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IN THE SUPREME COURT OF FLORIDA

THOMAS WAYNE SLAUGHTER, :

Petitioner,

v. CASE NO. 73,743

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

PAULA S. SAUNDERS
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR #308816
LEON COUNTY COURTHOUSE
FOURTH FLOOR, NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

ATTORNEY FOR PETITIONER

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I PRELIMINARY STATEMENT

Petitioner, THOMAS WAYNE SLAUGHTER, was the defendant in the trial court and appellant in the First District Court of Appeal. Respondent, the State of Florida, was the prosecution and the appellee, respectively. The parties will be referred to in this brief as they appear before this Court.

The record on appeal consists of one volume of pleadings which will be referred to in this brief as "R" followed by the appropriate page number in parenthesis. The transcripts of the proceedings in the lower court, including the transcript of the motion hearing on October 1, **1987** and the trial proceedings on December 7, 10 and 11, **1987**, will be referred to herein as "T." The transcript of the sentencing proceeding on January 6, **1988**, and the transcript of the jury selection on December 7, **1987**, are consecutively numbered the same. For the sake of clarity, all references to the sentencing hearing will be designated as "S."

The opinion of the court below is attached hereto as an appendix. The appendix will be referred to as "A."

II STATEMENT OF THE CASE

By information filed April 8, 1987, petitioner was charged with sexual battery of K[redacted] S[redacted] by oral and vaginal penetration with the use of or threat to use a deadly weapon, to wit: a butcher knife (Count I), and with sexual battery of K[redacted] S[redacted] by use of familial or custodial authority (Count 11), which offenses allegedly occurred in August of 1985 (R 9). The information was amended on June 4, 1987, by adding a third count charging petitioner with a lewd and lascivious assault on K[redacted] [illegible])et 1 and 1985 (R 16

Petitioner proceeded to trial on the amended information on September 1, 1987. The trial court granted a judgment of acquittal as to Count I, alleging sexual battery with the use or threat of a deadly weapon, and reduced the charge to sexual battery by use of force not likely to cause serious personal injury (R 28). The jury was unable to reach a verdict, and a mistrial was declared (R 38, 47; T 445).

Following the mistrial, the state filed a second amended information, charging petitioner with the lewd and lascivious assault (Count I), three counts of sexual battery by use of force not likely to cause serious personal injury (Counts 11, III and IV), two counts of sexual battery by use of familial or custodial authority (Counts V and VI), aggravated battery with a deadly weapon, a knife (Count VII), and one count of incest by i g in intercourse t K[redacted] S[redacted] natural daughter (Count VIII)(R 42-43).

Petitioner filed a motion to dismiss Counts I, 111, IV, VI, VII and VIII of the amended information, alleging that Count I was barred by the statute of limitations and that the remaining five counts were the result of prosecutorial vindictiveness (R 47-51). Following a hearing on October 1, 1987, the trial court dismissed Count I and upheld the second amended information with regard to the remaining counts, but agreed to limit petitioner's sentence, if convicted, to the recommended guidelines range to which petitioner would be exposed under the original information, unless the court found reasons to depart (R 57; T 444-480).

Following the dismissal of the lewd and lascivious charge in Count I, the state filed its notice of intent to introduce collateral crime evidence that between approximately 1975 and 1985, petitioner committed multiple acts of lewd and lascivious assault upon K[redacted] S[redacted] (R 58).

Petitioner's second trial also resulted in a mistrial (T 5-6, 37, 228-229). Petitioner proceeded to trial for the third time on December 10-11, 1987, at the conclusion of which, the jury returned verdicts of guilt on all counts as charged (R 86-87; T 341-344).

Petitioner was sentenced on January 6, 1988. After much confusion and discussion as the appropriate sentence vis-a-vis the trial court's ruling on petitioner's motion to dismiss, the court adjudicated petitioner guilty and sentenced him to a term of 15 years on Count 11, and to concurrent terms of 15 years on Counts 111, IV, V, VI and VII, which sentences were ordered to

run consecutive to the sentence on Count I, and to a concurrent term of five years on Count VIII, with credit for 293 days time served on all counts (R 88-104; S 425-231).

Petitioner timely appealed to the First District Court of Appeal (R 107). In his appeal, petitioner argued, inter alia, that the trial court erred in imposing multiple punishments for the commission of crimes which were grounded upon a single act, in violation of this Court's holding in Carawan v. State, 515 So.2d 161 (Fla. 1987). He further argued that the court erred in allowing the state to introduce as similar fact evidence the victim's testimony that petitioner committed various lewd and lascivious assaults upon her for ten years prior to the commission of the instant offenses. Finally, petitioner argued that his sentencing guidelines scoresheet, assessing 100 points for victim injury, was improper because on the date his crimes were committed in August, 1985, the guidelines did not allow victim injury to be scored for each count in a single criminal episode and the 1986 rule change could not be applied retroactively.

On February 1, 1989, the District Court issued its opinion rejecting each argument and affirming petitioner's convictions, but reversing the sentences because the trial court relied upon an erroneous scoresheet in imposing a purported departure sentence. Slaughter v. State, 538 So.2d 509 (Fla. 1st DCA 1989). A timely notice of discretionary review was filed on February 20, 1989, and this Court accepted jurisdiction by order dated May 12, 1989. This appeal follows.

III STATEMENT OF THE FACTS

K[redacted] S[redacted] is a 16 year old tenth grader, who is a cheerleader and active in school and church youth groups. She lives with her mother and stepfather. Petitioner is her father (T 33-34). Her parents divorced when K[redacted] was three or four years old. K[redacted] recalled that prior to their divorce, her mother worked nights, and her father would put her in bed with him and would fondle her breasts and between her legs (T 34-36, 40-41). K[redacted] saw her father sporadically after the divorce. Petitioner would take her to Cedar Key to his parents, and they would share a bedroom. One night when K[redacted] was 13, she woke up to find her father trying to remove her clothes. He fondled her breasts and vaginal area and threatened to hurt her and her mother if she told on him (T 42-44). On another occasion when K[redacted] was ten, she visited her father and his wife Penny in Otter Springs and petitioner again fondled her in the same area (T 44-46). K[redacted] visited her father in Lake Butler when she was 13 and her father was married to Gail, but petitioner never touched her on those visits (T 46-47).

