IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	:	
Petitioner,	:	
vs.	:	Case No. 67,282
W.S.L., A CHILD,	:	
Respondent/ Cross-Petitioner.	:	

RESPONDENT/CROSS-PETITIONER's BRIEF

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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

On October 5, 1983, the State Attorney in and for the Sixth Judicial Circuit, Pinellas County, Florida, filed a Petition for Delinquency charging the Respondent/Cross-Petitioner, W.S.L., with the following: First Degree Murder contrary to Florida Statute 782.04(1)(a), Sexual Battery contrary to Florida Statute 794.011(2), two counts of Attempted Sexual Battery contrary to Florida Statute 794.011/777.04, and Aggravated Battery contrary to Florida Statute 827.03 (R10,11). All of said events allegedly occurred on September 14, 1983. After having his Motion for Determination of Competency to Stand Trial denied, W.S.L. had a trial with the Honorable Jack A. Page, Circuit Judge, presiding on April 19 and 23, 1984 (R21-23,80,281). After hearing testimony, the trial court found W.S.L. guilty as charged on all counts, adjudicated W.S.L. delinquent, and committed W.S.L. to the Department of Health and Rehabilitative Services for an

indefinite period of time or until his nineteenth birthday, whichever first occurs (R48,51,426).

Nine-year-old W.S.L. did not testify nor did he present any evidence.

W.S.L. was committed on May 14, 1984; and he timely filed his Notice of Appeal on May 31, 1984 (R51,55).

On appeal W.S.L. attacked many areas in which it was felt the trial court erred. The Second District Court of Appeal agreed, in part, on two of the issues W.S.L. presented. The Second District Court of Appeal agreed that W.S.L. could not be guilty of both felony murder and the underlying felony and reversed the conviction and sentence for the underlying sexual battery. The court, however, certified the issue to this court; and the Attorney General has filed a brief on this issue. The Second District Court of Appeal also agreed with W.S.L.'s contention that a competency hearing should have been conducted when reasonable grounds were presented to place W.S.L.'s competency in issue. Instead of granting a mistrial, however, the Second District Court of Appeal directed the trial court to hold an evidentiary hearing to determine if W.S.L.'s competency could be made retrospectively. W.S.L. contends that the Second District Court of Appeal erred in allowing for this hearing and in its rejection of the remaining issues.

The State filed a Notice to Invoke Discretionary Jurisdiction on June 24, 1985; and W.S.L. filed a Cross-Notice on June 27, 1985. The Second District Court of Appeal's opinion was issued on June 12, 1985.

STATEMENT OF THE FACTS

Nineteen-year-old Evette Diane Lee, the mother of three children including eight-month-old Barbara Parks, testified that on September 14, 1983, she took two of her children to her mother's house (R85-87). It was noted that Barbara had Down's Syndrome and cardiac problems requiring medication (R86). Ms. Lee had left Barbara and her other daughter with her mother on the front porch, and then she snuck out of the house through the back door without telling anyone where she was going (R87,88). Ms. Lee stated that when she left, Barbara had no marks on her body anywhere (R88). Ms. Lee returned to her mother's house about an hour and a half later, but could not locate her mother or Barbara (R89). Having used the next door neighbor, W.S.L.'s mother, frequently as a babysitter, Ms. Lee went next door to see if Barbara was there (R90,105,106).

When Ms. Lee asked W.S.L.'s mother about Barbara, W.S.L.'s mother informed Ms. Lee that she did not have the baby (R90.134). Apparently, Ms. Lee's mother was angry with Ms. Lee for repeatedly leaving the baby and then sneaking out of the house (R115,116,122). When Ms. Lee's mother had to go to Lakeland that night, she took Barbara next door and told W.S.L.'s mother to tell her daughter that she did not have the baby (R116-118,123). In doing this, Ms. Lee's mother wanted to scare her daughter and teach her a lesson (R118,125,131,132).

When Ms. Lee asked W.S.L.'s mother about the baby and W.S.L.'s mother said that she did not have it, Ms. Lee left and visited with friends for another two hours (R90.104,107,108). At 10:30 p.m. Ms. Lee went back to the neighbor's house and this time W.S.L.'s mother stated that she did have the baby and returned the baby to Ms. Lee (R90.91,107,108). When Ms. Lee got the baby home and could see her in bright lights, she noted that the baby had a blackeye and her nose, lips, and head were bleeding (R92,93). The baby's dress was torn, and she was not moving (R92-94). After changing the baby, she noted that the baby was turning blue so she called the paramedics (R94,95,111). After calling the paramedics, Ms. Lee got W.S.L.'s mother to come over to ask her what had happened to the baby (R95). W.S.L's mother then got her two boys, W.S.L. and Andrue, and was questioning them about what had happened to the baby (R95,96). Ms. Lee noted that she had taken her baby over to the neighbor's home many times prior to this evening and nothing had ever happened to the baby before (R111,112).

W.S.L.'s mother stated that she received the baby around six or seven p.m. and returned the baby to her mother after ten p.m. (R132,140). During that time period, W.S.L.'s mother used some of her sister's baby milk and diapers to change the baby inasmuch as Ms. Lee had not brought any food or diapers with her when she left the baby at her mother's (R132,154,155). W.S.L.'s mother

then rocked the baby to sleep and put her in bed where her two sons, W.S.L. and Andrue, slept (R133). When Ms. Lee came looking for her baby at about eight p.m., W.S.L.'s mother told her son Andrue to hide the baby so that Ms. Lee would not see her (R134,135). After W.S.L's mother talked with Ms. Lee, she found Andrue sitting in the closet with the baby (R135). At that point she told Andrue to put the baby back in bed (R135). At about nine p.m., W.S.L.'s mother put her two sons to bed and checked on the baby (R136). When she did so, she turned on the light and noted that there was nothing wrong with the baby (R136,137). At one point after that and before the baby was picked up, W.S.L.'s mother could hear W.S.L. talking and she told him to hush up and go to sleep (R138-140).

