where defendant availed himself of opportunity to test veracity of victim's statement by taking victim's deposition.

Discussion: This is the first Florida appellate decision to address the *Crawford v. Washington* case. The court held that the deposition of the victim satisfied the right of confrontation of the witness and rejected numerous arguments from the defendant that a deposition is not the same as a meaningful cross examination. This case should be read carefully if this issue arises in one of your cases. Whether this decision survives further scrutiny by the Florida Supreme Court remains to be seen.

Springer v. State, 874 So.2d 719 (Fla. 5<sup>th</sup> DCA 2004):

No abuse of discretion in permitting state to play videotaped statement of victim to jury after victim had testified.

Discussion: This case provides very little discussion, but simply indicates that the issues were resolved by previous opinions.

Felder v. State, 767 So.2d 1267 (Fla. 3rd DCA 2000):

Decision holding elderly adult hearsay exception unconstitutional (*Conner v. State*, 748 So.2d 950 (Fla. 1999)) is inapplicable where victims testified at trial under oath and were subject to cross-examination.

Carter v. State, 737 So.2d 626 (Fla. 1st DCA 1999):

Error in admission of child hearsay statements was harmless in light of the fact that defendant admitted to crime.

Palaczolo v. State, 754 So.2d 731 (Fla. 2d DCA 2000):

Where defense called child abuse investigators to address limited issues and did not request witnesses to provide hearsay testimony from child victim and her brother, court erred in allowing witness to provide hearsay testimony from victim and her brother on cross-examination in absence of judicial determination of reliability.

Discussion: The fourth issue is whether the trial court erred in admitting child hearsay statement during cross-examination. Even though the State provided hearsay notices to the defense, they did not call the hearsay witnesses at trial. When the defense called these witnesses for their own limited purposes, the State introduced the hearsay statement during cross examination. For whatever reason, the court never made a finding of reliability concerning these statements when they were introduced. The appellate court found this error to be harmful. The mere fact that child hearsay is introduced through cross-examination does not negate the need to have a 90.803(23) hearing.

Ogden v. State, 658 So.2d 621 Fla. 3rd DCA 1995):

No merit in defendant's contention that the witness who testified to child hearsay statement at trial was not qualified to testify because she was not an expert witness in psychology or child sexual abuse. There is no such expert witness requirement under the above statute, as a lay witness as well as an expert witness may testify to such hearsay statements.

Discussion: This case speaks very little as to the facts and is not very helpful as a

resource tool.

State v. Asfour, 555 So.2d 1280 (Fla. 4th DCA 1990):

Videotaped initial police interview of child who was alleged victim of sexual battery was hearsay and was required to fall within some exception to hearsay rule in order to be admissible at trial.

Statute providing method whereby out of court statement of victim or witness who is under age 16 can be treated as in court statement is not applicable to already existing hearsay statements, such as videotaped police interview of allegedly abused child.

Discussion: The 4th DCA slams both the trial court and the State for basically missing the boat. The questioned statement involved a video taped investigative statement by the police. The trial court ruled that the statement was not hearsay and should be evaluated under Section 92.53. The appellate court pointed out that Section 92.53 does not come into play at the investigative stage, but only when the State wishes to videotape the testimony of a child to be used in lieu of testimony in court. The 4th DCA also chastised the State for apparently not being prepared to prove that the tape was admissible under section 90.803(23). The case was remanded so that the trial court could make the appropriate determinations under the correct rule.

State v. Romanez, 543 So.2d 323 (Fla. 3d DCA 1989):

State was not denied any procedural rights by trial court's apparent partial reliance on corroborative testimony of State's witnesses at prior hearing in which trial court barred defendant from deposing alleged child sexual abuse victim based on alleged victim's fragile mental condition, in determining to exclude from evidence at trial hearsay statements of alleged victim. Such prior testimony was relevant to issue before trial court, and trial court was entitled to consider full record.

Discussion: The State had previously moved for a protective order prohibiting the child victim from being deposed. The court considered testimony from the child's therapist. When you have these hearings, be sure you know what information is contained in the court file prior to deciding how to proceed at the hearing.

**FORM**

IN THE CIRCUIT COURT OF THE  
17TH JUDICIAL CIRCUIT, IN AND  
FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

XXX,

Defendant.

CASE NO:

JUDGE:

**NOTICE PURSUANT TO  
F.S. 90.803(23)**

\_\_\_\_\_ /

**COMES NOW** the State of Florida, by and through the undersigned Assistant State Attorney,  
and gives this notice of intent to introduce into evidence during the trial of this cause, testimony which  
constitutes hearsay pursuant to F.S. 90.803(23), to wit:

1. On or about January 1, 1994 the seven year old victim, Chastity Virtue, gave a statement to Detective John Doe of the Broward Sheriff's Office in reference to the above referenced case. Miss Virtue told Detective Doe that her mother's boyfriend, Ima Kleep, licked her "pee pee" and put is "ding a ling" in her "bootie." A transcript of the above mentioned statement is attached(*or has been provided in discovery*) to provide the total substance of the statement as

well as to provide indicia of reliability. The statement of Miss Virtue was taken at the Broward Sheriff's Office in the presence of Detective Doe and Colpa Scope, Chastity's counselor from the Phoenix Center. Defense counsel has also taken depositions of the above mentioned witnesses and that deposition is hereby incorporated by reference to provide the full content and indicia of reliability of the statement. There are several indicia of reliability for the above mentioned statement:

a: *List the first indicia of reliability. Consider the following:*

1. Mental and physical age and maturity of the child.
2. The nature and duration of the abuse or offense.
3. The relationship of the child to the offender.
4. The reliability of the assertion and the child.
5. Was the child still emotionally affected by the situation when she reported it?
6. Was the statement spontaneous?
7. Were the statements made at the first available opportunity?
8. Did the statements consist of a child-like description of the act?
9. Was the use of terminology unexpected of a child of similar age?
10. Was the statement made to a number of people and not only the mother?
11. Could the child distinguish fantasy from reality?
12. Were the statements vague and contradictory?
13. Was the time of the statement close to the time of the incident?
14. Was the statement elicited in response to questions from adults?
15. What was the mental state of the child when the abuse was reported?
16. Was there a motive or lack thereof to fabricate the statement?
17. Could the child distinguish between reality and fantasy?
18. Was there the possibility of improper influence on the child by participants involved in a domestic dispute?
19. Do not list other corroborating evidence to determine reliability.

b. *List the second indicia of reliability.*

2. *Provide content of second statement.*

I HEREBY CERTIFY that a true and correct copy of this notice has been provided by U.S. mail to defense counsel on this 2nd day of January, 1994.

Updated August 31, 2011

Child Hearsay  
D. Nicewander  
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