In the summer of 1985, K[redacted] visited her father at the home of her uncle Gordon and his wife, Nancy. She was 14. Her cousin, M[redacted] accompanied her on the visits. One day Gordon and Nancy went to Cedar Key and left K[redacted] and M[redacted] alone with petitioner. K[redacted] and M[redacted] had a fight, and went to bed. K[redacted] stayed up with her father talking. When said she was going to bed, Slaughter said he wanted to talk, and K[redacted] went into her father's bedroom. Petitioner

told her he loved her and would never do anything to hurt her. He hugged her, then ripped open her shirt, and kissed her neck and chest and subsequently removed her pants and tied her hands and legs to the bed. He then went *to* the closet and gave her a shot in the arm and applied electric shocks to her stomach and legs. He inserted a neon pipe into K[redacted] vagina. He next put a cream in her and penetrated her vaginally with his penis. Petitioner then untied K[redacted] hands and legs and made her sit on him, penetrating her again. He also forced her to perform oral sex on him (T 47-55).

Petitioner then took a knife, put it to K[redacted] throat and down her body, and told her that was what would happen if she ever told. She remained in the room for a while and then went *to* M[redacted] room. M[redacted] was still asleep. Nancy and Gordon returned later that day, and petitioner drove K[redacted] and M[redacted] home (T 55-57).

K[redacted] never told M[redacted] what happened because she was afraid. In fact, K[redacted] did not tell anyone for over a year. She first told her boyfriend, R[redacted] M[redacted] and then confided in her guidance counselor, Ms. Blalock. A week later she told her mother (T 57-58).

On cross-examination K[redacted] admitted telling R[redacted] her mother, the prosecutor and a deputy that the offenses occurred in August of 1986, a week before school started. When she had a gynecological examination in February of 1986, K[redacted] told the doctor that she never had sexual intercourse (T 62-64).

[redacted] remembered going with [redacted] to Gordon's and Nancy's trailer during the summer of **1985**. She remembered the year because the two girls were in a beauty contest in the watermelon festival. They put up a tent one night and the next day Gordon and Nancy left. [redacted] did not know where [redacted] slept that night while Nancy and Gordon were gone **(T83-86)**.

J[redacted] B[redacted], K[redacted]'s mother, and petitioner were divorced when [redacted] was four. Ms. B[redacted] had custody of [redacted], but petitioner had liberal visitation rights. When [redacted] was **13** she would become quiet and withdrawn after visiting her father, staying in her bedroom for hours listening to her stereo. She was normally a very active and outgoing child, participating in sports, beauty pageants, and church and school activities. She did not want to visit her father alone and wanted [redacted] to go with her (T **87-88, 90-92**). [redacted] participated in the beauty pageant at the watermelon festival in the summer of **1985**. She also spent a lot of time that summer with her father, who was then living with his brother, Gordon, and sister-in-law, Nancy. During the **1985-1986** academic year, [redacted] began experiencing abdominal pains and was hospitalized for ten days: there was no medical explanation for her pain, and the doctor suggested that [redacted] go into therapy. Ms. B[redacted] did not follow the doctor's advice (T **92-93, 95-96**). [redacted] saw petitioner twice after that summer, once in June of **1986**, at Gordon's and Nancy's new home in Inverness, and again in December of **1986**, in Cedar Key.

In February, 1986, petitioner visited K[redacted] in the hospital (R *96-98*).

K[redacted] was brought **to** Carol Blalock's guidance office in the winter of *1986* because of abdominal pains. Ms. Blalock saw her again when friends brought K[redacted] to her office. At that time K[redacted] was too upset to talk; she was crying and shaking and Ms. Blalock encouraged her to come back any time she wanted to talk. A week later, K[redacted] came back **to** Blalock's office and told the counselor that she had been sexually abused by her father when her mother was working at night. Blalock advised K[redacted] to tell her mother immediately. Blalock had to inform Ms. B[redacted] about what she learned from K[redacted] and recommended that K[redacted] get professional counseling (T 111-113).

Louis Legum was qualified as an expert in psychology and testified that he did a psychological evaluation of K[redacted] in October, 1987. He determined that K[redacted] was of low average intelligence and an underachiever for her age. Legum diagnosed her as suffering from post-traumatic stress disorder, an over-anxiety disorder, and severe depression. He found K[redacted] to be a very complicated child: although she was externally poised and composed, she was in emotional turmoil. He sensed that she had been depressed most of her life. K[redacted]s MMPI profile was highly unusual, suggesting that she was either psychotic or malingering or in a great deal of emotional distress. K[redacted] exhibited some of the common symptoms of post-traumatic stress disorder, including reexperiencing the trauma, a psychological numbness, and **hypervigilance** (T 116-120, 125-132, 152-158).

Dr. Gilda Josephson, a psychotherapist with special training in child sexual abuse (T 166-193), testified that she first saw K[redacted] in February, 1987, and continued seeing her on a weekly basis. Josephson diagnosed K[redacted] as suffering from post-traumatic stress disorder and stated that K[redacted] had all the common symptoms, such as reexperiencing the trauma through flashbacks and nightmares, regressive behavior, avoidance and numbing symptoms, lack of trust, startle reflex, amnesia, lack of concentration and psychosomatic symptoms such as undiagnosed illnesses (T 193-200, 205-206).

The state and defense stipulated into evidence the medical records of K[redacted] S[redacted] (T 214, 224).