When Ms. Lee came for her baby after ten p.m., W.S.L.'s mother went into the bedroom and found the baby lying on the floor on her stomach (R140). She noted that the baby was not moving, crying, or making any noises (R140). She picked the baby up, straightened her clothes, and gave her to her mother; but did so without turning on any lights (R141). Ms. Lee left with the baby, but three minutes or so later Ms. Lee's brother came and asked W.S.L.'s mother to go next door (R141). When W.S.L.'s mother saw the baby and her injuries, she got Ms. Lee's brother to go next door and get W.S.L. and Andrue out of bed (R141). When she asked the boys what had happened to the baby, both boys

started talking and blaming each other (R142,143). W.S.L. informed his mother that he was throwing the baby up in the air because she was crying and that she had busted her lip (R143). W.S.L. then stated that she had fallen on the floor (R143,144). When the baby's mouth started to bleed, W.S.L. went into the bathroom, got some paper, and wiped the baby's mouth (R144). W.S.L. then stated that he had ripped the baby's dress when he had picked her up from the floor (R144). W.S.L.'s mother did admit to having several hard-core pornographic books lying around her bedroom floor, one on which was entitled "Blackass" (R162,163).

Dr. Raymond McClain, an emergency physician at Bayfront Medical Center, stated that he received Barbara Parks at 10:38 p.m. on September 14, 1983 (R190-193). When the paramedics brought her in, Ms. Parks had been started on some oxygen but nothing else had been required prior to that (R193). When Ms. Parks arrived, she was unresponsive and limp but she was breathing and warm with a normal pulse rate (R194). After the examining the baby, Dr. McClain turned her over to a pediatric residence physician (R195). Shortly after turning Ms. Park's care over to Dr. Aoun, Ms. Parks arrested (R195). CPR was then performed in an attempt to resuscitate the child (R198). Dr. McClain did note that a body x-ray was taken of the child, and the x-rays showed no fractures or bleeding into the chest (R197).

When asked if there were any procedures available to an emergency room physician to determine whether or not there was internal bleeding, Dr. McClain did state that there was a technique for checking the abdomen for freely floating blood (R203,204). This technique called lavage or washing could have been performed on a child but was not done in this case (R204). The doctors had no indication that internal bleeding was occurring in the abdomen area and did not have enough time to assess the seriousness of the child's internal bleeding (R205,209). When asked about the tears and injuries to the child's anus and vagina, Dr. McClain indicated that said injures were not immediately life threatening and could be tended to at a later time (R210).

Dr. Ragab Aoun, a senior pediatric resident with All Children's Hospital, examined Ms. Parks at the Bayfront Emergency room at 11:00 p.m. on September 14, 1983 (R171,176,177). Dr. Aoun noted he observed an eight-month-old Down-looking child who was not breathing and who had on an oxygen mask (R177). When the baby failed to respond to medicine, Dr. Aoun supervised CPR on the child (R179,180). When the baby failed to respond to these attempts to resuscitation, Dr. Aoun pronounced the baby dead at 11:38 p.m. (R180). When asked why the baby's stomach was not checked for a blood loss, Dr. Aoun stated that lavaging a child is not done regularly in pediatrics and they did not perform this test in this particular case (R184). Dr. Aoun then stated that

at the time of his rendering emergency medical treatment to the baby, he did not realize that she was bleeding internally (R189).

Several hangers and a pencil were retrieved from the bedroom floor where W.S.L. and Andrue slept and examined for traces of blood (R216-218,238-241). Testing of these items failed to reveal the presence of any human blood (R240,241,249,250). Tests performed on the boys' bedsheets, however, revealed blood stains of a type consistent with Ms. Parks' blood type (R221,231,232,243-246).

W.S.L.'s seven-year-old brother, Andrue, stated that he remembered the night when Barbara Parks came to visit and was placed in his and his brother's bed (R255,263,264). According to Andrue, W.S.L. touched the baby first by picking her up by the shoulders and throwing her on the bed (R265,266). W.S.L. then told Andrue to also throw her on the bed, and Andrue did so (R267). When Andrue threw her on the bed, however, she landed on the bed and then fell on the floor (R267). Andrue then picked the baby up (R269). At one point, Andrue stated that W.S.L. and he took the baby into the closet and put dirty clothes on the baby in order to hid the baby from the baby's mother (R270-273,303,304). Also, while the baby was in the closet, the baby was placed on the floor, W.S.L. held her mouth, kneeled on her arms and chest somewhat, and Andrue held her feet (R271,272,300).

After awhile, Andrue took the baby out of the closet and put her in the bed (R275). W.S.L. then obtained a red pencil from their room, moved the baby's diapers aside, put the pencil between her legs, and moved it back and forth (i.e., in and out) (R276,279,300,301,312,313). W.S.L. the gave the pencil to Andrue and told Andrue to do the same thing, which Andrue did (R280). Andrue also indicated that W.S.L. hit the baby in the head with a belt buckle, causing the baby to bleed (R282-285). At that point W.S.L. went into the kitchen, got a cup of water, and put some water on the baby to wash the blood off (R285-287). W.S.L. also took a hanger from their bedroom and tried to put it in the baby's butt (R287,288). After he did that, he gave the hanger to Andrue and told him to do the same (R288,289). Andrue then did the same thing with the hanger (R289).

When asked if he and W.S.L. had ever examined the magazines in his mother's room showing pictures of men and women in various sexual positions, Andrue stated that they had looked at such magazines and had seen pictures of a man placing his penis in a woman's mouth (R289-292). Andrue then stated that on the night in question, W.S.L. placed his penis in the baby's mouth and went to the bathroom in her mouth (R292,293). At one point Andrue indicated that the baby had made him upset or mad that night, but he did not know why or did not say why (R293,294). Andrue also stated that he never saw W.S.L. choke the baby or kick the baby

or punch the baby (R296). Andrue did state, however, that W.S.L. did bite the baby on the stomach (R296,297). Andrue then identified a magazine from his mother's room that he had seen before entitled "Blackass" (R310).

Medical Examiner Joan Wood performed the autopsy on Barbara Parks (R318-320). Dr. Wood noted several bruises on the baby's head and face, a tear to the lip, a bite mark on the stomach, a tearing injury to the thumb on the right hand, and tearing to the anus and vaginal tissues (R322-327). Dr. Wood noted that a laceration and bruise on the right side of the face could have been caused by a coat hanger, and a puncture wound in the area of the vagina could have been caused by a pencil or the sharp end of a coat hanger (R327-330). The interior examination revealed a heart defect (R332,333). There was also a large quantity of free-moving blood within the abdomen which represented the cause of death to the child (R333). Due to the blunt trauma to the lower chest and upper abdomen area of the child, the internal organs were damaged resulting in blood loss into the abdomen (R332,334). This blunt trauma to the lower chest and upper abdomen resulted in the child's death (R333).

When asked if a nine-year-old child kneeling on top of the deceased could have caused the type of injuries resulting in the child's death, Dr. Wood indicated kneeling on the upper abdomen and lower chest area could have created the internal bleeding

(R335,336). When asked if bouncing a baby off the bed and on to the floor could have caused the type of trauma resulting in the baby's death, Dr. Wood stated it was doubtful that falling on the floor or on the bed would have had sufficient force to cause this type of injury (R337). Dr. Wood did indicate, however, that if the child impacted with the firm portion of the mattress such as a corner, then this could have caused the type of injury involved (R337,338). Dr. Wood then stated that the injuries she observed in the child could have been inflicted by a seven-or-nine-year-old child (R338,339). Although the bruises and lacerations could have occurred a few hours before the child's death, Dr. Wood stated that the internal injuries were of such magnitude that the child would have been in need of medical care within one-half hour after having those injuries inflicted (R339).

When asked about the baby's heart condition, Dr. Wood indicated that it had a significant effect on her injuries in that her heart could not pump fast enough to recover from the drop in blood pressure from the bleeding that had occurred (R340). Another child with a normal heart would have had a better chance of surviving such injuries (R341-343). It was noted that this baby's particular heart defect was one of the more serious types of defects (R344,345). It was stated that such a defect would cause the child to have a problem when she

was doing nothing more strenuous than crying or even doing nothing at all (R345,346). When asked about the head injuries and genitalia injuries, Dr. Wood stated that these injuries were not life threatening and did not cause her death (R346,347,349-351).

Forensic Dentist Dr. Kenneth Martin examined the bite mark on Barbara Parks' stomach prior to the performance of the autopsy (R358-361). He then compared the bite marks to the impressions of both W.S.L. and Andrue (R362). Dr. Martin definitely eliminated Andrue as the maker of the bite mark, and stated that W.S.L.'s bite pattern lined up identically with the bite mark on the child (R365,367). Dr. Martin then indicated that according to an expert dentist, five points of comparison would be enough to single out one person from anyone else in the world in comparing a bite mark; and Dr. Martin was able to find four points of comparison between W.S.L. and the bite mark on the child (R366,367). The percentage of someone else having that same bite mark with four points of comparison was estimated to be one out of seven hundred million people (R367).

SUMMARY OF ARGUMENT

The double jeopardy clauses of the United States and Florida Constitutions protect against multiple punishments for the same offense. Legislative intent determines which punishments are unconstitutionally multiple. The legislature does not intend separate convictions and sentences for necessarily included lesser offenses. In felony murder cases, the underlying felony is a necessarily included lesser offense. Therefore, separate convictions for both felony murder and the underlying felony are not permitted.

In regards to the Respondent/Cross-Petitioner's second issue, the Second District Court of Appeal erred when it held that a competency hearing could be held to retroactively determine W.S.L's competency to stand trial. A recent Florida Supreme Court case has ruled that such a hearing cannot be made, and a defendant is entitled to a new trial regardless of the findings at the competency hearing.

On the first-degree felony murder charge, W.S.L. argues that the underlying felony of sexual battery had nothing to do with the cause of death. Because Florida case law requires a causal connection between felony murder and the underlying felony and there is no causal connection in this case - the baby did not as a result of a sexual battery or any acts associated with a sexual battery - he could not be declared delinquent on a felony murder

charge. W.S.L. then points out that he could not be convicted of the lesser of third-degree murder because the charging document does not allege sufficient facts to bring in third-degree murder as a lesser. W.S.L. notes that under the standard jury instructions, third-degree is a factual lesser of first-degree felony murder and requires factual allegations in the charging instrument.

On the two attempted sexual battery charges, W.S.L. could not be adjudicated delinquent because the charges dealt with foreign objects and there was no proof or allegation of sexual gratification on W.S.L.'s part. Existing case law requires proof of sexual gratification when foreign objects are used. W.S.L. was charged with using a pencil/hanger in touching the infant's anus and vagina.

As to the sexual battery involving the placing of W.S.L.'s penis into the infant's mouth, there is lack of credible evidence to support such a charge. The only witness to this effect was a very young child who was lead on this issue by the State. In addition, the witness's testimony was unsupported by the physical evidence present. According to Andrue, W.S.L. "peed" into the baby's mouth. This fact was unsupported by the physical evidence as testified to by the medical examiner and the mother.

Last but not least, on the charge of aggravated sexual battery, there must be evidence that the accused intended to

cause great bodily harm to the victim. Merely doing an act that causes great bodily harm is not enough. W.S.L. had no such intent.

ISSUE I

WHEN A DEFENDANT IS GUILTY OF FELONY MURDER, CAN HE BE CONVICTED OF, ALTHOUGH NOT SENTENCED FOR, THE UNDERLYING FELONY?
(As stated by Petitioner.)