The state rested (T 227). Petitioner moved for a judgment of acquittal, which motion was denied (T 227-228).

Four witnesses testified for the defense.

Gordon Slaughter, petitioner's brother, testified that he lived in Alachua County in 1985. Petitioner had hip replacement surgery in February of that year and another operation in June. He was released from the hospital the first of July: his physical condition was very poor. He used crutches and was not able to bend. Slaughter was trying to sell his home at the time; he moved his furniture out of the house on August 2, 1985, and he vacated the home on August 7. Petitioner lived with Slaughter and his wife from the end of April until the last week of July, 1985 (T 230-232).

Slaughter testified that after petitioner got out of the hospital, K[redacted] and M[redacted] visited him in the Slaughter's

home. They did not visit him that August because there was no furniture in the home and the Slaughters moved. Slaughter said he never went to Cedar Key in the summer of 1985 and never left overnight while the girls were visiting. He thought petitioner and K[redacted] had a good relationship; she was crazy about her father and seemed to enjoy his company. K[redacted] visited again in the summer of 1986 at Slaughter's new home and never seemed fearful of petitioner (T 233-239).

Nancy Slaughter stated that petitioner lived with her and Gordon after his hip surgery in June. He moved slowly with the aid of crutches and was on pain medication. The Slaughters were in the process of selling their trailer and building a new home that summer and things were hectic. They moved their furniture on August 2, leaving only a bed, a television and some pots and pans (T 242-244). K[redacted] and M[redacted] would stay in the guest bedroom when they came to visit. Nancy remembered helping the girls set up a tent during the summer of 1985. She stated that the girls did not come often and she enjoyed their company, and she would never leave them when they were visiting. She denied going to Cedar Key overnight that summer. She said K[redacted] mother never called her about leaving the girls alone at their house. She called J[redacted] B[redacted] one time about taking the girls to Dunnellon, where they were building their new home. The girls had other plans and did not go, but Nancy and Gordon were home by nighttime. Nancy described her brother-in-law's relationship with K[redacted] as a loving father-daughter relationship and said she never saw any tension or friction between them. Petitioner

and K[redacted] and M[redacted] visited the Slaughters in Dunnellon in the summer of 1986, and Nancy did not observe anything unusual between K[redacted] and her father (T 246-249, 251).

Petitioner's aunt, Victoria Walker, lived in Cedar Key and remembered that Gordon and Nancy did not visit in the summer of 1985 because they were selling their home and needed to be home in case a potential buyer called. That upset her because they used to visit her frequently. Petitioner, K[redacted] and M[redacted] visited her after that summer. Ms. Walker said K[redacted] did not appear afraid of petitioner; in fact, she always clung to him, and they seemed very devoted to each other (T 252-254).

Petitioner testified that he was 38 years old. He worked as a correctional officer at UCI for seven years until the time of his arrest. He denied ever fondling or touching his daughter in a lewd or lascivious manner before or after his divorce from K[redacted] mother. He said he loved his daughter and, in fact, K[redacted] had asked to come live with him and his wife, Gail. He called J[redacted] B[redacted] about it, and she threatened to kill him if he ever tried to get custody of K[redacted] (T 255-258). Petitioner had back surgery in 1983 and two hip operations in 1985, one in February, and the second in June. He was hospitalized ten days and then moved back with Gordon and Nancy until they moved. He was in a great deal of pain after the surgery and used crutches to get around (T 258-261).

K[redacted] and M[redacted] visited petitioner in July at Gordon and Nancy's trailer. He remembered the girls setting up a tent and said Gordon and Nancy never left overnight while the girls

were there. Petitioner denied raping his daughter. He saw her at Christmas and took her to Gordon's home several times after that summer, and K[redacted] never appeared to be afraid of him (T 261-262).

Petitioner's medical records were introduced into evidence (T 265-266). The defense rested (T 266).

J[redacted] B[redacted] was recalled on rebuttal and testified, over the defense's objection, that she and her sister, M[redacted] mother, were concerned about the girls visiting petitioner that summer because she was aware that Gordon and Nancy were going away one night. She talked to Nancy to make sure it was okay if the two girls were there alone with petitioner (T 268-270).

The state rested (T 270), and petitioner's renewed motions for judgment of acquittal were denied (T 271, 325).

Following closing arguments (T 272-324), and instructions on the law (T 327-339), the jury retired to deliberate and then returned with its verdicts as noted above.

IV SUMMARY OF ARGUMENT

Petitioner contends in this brief that the decision of the lower court, affirming petitioner's convictions and sentences for vaginal sexual battery with slight force and vaginal sexual battery by familial authority, and for oral sexual battery with slight force and oral sexual battery by familial authority, and incest, is contrary to this Court's holding in Carawan v. State and subsequent cases. Although each offense contains an element that the other does not, the legislature did not intend to permit multiple punishments for a single act of sexual intercourse by vaginal penetration or a single act of sexual intercourse by oral penetration. Petitioner's convictions and sentences for two counts of sexual battery by slight force and incest must be vacated.

In Issue 11, petitioner contends that assessment of points for victim injury on the guidelines scoresheet for each offense in one criminal episode or transaction constituted an ex post facto violation, because the instant offenses occurred prior to the effective date of the rule change authorizing the scoring of victim injury for each count as to each victim.

In the final issue petitioner argues that the introduction of similar fact evidence was error since the collateral crimes were not relevant to any material fact in issue, and there was no independent evidence to establish the prior bad acts or to corroborate the victim's testimony. Therefore, the evidence of the lewd and lascivious assaults was not admissible and could only serve to prejudice the jury against petitioner.

V ARGUMENT

ISSUE I

PETITIONER WAS IMPROPERLY CONVICTED OF MULTIPLE CRIMINAL OFFENSES BASED UPON A SINGLE ACT.