In Whalen v. United States, 445 U.S. 684, 688, 100 S.Ct. 1432, 63 L.Ed.2d 715, 721 (1980), the United States Supreme Court ruled:

> The Fifth Amendment guarantee against double jeopardy protects not only against a second trial for the same offense, but also "against multiple punishments for the same offense," ...But the question whether punishments imposed by a court after a defendant's conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized.

This Court has repeatedly found that the legislature intends separate convictions and sentences only for separate offenses and does not intend separate convictions and sentences for both a greater and a necessarily included lesser offense. State v. Gibson, 452 So.2d 553, 556-558 (Fla. 1984); Bell v. State, 437 So.2d 1057, 1058 (Fla. 1983); Borges v. State, 415 So.2d 1265, 1267 (Fla. 1982). See 775.021(4), Florida Statute (1983). Convictions for lesser included offenses are punitive in effect because they expose the defendant to enhanced sentences under both the sentencing guidelines and habitual offender statutes, they adversely affect parole release dates in

those cases where parole remains available, and they may be used as impeachment evidence in subsequent criminal proceedings. Bell, supra at 1059; Fla.R.Crim.P. 3.701. Since the legislature does not intend separate convictions for such offenses are punitive, separate convictions are proscribed by the multiple punishment protection afforded by the double jeopardy clauses of the United States and Florida Constitutions. Portee v. State, 447 So.2d 219, 220 (Fla. 1984); Bell, supra at 1058, 1061. See Whalen, supra at 445 U.S. at 688-690; U.S. Constitution, amends. V and XIV; Article 1, sec. 9, Florida Constitution.

Whether a lesser offense is necessarily included in a greater offense is determined by examining the statutory elements or the two offenses. The two offenses are separate and may be separately punished only if each offense requires proof of a fact the other does not. Whalen, supra 455 U.S. at 691-692; State v. Baker, 456 So.2d 419, 420 (Fla. 1984); Bell, supra at 1058; 775.021(4), Florida Statute (1983).

In a felony murder case, the underlying felony is a statutory element of the felony murder. Thus, the elements of the underlying felony are wholly included within the elements of felony murder; and the underlying felony is a necessarily included lesser offense. Whalen, supra 445 U.S. at 693-694; Copeland v. State, 457 So.2d 1012, 1018 (Fla. 1984); Gibson, supra at 557 n.6; State v. Hegstrom, 401 So.2d 1343, 1346 (Fla.

1981); 782.04(1)(a), Florida Statute (1983). Petitioner argues that the underlying felony is not a necessarily included lesser offense because it is possible to commit felony murder without committing the particular underlying felony. The same argument was expressly considered and rejected by the United States Supreme Court in Whalen, supra 445 U.S. at 694, 695, 100 S.Ct. at 1439:

> The government contends that felony murder and rape are not the "same" offense under Blockburger, since the former offense does not in all cases require proof of a rape; that is, D.C.Code sec. 22-2401 (1973) proscribes the killing of another person in the course of committing rape or robbery or kidnapping or arson, etc. Where the offense to be proved does not include proof of a rape - for example, where the offense is killing in the perpetration of a robbery - the offense is of course different from the offense of rape, and the Government is correct in believing that cumulative punishments for the felony murder and for a rape would be permitted under Blockburger. In the present case, however, proof of rape is a necessary, element of proof of the felony murder, and we are unpersuaded that this case should be treated differently from other cases in which one criminal offense requires proof of every element of another offense. There would be no question in this regard if Congress, instead of listing the six lesser included offenses in the alternative, had separately proscribed the six different species of felony murder under six statutory provisions. It is doubtful that Congress could have imagined that so formal a difference in drafting had any practical significance, and we ascribe none to it. To the extent that the Govern-

> ment's argument persuades us that the matter is not entirely free of doubt, the doubt must be resolved in favor of lenity. See Simpson v. United States, 435 U.S. 6, 14-15, 98 S.Ct. 909, 914, 55 L.Ed.2d 70; see also n. 10, infra.
>
> Congress is clearly free to fashion exceptions to the rule it chose to enact in sec. 23-112. A court, just as clearly, is not. Accordingly, notwithstanding the arguments advanced by the government in favor of imposing consecutive sentences for felony murder and for the underlying felony, we do not speculate about whether Congress, had it considered the matter, might have agreed. It is sufficient for present purposes to observe that a congressional intention to change the general rule of sec. 23-112 for the circumstances here presented nowhere clearly appears. It would seriously offend the principle of the separation of governmental powers embodied in the Double Jeopardy Clause of the Fifth Amendment if this Court were to fashion a contrary rule with no more to go on than this case provides. (Footnotes deleted. Emphasis added.)

Rotenberry v. State, 468 So.2d 971 (Fla. 1985), a case relied upon by Petitioner, can be distinguished from the issue at hand based on Whalen's reasoning.

Whalen points out that legislative intent to treat the underlying felony as a separate crime from the felony murder crime could have been clearly expressed by making each underlying felony a separate statutory provision instead of running all the possible underlying felonies together in one provision. Without this type of clarification, it could not be assumed that the

legislative intent was for separate convictions and sentences. In Rotenberry, however, this court dealt with a statue that was divided into three separate statutory provisions. Because the statue was clearly divided, legislative intent could be assumed that separate convictions were allowed in drug trafficking versus drug possession or delivery cases as held in Rotenberry. This same assumption, however, cannot be made in felony murder and underlying felony cases. The statue is not clearly divided; and if there is a question as to legislative intent, that question must be resolved in the defendant's favor. See 775.021(1), Florida Statute.

Because the underlying felony is a necessarily included lesser offense to felony murder and the legislature did not intend separate convictions and sentences for necessarily included lesser offenses, the double jeopardy clauses of the United States and Florida Constitutions prohibit the imposition of separate convictions and sentences for the underlying felony. See Gibson, supra at 558 n.7; Bell, supra at 1058, 1061. However, this Court has created an anomaly in the law by allowing convictions for the underlying felony while reversing sentences for the underlying felony in Copeland, supra at 1018; Hawkins v. State, 436 So.2d 44, 47 (Fla. 1983); and Hegstrom, supra at 1346. See Snowden v. State, 449 So.2d 332, 335-337 (Fla. 5th DCA 1984), pet. for rev. pending, Fla. Case No. 65,176.

This Court recognized the conflict between Hegstrom, supra, and Bell, supra, in Gibson, supra at 558 n.7. This conflict should be resolved by holding that separate convictions for felony murder and the underlying felony are not permitted by section 775.021(4), Florida Statute (1983), and the double jeopardy clause. Id. The decision of the District Court reversing the conviction for the underlying felony was correct and must be affirmed.

ISSUE II

DID THE SECOND DISTRICT COURT OF APPEAL ERR IN HOLDING THAT A HEARING COULD BE USED TO DETERMINE W.S.L.'s COMPETENCY RETROACTIVELY? (As stated by Respondent/Cross-Petitioner.)

The Second District Court of Appeal correctly ruled that the tiral court erred in not conducting a competency hearing once the issue was raised via reasonable grounds. [1.] See Boggs v. State, 375 So.2d 604 (Fla. 2d DCA 1979); Fla.R.Juv.P. 8.170, and Fla.R.Crim.P. 3.210. The Second District Court of Appeal erred, however, in holding that a hearing should be conducted as to whether or not a retroactive determination of competency could be made.

In the recent case of Hill v. State, Case Nos. 65,223 and 62,227 (Fla. June 20, 1985)[10 F.L.W. 324], the Florida Supreme Court held competency hearings may not be held retroactively inasmuch as such a proceeding does not adequately protect a defendant's rights. This court went on to state that such a hearing should be conducted contemporaneously with the trial. The Second District Court of Appeal's opinion in W.S.L.'s case must be modified to comport with the decision in Hill. The convictions and sentences should be reversed and remanded with directions that the State may proceed to re-prosecute W.S.L. after it has been determined that he is competent to stand trial.

ISSUE III

DID THE TRIAL COURT ERR IN DENYING W.S.L's MOTION FOR JUDGMENT OF ACQUITTAL AS TO THE CHARGE OF FIRST DEGREE FELONY MURDER WHEN THE STATE FAILED TO SHOW A CAUSAL CONNECTION BETWEEN THE UNDERLYING FELONY OF SEXUAL BATTERY AND THE RESULTING DEATH? IF ERROR WAS COMMITTED, CAN THE CHARGE BE REDUCED TO THIRD-DEGREE MURDER?
(As stated by Respondent/Cross-Petitioner.)

The State's Petition for Delinquency as to the First-Degree Murder charge charged W.S.L. with Felony Murder in that Barbara Parks died as a result of wounds inflicted during the commission of a sexual battery (R10). The evidence presented at trial, however, never connected the sexual battery to the injuries that caused the child's death. In fact, the testimony by the medical examiner clearly removed all links between the sexual battery and cause of death.

According to Andrue, W.S.L. threw the baby on the bed and then Andrue threw the baby on the bed; but when Andrue threw the baby on the bed, she bounced off and fell on the floor (R265-268). Andrue's version as to time sequence is very unclear, but at one point he and W.S.L. hid with the baby in the closet to keep the baby's mother from finding her and W.S.L. kneeled partially on the baby (R270-272,303,304). According to Andrue and W.S.L's mother, however, she asked Andrue to hide the

baby so that baby's mother could not see her; and Andrue took the baby to the closet (R135).

According to expert testimony, the sexual batteries did not contribute to the baby's death. Dr. Wood stated that none of the injuries to the baby's vagina or anus contributed to the baby's death (R351). Dr. McClain also stated that the injuries to the vagina and anus were not life threatening (R210). The only hypotheses the State could present and the medical examiner could agree with as to the cause of the fatal injuries were kneeling on the baby or bouncing her off the corner of the mattress on to the floor (R334-337). In other words, the sexual battery did not cause the baby's death; and if the sexual battery had never occurred, the baby still would have died.

Florida Statue 782.04(1)(a) states:

> (1)(a) The unlawful killing of a human being:
>
> . . .
>
> 2. When committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any:
>
> . . .
>
> c. Sexual battery,
>
> . . .
>
> is murder in the first degree and constitutes a capital felony. ...

Case law has established that if a defendant is going to be held liable for a homicide based on the commission of an underlying felony, the homicide must be causally connected to the underlying felony. Bryant v. State, 412 So.2d 347 (Fla. 1982); State v. Amaro, 436 So.2d 1056 (Fla. 2d DCA 1983). As pointed out in Bryant, supra at 350, "Since it is the commission of a homicide in conjunction with intent to commit the felony which supplants the requirement of premeditation, ... there must be some causal connection between the homicide and the felony." And as was pointed out in Amaro, supra at 1061, "the homicide must have been committed in furtherance of the common criminal scheme, or as a probable, predictable, reasonably foreseeable, or causally connected result of the underlying felony." The question then becomes, what constitutes a causal connection versus an independent act.

The best example distinguishing causal connection versus an independent act in a felony and homicide situation is in Bryant, supra. In that case the defendant agreed to assist the co-defendant in the burglarizing of an apartment that, according to the co-defendant, was supposed to be vacant. When the defendant arrived at the apartment in question, he was surprised to see the victim tied up, nude, and on the floor. The defendant informed the co-defendant that the victim was improperly tied and could escape. The defendant then retied the victim by running a

cord through the victim's mouth and around his hands and placed the victim on the bed. When the defendant left the apartment, the victim was gagging but alive and had not been sexually assaulted. The victim's nude body was later found in a kneeling position against the bed with a necktie around his neck and with obvious evidence of a violent sexual assault having occurred. The victim had died of asphyxia by strangulation. The defendant asserted and the Supreme Court agreed that the death could have occurred from an act totally independent from the crime of burglary and robbery in which the defendant was involved. If the death was not caused or materially contributed to by any acts committed during the perpetration of the burglary and robbery and was solely caused by acts committed during the perpetration of the sexual battery, if the defendant was not present and did not participate in the perpetration of the sexual battery, and if the sexual battery was an independent act of another and not part of a common scheme or design, then the defendant could not be guilty of first-degree felony murder.