Petitioner was convicted of the sexual battery of K[redacted] S[redacted] per vaginal-penile intercourse by slight force (Count 11), sexual battery per vaginal-penile intercourse by a person in familial authority (CountV), and incest per sexual intercourse with his natural daughter (CountVIII). In addition, he was convicted of sexual battery per oral-penile penetration by slight force (Count IV) and sexual battery per oral penetration by a person in familial authority (CountVI). Petitioner urges that his triple convictions for the single act of vaginal penetration and his dual convictions for a single act of oral penetration are contrary **to** the legislative intent and violate the principles of Carawan v. State, 515 So.2d **161** (Fla. 1987), and State v. Crumley, 512 ***So.***2d **183** (Fla. 1987).[1]

In Carawan v. State, supra, this Court held that a defendant could not be convicted and sentenced for both attempted manslaughter and aggravated battery, where both offenses were predicated on a single underlying act, a single shotgun blast directed at one victim. The Court reasoned that the test set

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'Petitioner has not challenged his convictions and sentences for sexual battery by putting an object inside the victim's vagina (Count 111) or aggravated battery by touching the victim with a knife (CountVII).

out in Blockburger v. United States, 284 U.S. 299 (1932), and codified in Section 775.021(4), Florida Statutes (1983), was a rule of statutory construction that could not be used to defeat the legislative intent. Where there is any reasonable basis for concluding that multiple punishments were not intended by the legislature, the rule of lenity embodied in Section 775.021(1), Florida Statutes, forbids multiple punishments. The Court concluded that the two offenses were addressing essentially the same evil, and the legislature did not intend to punish them separately. The rule of lenity, therefore, must be construed in favor of the accused.

In State v. Crumley, supra, the Court held that aggravated battery and battery on a law enforcement officer could not be punished separately because both addressed the same evil. The same should be true of sexual battery of a daughter by familial authority and sexual battery of the daughter with slight force, where both offenses are predicated upon a single act.

In its opinion, the District Court held that the court was not prohibited from imposing judgments and sentences for sexual battery by slight force (Count 11) and sexual battery by a person in familial authority (Count V), since petitioner committed two discrete acts of vaginal intercourse upon the victim. With regard to incest (Count VIII) and sexual battery by a person in familial authority, the District Court reasoned that the incest and sexual battery statutes addressed separate evils, and each offense required proof of a fact that the other does not, thus the presumption under Blockburger applied. With regard to the

two counts of oral sexual battery (Counts **IV** and **VI),** the lower court held that because the statutes do not contain any express statement of intent, the Blockburger test applied and concluded that because Sections 794.011(5) and 794.041(2)(b) each require proof of a fact that the other does not, they address separate evils, and thus multiple punishments are permissible **(A** 2-4).

In Carawan, the Court dealt with a situation were it could not be said with certainty what the legislature intended. This Court treated Blockburger as the first step in its analysis to determine what the legislature intended and said that it would be absurd to apply Blockburger so as to defeat what reason and logic dictate to be the intent. The opinion below misconstrues Carawan by relying solely on a Blockburger analysis to reach a result contrary to that indicated by the rule of lenity because the Court found no express legislative intent.

As explained in Crumley, supra, at 184-185:

> [T]he Blockburger test is a rule of statutory construction that may not be used to defeat legislative intent. Blockburger's sole purpose is to assist in determining legislative intent when that intent is unclear. Thus, in Carawan we recognized that '[i]t would be absurd indeed to apply Blockburger . . . in a way that actually defeats what reason and logic dictate to be the intent.' 515 So.2d at 167. Where there is any reasonable basis for concluding that multiple punishments were not intended, the rule of lenity in section 775.021(1), Florida Statutes (1983), forbids the courts from presuming that multiple punishments are authorized. In Carawan we found that such a conclusion could be drawn from the fact that two crimes address the same evil, as where both constitute aggravated versions of a single underlying offense.4

> 4. It is possible that two crimes address the same evil without also constituting aggravated versions of a single underlying offense. See Carawan.

The Crumley Court concluded that aggravated battery and battery on a law enforcement officer were both aggravated versions of simple battery and that the most reasonable conclusion was that the legislature only intended to provide an aggravated penalty for a battery accompanied by certain other factors and not to impose multiple punishments because more than one aggravating factor happened to accompany a single act. Therefore, the rule of lenity forbids multiple punishments. The Court distinguished Crumley from its holding in State v. Carpenter, 417 So.2d 986 (Fla. 1982), finding that the crimes in Carpenter, battery on a law enforcement officer and resisting arresting with violence, did not share any common elements, a fact which tended to show that they address separate evils.

Even before Carawan and Crumley, a long line of cases in Florida, culminating with Houser v. State, 474 So.2d 1193 (Fla. 1985), recognized that the legislature did not intend to punish a single homicide under two different statutes, even where the two statutes in question were separate crimes, each requiring proof of an element which the other does not. There is simply no logical basis to ascribe a different legislative intent to a sexual battery. See also, Bryant v. State, 480 So.2d 665 (Fla. 5th DCA 1985), and Llanos v. State, 401 So.2d 848 (Fla. 5th DCA 1981)(defendant cannot be convicted of aggravated battery with great bodily harm and aggravated battery with a deadly weapon,

under Sections 784.045(1)(a) and (b), Florida Statutes, where only one battery is committed).