In the case at bar, there is no evidence establishing the necessary causal connection between the child's death and the underlying felony. The act of kneeling on the child in the closet was part of the game to hide the baby from her mother, and the act of throwing the baby on the bed where the baby bounced off and fell on the floor had no apparent motive with the

possible exception of playing (R265). [When asked why W.S.L. threw the baby on the bed, Andrue said he didn't know (R267). When asked about the baby crying, Andrue said the baby did not cry until he threw her on the bed and she fell on the floor (R266-268).] These acts had nothing to do with the sexual acts, and the sexual-act injuries had nothing to do with the death. There was no evidence of a common criminal scheme to sexually batter the baby that resulted in the homicide. The homicide was not a probable, predictable, reasonably foreseeable result of the sexual battery; and the sexual battery did not cause the death. Had the children never sexually touched the baby, the baby would have died anyway from its internal injuries; and had the baby only been sexually assaulted - it is to be noted that no force was necessary to sexually assault the baby because an eight-month-old infant is incapable of resisting - the baby would never have died.

Examples of a homicide and its causal connection to an underlying felony resulting in felony murder charge are legion: during an attempt to escape from the scene of the underlying felony, someone is killed, Amaro, supra; beating someone to effect a robbery or rape and the victim dies from the beating, Adams v. State, 341 So.2d 765 (Fla. 1976), and Bryant supra; and inflicting some type of wound while committing a felony, and the victim received inadequate or negligent medical treatment and

dies, Adams v. State, 310 So.2d 782 (Fla. 2d DCA 1975). The common denominator to all of these examples is that the victim would not have died but for the commission of the underlying felony. The victim would not have died if there had not been a felony crime scene to escape from; the victim would not have died if he hadn't been forced to receive negligent treatment from the doctors and/or hospital due to injuries received during the commission of the felon. It makes no difference whether it is the defendant or a co-defendant who causes the fatal injuries; if they both agreed to commit the felony, then they are both liable for the homicide that results therefrom. Adams v. State, 341 So.2d 765 (Fla. 1976).

In our case, however, there is no causal connection between the homicide and the sexual battery. It cannot be said that the baby would not have died but for the sexual battery. It cannot be said that in order to do the sexual battery such force was exerted to cause fatal injuries. And it cannot be said that the sexual battery injuries caused the homicide. The fatal injuries causing the death were independent acts, separate and distinct from the sexual battery. W.S.L. is not guilty of first-degree felony murder by sexual battery, and the trial court erred in denying his Motion for Judgment of Acquittal on the charge in first-degree felony murder.

The remaining issue is whether or not W.S.L. could be convicted of third-degree murder as a lesser included. Although the facts at issue could justify third-degree murder as a lesser, the Petition for Delinquency did not contain necessary allegations to justify a lesser. The Petition on the first-degree murder charge read as follows:

> Your Petitioner, undersigned Assistant State Attorney, respectfully represents that W.S.L. of the age of nine (9) years (09/26/74), is a delinquent child within the intent and meaning of the laws of Florida, in this, to wit: The said child did commit a delinquent act. On or about September 14, 1983, in the County of Pinellas, State of Florida, the said child did unlawfully, while engaged in the perpetration of, or in an attempt to perpetrate the crime of sexual battery, did inflict upon Barbara S. Parks, a human being, mortal wounds, and as a direct result thereof, the said Barbara S. Parks died; contrary to Florida Statute 782.014(1)(a), a Capital Felony. (R10)

Inasmuch as third-degree murder under Florida Statute 782.04(4)(a) requires an unlawful killing when perpetrated without any design to effect death during the perpetration of a felony other than those listed for felony murder (such as sexual battery), it is obvious that the allegations in the Petition do not justify third-degree murder as a lesser. In order for third-degree murder to apply, some sort of felony - such as battery or child abuse - must take place; and the State would have had to have made allegations pertaining to this other felony. Battery, for example, would require an allegation as to

touching against the will or intentionally causes bodily harm and child abuse requires culpable negligence resulting in great bodily harm. [2.] Allegations of sexual battery resulting in death do not encompass another type of felony necessary for third-degree murder. Sexual battery on a child can take place regardless of the child's consent, has nothing to do with culpable negligence, and may or may not result in intentionally caused bodily harm. The Petition in this cause is simply too narrow to encompass third-degree murder.

The question, however, is not whether the allegations in the Petition encompass the lesser of third-degree murder - the State basically admitted in its Memorandum of Law on the issue that the Petition's allegations were lacking (R43-45); but whether such allegations must be made in the charging document in order to allow for lessers in a situation involving degrees of a particular crime.

According to Fla.R.Crim.P. 3.490:

> If the indictment or information charges an offense divided into degrees, the jury may find the defendant guilty of the offense charged or any lesser degree supported by the evidence. The judge shall not instruct on any degree as to which there is no evidence.