Applying the rationale of the foregoing cases, it is clear that sexual battery by familial authority and sexual battery by slight force share common elements and address the same evils. Section 794.011(5), Florida Statutes (1985), provides:

> A person who commits sexual battery upon a person 12 years of age or older, without that person's consent, and in the process thereof uses physical force and violence not likely to cause serious personal injury is guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

A sexual battery upon a person 12 years of age or older, without consent, is a first degree felony where: the victim is physically helpless to resist, Section 794.011(4)(a), Florida Statutes: the offender coerces the victim to submit by threatening to use force or violence likely to cause serious personal injury, Section 794.011(4)(b); the offender coerces the victim to submit by threatening to retaliate against the victim or any other person, Section 794.011(4)(c); the offender incapacitates the victim by administering any narcotic, anesthetic or other intoxicating substance, Section 794.011(4)(d), or the victim is mentally defective, Section 794.011(4)(e). A sexual battery upon a person 12 years of age or older, without consent, is a life felony if the offender uses or threatens to use a deadly weapon or uses actual physical force likely to cause serious personal injury. Section 794.011(3), Florida Statutes.

Unquestionably, the acts proscribed in Sections 794.011(3) and 794.011(4) are aggravated versions of a sexual battery with slight force. They are aggravated by the degree of force used, the physical or mental infirmities of the victim, or the nature of the act used to render the victim into submission. The same is true of sexual battery by a person in familial or custodial authority. Section 794.041 proscribes sexual activity with a child 12 years of age or older by one in familial or custodial authority. The authoritative position of the offender enhances the slight force as an aggravating factor to coerce the victim to submit, just as the threat of force likely to cause serious personal injury, or the threat of retaliation, or rendering the victim physically or mentally incapacitated. Hence, there is a reasonable basis for concluding that the legislature did not intend to punish the two crimes separately.

This legislative intent can be gleaned from Chapter 84-86, Laws of Florida, where the legislature repealed sexual battery by familial authority under Section 794.011(4)(e), and created Section 794.012 [renumbered as Section 794.0411, eliminating consent as a defense. The lower court reasoned that by making Section 794.041 a distinct section, separate from Section 794.011, the legislature intended to permit multiple punishments (A 4). However, no such legislative intent is discernible from the enacting law. Rather, it is clear that the legislature simply intended to eliminate the defense of consent where the sexual battery is committed by a person in familial authority, while

retaining lack of consent as an element of the acts proscribed under Section 794.011(4).[2]

Consequently, petitioner could not be convicted of sexual battery by slight force and sexual battery by familial authority, where both offenses are predicated upon a single act. See George v. State, 488 So.2d 589 (Fla. 2d DCA 1986)(improper to

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[2]Chapter 84-86 provides in its enacting clause:

> WHEREAS, the defense of consent is inappropriate if a defendant charged with a sexual offense stands in familial or custodial authority over a young victim, ...
>
> * * *
>
> Section 2. Section 794.012, Florida Statutes, is created to read:
>
> 794.012 Prohibited acts; persons in familial or custodial authority; penalties.--
>
> (1) For purposes of this section, 'sexual activity' means oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object.
>
> (2) Any person who stands in position of familial or custodial authority to a child 12 years or age or older but less than 18 years of age and who:
>
> * * *
>
> (b) Engages in sexual activity with that child shall be guilty of a felony of the first degree punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
>
> (3) The willingness or consent of the child shall not be a defense to prosecution under this section.

convict and sentence for violations of Sections 794.011(4) and 794.011(5), when only one penetration occurred). The District Court acknowledged that there was only one act of oral penetration (A 3), but affirmed petitioner's convictions and sentences on Counts IV and VI, finding no basis for a legislative intent to preclude the multiple punishments. This was plainly error. The lower court justified the multiple punishments for the two counts alleging vaginal penetration because the evidence showed two discrete acts of vaginal intercourse. However, the state did not charge petitioner with two discrete acts of sexual battery by vaginal penetration: rather, the information alleged a sexual battery by vaginal penetration by familial authority and a sexual battery by vaginal penetration by slight force, based upon a single predicate act. Had the state intended to charge petitioner with committing two discrete acts of vaginal intercourse, which is neither apparent from the charging document, the jury instructions, nor the verdicts, the state presumably would have charged petitioner with two counts of sexual battery by familial authority per vaginal intercourse and two counts of sexual battery by slight force per vaginal intercourse and two counts of incest for each discrete act.[3] Petitioner would then be challenging six convictions and sentences, not just three.

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[3]See Presnell v. Georgia, 439 U.S. 14 (1978)(due process principles of procedural fairness preclude imposition of death penalty on basis that record would support the conclusion that the defendant committed a forcible rape when the jury had not so found).

Logically, if the state charged one act of oral penetration by two different methods, it appears that the two counts alleging vaginal penetration pertain to a single underlying act. Thus, petitioner's dual convictions and sentences under Counts II and V cannot be sustained.

As to sexual battery by familial authority and incest, the Court has recognized for at least 80 years that incest requires no particular amount of force by the father against his child, because the very nature of the familial relationship implies that the child will submit to the demands of her father. As stated by this Court in McCaskill v. State, 55 Fla. 117, 122, 45 So. 843 (1908):

> In the crime of incest there may be a certain force or power exerted, resulting from the age, relationship or circumstances of the parties, which overcomes the objections of the female, without amounting to that violence which would constitute rape.

Thus, because both incest and familial authority contain the same element of submission, they are not mutually exclusive crimes, see Huckaby v. State, 343 So.2d 29 (Fla. 1977). The crime of incest under Section 826.04, Florida Statutes (1985), is limited to instances of vaginal intercourse with a person related by lineal consanguinity. Neither the incest statute nor Section 794.041, Florida Statutes, requires proof of lack of consent. Because the offenses share common elements, and they both address the same evil, it should be clear that the legislature did not intend to punish them separately, and the rule of lenity must apply in favor of the defendant.

The District Court has misconstrued Carawan v. State, and its progeny. This Court must vacate petitioner's convictions and sentences for sexual battery by slight force under Counts II and IV and his conviction and sentence for incest and remand the cause for resentencing. See State v. Barton, 523 So.2d 152 (Fla. 1988) (when dual convictions are improper under Carawan, conviction of the lesser crime should be vacated).