The State argued that according to this rule, it matters not what allegations are in the charging document. If the crime charged is divisible by degrees and the facts support a lesser degree, a

lesser degree can be considered even if the allegations in the charging document fail to support such a lesser degree. Defense counsel argued that according to Brown v. State, 206 So.2d 377 (Fla. 1968), non-mandatory lesser includeds must be comprehended by the allegations of the charging document and supported by the proof. It was then pointed out by defense counsel that under the Schedule of Lesser Included Offenses contained in Florida's Standard Jury Instructions for Criminal Cases, third-degree murder is not a necessarily included offense as it is listed as a Category 2 for first-degree murder. Such Category 2 offenses "may or may not be included in the offense charged, depending on the accusatory pleading and the evidence, which will include all attempts and some lesser degrees of offenses (emphasis added.) Florida Standard Jury Instructions (Crim.), p. 257 (R35-37).

This particular issue was briefly touched upon by the Second District Court of Appeal in Linehan v. State, 442 So.2d 244 (Fla. 2d DCA 1983). The court noted that "the subject of lesser included offenses under first-degree (felony) murder is a difficult one with inherent, latent complexities." The Court believed that a lesser was required no matter what the charging document stated as long as the facts were present and then certified a question on the subject in general to this Court. Linehan, id. at 256. The certified question to date has yet to be answered.

W.S.L. would point out that his particular issue is a twist or variation of the issue in Linehan and deserves further attention in this Honorable Court if this Court agrees that first-degree murder is not supported by the evidence. Inasmuch as the charging document failed to inform the accused of the lesser of the third-degree murder and the accused is entitled to know exactly with what he is charged, third-degree murder is not a lesser.

ISSUE IV

DID THE TRIAL COURT ERR IN DENYING W.S.L's MOTION FOR JUDGMENT OF ACQUITTAL AS TO THE COUNT OF SEXUAL BATTERY DUE TO INSUFFICIENT EVIDENCE AND OF TWO ATTEMPTED SEXUAL BATTERY CHARGES WITH A PENCIL/HANGER IN THE VAGINA AND ANUS WHEN THE STATE FAILED TO SHOW EVIDENCE OF INTENT TO COMMIT THE BATTERIES FOR THE PURPOSE OF SEXUAL PLEASURE?
(As stated by Respondent/Cross-Petitioner.)

Case law in Florida has developed to the point where it has been determined that sexual gratification need not be alleged or proved in order to establish a sexual battery involving male and female sexual organs, but the issue of whether or not sexual gratification is necessary in a case involving foreign objects and a sexual organ has been left pointedly unanswered. Aiken v. State, 390 So.2d 1186 (Fla. 1980); State v. Aiken, 370 So.2d 1184 (Fla. 4th DCA 1979); Hendricks v. State, 360 So.2d 1119 (Fla. 3d DCA 1978); and State v. Alonso, 345 So.2d 740 (Fla. 3d DCA 1977).

Alonso, id., dealt with a situation involving foreign objects against sexual organs; but the court made the sweeping statement that psychosexual motivation - i.e., sexual gratification - was a necessary element for a sexual battery. Alonso, id. at 742, 743. In Hendricks, supra, the same court revisited Alonso and clarified it to the extent that the holding was limited to situations involving foreign objects. The court held:

> Clearly, when an object other than the actor's sexual organ is brought into union with the victim a question of intent to derive sexual gratification comes into play and becomes a necessary element of the crime. If this were not so, innocent conduct not intended by the Legislature to be included would be made criminal.
>
> However, under facts such as those in the instant case (where the act involves the sexual organ of the actor) there can be no question that the act itself infers a criminal intent requiring no specific intent other than that evidenced by the doing of the acts constituting the offense, (Askew v. State, [118 So.2d 219 (Fla. 1960)]) and intent of the actor to attain sexual gratification is not an element of the crime which must be alleged and proved.

Hendricks, supra at 1123, 1124.

When State v. Aiken, supra, came along, the majority of the Court refused to consider the idea of foreign objects and sexual gratification inasmuch as it was dealing only with a situation involving sexual organs only and no foreign object. The court stated it would not consider the question of intent to gain sexual gratification where the actor used a foreign object. The court then stated: "It is simply our decision that a desire for sexual gratification is not a necessary element to a sexual battery as charged here." State v. Aiken, supra at 1185. The specially concurring opinion by Judge Dauksch pointed out that by explicitly restricting the opinion to sexual organs only, the court was inviting further appellate litigation of the statute

with slightly different facts involving foreign objects. It is to be noted that when the Florida Supreme Court reviewed Aiken, the opinion adopted the majority decision and made no mention of the exception for foreign objects. Justice McDonald, however, in a specially concurring opinion noted the gap created by the opinion as pointed out by Judge Dauksch. Judge Dauksch's prophetic opinion has now been realized with this case.

In this case we have two very young boys, ages eight and six at the time (R127,128), who take turns poking an infant with a hanger and/or pencil in the baby's genital area (R275,276,279, 280,288,289,325-330). Andrue indicated that they moved the pencil between the baby's legs and put the hanger in the baby's "butt" (R278,288,289), but why he and W.S.L. did this is not asked or answered. What is brought out, however, is the fact that the boys have been exposed to highly pornographic materials in which men place objects into women's various orifices (R289-292,301,302,305-307); and the inference is clear that these boys were merely imitating what they had seen in the magazines without any true understanding of what they were doing. Sexual gratification was not alleged, nor proven, and not even considered a reasonable possibility - contrary to the Second District Court of Appeal's opinion (which, it is to be noted, does not give a record cite for support).

Due to the fact that the courts have been reluctant to include foreign objects in its determinations that sexual gratification is not a necessary element of sexual battery and the facts in this case that obviously show a battery as opposed to a sexual battery inasmuch as "sex" with all its connotations had nothing to do with this particular case, the trial court should have granted the motion for judgment of acquittal as to the two counts of attempted sexual battery with a pencil and/or hanger. As pointed out in Alonso, supra, the plain meaning of the words in the statute should be heeded and sexual battery should be concerned with criminal sexual conduct. One child's imitation of adults by touching another with a foreign object without some sort of evidence showing sexual gratification (i.e., knowledge of the true purpose behind such touching) is not criminal sexual conduct. Sexual battery in this situation should not be one of strict liability.