ISSUE II

THE TRIAL COURT ERRED IN ASSESSING POINTS FOR VICTIM INJURY FOR EACH COUNT CHARGED.

Petitioner's offenses were allegedly committed in August, 1985. At that time, Florida Rule of Criminal Procedure 3.701 (d)(7) provided:

> Victim injury shall be scored for each victim physically injured during a criminal episode or transaction.

The original committee note to Rule 3.701(d)(7) provided that

> [P]oints for victim injury be added only when the defendant is convicted of an offense (scored as either primary or additional offense) which includes physical impact or contact. Victim injury is to be scored for each victim for whom the defendant is convicted of injuring and is limited to physical trauma.

Subsequently, the Guidelines Commission and the Supreme Court, on April 11, 1985, and again on December 19, 1985, recommended amending the Committee Note as follows:

> Victim injury shall be scored additionally for each count where victim injury is an element of each offense at conviction in excess of one count as to each victim.

See The Florida Bar: Amendment to Rules of Criminal Procedure (3.701, 3.988-Sentencing Guidelines), 468 So.2d 220 (Fla.1985) and The Florida Bar Re: Rules of Criminal Procedure (Sentencing Guidelines, 3.701, 3.988), 482 So.2d 311 (Fla.1985). The rule was so amended in 1986 and became effective on October 1, 1986. See Chapter 86-273, Laws of Florida.

It is well settled that revisions to the guidelines cannot be applied retroactively to cause a harsher sentence than that

provided for by the guidelines in effect on the date of the crime. Miller v. Florida, 428 U.S. 423 (1987); Wilkerson v. State, 513 So.2d 664 (Fla. 1987); Booker v. State, 514 So.2d 1079 (Fla. 1987). Recently, this Court, in Fennell v. State, 14 FLW 265 (Fla. June 1, 1989), held that the amendment to Rule 3.701(d)(7), eliminating the requirement that victim injury be a statutory element of the offense at conviction in order to scored on the guidelines scoresheet, could not be applied to offenses committed before its effective date.

Because the revision authorizing scoring of victim injury for each count, in addition to scoring victim injury for each victim, did not become effective until October 1, 1986, over a year after the commission of the instant offenses, and had the effect of increasing petitioner's recommended guidelines range, it could not be applied to petitioner without violating the ex post facto clauses of Article I, Section 10, Florida Constitution, and Article I, Section 9, United States Constitution.

Under the guidelines in effect on the date of the crimes, victim injury could only be scored for injury suffered during the criminal episode or transaction. See Carawan v. State, 515 So.2d 161, 170 fn. 8 (Fla. 1987), defining "transaction" as "a related series of acts." Consequently, petitioner could only be assessed 40 points for penetration or slight injury on the scoresheet. Petitioner's sentences must be reversed and the cause remanded for resentencing.

ISSUE III

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ALLOWING THE INTRODUCTION OF COLLATERAL CRIME EVIDENCE, WHEN THE EVIDENCE WAS NOT RELEVANT TO ANY MATERIAL FACT OR TO CORROBORATE THE VICTIM'S TESTIMONY, AND COULD SERVE NO PURPOSE OTHER THAN TO PREJUDICE THE JURY BY SHOWING PETITIONER'S CRIMINAL PROPENSITIES.[4]

Over objection (T 6-9), the state was allowed to introduce evidence that petitioner fondled his daughter repeatedly over a ten year period prior to the charged offenses. These lewd and lascivious acts were charged in the original information, but were dismissed by the court prior to petitioner's second trial. Petitioner submits that the collateral crimes were not relevant to any issue at trial. The lewd and lascivious assaults became a feature of the trial and were highly prejudicial. Petitioner is thus entitled to a new trial.

The similar fact evidence here was introduced for the sole purpose of showing petitioner's propensity to sexually assault his daughter, which is expressly prohibited by Section 90.404 (2), Florida Statutes, and by Williams v. State, 110 So.2d 654 (Fla. 1959). The determinative standard for admissibility of collateral crime evidence is relevancy, i.e., to prove a fact

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[4]Petitioner is cognizant that jurisdiction was accepted by the Court on the basis of express and direct conflict in Issues I and II, supra. Nevertheless, having jurisdiction, this Court may consider the entire cause on the merits, including this issue, on the authority of Trushin v. State, 425 So.2d 1126 (Fla.1982), and Bould v. Touchette, 349 So.2d 1181 (Fla.1977).

in issue. See Section 90.402, Florida Statutes, and State v. Lee, 531 So.2d 133 (Fla. 1988). If there is no material fact in dispute, there is no relevancy, and the collateral evidence is not admissible.

In prosecutions for sexual battery, "the better approach treats similar fact evidence as simply relevant to corroborate the victim's testimony." Heuring v. State, 513 So.2d 122, 125 (Fla. 1987). When, as here, the victim is simply corroborating her own testimony, the similar fact evidence is not relevant or material and should not be admissible. The only disputed issue at the trial below was K[redacted] credibility. The evidence of the prior lewd and lascivious assaults was not relevant to corroborate K[redacted]s testimony because there was no independent evidence connecting petitioner to the collateral crimes. State v. Norris, 168 S0.2d 541 (Fla. 1964) (evidenceof a collateral crime is inadmissible unless accompanied by evidence connecting the defendant to the collateral acts); State v. Lee, supra (no connection established between collateral offenses and charged offenses). Here, either the jury believed K[redacted] testimony regarding the charged offenses or they did not; evidence of the prior molestation did nothing to aid the jury in evaluating her credibility. See Dinkens v. State, 291 So.2d 122 (Fla. 2d DCA 1974). In other words, the collateral crime evidence could not serve the only permissible purpose it might have, i.e., corroboration of K[redacted] testimony, as no other witness corroborated her testimony about the prior acts. K[redacted] was permitted to corroborate her own testimony that petitioner raped her by

claiming that petitioner committed various sexual assaults on her from the time she was four years old, when no other witness could substantiate that event.