In regards to the motion for judgment of acquittal on the sexual battery charge involving W.S.L. placing his penis in the infant's mouth due to insufficient evidence (R371,389), it is to be noted that the only evidence supporting this charge is that of Andrue's testimony. Andrue - lead by the State with the questions requiring "yes", "no" or one-word responses - stated he saw W.S.L. place his "peter" in the baby's mouth and then W.S.L. "peed" in her mouth (R292,293). This statement went

unsubstantiated by independent evidence in that witnesses stated that baby's dress was dry, and there was no sign of urine in the baby's stomach (R110,111,352). Andrue's testimony in this area was too unreliable to justify a conviction for sexual battery. See Robinson v. State, 462 So.2d 471 (Fla. 1st DCA 1984), based on a procedural error in which the defendant obtained a new trial with the renewed possibility of obtaining a judgment of acquittal based on insufficient evidence when the sole witness's testimony of alleged rape was entirely unsupported by scientific evidence. Although the court in Robinson took careful note of Tibbs v. State, 397 So.2d 1120 (Fla. 1981), it also noted that Tibbs stated that appellate courts continue to have authority to reverse a conviction "in the interest of justice" and emphasized that "each situation is unique."

Finally, it is to be noted that if this court rejects all of the above-stated arguments as to lack of evidence to sustain convictions for felony murder and sexual battery, the trial court erred in adjudicating Willie delinquent on both felony murder and the underlying felony; and the underlying felony adjudication should be stricken. See Issue I, above. [3.]

ISSUE V

DID THE TRIAL COURT ERR IN NOT GRANTING W.S.L.'s MOTION FOR JUDGMENT OF ACQUITTAL AS TO THE AGGRAVATED BATTERY CHARGE WHEN THE STATE FAILED TO SHOW W.S.L.'s SPECIFIC INTENT TO INFLICT GREAT BODILY HARM ON THE INFANT?

During his testimony, Andrue failed to give a reason as to why he and W.S.L. hit the baby with a belt, threw her on the bed, or bit her. Andrue indicated he was upset or mad with the baby, but stated he did not know why (R293,294). At one point the boys' actions with the baby were referred to as "playing with the baby" (R298). Andrue did state, however, that neither he nor W.S.L. meant or tried to hurt the baby that night (R304).

According to the charge against W.S.L. in Count Five, W.S.L. was charged with aggravated child abuse via aggravated battery (R11) and aggravated battery is defined as "intentionally or knowingly causes great bodily harm," Florida Statue 784.045(1)(a). Case law has established that aggravated battery is a specific intent crime. State v. Horvatch, 413 So.2d 469 (Fla. 4th DCA 1982); and see Evans v. State, 452 So.2d 1093 (Fla. 2d DCA 1984). A person must not just knowingly touch someone, he must do so as to intentionally or knowingly cause great bodily harm. See Sykes v. State, 351 So.2d 87 (Fla. 2d DCA 1977). In cases involving charges where specific intent is a required element of the offense, the mere doing of the act does not raise

a presumption of criminal intent; the State must prove that the accused had the specific intent involved in the charge. Smith v. State, 100 So. 738 (Fla. 1924). In Smith the Florida Supreme Court held that the mere striking and destruction of the victim's eye was not enough to show malicious intent to maim and disfigure.

The unrefuted evidence was that W.S.L. and Andrue did not mean or try to hurt the baby that night (R304). The fact that the boys were too young to know that kneeling on the baby or throwing the baby on the bed would cause great bodily harm to an infant with a heart problem [4]. does not show the requisite intent for an adjudication on this charge. The trial court erred in not granting the motion for judgment of acquittal on this count.

FOOTNOTES

1. Prior to trial defense counsel filed a Motion for Determination of Competency to Stand Trial, stating that W.S.L. would not discuss the incident with him (defense counsel), did not understand the charges, and did not understand the legal proceedings (R21,22). One doctor's report noted that W.S.L. had no ability to assist his attorney in planning a defense (R22). Defense counsel then asked that three experts be appointed to evaluate W.S.L. in regards to his competence to stand trial (R22,64-78,84,431-459). The trial court denied the motion (R23). During the middle of the proceedings, W.S.L.'s guardian ad litem testified that despite efforts by both himself and defense counsel, W.S.L. was unable to understand the nature of the proceedings and its consequences (R369,370). The guardian then noted that throughout the entire proceeding, W.S.L. read a dozen comic books and drew sketches (R370). W.S.L. paid no attention to the witnesses' - even his own mother - with the sole exception of listening to his little brother (R370).

2. See Florida Statutes 784.03 and 827.04, respectively.

3. It is to be noted that if this court agrees with the above-stated arguments in this issue, then there is insufficient evidence to sustain the sexual battery felony murder conviction inasmuch as there would be no underlying felony to support the conviction.

4. It was noted that had the baby not had such a severe heart defect; the infant would have had a better chance of surviving the incident (R343-346).

CONCLUSION

In light of the foregoing reasons, arguments and authorities, this Honorable Court should uphold the decisions as rendered by the Second District Court of Appeal in this case and in similar cases where the same issue has been determined by the Second District Court of Appeal as to the certified issue raised in the Petitioner's brief. See Dixon v. State, 463 So.2d 342 (Fla. 2d DCA 1985); and Enmund v. State, 459 So.2d 1160 (Fla. 2d DCA 1984). As to the issue involving the Second District Court of Appeal's ruling that a retroactive competency hearing should be held, this court should reverse for a new hearing and trial if W.S.L. is competent as per Hill, supra. The remaining three issues should also be determined in W.S.L.'s favor so as to determine the types of charges W.S.L. can be retried on.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to William I. Munsey, Jr., Assistant Attorney General, Park Trammell Bldg., 8th Floor, 1313 Tampa Street, Tampa, FL 33602, August 8th, 1985.

Respectfully submitted,

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