Dinkens v. State, 291 So.2d 122 (Fla. 2d DCA 1974), is on point. There, to establish the defendant's guilt of the crime charged, the state introduced the testimony of an accomplice, James Williams, Jr., who testified both as to the defendant's perpetration of the crime charged [the Berrier robbery], and as to the defendant's involvement in two collateral crimes [one being the robbery of a drive-in theater on the same night]. The court held that admission of the collateral crime evidence was reversible error because there was no independent evidence of the defendant's involvement in the collateral crime. The court noted:

> There were points of similarity between the Drive-In Theatre robbery and the Berrier robbery so that it could be said that the same general pattern or modus operandi existed in both. The difficulty we see in this testimony is that it was given by the same person who testified that Dinkens was involved in the Berrier robbery.
>
> Generally, the relevance of showing a modus operandi is that if a particular person is identified as having committed a crime similar in peculiar methods of operation to the one for which he is presently charged, his identification involving the other crime bolsters the identification with respect to the crime for which he is on trial. This presupposes an independent identification in each occurrence. In this case, the only evidence of the Drive-In Theatre robbery was the testimony of James Williams, Jr., who also testified concerning Dinkens' involvement in the Berrier robbery. Williams' testimony implicating

> Dinkens in the crime for which he was charged was not bolstered or aided in any material way by his testimony that Dinkens participated in the Drive-In Theatre robbery.
>
> Either the jury believed Williams with respect to the instant crime or they did not. It may be that the jury would more readily believe Dinkens committed the instant crime if another witness had identified him as also being involved in the similar Drive-In Theatre robbery. But, there was no such independent evidence here. As presented on this record, the only purpose this testimony appears to have served was to illustrate Dinkens' bad character and his propensity to commit robbery. As such it was inadmissible. [Citation omitted].

291 So.2d at 125 [Emphasis added: footnote omitted].

In Heuring v. State, supra, the defendant was convicted of committing a sexual battery on his stepdaughter. At trial, the court admitted evidence that Heuring had also sexually battered his natural daughter twenty years earlier. This Court held that the similar fact evidence was admissible since it corroborated the victim's testimony that her stepfather sexually battered her. The Court relaxed the strict admissibility requirements for Williams rule evidence in cases of sexual battery committed within a family setting, stating:

> We find that the better approach treats similar fact evidence as simply relevant to corroborate the victim's testimony, and recognizes that in such cases the evidence's probative value outweighs its prejudicial effect.

513 So.2d at 124-125.

By focusing upon the corroborative value of similar fact evidence, the Court implicitly rejected other justifications

for admitting this type of evidence, such as pattern of criminality. See, e.g., Cotita v. State, 381 So.2d 1146 (Fla. 1st DCA 1980). Furthermore, by emphasizing the corroborative value of similar fact evidence, the Court implicitly recognized that the collateral crime evidence must be independently corroborated. The victim cannot corroborate her own testimony with more testimony of other sexual misconduct against her.

Numerous cases have sanctioned the use of collateral crime evidence in cases involving sexual crimes against young females where the testimony was relevant to a material issue. In each of these cases, with few exceptions,[5] the similar fact evidence was introduced through testimony of a witness other than the victim. See, generally, Heuring v. State, supra (testimony of defendant's natural daughter that defendant sexually battered her 20 years before charged offenses admissible to corroborate victim's testimony): Williams v. State, supra (rape conviction affirmed where two witnesses testified to similar act committed by defendant in rebutting anticipated defense of consent); Calloway v. State, 520 So.2d 665 (Fla. 1st DCA 1988)(testimony of two children that defendant committed lewd and lascivious acts upon them properly admitted to corroborate victim's claim that

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[5]See Smith v. State, 14 FLW 278 (Fla. 1st DCA Jan. 27, 1989), and Whiteman v. State, 343 So.2d 1340 (Fla. 2d DCA 1977); see also, Sampson v. State, 14 FLW 866 (Fla. 1st DCA April 7, 1989) (victim's testimony about prior similar acts by defendant against her allowed to corroborate testimony of second victim).

defendant sexually battered her): Beasley v. State, 503 So.2d 1347 (Fla. 5th DCA 1987)(testimony victim's sister admissible to prove opportunity in prosecution for lewd and lascivious assault and attempted sexual battery by stepparent): Coleman v. State, 485 So.2d 1342 (Fla. 1st DCA 1986)(similar fact evidence by victim's sister relevant to continuing pattern of abuse by defendant of familial authority): Potts v. State, 427 So.2d 822 (Fla. 2d DCA 1983)(testimony of victim's sister and defendant's younger sisters regarding similar sexual incidents relevant to show defendant's intent and use of familial authority); Hodge v. State, 419 So.2d 346 (Fla. 2d DCA 1982)(testimony of defendant's natural daughter regarding sexual batteries on her when she was 10 years old admissible to show lack of consent and use of familial authority, in prosecution for two counts of sexual battery upon 11 year old stepdaughter): Cotita v. State, supra (evidenceof prior sexual abuses of victim and other neighborhood children relevant to establish pattern of criminality and to rebut defendant's alibi defense); Clark v. State, 266 So.2d 687 (Fla. 1st DCA 1972)(prior acts of incest by defendant many years earlier corroborated by victim's mother).

These cases and others too numerous to mention implicitly recognize that the relevancy of similar fact evidence depends, in whole or in part, upon its value as independently corroborating the victim's testimony. In the case sub judice, K[redacted] bolstered her claim against petitioner by also claiming that he sexually molested her for over ten years beginning when she was four. The state had no independent, corroborating evidence to

prove these uncharged collateral acts, and this evidence became nothing more than a character attack upon petitioner by showing his criminal propensities. The collateral crime evidence proved only petitioner's propensities towards his daughter: it did not corroborate K[redacted] testimony about the charged offenses because she simply could not corroborate herself. This does not mean K[redacted] testimony by itself was insufficient **to** convict petitioner, see Marr v. State, 494 So.2d 1139, 1141 (Fla. 1986) (no corroborative evidence is required in a rape case when the victim can testify to the crime and identify her assailant); it does mean that her testimony about the prior acts was not relevant or material.

Heuring allowed evidence of prior sexual batteries because

> The victim is typically the sole eye witness and corroborative evidence **is** scant. Credibility becomes the focal issue.

Id., at 124. Credibility was the only issue here, and the evidence of the prior sexual molestation of K[redacted] added nothing to the jury's resolution of this sole issue.

Although sanctioning the admissibility of the similar fact evidence in sexual battery cases, the Heuring Court also recognized the danger of admitting such testimony:

> Introduction of such evidence creates the risk that a conviction will be based on the defendant's bad character or propensity to commit crimes, rather than on proof that he committed the charged offense.

Id. See also, Peek v. State, 488 So.2d 52, ***55-56*** (Fla. 1986), quoting, Jackson v. State, 451 So.2d 458, 461 (Fla. 1984):

> There is no doubt that this admission [to prior unrelated crimes] would go far to convince men of ordinary intelligence that the defendant was probably guilty of the crime charged. But, the criminal law departs from the standard of the ordinary in that it requires proof of a particular crime. When evidence has no relevancy except as to the character and propensity of the defendant to commit the crime charged, it must be excluded.

The improper admission of collateral crime evidence is presumptively harmful because of the danger that a jury will take bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged. Peek v. State, supra: Straight v. State, 397 So.2d 903 (Fla. 1981).

Here, the erroneous introduction of the collateral crimes was patently harmful. The prior bad acts became a feature of the trial and were highly prejudicial. See Knox v. State, 361 So.2d 799, 800 (Fla. 1st DCA 1978)("the evidence of the collateral incident became the 'featured evidence"' and was highly prejudicial). The years of sexual molestation were emphasized throughout the trial, in the state's opening statement, during the victim's testimony (T 35-36, 40-47), and again in closing arguments. The state commenced its opening remarks by telling the jury that

> This case is going to be about what has happened to her during the majority of her life.
>
> The evidence will show that K[redacted] has been repeatedly fondled and then raped by the very person that most young girls look to for their protection, her father. The evidence will show that; since the time she was four years old, her father, the defendant, sexually molested her.

> I'm intentionally not going to go into detail about those events, because **I** want you to hear that from K[redacted] own lips. I ask you to listen carefully as she describes the sexual abuses that were committed on her as a young child.

(T 17). The state attorney twice referred to "this lifetime of sexual molestation" in opening arguments (T 18), and harped on this theme throughout **its** closing argument ["You heard her tell you that she has been sexually molested by her father since she was approximately four years old" (T 273); "She got older still and the sexual molestation continued" (T 274); "But in the summer of 1985, the defendant took the sexual molestation of his daughter one giant step further" (T 275); "She's told you about what happened to her during most of her life" (T 281); "Think about it -- who has been sexuallymolesting her since she was four years old?" (T 319); "I want to tell you something about those events that happened during K[redacted] growing-up years, before six-, eight-, ten-year-old life: He's not charged with those crimes. There's reasons for that that aren't within your world" (T 319); "But they're brought to your attention for a reason . . . . Look at it -- it happened all her life" (T 319-320); "This father, that molested her since she was four years old, and then raped her when she was 14" (T 322)]. The state continued **its** assault on petitioner's character by portraying him as an abusive husband and an alcoholic (T 43, 75, 88, 240).

In State v. Lee, **531** So.2d **133** (Fla. 1988), the Court held that the state's opening and closing arguments led to the inescapable conclusion that the prosecutor was asking the jury to

find the defendant guilty, at least in part, because he was an evil man intent on committing crime. The prosecutor's remarks quoted above leave no doubt that the state was asking the jury to convict petitioner not solely on the offenses charged, but for "this lifetime of sexual molestation."

The admission of the collateral crime evidence here cannot be deemed harmless error under any circumstances. The harmless error test as stated in State v. DiGuilio, 491 So.2d 1129, 1135 (Fla. 1986), and recently reaffirmed in State v. Lee, supra, at 136, requires the state to show "beyond a reasonable doubt that the error complained of did not contribute to the verdict," or "that there is no reasonable possibility that the error contributed to the conviction." Here, as found in Lee, "the improper collateral crime evidence was given undue emphasis by the state and was made a focal point of the trial." Id., at 137. Thus, it cannot be said that the improper admission of the collateral crime evidence did not contribute to the verdict.

Petitioner's convictions must, therefore, be reversed and the cause remanded for a new trial.

VI CONCLUSION

Based upon the foregoing argument, reasoning and citation of authority, petitioner requests, in Issue I, that this Court vacate his judgments and sentences in Counts II, IV and VIII, and remand the cause for resentencing. In Issue II, petitioner requests that this Court remand the cause for resentencing with directions to the trial court to eliminate all but 40 points on the sentencing guidelines scoresheet for victim injury. In the third issue, petitioner requests this Court to reverse his convictions and sentences and remand the cause for a new trial.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

Paula S. Saunders

PAULA S. SAUNDERS
Fla. Bar No. 308846
Assistant Public Defender
Leon County Courthouse
Fourth Floor, North
Tallahassee, Florida 32301
(904) 488-2458

Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petitioner's Brief on the Merits has been furnished by hand delivery to Robert Butterworth, Attorney General, The Capitol, Tallahassee, Florida **32399-1050** and a copy has been mailed to Mr. Thomas Wayne Slaughter, #110359, P.O. Box 1100, Avon Park, Florida **33825** this 6th day of June, **1989**.

Paula S. Saunders
PAULA S. SAUNDERS